THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

FEDERATION OF SAINT CHRISTOPHER AND NEVIS

SAINT CHRISTOPHER CIRCUIT

(CIVIL)

A.D. 2013

CLAIM NO.: SKBHCV 2012/0022

BETWEEN:

DEVELOPMENT BANK OF ST KITTS AND NEVIS
Respondent/Claimant

And

MITCHELL GUMBS
1ST DEFENDANT/APPLICANT

DERRICK A. LAKE
2ND DEFENDANT

Appearances

Mr. Arudranauth Gossai for the Applicant/1st Defendant
Ms. Deidre Williams for the Respondent/Claimant

2013: October 25
2014: February 18, April 8

Cause of Action – Joint and Several Liability – Default Judgment Against one Defendant - Doctrine Election - Merger of Judgment – Whether Default Judgment Amounting to Act of Unequivocal Election - Whether Doctrine of Election Relevant to Cases of Joint and Several Liability.

Agreement to Settle Claim – Privileged Communication between Attorneys –Details of Privileged Communication – Whether Court should be provided with Actual Details of Privileged Communication.

JUDGMENT

[1] RAMDHANI J. (Ag.) This matter is similar to a number of cases that has recently engaged the court's attention. First, it raises for the court's determination, issues relating to election and merger of cause of action in judgment which may flow from a claimant seeking and obtaining default judgment against one of two parties in a claim for a debt. Second, it also raises as a primary issue whether certain 'without prejudice discussions and communications' between attorneys at law on opposite side, and statements made to the Master during case management conferences, have led to a binding agreement between the 1st defendant/applicant and the claimant/respondent to settle the claim against the applicant.

Parties and the Underlying Claim

[2] On the underlying claim filed on the 19 January 2012, the 1st defendant, the applicant on this application, together with the 2nd defendant were sued jointly and severally as guarantors on a loan extended to a third party, one Mr. Kafa Burt, by the claimant, the Development Bank of St. Kitts and Nevis, the respondent on this application. The third party, Mr. Burt was not sued, but default judgment was obtained against the 2nd defendant in the sum of $108,627.77 with interests and costs, being the full sum claimed.

[3] In the particulars provided by the statement of claim, the claimed sum comprised of $70,177.00 lent to the third party and other banking and transactions charges and interests related to the loan. It was particularized that both the 1st defendant and 2nd defendant guaranteed this debt.

[4] The statement of claim further contended that it was a term of the loan agreement and the guarantee that if there was default in making any of the monthly payments on the loan, then the full outstanding amount would become immediately payable from either of the guarantors as it was a debt owed by the defendant jointly and severally. There was

default, the statement of claim contended, and as such the respondent became entitled to seek to recover the full outstanding amount.

[5] On the 22 February 2012 the applicant filed a defence disputing the claim on a number of grounds. On the 11 June 2012, the applicant further filed an Amended Defence.

[6] There was no acknowledgement of service or defence filed by the 2nd defendant, and on the 15 June 2012 the respondent requested judgment in default against the 2nd defendant. On the 22 June 2012, as noted earlier, judgment in default was entered against the 2nd defendant for the full amount claimed.

[7] The remaining claim against the 1st defendant came up on a number of occasions before the learned Master when there were statements made relating to a settlement. Several adjournments later, and when it was clearly stated by Ms. Deidre Williams for the claimants that the matter was not settled, the Master took the matter off the court's List. The applicant then filed the present application

The Application to Strike Out the Claim and to Enforce the Agreement to Settle

[8] By this Notice of Application dated the 2 July 2013, the applicant in relying on the doctrine of election and merger as well as an 'agreement to settle' which he says was arrived at between the parties, is specifically seeking the following relief:

1. *That this matter be restored to the Court List.*
2. *That the Claimant/Respondent pay the Applicant/1st Defendant his agreed legal costs in the amount of $8,843.16.*
3. *That the claim filed by the Claimant/Respondent in this matter be dismissed against the Applicant/1st Defendant.*
4. *That the Claimant be ordered to pay the costs of this Application in the amount of $884.32*
5. *Such Further and/or other relief that the Court deems just and proper in the circumstances.*

[9] In the grounds supporting the application, the 1st defendant relies on the fact that the claimant, having brought its claim against both parties, sought and obtained default judgment against the 2nd defendant for the entire sum claimed in its claim form. He stated

that meant that the claimant could not seek to recover the said sum a second time from the 1st defendant. If the claim were to proceed against the 1st defendant it would mean that the claimant, if it succeeds, would obtain two judgments on the same claim or double the amount claimed. This, the 1st defendant asserts, is impermissible.

[10] He further states, the claimant, by requesting and obtaining the default judgment against the 2nd defendant made an election to proceed to judgment against the 2nd defendant alone and must have been aware of the attendant consequences of so doing.

[11] Apart from consequences of election and merger, the 1st defendant contends that there has been an agreement to settle the matter. He stated that after he had filed a defence in this matter, Mr. Jason Hamilton, one of the attorneys at law representing the respondent had agreed with Mr. Arudranauth Gossai, his attorney at law, to settle the matter and to withdraw the claim against him, as well as to pay certain 'agreed legal costs' in the sum of $7,599.63.

[12] Providing the evidential basis for the grounds is an affidavit dated the 2 July 2013, and sworn to by Ms. Shermia Richards a legal clerk in the Law Firm of Gonsalves Hamel-Smith (with which Mr. Gossai is associated), attorneys on record for the applicant. Ms. Richards's entire affidavit has been drafted on information provides by Mr. Gossai, who represented the applicant on the hearing of this application. Briefly, with regard to the purported settlement agreement, she states that after default judgment had been obtained against the 2nd defendant, there was a number of discussions between counsel, several pieces of written communication, and even certain statement made to the Master which became incorporated in several case management orders. It is this that the 1st defendant is relying on to prove a binding agreement to settle the matter and pay the specified costs.

[13] On the opposite side, the respondent is relying on an affidavit of Mr. Jason Hamilton dated the 10 July 2013, filed in response to Mr. Richards' affidavit, in which he denies that there has been any agreement. He admits that there have been discussions with a view to settle the matter, but he states there was never any complete and binding agreement.

[14] There is another document that purports to be an affidavit of Ms. Kristyl Bristol dated the 10 July 2013, which has been filed on behalf of the respondent. This court, agreeing with the applicant, is unable to take any cognizance of this document, as Ms. Bristol did not swear to it.[1]

[15] Following the affidavit of Mr. Jason Hamilton and the unsworn affidavit of Ms. Bristol, the applicant filed an 'Affidavit in Reply' on the 15 July 2013 sworn to by Ms. Richards. In this affidavit she, again being informed by Mr. Gossai, challenged Mr. Hamilton's version, providing more details as to what was stated to the Master, and again deposed that Mr. Gossai and Mr. Jason Hamilton had met in January 2013 and agreed on all the outstanding matters.

[16] There has been no cross examination on any of the affidavits.

The Issues

[17] There are two main issues which the court must decide in this matter, namely:

(1) Whether as a matter of law, the doctrine of election and merger of cause of action in judgment applies to this case?

(2) Whether there is an enforceable agreement to settle the matter?

Election and Merger of Cause of Action

[18] As noted earlier, it is the 1st defendant's arguments that when the claimant sought and obtained the default judgment against the 2nd defendant this operated as a complete bar to the action against the 1st defendant. [2] He states this amounted to an unequivocal election

[1] This appears to have been an act of carelessness on the part of Commissioner of Oaths.

[2] The 1st defendant also relied on Marie Clarke-Johney v Evariste Ambrose Claim No. 438 of 2008 (St. Lucia) and Sandra George v Clement Samuel et al Claim No. 293 of 2004 (Antigua) to demonstrate that a default judgment was

and as such there was a merger of the cause of action against him into the judgment obtained against the 2nd defendant. He relies on a number of cases to support his position, namely John Hopkin v Robinson Lumber Co. Ltd.[3]; Hammond v Scholfield[4]; Morel Brothers Co. Westmoreland (Earl of)[5].

[19] I have treated with this matter at length in Development Bank v Brian Brown and Others[6], which judgment was also delivered today, and I do not propose to revisit all the authorities dealt with in that matter. I will simply say here that I am not in agreement that these principles assist the 1st defendant having regard to the circumstances of this case. All of the cases cited by the 1st defendant involve either situations of joint liability between two or more debtors, liability in the alternative, or cases in which the cause of action against one is inconsistent with the cause of action against the other. It is in these cases that an equivocal election will have the consequences that the 1st defendant argues hopes for.

See Rukhmin Balgobin v South West Regional Authority[7]; King and Another v Koare[8]; United Australia Company v. Barclays Bank[9].

[20] The cases however, show that there is an important distinction to be made between cases of joint liability and cases where the liability is joint and several. As the authors of Chitty on Contact Volume 1 states:

> *"Joint and several liability arises when one or more persons in the same instrument jointly promise to do the same thing and also severally make separate promises to do the same thing. Joint and several liability gives rise to one joint obligation and to as many several obligations as there are joint and several promisors. It is like joint liability in that the co-promisors are not cumulatively liable, so that performance by one discharges all; but it is free from most of the technical rules governing joint liability."*

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an effective judgment. There was no attempt in this case to set aside that judgment, and so this court does not consider that this issue arises for discussion.

[3] Civil Appeal No. 8 of 1998 (Grenada)

[4] [1891] 1 QB 453

[5] (1903) 1 KB 64

[6] Claim No. 84 of 2012

[7] [2012] UKPC 11

[8] (1844) 13 M & W 494

[9] (1941 Appeal Cases, page 1) referred to with approval in Clarkson Booker v Andjel [1964] 2 QB 775

[21] In cases where the several persons have agreed to be jointly and severally liable for a debt, a judgment against one will not bar the claimant proceeding against the remaining debtors or defendants as the case may be. There could be no election at this stage and thus no merger[10] of the cause of action in a judgment granted against one of the joint and several debtors such as to bar pursuit of the matter against the other defendants, as in these cases there are really separate obligations[11] and separate remedies[12], or a cause of action[13] against each of the persons. For this reason also there can really be no *res judicata* against any of the joint and several debtors in relation to a judgment obtained against one. What bars the claimant from proceeding against the remaining debtors or defendants is a full satisfaction of the debt,[14]or a release and discharge.[15] It is not necessary that the creditor seek to recover on the first judgment before he may proceed against the second joint and several debtor. He may commence an action against both, and having obtained default judgment against one, be entitled to continue the claim against the other. There is nothing barring him from recovering two or more separate judgments for the full sum against each of the debtors jointly and severally liable. He is not however, entitled to double satisfaction nor can he recover more that the owed sum that was the subject matter of the several claims. The court has a common law and equitable power to ensure that there is no execution on any of the judgment for more than the sum claimed.

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[10] Per Cave J in Re Chandler

[11] Re Chandler per Cave J; see also *Chief Justice Popham (Pro Jac. 74) quoted with approval by Parke b in King v Koare*

[12] per Parke B in King v Koare

[13] Lord Justice Bowen in Isaacs & Sons v Salbstein [1916] 2 KB 139

[14] King and Another v Koare which held: *"A judgment without satisfaction recovered against one of two joint debtors is a bar to an action against the other: - Secus where the debt is joint and several – and it is pleadable in bar not in abatement. – Such a Plea need not contain a verification by the record, or prayer of judgment"*

[15] See also Kendall v Hamilton (1878) 3 C.P.D. 403 - the defendant argued that the contract on which the plaintiffs had brought the action, was the joint contract of the defendant and certain other partners, and that the judgments recovered against some of the joint contractors are a bar to an action against the other co-contractor, on the ground that the original cause of action is merged in the superior obligation of the judgments. The court examined a long line of cases including King and Another[15] and agreed that this was the principle in case of joint liability. The court went on to also examine another line of cases showing that this rule did not apply to cases where the contract creates an obligation that is not simply a joint liability but is one which is '*joint and several*'. As Cotton L.J. stated: *"There is no doubt that the judgments referred to will not bar the present action, if the contract entered into by Wilson, McLay, & Co. on behalf of themselves and the defendant is to be considered several as well as joint.*

[22] In the present case, by the statement of claim, the claimant sought to recover a debt from the defendants 'jointly and severally'. In his 'Amended Defence,' the 1st defendant did not specifically address this issue of joint and several liability though he contended that the 'bond' that he signed was not enforceable and further he did not owe any debt. As I have noted in another case, this issue should not be determined simply on the pleadings which contains a mere statement that it is for joint and several liability.[16]"The form of the statement of claim cannot be determinative. By simply submitting that the form of the pleading is either joint or alternative does not make it such. The contract is what it is, not what it is said to be."[17]

[23] Notwithstanding this view, this Court has not been provided with the 'bond' or the guarantee signed by the 1st and 2nd defendant. In these circumstances, I am constrained to rely on the pleadings. These show that claimant's claim is grounded in joint and several liability.

[24] Accordingly, at this stage, I am compelled to find that when the claimant sought and obtained judgment against the 2nd defendant, and even sought to enforce that judgment against that defendant, it did not mean he was barred against continuing against the 1st defendant. The principles relating to election and merger of cause of action in judgment do not apply. Where the claim involves 'several' liability, the claimant's right to continue the case against the remaining defendant will only expire when there has been full satisfaction of the judgment debt, or a full release given to one in full satisfaction of the debt.

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[16] Kohn v. Devon Mortgage Ltd., 1983 CanLII 1105 (AB QB) - I have concluded that the allegation of the joint and several liability of the defendants as contained in the pleadings is not significant in determining the issue of whether the default judgment is a bar to further proceedings against Glass. As in the *Fritz Plumbing* case, supra, I can find here no evidence of joint liability of the two defendants. To me this is a clear case of alternative liability. The plaintiffs' position on the third issue (that is the agency issue which I will deal with shortly) is that at all material times Devon Mortgage Ltd. acted under actual or ostensible authority of Glass to receive from the plaintiffs the funds necessary to discharge the mortgage. If this is correct the plaintiffs are entitled to a discharge of the mortgage or alternatively, but not in addition, judgment in debt against Devon Mortgage Ltd. If the plaintiffs' assertion of agency is incorrect then, in the absence of a conspiracy between the defendants which is not alleged, the defendant would be entitled to judgment against Devon Mortgage Ltd. but not, in addition, any recourse whatsoever against Glass.
[13] I have concluded that R. 148(2) does not apply to the present situation. In addition, I find that by obtaining judgment by default against Devon Mortgage Ltd., the plaintiffs elected to proceed against the agent and have thus precluded themselves from proceeding against Bertha Glass unless the default judgment is vacated.

[17] T.f. Speciality Sawmill Inc. v. Obal, 1999 CanLII 5548 (BC SC)

[25] I have noted that Mr. Gossai in the letter of the 28 December 2012 commented that he had been informed that the borrower Mr. Burt had fully paid off the debt. There was no acceptance of this statement by the claimants. I will now say that if that has been the case, then the 1st defendant contentions will be given some teeth. In such an event, he will be able to contend that the claim should not have been continued against him. In the normal case when a claimant is fully paid on a debt that is owed severally, he should take steps to immediately withdraw the existing claim against the other defendant. Whether there could be costs against the claimant for the claim against the 3rd defendant even then would depend on whether the claimant had acted reasonably in commencing the claim in the first place, and it is likely the principal borrower may be subjected to a Bullock Order to bear the burden of any costs order against the claimant.

[26] I now turn to the other main issue.

The Relevant Legal Principles of the Admissibility of 'Without Prejudice Communications'

[27] There has never been any doubt that the general rule that 'without prejudice communications' are not admissible in court, is one founded on public policy aimed towards 'encouraging parties to settle their differences rather than litigate them to a finish. This public policy justification was succinctly dealt with by Oliver L.J. in Rush & Tompkins Limited v Greater London Council where he said:[18]

> *"That the rule rests, at least in part, upon public policy is clear from the 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 is 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 of offers made in the course of negotiations*

[18] [1980] AC 1280 at 1299

for settlement being brought before the court of trial as admissions on the question of liability."[19]

[28] As was noted in Rush 'the rule applies to all communications genuinely aimed at settlement whether oral or in writing from being given in evidence'. While it is sensible that parties engaged in discussions regarding settlement state expressly that such communications are made 'without prejudice', the rule will still apply in the absence of such qualification where it is clear from the surrounding circumstances the parties were seeking to settle a matter.

[29] In this case, as noted both sides have approached this matter on the acceptance that all of the communications in this matter, except those that were made before the Master, are 'without prejudice' communication.

[30] Whilst the claimant was not prepared to accept that there was any exceptions to the general rule that without prejudice communications are not admissible in court, Mr. Gossai for the 2nd defendant has quite properly submitted that where it has been raised as an issue that the parties in the course of these without prejudice negotiations have arrived a settlement of the matter, the court would be entitled to pierce this veil of privilege and examine the discussions and communications. This point was well made in Rush where the court stated:

> *"Nearly all the cases in which the scope of the without prejudice rule has been considered concern the admissibility of evidence at trial after negotiations have failed. In such circumstances no question of discovery arises because the parties are well aware of what has passed between them in the negotiations. These cases show that the rule is not absolute and resort may be had to the without prejudice material for a variety of reasons when the justice of the case requires it. …Thus the without prejudice material will be admissible if the issue is whether or not the negotiations resulted in an agreed settlement.* [emphasis supplied]

[19] Quoted with approval in AAG Investments Ltd v BAA Airports Ltd (Rev 1) [2011] 2 All ER (Comm) 1171; Approved of in Unilever v plc v The Proctor and Gamble Co; In *Tramountana Armadora S.A. v. Atlantic Shipping Co. S.A.*, Donaldson J. noted:*"…it is in the public interest that there should be a procedure whereby the parties can discuss their differences freely and frankly and make offers of settlement without fear of being embarrassed by these exchanges if, unhappily, they do not lead to a settlement."*

[31] In this case, on this application, the issue is whether or not there has been an agreed settlement. That is very clear, and so I find that the without prejudice material is admissible to determine whether or not these discussions resulted in an agreed settlement. In this process the court is required to examine the actual communications between the parties.[20]

A Factual and Legal analysis of the Evidence in this Matter

[32] The task is now to examine the evidence in this matter, including all of the 'without prejudice' communications to determine whether or not there was an agreement to settle this matter.

[33] The first relevant event, as asserted by the applicant, took place on the 12 June 2012, before default judgment obtained against the 2nd defendant, when the matter claim came on for case management before the Master. Mr. Jason Hamilton informed the Master that he was seeking to take a course to alleviate the need for a trial, and sought an adjournment that was granted without objection.[21] This was followed by the default judgment on the 22 June 2012.

[34] On the adjourned day, the 9 October 2012, Ms. Richards deposes that she informed by Mr. Gossai and she verily believes that Mr. Jason Hamilton represented to the Learned Master that settlement negotiations were very advanced and that the only remaining matter was a date for payment, and further that the matter would be discontinued shortly.

[35] When the matter came before the Master on the 4 December 2012, it was 'adjourned to February 5, 2013 to facilitate conclusion of settlement negotiations between the parties.' The Master ordered that the 'parties are to file a consent order in the event they reach a settlement prior to the adjourned date.'[22]

[20] See the approach of the court in Tomlin v Standard Telephone Cable Ltd. [1969] 1 WLR 1378
[21] Paragraph 7 of Ms Richards' affidavit of the 2 July 2012. This was not contradicted by the respondent.
[22] This Order was entered 20 December 2012.

[36] Mr. Gossai then wrote a 'without prejudice' letter to Mr. Jason Hamilton dated the 28 December 2012 in which he stated:

> *Dear Mr. Hamilton,*
>
> *Re: Claim No. SKBHCV2012/0022 – Development Bank v Mitchell Gumbs; Derrick Lake*
>
> *We continue to act for the First Defendant, Mr. Mitchell Gumbs.*
>
> *We have been reliably informed that the borrower, Kafa Burt has paid the full amount owing to your client. In addition to this, your client also obtained a Default Judgment against the Second Defendant, Derrick Lake.*
>
> *Your Client's case against our client has no basis in law and our client is minded to make the necessary application to have the claim against him dismissed with costs.*
>
> *Our client is entitled, at this stage of the proceedings based on the Civil Procedure Rules 2000, to costs in the amount of $8,843.16. In order to facilitate the settlement of this matter without further court proceedings and additional costs, our client will be willing to consent to the matter being settled upon payment of his costs of $8843.16.*
>
> *The next hearing of this matter is set for 5th February, 2013 and we intend to make the necessary application to have the claim dismissed if it is not settled before that date.*
>
> *Sincerely yours*

[37] It is important to note that Mr. Gossai was contending that he was entitled to have the matter dismissed, and he was saying that in order to save further costs, 'our client is willing to consent to the matter being settled upon payment of his costs of $8,843.16.' At this stage, there is simply an offer being made. What happened next?

[38] By a 'without prejudice letter' letter dated the 4 January 2013 Mr. Jason Hamilton acknowledged the offer made by Mr. Gossai and stated:

> *"Kindly note that we have received instructions from our client which oblige us to indicate that our client is minded to pay costs in this matter in the sum of $4,500.00.*
>
> *"We would be grateful for your earliest response hereto."*

[39] Again there was no agreement here. By a further 'without prejudice' letter Mr. Gossai responded in the following terms:

> *"Regrettably, unlike in the other matters, we cannot accept your client's offer of costs in the sum of $4,500.00 for the simple reason that our client has expended costs beyond the sum of $8,843.16 to which he is lawfully entitled at this stage of the proceedings.*
> *"In the circumstances, we are left with no alternative but to request that our client be paid costs in the sum of $8,843.16 to which he is entitled at this stage of the proceedings."*
> *"If our information is correct and the amount owing to your client was paid by the principal debtor, then your client ought to discontinue the matter against our client and his costs in the amount stated above, that is the sum of $8,843.16.*
> *We hope that this matter will be discontinued prior to the hearing on 5th February, 2013.*
> *We wish to express our gratitude for your openness and frank discussions in this matter."*

[40] Again there would have been no agreement concluded. It here that the 1st defendant seeks to rely on the affidavit of Ms. Richards. Making reference to the letters set out above, she says that Mr. Gossai informs her and she verily believes that Mr. Gossai and Mr. Hamilton 'met in January, 2013 whereby it was agreed that the Claimant/Respondent would discontinue the matter against the Applicant/1st Defendant and pay his costs in the amount of $8,843.16.'[23]

[41] Whilst a deponent on an affidavit supporting an interlocutory application is allowed to depose to first hand hearsay once he confirms his belief in such statement, in a matter such as this, it is important that such affidavits contain details of the actual conversations and not simply conclusions.

[42] With regards to this meeting, what had been provided to the court however, are not really the details of the discussions, but rather the ***conclusions*** drawn by Mr. Gossai from that conversation. Effectively, counsel is saying that because ***he is saying*** the discussions in

[23] Witnesses should not give evidence as to inferences which they believe can be drawn from the facts. Paragraphs 8, 10, and 18 in their entirety, and portions of paragraphs 11, 16, 19, 20 and 21 contain statements which constitute commentary on the facts, unnecessary opinion, or submissions better left for trial. These are not facts which the deponent is able to prove from his own knowledge and are hereby struck out: Director of Corporate Enforcement v Bailey and Anor [2007] IEHC 365 followed. JIPFA

January 2013 amounted to 'an agreement', that is sufficient for this court to then hold that the 'discussions' amounted to an agreement. This line of reasoning prevents the court from being able to assess for itself whether the discussions between Mr. Gossai and Mr. Jason Hamilton did amount to an agreement. What it really does, is that it allows counsel to perform the task that should be performed by the court in order to determine whether those 'discussions' or communications in January 2013 amounted to an agreement.[24]

[43] I wish to make the point clearly that Mr. Gossai may well be right, and this analysis should not be taken as any criticism on the manner in which he conducted those discussions, and whether he himself properly believed that an agreement was reached. He is not the one, however, who has to analyse the communications in order to determine the question of admissibility, relevance and weight; this is the function of the court. What Ms. Richards has presented in her affidavit is a 'conclusion', in other words, what it seems, was apprehended by Mr. Gossai as a result of the discussions between the parties. None of the authorities seem to suggest at all that the court, in deciding whether to admit 'without prejudice communications', is entitled to consider what one party believes to be the effect of the communication. In Brown v Rice[25], Justice Stuart Isaacs Q.C. stated that when the issue of one whether 'without prejudice communications' have resulted in a concluded settlement agreement the communications must be considered. As he put it:

> *"This is for the understandable reason that without considering the communications in question it would be impossible to decide whether there was a concluded settlement agreement or not".*

[44] The court must be presented with the written communication or if the discussions are oral, with details as to what is said, if not the actual words, before the court can properly undertake the exercise of determining whether or not an agreement was reached. In Tomlin v Standard Telephones,[26] where the court in deciding whether a matter had been compromised by an agreement between the parties, held that the *correspondent 'must be*

[24] I did remind Counsel during the hearing that an attorney at law should not personally appear in any matter in which he has sworn an affidavit. I expressed the view that this principle should equally apply in cases where the attorney at law has caused one of his subordinates swear an affidavit based on information provided by himself.
[25] [2008] F.S.R. 3
[26] [1969] 1 W.L.R. 1378, CA

looked at to ascertain whether an agreement intended to be binding had been reached between the parties'.

[45] In Tomlin, the court was called upon as a preliminary matter to determine whether the parties had agreed to settle the matter. In this case, as the head-note reads, the 'plaintiff instituted proceedings against the defendants, his employers, claiming damages for personal injuries. Negotiations followed between the plaintiff's solicitors and the defendants' insurers, all material letters from the defendants' insurers being marked "without prejudice." Eventually, the defendants' insurers offered a sum of £625 16*s.* 8*d.* , being 50 per cent. of the sum of £650 by way of general damages and £601 13*s.* 4*d.* special damage. That offer was refused by the plaintiff, and the action was proceeded with. By his statement of claim the plaintiff pleaded that it had been agreed between the parties during the negotiations that he was entitled to be compensated on the basis of 50 per cent. liability. By their defence the defendants denied that any such agreement had been reached, contending that they had corresponded 'without prejudice', with a view to negotiating settlement of the plaintiff's claim.'

[46] At the trial of the preliminary issue, the trial judge held that there had been a binding agreement as to liability on a 50/50 basis. The majority of the Court of Appeal agreed with the judge and Dankwerts L.J. that the correspondence was admissible to determine the issue stated:[27]

> *"When, however, it comes to the letters, there is another and more difficult point, I think, and this is: was there, as Fisher J. held, an agreement which was effective and binding between the parties that the rights of the plaintiff should be 50 per cent. of any liability, and, therefore, he would be entitled to recover 50 per cent. of whatever was the proper amount of damages, which was the construction put upon the matter by the judge, or was there the alternative construction (which other people may possibly view as being the right one) that the agreement as to 50/50 liability was merely a step in the negotiations which were still in progress and which were intended to reach a final settlement between the parties of the amount of damages and of the liability of the defendants in respect of those damages, as was contended on behalf of the defendants? It seems to me quite possible that that might be the proper result, but, when the correspondence which I have read is looked at, and in particular the letter from the plaintiff's solicitor of*

[27] At page 1384

December 20, 1966, which states that a 50/50 basis has been agreed as proposed by the insurance company on behalf of the defendants "and accordingly this leaves only the question of quantum to be disposed of," that was never contradicted or rejected on behalf of the defendants. In four instances at least the defendants' representative, the insurance company's claims manager, had referred to the agreement for 50/50 as an "agreement," and there is no suggestion that it was merely a step in an eventual settlement to be reached. The correspondence proceeds on the basis that there is an agreement for sharing the liability 50/50 and that the plaintiff should be entitled to recover 50 per cent. of whatever was the proper amount of damages. In the face of the letters written by the representatives of the defendants I come to the conclusion that the proper construction is that there was a definite and binding agreement on a 50/50 basis and that, though certain negotiations were entered into for the purpose of trying to agree to the amount of the damages, the agreement as to the 50/50 basis stands, and the plaintiff is entitled to hold on to that agreement which was reached. Accordingly, I would dismiss the appeal."

[47] The case of Optical Express (Southern) Ltd v Birmingham City Council[28] is another case that provides an example of the kind of details that can be useful to the determination nature of the communication between the parties, and whether it fell to be caught by the 'without prejudice' rule. In that case, the court embarked on an analysis of the actual correspondence and discussions between the parties to decide the issue. The material considered by the court comprised of a sequence of telephone conversations between agents of the parties, evidenced in some instances by 'telephone notes' and in other instances by details of the calls, provided by the parties. A letter was also produced where one party wrote to the other drawing reference to the telephone conversation speaking to a settlement. Emails were also exhibited linking these conversations and negotiations.

[48] This analysis demonstrates the need for the court to examine the actual correspondence or to be provided with some details of the oral discussions between the parties rather than mere conclusions as to whether an agreement was reached. Further, all of this underscores the point that a court has to be sensitive to the fact that very often, busy practitioners may from time to time engage in discussions which relate to settlement in which depending on the length of any such discussions various aspects of the settlement

[28] [2003] ADR.L.R. 08/27

may raised by either side, perhaps with proposals and counter-proposals. This point was well made in the Unilever[29] case when Walker LJ said at 2443-2444:

> *"Without in any way underestimating the need for proper analysis of the rule, I have no doubt that busy practitioners are acting prudently in making the general working assumption that the rule, if not 'sacred' (Hoghton v Hoghton (1852) 15 Beav 278 at 321, 51 ER 545 at 561), has a wide and compelling effect. That is particularly true where the 'without prejudice' communications in question consist not of letters or other written documents but of wide-ranging unscripted discussions during a meeting which may have lasted several hours. At a meeting of that sort the discussions between the parties' representatives may contain a mixture of admissions and half-admissions against a party's interest, more or less confident assertions of a party's case, offers, counter-offers, and statements (which might be characterised as threats, or as thinking aloud) about future plans and possibilities."*

[49] Where an agreement has been denied, it is not good enough that the court be simply presented with the subjective conclusion of one side to any settlement discussion. There are many cases in which the court has had to disagree with Attorneys on one side or the other, contending that they have or have not agreed to a settlement. To allow any Attorney to present his conclusion on what was agreed in a matter such as this would not be a proper course to adopt. The necessity for details becomes crucial when it is recognized that often 'parties may reach agreement on essential matters of principle', but 'if important points are left unsettled their agreement will be incomplete'.[30] There is thus a need for the court to be given some details of the oral discussions between the parties especially when one side is relying in large part on those discussions to ground the agreement.[31] This court therefore considers that if one party to pending litigation is saying that the proceeding have been compromised by an agreement which is in dispute, he is required to produce evidence of that agreement and may not simply state, as a legal or factual conclusion, that there is such an agreement. It is unhelpful to the court to use this 'conclusion' to ground any agreement. What should have been presented to the court as adverted to, are the details of this discussion, so that the court could decide whether these 'without prejudice discussions' led to an agreement. That is the purpose of examining the communication.

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[29] [2000] 1 W.L.R. 2436

[30] *Chitty on* Contracts , 29th ed (2004) para 2–110 cited with approval in Western Broadcasting Services v Seaga 2007 WL 919436 Privy Council (Jamaica)

[31] See also Optical Express (Southern) Ltd v Birmingham City Council [2003] EWLands ACQ_109_2002 (27 August 2003), in which the court was provided with details of telephone conversations between the p

[50] Quite apart from the court's conclusion on this aspect of the evidence so far, there is also the evidence of Mr. Jason Hamilton effectively denying that there was a binding contract. He states that:

> *"11. Mr. Gossai for the Applicant Mitchell Gumbs and I entered into without prejudice discussions on the basis that the principal Debtor Kafa Burt would liquidate the entire debt pursuant to the terms of his agreement with Development Bank St. Kitts-Nevis."*
>
> *12. It was always the intention that any agreement reached between myself and Mr. Gossai would be subject to the precondition that the said Kafa Burt would honour his obligations and any agreement made with the Development Bank St. Kitts-Nevis."*
>
> *13. No agreement was reached with respect to the discussion and negotiations between Mr. Gossai and myself."*

[51] This clearly does not move the applicant's case forward. There has been no cross examination of Mr. Jason Hamilton on his affidavit, and so even if the court could use Ms. Richards' statement that the parties met in January 2013 and 'agreed', the court is left with two different versions of these discussions. The question then for me is whether the events and the communication following can shed some light and prove an agreement as to the applicant's claims? What happened next?

[52] The matter then came up before the Master on the 5 March 2013 when Mr. Glenford Hamilton and Mrs. Sherry Ann Liburd-Charles appeared for the claimant and the 1st defendant respectively. The order of that day reads:

> *"Upon the matter coming on for further reporting;*
> *And upon the parties indicating that they have reached agreement but have not yet drawn up the terms thereof;*
> *It is hereby ordered*
> 1. *That the matter is finally adjourned to 9th April 2013 for further reporting on settlement unless a consent order is sooner filed."*

[53] The 1st defendant, through Mr. Gossai, then sent a letter, dated 3 April 2013, to Mr. Glenford Hamilton in the following terms.

> "We continue to act for the First Defendant, Mr. Mitchell Gumbs.

As indicated to the Learned Master Pearletta Lanns on 5th February, 2013 Mr. Jason Hamilton agreed to discontinue the matter against the 1st Defendant and to pay his costs in the amount of $8,843.16. On that occasion you informed the Learned Master that you were not familiar with the file but that you will seek to have the matter dealt with by 5th March, 2013.

On 5th March, 2013, when the matter came up before the Learned Master Pearletta Lanns, the Claimant had not yet discontinued the matter against the 1st Defendant and had not paid the costs of $8,843.16 to be paid before the next hearing date of 9th April, 2013.

We wish to thank you in anticipation of your full cooperation in this matter.

Sincerely yours"

[54] Then on the 9 April 2013, before the Master, Ms. Deidre Williams of Counsel appeared for the claimant, and Mr. Gossai appeared for the 1st defendant. Ms. Williams requested an 'adjournment to facilitate perusal of the file', and the Master granted a final adjournment to the 8 May 2013 to 'report on settlement'.

[55] On the 8 May 2013, the report given to the Master from Mr. Gossai was that the 'matter had been settled except for one outstanding issue'. Ms. Williams on the other hand indicated that she was 'not in a position to confirm settlement of the matter'. The order of that day is in the following terms:

UPON the matter coming up following a final adjournment for reporting;

AND whereas Counsel for the 2nd Defendant has indicated that the matter has been settled except for one outstanding issue

AND it appearing that Counsel for the Claimant is not in a position to confirm settlement of the matter

AND whereas this matter has been adjourned for report on settlement repeatedly to no avail;

IT IS HEREBY ordered that:-

1. The matter is removed from the Court's list to be restored on the application either side.

2. Cost of the day awarded to the 2nd Defendant in the sum of $500.00

[56] From all of this, the 1st defendant maintains that there has been a settlement. He points to the letter dated the 3 April 2013, and what Mr. Glenford Hamilton told the Master on the 5 March 2013. The court has some difficulty in finding this complete and binding agreement. There is nothing in the correspondence that indicates what 'settlement' Mr. Glenford Hamilton was referring to. The statement to the Master was that the terms of the settlement were to be 'drawn up'. What terms were these? Mr. Jason Hamilton now is denying any settlement had been arrived at in January 2013, and while his affidavit states that there were settlement talks he states that such talks were premised on the third party paying off the judgment debt. This did not happen it seems. It seems even the Master had left it to the parties to draw up whatever terms they had agreed to. I can hardly use the letter of the 3 April 2013, from Mr. Gossai as this was never responded to. In the circumstances that exist here, I cannot treat this non-response from the claimant's attorneys as an acceptance of what Mr. Gossai was saying in this letter, as only a few days later before the Master, the claimant was still not accepting that there was agreement, and by the 8 May 2013 the claimant was categorically denying a settlement.

[57] I have no doubt that Mr. Gossai honestly believed that there was settlement, and equally there is nothing which could lead me to think that Mr. Jason Hamilton did not honestly believe that there was no settlement, but this court has to look at what both sides said and did, to find whether there was, in fact and law, this agreement to settle the matter. The meeting of January 2013 was crucial to this issue. Perhaps if the discussions of this meeting had been immediately reduced to writing and acknowledged by the other side, the claimant would have been in a better position to prove an agreement, or realize that in fact there was none, having regard to any immediate response he may have gotten from Mr. Jason Hamilton. Such a course may have obviated the need for this application.

[58] For the reasons set out above, this Court is in no position to find a complete and binding agreement between the parties to settle this matter.

[59] Having regard to the foregoing, the application is dismissed and the 1st defendant is to pay the costs of the claimant, to be assessed if not agreed.

…….
Darshan Ramdhani
Resident Judge (Ag.)