IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
GRENADA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. GDAHCV 2011/0103

BETWEEN:

RDF ENTERPRISES LTD.

Claimant

and

NATIONAL INSURANCE BOARD

Defendant

Appearances:
Ms. Claudette Joseph for the Claimant
Mr. Ruggles Ferguson for the Defendant

2011: May 18; September 28;
2012: March 29; September 21.

DECISION ON A PRELIMINARY ISSUE

Introduction

[1] **TAYLOR-ALEXANDER, J. (Ag.):** The parties to these proceedings, by consent order dated the 18th day of May 2011 agreed to try as a preliminary question, whether correspondence exchanged between them dated the 28th August 2009 and the reply to the correspondence dated the 24th September 2009 together constituted a valid and binding agreement.

Brief Summary of the Proceedings

[2] The Claimant, a limited liability company, is indebted to the Defendant in the accumulated sum of $9.8 million for various loans advanced to the Claimant over a period of 10 years beginning on the 7th March 1997. The Claimant evidently had

difficulty repaying the loans, and in an attempt to assist the Claimant remaining viable, discussions ensued between the parties on a "land for debt swap". During negotiations two letters were exchanged between the parties. One by the Defendant on the 28th August 2009 and a reply by the Claimant on the 24th September 2009, which the Claimant says successfully concluded an agreement between them.

[3] By statement of case filed on the 28th February 2011, the Claimant sought an order for specific performance on the basis of the concluded agreement. By defence filed on the 28th March 2011, the Defendant disputed the existence of an agreement, submitting that discussions conducted between the parties were "without prejudice". These discussions, the Defendant submitted, could not be adduced before the court to validate the existence of a purported agreement.

[4] At case management conference held on the 18th May 2011, the parties agreed by consent order to try preliminarily, the question of whether the Defendant's offer to the Claimant dated the 28th August 2009 and the Claimant's reply dated the 24th September 2009 together constitute a valid and binding agreement between the parties.

[5] On the 22nd of August 2012 the parties who have so far been generous with their patience awaiting the decision on the preliminary issue were invited by the court to consider whether the question put for preliminary determination is one that ought properly to be determined at a trial of the law and facts, given that the preliminary question is in substance the principal issue to be decided between the parties. I was assured by the parties that the effect of the consent order was to summarily try the proceedings.

The Letters

[6] The two letters exchanged between the parties are central to the preliminary question. I have therefore reproduced them in full.

[7] The Defendant's Letter:

"Ref. NIS 41/31B

WITHOUT PREJUDICE

August 28, 2009

Mr. Geoff Croome
Chairman
RDF Enterprises Ltd
P.O Box 648
ST. GEORGE'S

SALE OF LANDS TO LIQUIDATE INDEBTEDNESS OF RDF TO THE NATIONAL NSURANCE BOARD

We thank you for your letter dated July 24, 2008 which arrived at our office on July 24, 2009.

The National Insurance Board reviewed your offer to sell lands so as to liquidate monies owed and I am directed to advise as follows:

1. *The National Insurance Board holds a first mortgage over the entire property of RDF Enterprise Ltd. for monies loaned amounting to $5.8 million.*

2. *To date the RDF Enterprises Ltd. has failed to meet its obligation to the National Insurance Board as provided for under the Loan Agreement.*

3. *The RDF Enterprises Ltd. is also in arrears with its National Insurance contributions amounting to an estimated sum of $ 0.8 million.*

4. *The National Insurance Board rejects any suggestion that is in any way contributed to the inability of the RDF Enterprises Ltd. to be able to meet its obligations with the Board. In fact, the National Insurance Board, through the various financing facilities made available to RDF Enterprises Ltd., sought to assist it in becoming viable.*

5. *The National Insurance Board reiterates its preparedness to facilitate the settlement of the full debt by way of "a land for debt swap" instead of exercising the option of foreclosure as provided for in these circumstances.*

6. *The National Insurance Board is prepared to accept in full satisfaction of all sums owing to it, that is $9.8 million, the area of land amounting to 84.9 acres and designated as parcel 3 in the plan of Godwin Alexis of March 2008.*

7. *The Offer is made without prejudice and is valid for 30 days from the date of this letter.*

Please be guided accordingly.

Yours faithfully,

Alfred P. Logie
DIRECTOR"

[8] In response to the letter issued by the Defendant the Claimant wrote:

"National Insurance Scheme
Melville House
St. George's

By hand

24th September 2009

Attn: Mr. A. P. Logie, Director

Dear Mr. Logie,

SALE OF LANDS AT RIVER ANTOINE ESTATE TO THE NATIONAL INSURANCE BOARD

We acknowledge receipt of your letter dated 28th August 2009, in which you convey, on behalf of the National Insurance Board, the Board's offer to accept title to an area of land at River Antoine Estate, comprising 84.9 acres described as Area B in the March 2009 survey plan prepared by Godwin Alexis, all in full settlement of all sums owed by RDF Enterprises Ltd. to the Board.

The Board of Directors of RDF Enterprises Ltd. has authorised me to accept the Board's offer on its behalf, and I do so accordingly.

RDF will immediately instruct Godwin Alexis, Licensed Land Surveyor, to re-survey the said Area B and to prepare a registrable plan. We will instruct Solicitors to be advised to represent us in this transaction. Please advise us as to the Solicitor who will represent the Board.

Please convey my regards to the Board Members and assure them that we will cooperate in finalising this long-awaited resolution of our problem as quickly as possible.

Your sincerely,
for RDF Enterprise Ltd

....
A.G. Croome, Chairman"

Consideration of the Submissions

[9] The "without prejudice" rule applies to exclude all negotiations genuinely aimed at settlement, whether oral or in writing, from being given in evidence. This is a public policy justification aimed at preventing statements or offers made in the course of negotiations from being brought before the court at trial, as an admission on the issue of liability so as to compromise the freedom of settlement discussions. The application of the rule is not dependant on the use of the phrase "without prejudice", and evidence of the content of negotiations that seek to compromise an action will as a general rule not be admissible at trial and cannot be used to establish an admission or partial admission. Such correspondence remains privilege even after a compromise had been reached.

[10] The submissions of the Defendant on the preliminary issue rests entirely on the premise that the correspondence exchanged between the parties was made during the course of negotiations aimed at settling a dispute and had been expressed to be "without prejudice". The veil of protection offered to such correspondence ought not to be lifted, the Defendant submits, to make admissible the exchanged correspondence. The Claimant in its focused submissions does not deny the existence of the well established principles relating to "without prejudice" communication, but challenges the Defendant's submission that the correspondence is protected from admissibility, submitting instead that it falls within an exception to the rule.

[11] There are well known exceptions to this rule. In **Rush and Thompkins Ltd. v Greater London Council and Another** [1988] 3 All ER 740 per the dicta of Lord Griffith, it was acknowledged that resort may be had to "without prejudice" material where the justice of the case requires it and in particular cases where the issue to be determined is whether the "without prejudice" negotiations resulted in an agreed settlement.

[12] In **Unilever Plc v Proctor & Gamble Co.** [1999] ADR.L.R. 10/28 Justice Robert Walker gave the rationale for the exception:-

> *"Many of the alleged exceptions to the rule will be found on analysis, to be cases in which the relevance of the communication lies not in the truth of any fact which it asserts or admits, but simply in the fact that it was made. Thus, when the issue is whether without prejudice letters have resulted in an agreed settlement, the correspondence is admissible because the relevance of the letters has nothing to do with the truth of any facts which the writers may have expressly or impliedly admitted. They are relevant because they contain the offer and acceptance forming a contract which has replaced the cause of action previously in dispute."*

[13] I am satisfied that the exchanged correspondence in the present proceedings come within the exceptions referred to in **Rush and Thompkins v GLC** [1988] 3 All ER 740 as being correspondence relevant to determine whether all the elements of a concluded contract are contained therein. The communication is therefore not protected from admissibility and it is permissible for this court to receive its contents to determine whether a concluded agreement had been reached.

[14] In any event I question whether the Defendant could have successfully postulated an objection to the admissibility of the correspondence when in my view the terms of the consent order agreed to by the parties operated to waive any protection that may have previously been afforded such correspondence. It is the parties themselves who by consent order directed the early ruling on whether the letters exchanged between the parties constituted the terms a valid binding agreement.

The Legal Effect of the Letters

[15] Whether the two letters read together constitute a valid binding agreement is ultimately a question of construction. The law does not require a contract to be made in any particular form nor according to particular formalities, it is enough for the elements necessary for a valid contract to be present.

[16] It matters not that the formalities are not worked out in meticulous detail and the intention is to execute a more detailed formal document. The court will find the existence of, an agreement provided there is sufficient certainty for the terms to be complete.

Halsbury's Laws of England (4th edn.) Vol. 9 at para 203 and 261) identifies the requirement of a valid contract:-

> *"203. (1) there must be two or more separate and definite parties to the contract. (2) there must be consensus ad idem between the parties (3) the parties must intend to create legal relations in the sense that the promises of each are to be enforceable simply because they are contractual promises (4) the promises of each party must be supported by consideration, or by some factor which the law considers sufficient. Generally speaking the law does not enforce a bare promise but only a bargain."*

> *"261.To be a good contract there must be a concluded bargain, and a concluded contract is one which settles everything that is necessary to be settled and leaves nothing further to be settled by negotiation between the parties…"*

[17] Upon scrutiny of the two letters I am satisfied that with the authority of its Board the Defendant made an unequivocal offer to have the Claimant's debts in their books cleared by a "land for debt" swap. The terms of the swap are clearly spelt out identifying that it was to settle a debt of $9.8 million and identifying an area of land measuring 84.9 acres designated as Parcel 3 in the plan of Godwin Alexis of March 2008. The letter was reflected to be an offer that was to remain open for a period of 30 days from the date of the letter. I am satisfied that the Claimant's response dated the 24th September 2009, was issued within the 30-day period and

was an acceptance on the terms specified in the offer. I am also satisfied that each party by the terms of the offer and of the acceptance provided legally acceptable consideration for their obligations. No doubt the letters contemplated the executions of certain formalities including a resurvey, producing a plan for registration, execution of contractual documents in the form of a deed of indenture. This in my view was a mere formality, the terms of the contract having been settled by letter.

[18] I therefore declare that the letters of 28th August 2009 and 24th September 2009, read together, contained the terms of a valid bargain, the terms of which are clear and unambiguous.

[19] I further order that any cost occasioned on the determination of this issue be costs in the cause.

[20] This matter is set down for further Case Management Conference on a date to be scheduled by the court office.

V. Georgis Taylor- Alexander
High Court Judge (Ag.)