

IN THE HIGH COURT OF FIJI
AT SUVA
COMPANIES JURISDICTION

Companies Action No. HBE15 of 2023

IN THE MATTER of FAMOUS PACIFIC
SHIPPING (NZ) LTD

AND

IN THE MATTER OF an application by the Plaintiff under section 516 of the Companies Act 2015 to set aside Statutory Demand dated 28 February 2023 issued by **ALL FREIGHT LOGISTICS FIJI LIMITED** against **FAMOUS PACIFIC SHIPPING (NZ) LTD**

BEWTEEN : **FAMOUS PACIFIC SHIPPING (NZ) LTD** a duly registered foreign company whose principal place of business in Fiji is Lot 7, Jai Ambamma Street, Vatuwaqa, Suva

PLAINTIFF

AND : **ALL FREIGHT LOGISTICS FIJI LIMITED** a duly registered limited liability company whose registered office is at Lot 6, Jai Hanuman Road, Vatuwaqa, Suva.

DEFENDANT

Coram : Banuve, J

Date of Hearing : 17 July 2024

Date of Ruling : 17 October 2025

Counsels : Munro, Leys, Solicitors for the Plaintiff
Navneet Charan Lawyers for the Defendant

RULING

A. Introduction

1. The Plaintiff filed an *Amended Summons to Expunge Affidavit* together with an *Affidavit of Nilesh Kumar in Support* on 14 March 2024. The orders sought in the Summons were as follows;
 1. *The Affidavit of Alfaaz Mallam (Mallam Affidavit) filed on 1 June 2023 be wholly removed and expunged in its entirety.*
 2. *Alternatively, paragraphs 11(f,g,h) and annexure AM-1(particularly the email dated 29 December 2022) be removed and expunged from the Court Record.*
 3. *The Defendant files an affidavit in opposition in accordance with the Rules of the High Court within 14 days after the order.*
 4. *The Court extends the time for the Plaintiff to file its affidavit in reply to 14 days after the Defendant files its affidavit in response or after the application is determined by the Court.*
 5. *The Defendant pay the costs of this application on an indemnity basis*
 6. *Such other orders as the Court deems just.*

ON THE GROUNDS THAT

[In support of Orders 1 and 2]

1. *The Mallam Affidavit is scandalous, irrelevant, oppressive or otherwise contrary to the rules of evidence as it discloses an annexure which contains without prejudice communications between the Plaintiff and the Defendant; and*
2. *The Mallam Affidavit at paragraph 11(f,g,h) refers to communications between the Plaintiff and the Defendant.*

[In support of Orders 3, 4 and 5]

3. *The Defendant has failed to withdraw the Mallam Affidavit despite notice from the Plaintiff that the affidavit contains scandalous, irrelevant, oppressive materials related to resolving the dispute between the parties in this proceeding.*

This application is made pursuant to Order 41, rule 6 of the High Court Rules 1988 under the inherent jurisdiction of this Court.

2. The issue that the Plaintiff takes exception to is raised in the Defendant's Affidavit of 1 June 2023, (the 'Mallam Affidavit'), that the Plaintiff had engaged the Defendant's services by using its warehouse, to store 19.65 cubic metres of cargo at an agreed rate of FJD\$15.00 per cubic metre per day, which to date, has not been paid. A demand notice had been served based on the service rendered by the Defendant to the Plaintiff, which has not been heeded despite several reminders.
3. The paragraphs which the Plaintiff find objectionable and asks the Court to expunge refers to a series of email correspondence between it and its Australian exporter client Specific Freight Proprietary Ltd (SFL), wherein it was trying to resolve the outstanding fees for the storage of the goods in the Defendant's warehouse . The Defendant was not copied in these correspondence, and the Plaintiff finds it objectionable that the Defendant cites the following passages in paragraph 11 of the affidavit of 1 June 2023;

(f) That email correspondence between FPSL and Specific Freight is evident that they do agree that AFLPL has stored the cargo on behalf of FPSL and at a discounted rate.

(g) That in December 2025, AFLPL has provided FPSL with settlement figures which they did not honor and charges kept accumulating and they were aware of the daily accruing rate of the storage facility

(h) FPSL stated it was not responsible yet on 19 December 2022 via email they offered \$10,000.00 as settlement figure.

B. Analysis

4. Order 41 Rule 6 of the *High Court Rules 1988* states that;

“ the Court may order to be struck out of any affidavit any matter which is scandalous, irrelevant¹ or otherwise oppressive”²

5. Paragraph 24/5/45 of the Supreme Court Practice (White Book) provides a clarification on ‘without prejudice’ communication;

“Without prejudice communications-The ‘without prejudice’ rule governs the admissibility of evidence and is founded upon the public policy of encouraging litigants to settle their differences rather than litigate to the finish: Cutts v Head [1984] 1 ALL E.R 597. The rule applies to exclude all negotiations genuinely aimed at a settlement, whether oral or in writing, from being given in evidence. The purpose of the rule is to protect a litigant from being embarrassed by any admission made purely in an attempt to achieve a settlement”

It is a rule of evidence that communications between parties which are genuinely aimed at settlement of a dispute between them cannot be put in evidence, without the consent of both parties, in the event that the dispute is not settled. The rule is called ‘without prejudice privilege’.

In order for privilege to operate, it is essential that there must be some person in dispute or negotiation with another person, and the statement which it is sought to exclude from evidence must have some bearing on negotiations for a settlement of that dispute.

The new use of the words ‘without prejudice’ in the communication ...does not operate to attract the rule, or privilege. The court is required to consider the statement in its context and decide for itself whether the privilege applies. Thus a letter marked ‘without prejudice’ which is not in fact a genuine attempt to settle a dispute will not be privileged from production in evidence, and a letter which is

¹ A ground of irrelevancy is the inadmissibility of evidence-Volume 3 *Atkin’s Court Forms* (2nd Ed), p 324

² *Singh v Ikanidrodro* [2015] FJHC 680.

so aimed will be privileged even if it is not marked 'without prejudice'-*Slaveski v Economakis* [2006] VSC 2244.

6. The Mallam Affidavit at paragraph 11(h) refers to a settlement offer made by the Plaintiff to the Defendant and annexes an email correspondence dated 19 December 2022.
7. In general, the Plaintiff asserts that the wording of paragraphs 11(f)-ii(h) shows that the Defendant seeks to undermine the Plaintiff's case and portray it as an admission of the purported debt when it is clear that all it was trying to do was resolve the conundrum (that the Defendant was blaming the Plaintiff for the impasse), further the Plaintiff states;
 - (i) The Defendant's use of the settlement email offends the well settled principles on "without prejudice" communications., as it asserts the said email is a request for a concession³ and not an offer to settle a dispute⁴;
 - (ii) The Plaintiff's case is different in that it is a disputed debt, as it was acting for another party (SFL). Although it did not believe it owed the money (since it was acting on SFL's instructions) it offered \$10,000 to bring the matter to an end,
 - (iii) The Defendant's contention is not consistent with its reference in paragraph 11(h) of the Mallam Affidavit that the \$10,000 was offered as a "settlement figure". To convert the 'offer of compromise' to an admission prejudicial to the party making them, the effect would be, that no attempt to compromise a dispute could ever be made.⁵
8. The Court is required to consider the communication divulged in paragraph 11(f,g,h) and Annexure "AM-1" of the Mallam Affidavit filed 1 June 2023, in context, and decide for itself whether they were divulged as part of a genuine attempt to settle the dispute on the settlement of outstanding storage fees and whether the 'without prejudice' rule applies to them.

³ *Bradford & Bingley v Rashid* [2006] 4 All ER 705

⁴ Annexure AM 1 in the Defendant's Affidavit in Opposition filed on 1 June 2023

⁵ *Jones v Foxall* (1852) 51 ER 585

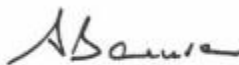
9. After a consideration of the material before it the Court rules that paragraphs 11(f, g and h) and Annexure AM-1 (particularly the email dated 19 December 2022), be expunged from the Court Record as being divulged contrary to the rule on 'without prejudice privilege' and without the consent of the Plaintiff, specifically;
- (i) The Plaintiff, and the Defendant, had been negotiating as to who ought to bear the cost of outstanding fees for the abandoned cargo at the Defendant's warehouse. During negotiations, the Plaintiff informed the Defendant that it had been acting on behalf of another party, Specific Freight Pty Ltd (SFL), an Australian company.
 - (ii) It was a genuine attempt by the Plaintiff to settle a dispute evident in it divulging email correspondence on or about 20 December 2020 between it and SFL and as instructed by the latter that;
 - (a) the goods had been abandoned by its owner Delivery Group;
 - (b) any storage fees should be invoiced to Delivery Group (the owner of the goods), and that this information be passed on to the Defendant.
 - (c) the offer of a settlement sum of \$10,000 represents a genuine attempt by the Plaintiff to address the conundrum it was placed in, as set out in paragraphs (a) and (b) herein, on the abandonment of the goods by its owner, on one hand, and the insistence by the Defendant, nevertheless, that the Plaintiff be responsible for the payment of the storage fees, on the other.
10. The Plaintiff seeks costs on an indemnity basis. The Court notes the conundrum which the parties find themselves in involves goods initially consigned by air from Australia, which on arrival in Fiji, is stored in the Defendant's warehouse but is later abandoned. The question as to which party bears the responsibility for the storage fees for the goods abandoned by its owner is a complex one where the parties have divergent views based on trade practice, which however has not been resolved. The Court has some sympathy for the position that the parties find themselves in. Taking account all circumstance the Court finds however, that the Plaintiff is entitled to costs because this interlocutory process could have been

avoided by the Defendant agreeing to simply delete the offending paragraphs from the Mallam Affidavit filed on 1 June 2023.

ORDERS

- 1. Paragraphs 11 (f, g, h) and Annexure AM-1 (particularly the email dated 29 December 2022) be removed and expunged from the Court Record;**
- 2. The Defendant files an Affidavit in Opposition in accordance with the Rules of the High Court within 14 days of this order.**
- 3. The Court extends the time for the Plaintiff to file its affidavit in reply to 14 days after the Defendant files its affidavit in response or after the application is determined by the Court.**
- 4. The Defendant pays the costs of this application to the Plaintiff summarily assessed at \$2,000.00 to be payable within 14 days of this order.**




Savenaca Banuve
Judge

Dated at Suva this 17th day of October, 2025.