Neutral citation [2024] CAT 60

Case Nos: 1568/7/7/22
1595/7/7/23

**IN THE COMPETITION APPEAL TRIBUNAL**

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

25 October 2024

Before:

HODGE MALEK K.C.
Chair

Sitting as a Tribunal in England and Wales

BETWEEN:

**JULIE HUNTER**

Applicant/Proposed Class Representative

- v -

**AMAZON.COM, INC AND OTHERS**

Respondents/Proposed Defendants

AND BETWEEN:

**ROBERT HAMMOND**

Applicant/Proposed Class Representative

- v -

**AMAZON.COM, INC AND OTHERS**

Respondents/Proposed Defendants

---

**RULING (WITHOUT PREJUDICE)**

---

Excisions in this Judgment (marked "[…][✂]") relate to commercially confidential information: Schedule 4, paragraph 1 to the Enterprise Act 2002

## A. INTRODUCTION

1. The Tribunal received rival applications for an opt-out collective proceedings order pursuant to section 47B of the Competition Act 1998 (the "1998 Act") from Ms Julie Hunter represented by Hausfeld & Co. LLP ("the Hunter Application") and Mr Robert Hammond represented by Charles Lyndon Limited and Hagens Berman EMEA LLP ("the Hammond Application"). In the proposed collective proceedings damages are to be claimed against Amazon.com Inc and other Amazon companies (together "Amazon") for alleged infringement by way of abuse of a dominant position of Article 102 of the Treaty on the Functioning of the European Union and section 18 of the 1998 Act. The alleged abuse of dominant position concerns the "Buy Box" through which purchases can be made on the "Amazon Marketplace" online market and the related Featured Merchant Algorithm which Amazon uses to select the "Featured Offer" featured in the Buy Box. It is alleged that in selecting the Featured Offer, Amazon favoured its own retail offers and those of sellers that use Amazon's fulfilment service.

2. The Hunter Application was filed on 15 November 2022. The Hammond Application was filed on 8 June 2023. The filing by Hammond crystalised a carriage issue between both applicants. The Tribunal has yet to decide on certification, but on 5 February 2024, after a one-day hearing on 20 December 2023, it decided the carriage dispute in favour of Mr Hammond as a preliminary issue: [2024] CAT 8.

3. The costs of the carriage issue are significant and there is a pending application by Mr Hammond against Ms Hunter for costs. Mr Hammond's costs schedule

totals approximately £970,000 including VAT. There are two versions of Mr Hammond's costs application dated 7 March 2024: Application B which relies upon and exhibits correspondence over which its admissibility is in dispute ("the Correspondence") and Application A which omits the Correspondence. The costs application is to be heard and determined by the panel chaired by Sir Peter Roth (Acting President). Ms Hunter and Mr Hammond have agreed that the issue of the admissibility of the Correspondence should be determined without an oral hearing by a different Chairman. Accordingly, the issue of the admissibility of the Correspondence has been referred to me on the direction of Sir Peter Roth. This is consistent with the Tribunal's flexible practice as to the determination of interlocutory applications, which can be dealt with or without a hearing depending on the circumstances and, where appropriate by a Chair not part of the panel appointed for the substantive proceedings. Where there is an issue as to admissibility it is sometimes preferable for that to be determined by another Chair, such as where issues of privilege arise.

4. The Correspondence is referred to at paragraph 15 of Application B which provides:

> "This point requires no strengthening, but it is against *a fortiori* where, in this case, efforts could have been made by Ms Hunter's representatives to reach an agreement on co-counselling with Mr Hammond's representatives. Mr Hammond's representatives repeatedly sought throughout 2022 and 2023, including in November 2022 (shortly before Ms Hunter's claim was filed) and in October 2023 (after Mr Hammond filed his claim), to explore the options for co-counselling with Ms Hunter's representatives. Ms Hunter's representatives rebuffed those approaches although they indicated in May 2022 that they might reconsider their position once the claims were closer to issue. An email of 23 May 2022 from Mr Maton to Mr Burnett outlining Hausfeld's position on co-counselling is enclosed as […]. In the end, however, Ms Hunter's representatives never engaged substantively on the question of co-counselling either before or after the issue of the Hunter and Hammond claims and preferred instead to contest carriage. In circumstances where no effort has been made by a PCR to attempt to compromise a potential carriage dispute a costs order against the losing PCR is clearly appropriate."

5. It is evident that the Correspondence consists of the following:

   (1) An email dated 23 May 2022 from Hausfeld (Anthony Maton) to Charles Lyndon Limited (Rodger Burnett);

   (2) Unspecified communications on possible co-counselling between the representatives of Mr Hammond and Ms Hunter.

   The only actual communication placed before the Tribunal is the email dated 23 May 2022, which is just under 5 months before the Hunter Application was filed with the Tribunal and just over 12 months before the Hammond Application. The email from Hausfeld stated:

> "I am coming back to you on Amazon following various internal discussions here and formal consideration by our New Case Committee. The short answer to your proposal to combine representation across the two cases is a no, which I am obviously happy to discuss, but the reasons for which I set out below.
>
> […][✂]
>
> On this basis our position on Amazon remains unchanged and as previously explained to Steve. As and when a claim is issued or close to issue we are open to discussion to see if we can agree suitable terms to avoid a carriage dispute. I hope you can understand that if we were to agree to co-operation on claims that we were told would be filed we would be tilting at a lot of windmills.
>
> My apologies that this is rather formal, but I thought we had reached the place where it was better to set things out in writing.
>
> I know you are travelling this week & I am in the US but happy to find a time to speak. It can wait until next week if better from my point of view.
>
> Thanks."

6. As regards the Correspondence, it is asserted by Mr Hammond that his representatives had repeatedly sought to explore options for co-counselling throughout 2022 and 2023; including in November 2022 (shortly before the Hunter Application) and in October 2023 (after the Hammond Application was filed). However, by letter dated 6 June 2023 from Hausfeld to Hagens Berman EMEA LLP, it was stated that there had been no formal correspondence between the two firms. The letter referred to isolated discussions between

individuals at the respective firms which raised the question of whether any potential carriage dispute could be compromised. Hausfeld claimed that such communications were properly deemed confidential and "without prejudice."

7. After the Tribunal's ruling on the carriage issue, Charles Lyndon Limited set out its position on costs by letter dated 14 February 2024, which stated, inter alia:

> "Further, as you are aware we have always considered the uncertainty and added costs associated with a contested carriage dispute to be contrary to the interests of the class, and in an effort to avoid this, we proposed to cooperate with you in relation to our clients' respective applications. You made a strategic commercial decision not to engage with our approaches, which were made both before and after the issue of our respective clients' claims. Indeed, despite your email exchanges about cooperation in February/March 2022 with Hagens Berman, and March, May, and November 2022 with Charles Lyndon, you denied that we had ever approached you. Paragraph 8 of Ms Hunter's Witness Statement in support of her application stated that "I am not aware of any other applicant seeking approval to act as the representative in respect of the same claims."

## B. THE WITHOUT PREJUDICE RULE

8. The "without prejudice" rule is a rule as to the admissibility of evidence. This evidential rule renders inadmissible both admissions and other communications in the course of negotiations to settle disputes. In *Rush & Tompkins Ltd v. Greater London Council* [1989] AC 1280 the "without prejudice" rule was considered in some detail by the House of Lords. It is a useful starting point for an authoritative analysis of the evidential rule. The policy behind the rule was explained by Lord Griffiths at 1299:

> "The "without prejudice" rule is a rule governing the admissibility of evidence and is founded upon the public policy of encouraging litigants to settle their differences rather than litigate them to a finish. It is nowhere more clearly expressed than in the judgment of Oliver L.J. in *Cutts v. Head* [1984] Ch. 290, 306:
>
> > "That the rule rests, at least in part, upon public policy is clear from many authorities, and the convenient starting point of the inquiry is the nature of the underlying policy. It is that parties should be encouraged so 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 (and that includes, of course, as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings. They should, as it was expressed by Clauson J. in *Scott Paper Co. v. Drayton Paper Works Ltd* (1927) 44 R.P.C. 151, 156, be encouraged fully and frankly to put their cards on the table… The public policy justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the question of liability".
>
> The rule applies to exclude all negotiations genuinely aimed at settlement whether oral or in writing from being given in evidence. A competent solicitor will always head any negotiating correspondence "without prejudice" to make clear beyond doubt that in the event of the negotiations being unsuccessful they are not to be referred to at the subsequent trial. However, the application of the rule is not dependent upon the use of the phrase "without prejudice" and if it is clear from the surrounding circumstances that the parties were seeking to compromise the action, evidence of the content of those negotiations will, as a general rule, not be admissible at the trial and cannot be used to establish an admission or partial admission."

9. Although it is usual and indeed good practice to mark correspondence intended to be covered by the rule as "without prejudice," the label by the parties is not conclusive. In practice a party who contends that a document marked "without prejudice" will need to advance good reason why it is not covered by the rule. Similarly, if the expression "without prejudice" is not used, it is open to a party to assert the rule if the requirements are objectively established: *BE v. DE* [2014] EWHC 2318 (Fam) at [22].

10. For the rule to apply, there must be a dispute between the parties which the communications were sought to resolve: see Matthews and Malek, *Disclosure* (6th edn, 2024), paras.14-13 to 14-16. As stated by Bodey J. in *BE v. DE* at [23]:

> "Whilst this clearly does not require the existence of legal proceedings, it must surely mean a reasonably cohate and definable issue or series of issues, not just a number of reciprocal differences or grievances which might or might not prove soluble with reflection and discussion."

In that case Bodey J. was considering discussions between husband and wife before their relationship dissolved into acrimony and divorce proceedings.

## C. THE PARTIES' SUBMISSIONS

11. Ms Hunter submits that the Correspondence is covered by litigation privilege for the 23 May 2022 email and thereafter once a dispute had arisen by the without prejudice rule. In summary:

    (1) It is accepted that the 23 May 2022 email is not subject to "without prejudice" because at that stage there was no dispute. Instead, it is asserted that it is covered by litigation privilege in that litigation was in contemplation and it was correspondence with a third party.

    (2) Communications once the dispute can be regarded as being in existence are covered by the without prejudice rule. Whilst there were no substantive discussions about the possibility of co-counselling, Mr Hammond cannot have it both ways. Insofar as he maintains that the discussions are relevant, then they must have had some substance and therefore must be subject to the "without prejudice" rule.

12. Mr Hammond contends that neither litigation privilege nor the without prejudice rule apply. In summary:

    (1) As regards the 22 May 2022 email it is not covered by litigation privilege in that:

        (i) it was not for the dominant purpose of giving or receiving legal advice and/or collecting evidence;

        (ii) it was not for a specific client but merely setting out a general position on co-operating on collective cases;

        (iii) to the extent the email related to a potential dispute, it was not with a third party, but with the party it ended up disputing with.

    (2) As regards communications after any dispute may have arisen (i.e. some point after May 2022):

(i) nothing was expressed to be or marked "without prejudice" at the time;

(ii) Ms Hunter has failed to identify the point at which a carriage dispute came into existence;

(iii) the approaches were rebuffed and hence the Correspondence fell short of the threshold for a dispute attracting the without prejudice rule.

## D. THE TRIBUNAL'S ASSESSMENT

13. Ms Hunter is correct in not pursuing a claim that the 23 May 2022 email is covered by the without prejudice rule. At that stage there was no dispute between Ms Hunter and Mr Hammond. The possibility of co-operating further down the line between those represented or to be represented by the firms of solicitors was merely being raised and even then not in concrete terms. It was not until over a year later that the Hammond Application was filed. The email is not covered by litigation privilege either. The email was between two firms whose clients may end up having a carriage dispute, which eventually materialised long after. This is not a communication with a third party, but between those who ended up representing rival parties. As between them the communication is not confidential and either party is entitled to deploy it.

14. As regards the subsequent Correspondence, there were no substantive negotiations. The proposals appear to go no further than raising the possibility of avoiding a carriage dispute. They were not marked or labelled "without prejudice." Indeed, on Mr Hammond's case there was no real engagement on the possibility of co-operation, but it is fair to observe that on the materials before me, nothing concrete or developed appears to have been put to Ms Hunter or her representatives. It appears that there were in fact no negotiations in any meaningful sense between the parties on co-operating or resolving the carriage dispute. Even had both parties been willing to engage in substantive discussions,

it is not possible to reach an assessment as to whether a collaboration agreement on mutually acceptable terms would have resulted.

15. Neither party is suggesting that there were any admissions in the Correspondence, not least because it is common ground that there were no substantive discussions between the parties on the topic of possible collaboration.

16. I am not satisfied that any claim to litigation privilege or the without prejudice rule has been made out. Accordingly, Mr Hammond is entitled to place Application B before the panel of the Tribunal that will determine his costs application. This is not to be taken as any ruling on the weight or relevance of the Correspondence, which must be for the panel determining the costs application.

Hodge Malek K.C.
Chair

Charles Dhanowa O.B.E., K.C. (*Hon*)
Registrar

Date: 25 October 2024