UPPER TRIBUNAL (LANDS CHAMBER)

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17 November 2022

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – FTT PROCEDURE – application to exclude documents from evidence – whether text message a "without prejudice" communication – whether any relevant dispute existed – whether privilege being abused to conceal "unambiguous impropriety" – appeal dismissed

AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)

BETWEEN:

OCTAGON OVERSEAS LIMITED (1)
CANARY RIVERSIDE ESTATE MANAGEMENT LIMITED (2)
RIVERSIDE CREM 3 LIMITED (3)

Appellants

-and-

CIRCUS APARTMENTS LIMITED

Respondent

Re: Canary Riverside Estate,
Westferry Circus,
London E14

Martin Rodger KC, Deputy Chamber President

Hearing date: 17 October 2022

Timothy Morshead KC and *Justin Bates*, instructed by Freeths LLP, for the appellants
Philip Rainey KC, instructed by Norton Rose Fulbright LLP, for the respondent

The following cases are referred to in this decision:

Cutts v Head [1984] Ch 290
Ferster v Ferster [2016] EWCA 717
Oceanbulk Shipping SA v TMT Ltd [2011] 1 AC 662
Ofulue v Bossert [2009] AC 990
Rush & Tompkins Ltd v Greater London Council [1989] AC 1280
Unilever plc v The Procter & Gamble Co [2000] 1 WLR 2436

Introduction

1. This appeal is like a distant satellite, orbiting an application in the First-tier Tribunal, Property Chamber (the FTT) for a variation of the terms of appointment of Mr Sol Unsdorfer, the FTT-appointed manager of the Canary Riverside Estate.

2. The Canary Riverside Estate is a mixed-use residential and commercial development at Canary Wharf in East London. It was completed in 2000 and comprises 325 apartments in four towers, together with a hotel, various restaurants, a cafe and a health club.

3. In 2016, on an application by long leaseholders of flats in the towers, the FTT made an order under section 24, Landlord and Tenant Act 1987, appointing Mr Alan Coates as manager of the Estate. In his skeleton argument for the appeal Leading Counsel for the respondent, Circus Apartments Ltd (CAL), aptly described the litigation which has followed the making of that order as "long-running and sprawling".

4. On 1 October 2019, Mr Unsdorfer was appointed as manager in place of Mr Coates. The management order was due to expire in September 2021 but it has been extended temporarily pending the determination of an application by the leaseholders to renew it for a further term of three years.

5. The appellants are all parties to the proceedings in which the management order was made. The first appellant, Octagon Overseas Ltd, owns the freehold of the Estate. It granted head leases of both residential and commercial parts of the Estate to the second appellant, Canary Riverside Estate Management Ltd (CREM); in November 2018 some of those interests were transferred by CREM to the third appellant, Riverside CREM 3 Ltd. I will refer to them collectively as "the Landlords".

6. One of the buildings on the Estate contains apartment units held on long leases by CAL, the respondent. It was not a party to the original application for the appointment of the manager but it is identified in a schedule to the order as one of the "commercial tenants" of the Estate. On 19 March 2021 CAL made an application of its own under section 24(9), 1987 Act, seeking a variation of the management order to remove references to it as a commercial tenant. CAL does not regard itself as a commercial tenant and is sensitive to the possibility that being so described might prejudice its interests. In particular it wishes to protect what it believes is an entitlement to make an application for an acquisition order under Part III of the 1987 Act (which permits "qualifying tenants of flats" to acquire their landlord's interest without its consent where, amongst other conditions, a management order has been in force for at least two years).

The application to redact Mr Christou's witness statement

7. The appeal arises out of an application by CAL to exclude parts of a witness statement filed in response to its variation application by Mr Chris Christou, the in-house solicitor for the Yianis Group of companies, of which the Landlords are all members.

8. The final hearing of the variation application was originally due to take place in March 2022. Evidence was filed in response to the application by the Landlords, including the witness statement of Mr Christou dated 24 November 2021. Exhibited to that statement are a number of documents which CAL says ought not to be received in evidence or taken into account by the FTT.

9. On 21 January 2022 CAL applied for an order that those paragraphs of Mr Christou's statement which refer to the disputed documents be struck out and removed from evidence together with the documents themselves. The application was made on a number of different grounds, including, that the documents as a whole are irrelevant to the issues in the variation application; that they are confidential; that (having been disclosed in earlier court proceedings between the same parties) some are covered by the prohibition on their use imposed by CPR 31.22; and finally that one document (a text message) was covered by "without prejudice" privilege.

The FTT's decision

10. The FTT published its decision on CAL's application on 9 March 2022. It did not rule on all of the grounds of the application because it considered that the Landlords were entitled to further time to consider and respond to some which had been introduced late in the day. It decided that it would not rule on the issue of relevance but would consider it at the final hearing. It determined that the disputed text message was covered by privilege and could not be relied on in the proceedings.

The grounds of appeal

11. Both parties applied to the FTT for permission to appeal. It gave the Landlords permission on two grounds but refused to allow them to challenge its case management decision deferring consideration of the issues raised late. It also refused an application by CAL for permission to appeal on the issue of relevance. Both sides then sought permission from this Tribunal but both applications were again refused.

12. That leaves only the two issues for which the FTT itself has granted permission.

13. The first can be dealt with briefly as it is no longer contentious and is agreed not to affect the substance of the FTT's decision. In July 2018 in settlement of an application made to the FTT Mr Coates had agreed to provide disclosure of two categories of documents to the Landlords. The settlement was a contractual agreement rather than an order of the FTT. In its decision the FTT misunderstood the circumstances in which certain documents had been provided by Mr Coates pursuant to that agreement and incorrectly referred to them as having been disclosed in earlier County Court proceedings. On that understanding the FTT said in its decision that the documents "may well" attract the protection afforded by CPR 31.22. It reached no final conclusion on that question because the whole of the argument about CPR 31.22 was postponed to a later date. When CAL applied for permission to appeal the FTT acknowledged that it had misunderstood the evidence. As it had made no order which might be said to have been tainted by its mistake, that acknowledgement might have been thought sufficient to dispose of the matter, but the FTT nevertheless granted the Landlords

permission to appeal. At the hearing of the appeal Mr Rainey KC described the issue as a "non-point" and did not suggest that the FTT would be bound in future by the mistaken impression recorded in its decision. I agree, and do not see the need to make any order on this aspect of the appeal.

14. The second issue for which permission was given is more contentious.

15. In April 2016, before the appointment of the manager Mr Christodoulou (the owner of the group of companies of which the Landlords form part) received a text message from Mr Ritchie (a director of CAL). The text was quoted by Mr Christou at paragraph 126 of his third witness statement in support of a suggestion that CAL's interest in the management order is related to its long-term objective of enhancing its investment in the Estate rather than any concern about the quality of the Landlords' management. CAL's objectives are said by the Landlords to be relevant to the exercise of the FTT's discretion whether to renew the appointment of the manager, since the purpose of Part II of the 1987 Act is to protect the interests of residential leaseholders rather than to promote those of property companies.

16. The context of the disputed text is that the self-contained building of which CAL holds a long sub-lease is three storeys lower than the other buildings on the Estate, and in 2016 CAL wished to negotiate a price with the Landlords for a variation of its own sub-lease to enable it to construct two additional floors on top of the building. CAL was also aggrieved that the Landlords were withholding their consent to a request made in February 2016 for permission to assign its sub-lease to a newly incorporated company, alternatively to underlet to it, which CAL considered was unreasonable. If CAL was right about that, the Landlords would have been in breach of their statutory duty under section 1(3), Landlord and Tenant Act 1988 and liable to compensate CAL for any damage it had sustained as a result. The Landlords responded to that complaint on 29 March 2016 by commencing proceedings against CAL in the County Court alleging that it was in breach of covenants in its sub-lease, including by underletting without consent on terms prohibited by the sublease. Meanwhile, the application for the appointment of a manager was being pursued by the residential leaseholders (not including CAL).

17. Against that background Mr Ritchie sent the disputed text to Mr Christodoulou on 15 April 2016. In it he said this:

> " … I will send you the deed of variation I want and the development proposal formula for the roof next week if you agree the DOV I will pay you £1m on completion if you change any of it then less, if we get planning on the roof we will pay you more. I will give you 7 days to agree it if not we will not only issue proceedings for the underletting delay but also the assignment delay and at the same time throw our full support behind the neighbours. I cannot sit around forever trying to carry out a one sided negotiation, sorry but not engaging with me leaves no other option …".

18. CAL argued that the text message was a "without prejudice" communication which could not be relied on in evidence. The FTT found in CAL's favour, describing the text as "clearly conveying an offer to settle a dispute", namely the dispute over CAL's request for consent

to assign or underlet which was an issue in the County Court proceedings. It did not matter that the text was not expressly stated to be "without prejudice" because it was a genuine attempt to compromise a dispute.

19. On behalf of the Landlords Mr Morshead KC submitted that the FTT was wrong to exclude the text from evidence. First, because the text did not concern a relevant "dispute", which he suggested must be something on which a court or tribunal could make a ruling; by contrast, the subject of the text was a commercial negotiation over the development of additional floors on top of the building. The message made no reference to any other dispute between the two companies but referred instead to the claim by "the neighbours" (meaning the residential leaseholder) which CAL threatened to support but to which it was not then a party. Accordingly, acceptance of the "offer" contained in the text message would not have addressed any dispute between CAL and the Landlords.

20. Alternatively, Mr Morshead KC submitted that "without prejudice" privilege does not extend to communications which abuse the privilege, one such abuse being where the communication involves "unambiguous impropriety". The text contained improper threats which were intended to coerce or frighten the Landlords into conceding rights to CAL which it had no right to enjoy.

21. In *Oceanbulk Shipping SA v. TMT Ltd* [2011] 1 AC 662, at [1], Lord Clarke JSC referred to the "without prejudice rule" as "the principle that statements made in the course of without prejudice negotiations are not admissible in evidence". He explained that although the rule had initially focussed on the exclusion of admissions made by parties in the course of negotiations, its scope is now much wider. It extends (with exceptions) to "exclude all negotiations genuinely aimed at settlement whether oral or in writing from being given in evidence" (quoting Lord Griffiths in *Rush & Tompkins Ltd v Greater London Council* [1989] AC 1280, 1299). *Rush & Tompkins* shows that the rule is not limited to two party situations, as Lord Clarke explained:

> "It was held that in general the rule makes inadmissible in any subsequent litigation connected with the same subject matter proof of any admissions made with a genuine intention to reach a settlement and that admissions made to reach a settlement with a different party within the same litigation are also inadmissible, whether or not settlement is reached with that party."

22. The rule sometimes rests on an express or implied agreement between the parties, but such an agreement is not essential. In its absence (for example where a without prejudice offer is made but never responded to) public policy will prohibit reference to a genuine offer. The strong policy underlying the principle is that:

> "parties should be encouraged as far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations … may be used to their prejudice in the course of the proceedings."

(Rush & Tompkins Ltd v GLC [1989] AC 1980 per Lord Griffiths agreeing with Oliver J's summary in *Cutts v Head* [1984] Ch 290, 306: quoted in *Oceanbulk* at [22]–[23].)

23. The weight to be given to the public policy of encouraging parties to settle their disputes without resort to litigation is apparent both from *Rush & Tompkins* (which shows that negotiations with other parties to the same dispute are covered) and by *Ofulue v Bossert* [2009] AC 990 which concerned the admissibility in subsequent proceedings of a statement made in without prejudice negotiations to settle earlier proceedings. By a majority the House of Lords held that an acknowledgement of title contained in an offer to settle earlier possession proceedings (which had not been pursued to judgment) could not be referred to in subsequent proceedings in which title was claimed to have been acquired by adverse possession. The fact that title to the property had not been in issue in the earlier proceedings was not a good ground for admitting a without prejudice offer to purchase the property. Lord Neuberger, with whom Lord Walker, Lord Rodger and Lord Hope all agreed, expressed the rule in wide terms, at [91]: "save perhaps where it is wholly unconnected with the issues between the parties to the proceedings, a statement in without prejudice negotiations should not be admissible in evidence, other than in exceptional circumstances."

24. Mr Morshead KC's first submission was that the disputed text concerned a commercial negotiation rather than a dispute capable of being the subject of proceedings, let alone a dispute connected with the same subject matter as existing or threatened litigation. The public policy rule was to promote the settlement of disputes. It was not concerned with commercial negotiations so the communication should be seen as falling outside the rule.

25. I do not accept that very narrow way of looking at the disputed text message. It is true that what Mr Ritchie wanted was a commercial deal to allow CAL to develop additional floors on the building, but that is only half of what he was talking about; the text also contained an express threat to "issue proceedings for the underletting delay but also the assignment delay" if the deed of variation was not forthcoming. The dispute regarding the refusal of consent was one of the issues in the County Court proceedings (both because underletting was one of the breaches of covenant complained of by the Landlords and via a counterclaim brought by CAL claiming damages for breach of statutory duty). Mr Ritchie was prepared to trade that cause of action for a commercial deal to vary CAL's sublease. It is therefore simply not possible to suggest that the subject matter of the text did not include the resolution of current or future litigation between CAL and the Landlords.

26. Mr Morshead KC's next point was that the dispute alluded to in the text was not concerned with the same subject matter as the proceedings with which the FTT is concerned (whether the original application to appoint the manager or the subsequent applications to vary the order and to renew the appointment). The only significance of the FTT proceedings to CAL was that they provided an opportunity to make trouble for the Landlords by CAL "throw[ing] our full support behind the neighbours".

27. I do not accept that CAL had no interest in the FTT proceedings. It could, arguably, have joined in the application for the appointment of a manager in its own right, because it was a "tenant of a flat" (in fact, of 45 flats) in the building (as required by section 21, 1987 Act). It had not participated so far and had not served a preliminary notice concerning its own

building, but it certainly had an interest in the management of the Estate and has gone on to support the residential leaseholders and to seek a variation of the management order. CAL might also have seen the appointment of a manager as a route to the achievement of its development ambitions: Mr Christou suggests in the disputed witness statement that the order sought by the leaseholders' whom Mr Ritchie was threatening to support would have made the manager responsible for deciding whether CAL could build additional flats on top of the building.

28. It is clearly not appropriate to adopt too narrow a focus when considering the subject matter of a wide ranging dispute being contested on a number of different fronts. Read objectively, the proposal which Mr Ritchie was foreshadowing in the text would (or at least could) have covered all aspects of the troubled relationship between CAL and the Landlords, including the breach of covenant claim, the breach of statutory duty claim, and the claim for a management order in which CAL was not yet an active participant. As the text referred to a genuine offer of settlement and sketched out its terms I am satisfied that it is properly within the scope of the without prejudice rule and cannot be referred to in evidence unless some exception applies to make it admissible.

29. Mr Morshead KC's final argument was based on one of the recognised exceptions to the without prejudice rule, namely that it cannot be invoked "as a cloak for perjury, blackmail or other 'unambiguous impropriety'" (see *Unilever plc v The Procter & Gamble Co* [2000] 1 WLR 2436, 2444F, *per* Walker LJ, who added that "the exception is to be applied only in the clearest case of abuse of a privileged occasion").

30. The suggested "impropriety" on which the Landlords relied was the making of an improper threat that CAL would "throw our full support behind the neighbours…" if they did not give in to its request for a deed of variation. That was improper, Mr Morshead contended, because the variation was not something in respect of which CAL had any cause of action of its own to pursue against the Landlords. Instead, it threatened to "support" the residential leaseholders: that is to say, make the residential leaseholders' claim harder for the Landlords to deal with. The illegitimacy of that threat was said to lie in the fact that CAL was not motivated to support the residential leaseholders for any reason related to its own rights as a leaseholder, or for reasons of good estate management, but simply to put pressure on the Landlords in order to achieve its commercial objective.

31. In support of these submissions Mr Morshead referred to the decision of the Court of Appeal in *Ferster v Ferster* [2016] EWCA 717, which concerned an unfair prejudice petition brought by one shareholder in a family company against his brothers. The petitioner complained that the company had been caused by his brothers to commence proceedings against him for breaches of fiduciary duty for the improper purpose of pressurising him to buy their shares at an inflated price. Following an unsuccessful mediation, the brothers had made a without prejudice offer to accept a figure 25% higher than had previously been discussed on the grounds that they had discovered wrongdoing by the petitioner which they threatened to use as the basis for committal proceedings and criminal action against him and possibly against his partner. The judge at first instance permitted the petitioner to amend the petition to rely on this threat on the grounds that it was an attempt at blackmail falling within the unambiguous impropriety exception to the rule. The Court of Appeal agreed, for reasons summarised by Floyd LJ, at [23]:

> "Firstly, the threats went far beyond what was reasonable in pursuit of civil proceedings, by making the threat of criminal action (not limited to civil contempt proceedings). Secondly, the threats were said to have serious implications for Jonathan's family because of Jonathan's wrongdoings. Thirdly, the threats were of immediate publicity being given to the allegations. It is nothing to the point in this connection that Warren and Stuart may have believed the allegations to be true. The threat to publicise allegations of extreme severity against Jonathan and his partner, and within such a short timescale, placed quite improper pressure on Jonathan. Fourthly, the purpose of the threats was to obtain for the brothers an immediate financial advantage arising out of circumstances which should accrue, if they had basis in fact, to the benefit of the company. Finally, there was no attempt to make any connection between the alleged wrong and the increased demand."

32. As this explanation makes clear, *Ferster* was the sort of "truly exceptional" case which the Court of Appeal had earlier said is necessary before the unambiguous impropriety exception can be relied on. In my judgment nothing in this appeal comes close to *Ferster's* combination of personal threats, potentially devastating consequences for the victim of those threats and unjustified financial benefits for the makers. The only threat in this case was that if the Landlords would not come to the negotiating table CAL would support an entirely proper (and ultimately successful) application being brought by its fellow leaseholders to secure the appointment of a manager to carry out obligations which the Landlords were already contractually obliged to perform but were failing to undertake. There is no evidence that the price offered by CAL was unreasonable but, in any event, the terms of the variation were negotiable, as was the total price if planning permission was eventually obtained. There is nothing remotely improper, let alone unambiguously improper, in one property company proposing terms to another for a renegotiation of their relationship, even if the £1 million carrot offered in return is accompanied by a stick only tangentially related to that relationship. The suggestion that by trying to exclude Mr Ritchie's text from evidence CAL is abusing the without prejudice privilege is unsustainable. The submission by Mr Morshead KC in his written argument that "it would be correct to characterise CAL's conduct as an example of blackmail" is fanciful.

Disposal

33. For these reasons I make no order in respect of the first ground of appeal and I dismiss the second ground. I hope it will now be possible for the parties to cooperate with the FTT to ensure that the substantive applications are brought to a final hearing with a minimum of preliminary arm wrestling.

Martin Rodger QC,

Deputy Chamber President

17 November 2022

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.