[2017] CCJ 14 (AJ)

IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF GUYANA

CCJ Appeal No GYCV2017/004
GY Civil No 45 2012

BETWEEN

ROSEMARIE RAMDEHOL **APPELLANT**

AND

HAIMWANT RAMDEHOL **RESPONDENT**

Before the Right Honourable and the Honourables

Sir Dennis Byron, President
Mr Justice Wit
Mr Justice Hayton
Mr Justice Anderson
Mme Justice Rajnauth-Lee

Appearances

Mr Sanjeev J Datadin and Ms Jamela A. Ali for the Appellant

Mr Chadrapratesh Satram with Mr Roopnarine Satram and Ms Shaunella Glen for the Respondent

JUDGMENT
of
The Right Honourable Sir Dennis Byron, President, and the Honourable Justices Wit, Hayton, Anderson and Rajnauth-Lee

Delivered by
The Honourable Mr Justice Winston Anderson

on the 12th day of October 2017

JUDGMENT OF THE HONOURABLE MR JUSTICE WINSTON ANDERSON:

Introduction

[1] Matrimonial legislation in Guyana[1] provides clear rules for the division of matrimonial property upon a divorce. However, the legislation also permits the divorced parties to opt out of those rules and to agree between themselves to settle the division of their property by contract. The question of significance which arises in the present case concerns whether or to what extent are the legislative rules on the division of matrimonial property relevant when there is such a contract between the parties. The essential facts of the case from which this question arises can be summarized in the following four paragraphs.

[2] Haimwant and Rosemarie Ramdehol were formerly husband and wife and partners in a successful auto sales business. Their marriage ended in 1998 but it was only in 2007 that they agreed to negotiate a division of their accumulated matrimonial and business properties. Negotiations commenced through their lawyers and after a series of correspondence, a "without prejudice" letter, dated 12th September 2007 was exchanged setting out terms purportedly agreed for the division of the properties. Mrs Ramdehol would pay Mr Ramdehol the sum of US$262,500 in exchange for his transfer to her of his half share and interest in the business, building and land at 226 South Road, Bourda, as well as all stocks in the business warehouse. He would have the use and benefit of four cars, including vehicle PJJ 831, while she would have the use and benefit of motor vehicle RAV 4 PJJ 225. Mrs. Ramdehol would transfer her half share in the matrimonial home at 43 Street, La Penitence to Mr. Ramdehol.

[3] Mr Ramdehol claimed that the 12th September 2007 letter constituted the final settlement between the parties and that he performed his obligations under the agreement but that Mrs Ramdehol never paid him any of the agreed sum of US$262,500 nor gave him the vehicle PJJ 831 as per the terms of the agreement.

[1] Married Persons (Property) Act Cap 45:04.

Mrs Ramdehol claimed that no formal and binding agreement had been concluded and that to save on legal costs she and Mr Ramdehol had agreed to renegotiate the agreement set out in the letter 12th September 2007. Furthermore, on appeal before this Court she claimed that the agreement on which Mr Ramdehol relied was contrary to the matrimonial legislation of Guyana which was premised on equal division of matrimonial property.

[4] On 22nd January 2010, Mr Ramdehol brought proceedings in the High Court of Guyana against Mrs Ramdehol claiming specific performance of the agreement of 12th September 2007. Mr Justice Rishi Persaud gave judgment for Mr Ramdehol. The learned judge upheld the "without prejudice" letter of 12th September 2007 as a concluded agreement between the parties and held that there was no evidence of any renegotiation of the agreement as claimed by Mrs Ramdehol. He therefore ordered the payment of US$262,500 and the handing over of vehicle PJJ 831 or its value to Mr Ramdehol as provided in the "without prejudice" letter.

[5] Mrs Ramdehol's appeal to the Court of Appeal was filed on July 23, 2012 but became stymied in interlocutory proceedings concerned with staying the execution of the judgment of Justice Persaud. These proceedings included litigation before this Court.[2] Eventually, the Court of Appeal heard and, in an oral judgment delivered on February 21, 2017, dismissed the substantive appeal. Mrs Ramdehol now appeals to this Court contending that the courts below erred in finding that the 12th September 2007 letter constituted a concluded agreement between the parties and claiming that the contractual distribution of the parties' property was unfair and not in accordance with the division of the matrimonial property laws in Guyana under which each party would be entitled to half the value of the matrimonial assets.

[6] In order to understand the full gravamen of these complaints it is necessary to consider in greater detail the facts and related contending positions taken in the

[2] [2013] CCJ 9 (AJ).

courts below. Mrs Ramdehol is referred to as the appellant and Mr Ramdehol as the respondent. Together they are referred to as the parties.

High Court Proceedings

[7] It was accepted in the High Court proceedings that the parties had engaged the services of attorneys-at-law to act on their behalf. Mr. Khemraj Ramjattan acted on behalf of the respondent and Mr. Moenudin Mc Doom Jnr, a partner in the firm Mc Doom & Co., acted on behalf of the appellant. The parties also negotiated between themselves. The first letter of relevance was dated June 12, 2007 and written by Mr Ramjattan to the appellant and is reproduced below. It is useful to bear in mind that the respondent was sometimes referred to as "Brother".

> "Dear Rose
> We spoke on the telephone. This letter constitutes an attempt to avoid litigation in the matter of a division of property between yourself and [Mr. Ramdehol] ... below is my proposal for a full and final settlement.
> The assets of the Union aggregate to the following:-
> a) Building and land (bonded warehouse) situated at 226 South Road, Bourda. Value thereof is approximately $360,000.00 U.S.
> b) Stocks inside of this bonded warehouse. Value thereof is approximately $2000,000.00 U.S.
> c) Building and land at 43 Second Street, La Penitence. Value thereof is approximately $100,000.00 U.S.
> d) Land in Florida USA. Value thereof at $35,000.00 U.S.
> e) 2 motor vehicles- Rav 4 PJJ225; Corolla PJJ 931.
> My proposal on Brother's behalf, once it is agreed that the above constitute the assets and the respective values thereof, is that Brother be given half of the value thereof. The two vehicles will be excluded. He will have PJJ 225 which he presently uses; and you will have PJJ 831 which you presently use.
> What this means is that you will pay to him $368,000.00 U.S. as full and final settlement. Alternatively, Brother will pay to you the sum of $368,000.00 U.S. and he keeps the assets thereafter."

[8] The response came in letter dated July 23, 2007 written by Mr. Mc Doom Jnr to Mr. Ramjattan:

> "We represent Rosemarie Ramdehol…who provided us with a copy of your letter dated 12th June, 2007 with instructions to reply.
>
> …

Our client is not in agreement with certain values stated in your letter…Our client's proposal for an amicable resolution of this matter is as follows:

a. She will purchase your client's shares and interest in the Building and land situated at 226 South Road, Bourda for the sum of US$150,000
b. She purchase her husband's right, title and interest to and in the stocks inside the bonded warehouse for the sum of US$75,000
c. Your client currently resides at the matrimonial property situated at 43 Second Street, La Penitence from which she was forced to move to avoid physical and mental abuse. Therefore, your client will purchase our client's and interest in that property for US$50,000
d. Your client may purchase the land in Florida USA for US$70,000 or alternatively, the property may be placed for sale on the real estate market in Florida and the proceeds of the sale thereof shall be divided equally between your client and ours after all incidental fees and costs are paid.
e. Our client will pay to your client US$35,000 out of the two (2) accounts in the USA. This is notwithstanding that our client informs us that your client had previously agreed that the sum of US$70,000 in the said accounts was to be used for the payment of college tuition fees and living expenses for their children who are studying in the USA.
f. Our client will have the Rav 4 PJJ 225…your client will have the Carolla PJJ 831…Toyota Corona PJJ 3934 and the Toyota Starlet EP91 racing car purchased by the business."

[9] In letter dated August 13, 2007 written by Mr Ramjattan to Mr Mc Doom Jnr the following was said:

"Our clients have been talking after you sent your letter dated 23rd July, 2007…

From what Haimwant has told me I gather that Rose will agree to the following as being a full final settlement. If not, please communicate any disagreements which I will put to my client.

a. Haimwant will be paid US $175,000 for the 226 South Road property. He will transfer all his right, title and interest to Rose
b. Haimwant will be paid US$ 85,000 for transferring his rights, title and interest to the stocks in the bonded warehouse.
c. Rose will be paid US$ 30,000 for her interest and title being transferred to Haimwant of the 43 Second Street La Penitence property.
d. Haimwant will be paid US $10,000 for his interest in the Florida property in U.S.A.
e. Haimwant will be paid US S 35,000 from proceeds in the two U.S.A. bank accounts.
f. The Rav 4 PJJ 225 will be Rose's; and Toyota Corona PJJ 3934, the Toyota Mark II PFF1555, the Toyota Wagon PJJ 831 and the Starlet race car will be Haimwant's…"

[10] In letter dated August 31, 2007 written by Mr. Mc Doom Jnr to Mr. Ramjattan, the following was stated:

> "We refer to your letter ... dated 13th August 2007 which we have discussed with our client… we gather that our respective clients have been negotiating since your letter was received and our client has advised that she is now prepared to pay to your client the sum of US$250,000 as full and final settlement itemized as follows:
>
> a. She will purchase your client's undivided half shares and interest in and to the building and land situated at 226 South Road, Bourda for the sum of US$ 160,000.
> b. She will purchase your client's right, title and interest to and in the stocks inside the bonded warehouse for the sum of US$75,000
> c. Your client will purchase our client's undivided half share and interest in the matrimonial property situated at 43 Second Street, La Penitence for the sum of US$30,000
> d. She will purchase your client's right, title and interest in the land in Florida USA for US$10,000
> e. She will pay to your client US$35,000 out of the two (2) bank accounts in the USA
> f. She will have the Rav 4 PJJ 225 and your client will have the Corolla Wagon PJJ831, Toyota Corona PJJ 3934, Toyota Mark 11PFF 1555 and the Toyota Starlet EP91 racing car.
>
> …
>
> We further look forward to your response to our proposal and are available for discussion to bring this settlement to an early conclusion."

[11] The penultimate letter dated September 5, 2007 was written by Mr. Ramjattan to Mr. McDoom Jnr:

> "…
>
> I have gotten your letter dated 31st August, 2007. I spoke to my client who indicated that himself and Rose spoke. I confirmed with Rose on the 4th September, 2007, at 2:15pm and she verified and confirmed that she will agree to a payment of $262,500.00US (two hundred and sixty two thousand five hundred United States dollars) which constitute the midmark between $275,000.00 US and $250,000.00 US.
>
> My client agrees to this as a final settlement.
>
> He wants this sum in U.S. within a period of one week herefrom."

[12] The final crucial letter dated 12th September 2007 was written by Mr. McDoom SC to Mr. Ramjattan.

> "…
> Your letter dated 5th September, 2007 to Moenudin Mc Doom Jnr. was received. He is out of office and I have noted the contents of your letter which seemed to have been a response to a letter to you from my partner.
> What I find alarming in your letter is that your client wishes to have the sum paid over to him within one (1) week.
> Surely documentation and titles etc have to be altered before such payment is made. The modalities of such require a period of time.
> Our client has agreed to the sum suggested by yours and we can now begin the process of effecting the six (6) items in my partner's letter.
> All for your information and guidance."

[13] The respondent submitted that the September 12, 2007 letter read along with the September 5th and August 31st letters proved that the appellant agreed to pay him the US$262,500. In fulfilment of his obligations under the agreement, on July 30, 2008 he transferred his half share in the South Road property to her and gave her control of all the goods in the bonded warehouse. Despite this, she did not pay to him the agreed US$262,500. He admitted to receiving 3 cheques: GY$500,000 paid to him on October 17, 2008; GY$4,000,000 paid to him on November 13, 2009; and GY$2,800,000 paid to him on December 21, 2009 but said that these had nothing to do with the agreed US $262,500. Rather these were repayments for monies he loaned the appellant as well as the proceeds of the sale of a Titan Nissan car which he had asked her to sell for him.

[14] For her part, the appellant submitted that after the September 2007 correspondence she renegotiated the agreement with the respondent upon his request. She however could not provide the High Court with the date at which this renegotiated agreement was concluded and there was also no written correspondence between parties and no correspondence between their attorneys detailing the terms of a renegotiated agreement. However, she submitted a letter dated January 22, 2010 (the same date the claim against her was issued) written by her new attorney, Ms. Jamela Ali, who had written to the respondent's attorney, disputing that the appellant had an obligation to pay the specified sum and informing him that the parties had entered a new agreement to the effect that:

a) The appellant would transfer her half share in the property at La Penitence to the respondent;
b) The respondent would transfer his half share of the South Road property to the appellant subject to the first and second mortgages;
c) The appellant would give the respondent the following 3 vehicles:
    i. Toyota Starlet EP91;
    ii. Toyota Corona PJJ 3934;
    iii. Toyota Mark II PFF 1555.
d) The appellant would keep the Toyota Corolla Wagon PJJ 831 and Toyota Rav 4 PJJ225; the respondent to transfer the certificate of registration of the Rav 4 to appellant;
e) The appellant would pay the appellant **25 million dollars (GYD)**;
f) The New York bank account would be used for the education of their three children- Johanna, Achisha and Kelly;
g) The appellant would continue to be responsible and bear solely the full cost of the educational and other needs of their youngest son Joshua Ramdehol;
h) Since the real estate market value of the land in Florida was low, the land would be kept in the name of the appellant.

[15] In the said letter Ms. Ali said that the appellant was 'shocked' that after the appellant had completed her obligations pursuant to the renegotiated agreement, including full payment of the renegotiated sum of 25 million dollars, the respondent was demanding payment of the $262,500US in a letter dated December 21, 2009.

[16] The appellant also said that she paid the respondent in excess of the 25 million dollars as agreed and denied that the payments she made to him were for a repayment of a loan or for the sale of a Titan Nissan car. She did admit to borrowing GY 4 million dollars from the respondent and that, at the respondent's request, she bought the Nissan Titan motor vehicle from him for GY $3,600,000. In relation to the 4 million dollars, she said that that sum was repaid in the form of (a) 1 million dollars cash she sent to the United States to his son Ryan and the mother of his child; (b) a cheque identified as exhibit 'J' dated August 20, 2008 for the sum of 1 million dollars; and (c) $2 million dollars received by the respondent from Mr. Michael Bhagwandeen on behalf of the appellant (a receipt submitted and identified as 'K').

[17] In her witness statement, she also noted that she had endured years of abuse at the hands of the respondent. She detailed an incident which led to her deciding to move from their joint residence in February 2007. This incident was also mentioned in the witness statement of Joshua Ramdehol (the parties' son). She said that she made reports of his abusive actions towards her to the police and that the respondent had been charged but that she did not pursue the matter. No record of the reports made to the police was exhibited. However, in the face of many allegations of abuse, the respondent did not, either in his witness statement or oral evidence, deny the allegations against him.

[18] In her witness statement, the appellant said that during the time the parties had been negotiating in 2007, the respondent was still abusive towards her. She said that this affected her health substantially and that it was in this "confused state of mind of undue influence and pressure" that she negotiated with the respondent. However, no arguments for undue influence were submitted by counsel on her behalf at trial or on appeal to the Court of Appeal.

[19] It was further submitted by the appellant that there could have been no agreement based on the letters sent by her attorney as these were "without prejudice" and she was under the impression that there would be no agreement until there was a formal written agreement with a time clause and after valuations had been done. She also said that there could be no agreement because she retained the services of Mr. Mc Doom Jnr and the September 12, 2007 letter had been written by Mr. Mc Doom SC, who she did not instruct to settle the matter on her behalf. Furthermore, even if there was an agreement, that agreement was renegotiated sometime after September 2007.

[20] Additionally, in her witness statement as well as her oral evidence at trial, the appellant said that she had no knowledge of the letters being sent to Mr. Ramjattan by Mr. Mc Doom Jnr after July 2007. She said that she dismissed Mr. Doom Jnr in July of that year because she was not satisfied with a letter that she saw him send

on her behalf. She said that the other letters were only brought to her attention when she went to collect her file from Mr. Mc Doom Jnr.

[21] In her witness statement, the appellant admitted that the respondent transferred by way of gift, his half share in the property at Bourda. She denied that the respondent transferred 'all the stocks inside the bonded warehouse' to her and stated that at all material times the business was owned by her and all sales and purchases had always been executed by her. She also denied that she transferred her half share in the property at La Penitance to the respondent and said that although there was an agreement to do so, the appellant sold the property. She was only asked to sign the transfer documents in respect of her half share in the property and that is what she did.

[22] The parties' son, Joshua Ramdehol, gave evidence on behalf of his mother. He said that he was present at the time the parties renegotiated the contract and that he could attest to the fact that his mother paid the 25 million dollars in fulfilment of the new agreement. He also detailed a history of abuse by his father towards his mother.

[23] On June 11, 2012 Justice Rishi Persaud found in favour of the respondent. He was of the view that although the letters were expressed to be "without prejudice" that did not prevent the respondent from relying on them to prove that the parties had arrived at an agreement.[3] He also made the following findings of fact: (a) that there was 'a clear and concluded agreement with referable acts of part performance' by the respondent 'for example, a transfer of interest in 226 South Road property'; (b) there were no renegotiations between the parties and that it was 'unbelievable' that the parties privately renegotiated the agreement despite letters being exchanged between counsel; (c) the respondent's claim that she did not authorise Mr. Mc Doom Jnr to send letters on her behalf was unbelievable; and (e) that it was curious that the appellant submitted on the one hand that the parties did not arrive at an

[3] The learned judge referred to the principles in cases such as *Unilever plc v Proctor & Gamble Co* [2001] 1 WLR 1630; *Tomlin v Standard Telephone and Cables* [1964] 1 WLR 1378.

agreement in September 2007 (she had no knowledge of the letters being sent) and on the other hand argued that the agreement was renegotiated.

[24] Justice Persaud therefore ordered that:

a) The appellant should pay to the respondent the sum of $262,500.00US or the Guyanese equivalent 'as agreed to be paid to him by virtue of an Agreement made on September 12, 2007 concerning division of property';
b) The respondent was to be given possession of the car, licence plate # PJJ 831, or $2,000,000.00 as representing its value;
c) costs be awarded to the respondent in the sum of $150,000.00; and
d) there be a stay of execution of the judgment for a period of 6 weeks.

Court of Appeal Proceedings

[25] The oral judgment of the court (comprising Mr Justice Carl Singh (Chancellor (ag)), Mme Justice Yonette Cummings-Edwards (Chief Justice (ag)), and Mr Justice Brassington Reynolds (Additional Judge)) was delivered by the Acting Chief Justice. The court agreed with Mr Justice Persaud that the "without prejudice" communication did not bar the respondent from relying on the letters to prove that an agreement had been formed.[4] Additionally, the court was not minded to disturb the findings of fact as there was, in their opinion, no evidence that the trial judge misdirected himself or that his reasons were not satisfactory. Nor were they of the view that there were telling facts or compelling circumstances in this case as to warrant the disturbance of the findings of the trial judge.[5] The appeal was therefore dismissed, the orders made by Justice Persaud upheld, and costs awarded to the Respondent.

Appeal to the CCJ

[26] On 28th February 2017, the appellant filed in the Court of Appeal, her application for special leave to appeal to the Caribbean Court of Justice, and for a stay of the execution of the orders made by the Court of Appeal. On March 5, 2017, she filed

[4] In addition to the cases relied on by Justice Persaud, (supra (n2)) the court also cited *Sang Kook Suh v Mace* [2016] EWCA Civ 14; *Rush & Tompkins Ltd v Greater London Council* [1989] AC 1280 and *Ofulue v Bossert* [2009] UKHL 16, [2009] 1 AC 990.
[5] The court relied on the principles in *Lachana v Arjune* [2008] CCJ 12 (AJ); *Industrial Chemical Co (Jamaica) Ltd v Ellis* (1896) 35 WIR 303.

a separate application at the CCJ alleging that the 28th February 2017 application could not be fixed for hearing as the Full Bench of the Court of Appeal could not be constituted at that time due to a lack of judges. The appellant expressed fears that the respondent was in the process of taking steps to enforce the judgment.

[27] At a Status Hearing before Justices Saunders, Wit and Hayton, held on March 28, 2017, the appellant gave an undertaking to withdraw her application filed in the Court of Appeal and the respondent undertook not to enforce the judgment until the determination of the substantive appeal before the CCJ. The respondent also agreed (entirely without prejudice) that the appellant had an arguable case and upon that basis special leave to appeal the decision of the Court of Appeal was granted.

[28] Also at the said Status Hearing, this Court was informed that approximately GY$4,000,000 of the GY$8,000,000 which was not subject to the stay of execution of the judgment had already been paid by the appellant to the respondent. The Court was informed that the appellant continued to pay approximately GY$100,000 per month to the respondent.

[29] The appellant failed to file her Notice of Appeal within 21 days of the grant of special leave to appeal as required by Rule 11.1 of the Appellate Jurisdiction Rules. Her application to extend time to file the document was decided on paper. President Byron and Justices Wit and Hayton found the delay in filing the document to be short and, in the circumstances of the case, excusable. An order granting an extension of time to April 24, 2017 (the day on which the document was actually filed out of time) was made by the court on May 17, 2017.

Grounds of appeal

[30] In her grounds of appeal, the appellant submitted that the trial court and the Court of Appeal erred in several respects. These grounds involve three primary issues, namely whether:

a. the "without prejudice" letter could be adduced as evidence of a concluded contract between the parties;
b. the finding that the monies paid by the appellant and received by the respondent were in furtherance to the property settlement agreement between the parties; and
c. any contractual agreement between the parties ought to reflect the application of the practice and statute as it related to the division of matrimonial property.

[31] The first two of these grounds were fully considered in the courts below and careful decisions made in respect of them; the third less so. Nonetheless, out of deference to the efforts of counsel, all three grounds are considered below.

Was there was an enforceable contract?

[32] The appellant raised both legal and factual issues relating to the conclusion of the alleged contract of 12th September 2007. As regard the legal issues, she contended first that the status of the "without prejudice" letter precluded its admission into evidence to prove the content of the alleged agreement, and second, that there was no binding contract because there was no concluded agreement since terms such as time for payment had not been finalized. Specifically, there was a failure to specify a deadline or certain period within which the US $262,500 should be paid; the September 12, 2007 letter clearly stated that the appellant had refused the respondent's request to be paid within a week. Other terms were said to have been left out of the agreement including the responsibility for payment of two mortgages on the South Road property which was transferred to the appellant; entitlements to the contents of the matrimonial home at La Penitence, maintenance and education of the children, division of the foreign currency held by the Respondent in his Barbados bank account; and responsibility for the expenses of the transfer of the properties. The appellant submitted that she was prejudiced by these omissions as she was left to bear all the additional expenses.

[33] In our view, these legal issues were properly decided in the courts below. It is trite law that letters exchanged between parties in hopes of arriving at an agreement, even before a party initiates litigation, are privileged because they are "without prejudice" communication. Indeed, once the communication is made bona fide in the course of arriving at a settlement, the document is privileged whether or not the words "without prejudice" are expressly used in the document. However, there are exceptions to this general rule, many of which were discussed in *Unilever plc v Proctor & Gamble Co*,[6] a decision upon which the respondent relies and which was applied by the trial judge and the Court of Appeal. In that case, Walker LJ noted that when there is an issue as to whether "without prejudice" communications have resulted in a concluded compromise agreement, those communications are admissible.[7] They are admissible as giving rise to an estoppel even if there is no concluded compromise provided there is a clear statement made by one party upon which the other party is intended to act, and in fact does act.[8] Walker LJ also found that the correspondence would be admissible when proving that an agreement apparently concluded between the parties during the negotiations should be set aside on the ground of misrepresentation, fraud or undue influence.[9]

[34] As regard the submissions of an incomplete contract for failure to specify certain terms, two cases are instructive. The Jamaican (Privy Council) decision of *Western Broadcasting Commission v Edward Seaga*[10] makes the point that even if the court finds that the parties had agreed only to some specified terms based on evidence submitted in "without prejudice" correspondence, the agreement may be binding and enforceable, if it contains sufficiently certain terms. The court must therefore look to see if what was agreed between the parties was sufficiently certain, regardless of any omission.

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[6] [2001] 1 WLR 1630.
[7] *Tomlin v. Standard Telephones and Cables Ltd*[7] applied.
[8] Neuberger J. in *Hodgkinson & Corby Ltd. v. Wards Mobility Services Ltd*[8] applied.
[9] *Underwood v. Cox* (1912) 4 DLR 66, Ont DC applied.
[10] [2007] UKPC 19.

[35] In *G Percy Trentham Ltd v Archital Luxter Ltd*[11], a case relied on by the respondent, Steyn LJ rightly pointed out that:

> "The fact that the transaction was performed on both sides will often make it unrealistic to argue that there was no intention to enter into legal relations. It will often make it difficult to submit that the contract is void for vagueness or uncertainty. Specifically, the fact that the transaction is executed makes it easier to imply a term resolving any uncertainty or alternatively, it may make it possible to treat a matter not finalised in negotiations as inessential."

[36] Bearing these principles in mind, it was both possible and permissible to allow the respondent to rely on the letters to show that either an agreement had been concluded or that he had conducted himself (to his detriment) based on clear statements made by or on the appellant's behalf such that the appellant should be bound by those statements. It was also possible and permissible to allow the appellant to rely on the letters to show that even if there was an agreement, that agreement should be set aside because there was some misrepresentation, mistake or undue influence by the respondent who was allegedly abusive towards her and as such the agreement should be set aside.

[37] The trial judge found that the agreement evidenced in the 12th September 2007 letter was 'binding and enforceable' based on his 'perception of the facts'; that there was acceptance of the terms specified in that letter (linked to the September 5th and August 31st letters) and there were acts of part performance by the respondent. He found that the letter contained an acceptance of the obligation to pay the US$262,500 and that the respondent made transfers of assets to the appellant based on the acceptance communicated by the appellant's attorney. These findings were upheld by the Court of Appeal.

[38] We consider the facts that the respondent transferred the assets to the appellant well after the one-week deadline for payment discussed and rejected in the 12th September 2007 letter, and that the appellant accepted the said transfers, as evidence that the time for payment within one week was not a condition of the agreement, the

[11] [1993] Lloyd's Report 25, at p. 27.

parties acting on the basis that the agreement was to be carried out within a reasonable period. The terms of the contract were thus sufficiently certain. We therefore agree with the courts below that the contract, evidenced by the 12th September 2007 letter and later acts of part performance, is enforceable.

[39] We do not place much significance in the argument by the appellant that the 12th September 2007 letter was by Mr. Mc Doom SC whereas she had engaged the services of Mr Mc Doom Jnr. The fact of the matter is that both Mc Dooms were partners in the law firm that handled her matter. The appellant failed to show that the attorney-client retainer was specifically between her and Mr. Mc Doom Jnr and not between her and the firm. Indeed, the language of the 12th September 2007 letter was such that it could be implied that the retainer was with the firm. It will be recalled that in the letter, Mr. Mc Doom SC noted that his partner Mr. Mc Doom Jnr was out of office and continued:

> "…I have noted the contents of your letter which seemed to have been a response to a letter to you from my partner...Our client has agreed to the sum suggested by yours and we can now begin the process of effecting the six (6) items in my partner's letter."

[40] As the attorney-client relationship was therefore between the appellant and the firm, Mr. Mc Doom SC had implied authority to send correspondence on behalf of the appellant. In any event, we note that the obligation on the appellant to pay the sum specified in the August 31 letter written by Mr. Mc Doom Jnr was not substantially different from that specified in the 12th September letter written by Mr Mc Doom SC (US$250,000 as contrasted with US$262,000).

[41] We also note the appellant's submission made before the courts below and repeated before us that she could not be bound by the 12th September letter because she was not aware of the letters being sent on her behalf and because her attorneys had not complied with her instructions. A client may sue an attorney for acting on her behalf without her instructions.[12] But, whatever legal action the appellant might have had

[12] *Yonge v Toynbee* [1908-1910] ALL ER 204.

or might have against her attorneys for non-compliance with her instructions, the fact remains that, as regards third parties, the authority of an attorney to act on behalf of a client in negotiations includes a power to compromise the claim. Brightman J in *Waugh v HB Clifford & Sons Ltd*[13] affirmed that an attorney has an implied authority to compromise a suit *without reference to the client*, provided that the compromise does not involve any matter 'collateral to the action' and there was no misrepresentation. The appellant's attorneys also had ostensible authority to act on her behalf and to indicate an agreement on her behalf. When her attorneys signalled that she accepted the offer to pay US$262,500 in the September 2007 letter, she was bound by this representation: *Robinson v Bank of Bermuda Ltd.*[14]

Were the findings of fact contrary to the weight of evidence?

[42] The appellant advanced several arguments based on the common premise that findings of the courts below were contrary to the weight of the evidence. She questioned whether the parties had actually negotiated an agreement under which the respondent was to be paid US$262,500; whether the appellant was aware of the contents of the letters sent on her behalf after July 23, 2007; whether the parties had renegotiated the agreement; whether monies paid by her to the respondent were intended to satisfy her obligations under the agreement on division of their property.

[43] These are all questions of fact upon which there were concurrent findings by the courts below. The judge, having considered the demeanour and relative reliability of the parties and their witnesses found, inter alia, that:

a. there was no renegotiation of the agreement;
b. the appellant and her son were 'unbelievable' - on the one hand, the appellant argued that there was no agreement and on the other she argued that they had renegotiated the agreement at the respondent's request;
c. The appellant offered no proof of the said agreement, not even a date on which the parties were said to have formed a new contract;

[13] [1896] 2 Ch. D. 105.
[14] [2010] Bda L.R. 36.

d. the appellant's evidence was a crafted defence based on the respondent's part performance;
e. the appellant's evidence that the agreement was reached by her lawyer without her input was unbelievable;
f. the payments by the appellant to the respondent were in respect of a loan and the arrangement to sell the Nissan vehicle for the respondent and were not in respect of the agreement to settle the division of their property.

[44] The Court of Appeal had to decide whether it would disturb these findings of fact and cited the principles laid down by this Court in *Campbell v Narine*[15], and also by the Privy Council and House of Lords decisions in *Beacon Insurance Ltd v Maharaj Bookstore Limited*[16], and *Watts (or Thomas) v Thomas*.[17] The Court of Appeal decided that it would not interfere with the findings of fact because there were no 'telling facts and compelling circumstances' warranting the court's intervention. Additionally, the trial judge had the benefit of seeing and hearing the witnesses and his analysis of the evidence, having regard to its discrepancies and inconsistencies, could not be faulted. There were therefore concurrent findings of fact by the lower courts.

[45] We have previously discussed the principles to be applied by this Court in relation to overturning concurrent findings of fact by lower courts in the cases of *Lachana v Arjune*,[18] *Ramgalan v Singh*,[19] and *Campbell v Narine*. Unlike the Privy Council's strict approach, we opted in *Lachana* for a more flexible approach. Even so, in the subsequent case of *Singh* we held that generally it was only in exceptional circumstances that we would review concurrent findings of fact of the courts below. When we speak of exceptional circumstances, we mean cases including those where this Court is satisfied that:

a. there was a miscarriage of justice;

[15] [2016] CCJ 07(AJ).
[16] [2014] UKPC 21.
[17] [1947] A.C. 484.
[18] [2008] CCJ 12 (AJ).
[19] [2014] CCJ 5 (AJ).

b. any advantage enjoyed by the trial judge, by reason of having seen and heard the witnesses could not be sufficient to explain or justify the judge's conclusion;

c. the reasons of the lower courts are not satisfactory;

d. there is a lack of clarity and conflicting findings of fact; or

e. there is a lack of any evidential basis.

[46] In *Campbell*, we also took the time to explain exactly what ought to be considered a 'finding of fact' as distinguished from a perception of the facts. We noted that Byron CJ developed the concept in *Grenada Electricity Services Ltd v Isaac Peters*[20] where he noted as follows:

> "It is in the finding of specific fact or the perception of facts, that the court is called on to decide on the basis of the credibility of the witnesses. When this is the position, an appellate court must exercise caution and have a rational basis for differing with the trial judge who had the advantage of observing the witnesses in the process of giving testimony. On the other hand, the court may have to consider a situation where what is in dispute is the proper inference to be drawn from facts, or in other words the evaluation of facts. In such cases the appellate court is generally in as good a position to draw inference or to evaluate as the trial judge."[21]

[47] In this case, apart from the stand-alone letter written by the appellant's new attorney to the respondent's attorney, outlining what she claimed to be the terms of a renegotiated agreement, there was no other tangible evidence that the parties had renegotiated. The alleged renegotiated agreement, if it did exist, must have been oral. The credibility of the witnesses would be the only substantive proof that such an agreement was formed. The appellant's case contained numerous inconsistencies and the trial judge did not find her story to be credible. He found it to be a carefully crafted defence. On appeal, the appellant did not raise any exceptional circumstances that could persuade the Court of Appeal to disturb the trial judge's findings. Similarly, no exceptional case has been put before us and as

[20] Grenada Civil Appeal No 10 of 2002 at [7], endorsed by Burgess JA in *Ward v Walsh* Barbados Civ App No 20 of 2005 at [58.].
[21] Supra (n7), [39].

such we do not consider it permissible to review and vary the concurrent findings of fact made by Justice Persaud and the Court of Appeal.

Application of practice and statute as it relating to division of matrimonial property

[48] The preceding two grounds were fully considered and decided by the courts below and we have, in this judgment, agreed with those decisions. The third ground was pressed before us with vigour. It was that the contract for division of the matrimonial property ought to be set aside because of its unfair distribution of marital assets. The appellant argued that the contractual division did not at all correspond with the legislative scheme which basically called for an equal division in matrimonial property.

[49] The critical consideration is that where provision for dependent minor children is not in issue, the Married Persons (Property) Act Cap 45:04 gives the parties complete autonomy to settle the division amongst themselves by contract. The parties can perhaps better give effect to the relative physical and psychological contribution which they have actually invested in the acquisition of the property during the marriage. In negotiating/concluding the agreement each party has the right to ensure his or her interests are protected by engaging the lawyer of his or her choice. Where the parties choose to opt out of the legislative scheme in favour of a contractual division, the general rules of contract law apply. In other words, the autonomy of the parties to enter into divorce settlements trumps the property rules relating to marriage and distribution on divorce. The general position was set out by Lord Kincraig in *Milne v Milne*[22] who said that:

> "In my opinion parties may by agreement oust the jurisdiction of the court to pronounce upon the pursuer's entitlement to payment of a capital sum, where such is applied for in an action for divorce, and if they do so, the court must give effect to any such agreement. It has always been the law that notwithstanding statutory provisions regulating the rights of parties, they may agree to certain terms, and if they do so they must receive effect. It is different where the court has a duty in relation to the interests of other

[22] 1987 SLT 45 at 47. See also *Thomson v Thomson* 1982 SLT 521, *Elder v Elder* 1985 SLT 471, *Horton v Horton* 1992 SLT (Sh. Ct) 37.

> parties affected by a decree of divorce, such as children of the marriage…. No agreement between the parties on these matters can relieve the court of its obligation. Further there may be statutes which expressly provide that no parties may contract out of the provisions of the statute."

[50] The only provision in the Married Persons (Property) Act Cap 45:04 that deals with agreements relating to distribution of property between married/divorced persons is section 17 of the Act. That section provides:

> "Nothing in this Act contained shall interfere with or affect any ante-nuptial agreement or settlement, or agreement for an ante-nuptial agreement or settlement, made or to be made, whether before or after marriage, respecting the property of any married woman, or shall interfere with or render inoperative any restriction against anticipation at present attached or hereafter to be attached, to the enjoyment of any property or income by any person under any ante-nuptial contract or settlement, or will or other instrument; but no restriction against anticipation contained in any ante-nuptial contract or agreement, of a person's own property to be made or entered into by that person, shall have any validity against debts contracted by that person before marriage."

[51] The Guyanese legislation does not contain any provisions like those, for example, in Jamaica[23] that allow the court to vary or set aside such agreement based on specified factors (including because the agreement was unfair). Unless the appellant can show that the agreement was in breach of general contract principles the agreement must be enforced.

[52] In her Submissions in Reply, the appellant submitted that she acted under an undue influence when she made initial payments to the Respondent. In the appellant's witness statement at trial, she stated that the respondent had been violent towards her and that it was in a "confused state of mind of undue influence and pressure" that she negotiated with the respondent. However, she did not specifically plead undue influence in the proceedings below and neither in those nor the submissions filed in this Court did she submit substantive evidence to prove this claim of undue influence. Furthermore, even if there was undue influence in relation to those initial payments, as the appellant now submits to this Court, she would have to show how

[23] Section 10 Property (Rights of Spouses) Act.

that affected the actual agreement in September 2007. All that was submitted to us in the appellant's Reply was that she made initial payments to the respondent without a proper valuation of the assets as she was in fear of him. Without the benefit of detailed evidence of undue influence, this Court cannot properly use this claim as a basis to intervene in the contractual agreement.

[53] The appellant advanced several arguments based on what she alleged to be inaccurate valuations of the properties; she submitted that the agreement should be set aside because the attorneys failed to obtain a valuation for the real properties passing between the parties. The parties commenced negotiation by ascribing values to their joint assets. After determining a general total of the assets, the parties then agreed on US $262,500 as a 'mid-mark' between US $275,000 and US$ 250,000 so as to split the assets equally between the parties. The appellant alleged that the value ascribed to the lands turned out to be inaccurate and had there been an evaluation, the true values would have been known.

[54] In the August 31, 2007 letter (which ought to be read along with the September 12 letter) the parties supposedly valued the La Penitence property to be worth US $60,000. It was agreed that the respondent would keep the property with the appellant paying him US $30,000 or approximately GY 6 million dollars for her half interest in the home under the agreement. It so happened that the respondent subsequently sold the house to a third party (with the consent of the appellant) for GY 20 million dollars or approximately US $100,000. The appellant therefore argued that she was prejudiced by the undervalued figure mentioned in the correspondence.

[55] The appellant also argued that she was further prejudiced because a Certificate of Value prepared by the Government Chief Valuation Officer in March 2008 at the request of the respondent, valued the Bourda property at GY15.5 million dollars or approximately US $77,500 whereas the parties had ascribed a value of US $320,000 or approximately GY 64 million dollars. The respondent would transfer his share in

the property to her for the half sum of US $160,000. In relation to the property located in Florida, the parties ascribed a figure of US $20,000 or approximately GY 4 million dollars, and it was agreed that the appellant would pay US $10,000 for the respondent's half share. A subsequent State valuation valued the property at US $7,000.

[56] Valuations are important in getting an idea of the true market value of a property which is the subject matter of a contract. But it is common knowledge that a valuation, especially by the government, need not coincide with the actual sale price. It is also the case that what may have been reasonably accurate valuations at the time of contracting might not be so when the property is sold or ten years later at the time of litigation. Furthermore, it is not necessary for the parties to obtain a valuation before a binding and enforceable contract can be concluded because consideration need not be adequate; it need only be sufficient.[24]

[57] It is the case that the June 12, 2007 letter from the respondent's attorney to the appellant gave her the option of 'buying out' the respondent and keeping the assets or of allowing the respondent to keep the assets and 'buying her out'. As evident in the subsequent correspondence she chose to keep the assets in return for 'buying out' the respondent. In these circumstances, it seems reasonable to assume that the parties, who were persons of business with some general idea of the value of their assets, had taken the risk of the accuracy of the valuations as agreed in the negotiations between them. Where the parties, having the benefit of legal advice, choose to proceed without obtaining a valuation they cannot thereafter claim that the agreement should be set aside because the property turns out to be worth far more or far less than they originally thought. They have taken the risk of the valuation and cannot complain later that the risk went against them.

[58] The appellant repeats her argument that the figures mentioned in the letters were a mere estimate and that her attorney promised her that he would get a valuation

[24] *Chapell & Co Ltd v Nestle Co Ltd* [1960] AC 87.

before a formal agreement was written up. We have already commented on the relationship between the appellant and her lawyers and the possibility, assuming these allegations to be true, of legal action against the attorneys.[25]

[59] Whether a failure to ascertain the true value of an asset before agreement could be considered a common/fundamental mistake is debateable[26] but, in any event, no argument was advanced to us in support of a claim that there was such a mistake. We can therefore find no basis for interfering with the contractual agreement on the division of the matrimonial property in this case. Accordingly, we find that the parties are bound by the contractual agreement evidenced by the letter of 12th September 2007 and therefore that the appeal must be dismissed with the award of costs in favour of the successful respondent.

[60] The Court notes that there may have been an issue as to whether the respondent fulfilled his contractual obligation to pay to the appellant the agreed US$30,000 for the transfer of her half share and interest in their matrimonial home to him. However, the burden was on the appellant to at least formally allege in the pleadings and the grounds of appeal that this sum had not been paid to her. She failed to do this, and, indeed, it is possible that the US$30,000 to be paid to the appellant was taken into account in arriving at the overall figure of US$262,500 to be paid by the appellant to the respondent. In these circumstances the Court cannot disturb the order by the Court of Appeal that the full sum of US$262,500 must be paid by the appellant to the respondent.

Effect of delay

[61] Before giving our orders, we wish to comment upon the inordinate delay in adjudicating this case. The respondent commenced his case in January of 2010, almost eight years ago. It may be that the circumstances of the paying party may have deteriorated, making it more difficult to comply with the court order now than

[25] See [41] above.
[26] *Wood v Boynton* 64 Wis. 265, 25 N.W. 42 - Lady found a stone and sold it as a Topaz for $1. It was a raw uncut diamond worth $700. The contract is not voidable.

would have been the case eight years ago; similarly, the party to be paid may well have suffered by the absence of the settlement fund over these years. Such a delay in a relatively simple case is inconsistent with the overriding objective expressed in the new civil procedure rules of Guyana and we hope that the judiciary will take advantage of the opportunities that are available in those rules to negate the possibility of this type of delay recurring.

Orders

[62] The appeal is dismissed.

[63] The order that the appellant pays to the respondent the sum of US $262,500 is upheld.

[64] The sum due to the respondent is subject to sums already paid in fulfilment of Justice Rishi Persaud's order in this matter dated June 11, 2012.

[65] The appellant must pay the costs of the appeal assessed, as agreed between the parties, on the basis of basic costs.

/s/ CMD Byron

The Rt. Hon. Sir Dennis Byron, President

/s/ J. Wit

The Hon Mr Justice J Wit

/s/ D. Hayton

The Hon Mr Justice D Hayton

/s/ W. Anderson

The Hon Mr Justice Anderson

/s/ M. Rajnauth-Lee

The Hon Mme Justice M Rajnauth-Lee