EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

ANTIGUA AND BARBUDA

ANUHCVAP2011/0007

BETWEEN:

MONTPELLIER FARM LTD.

Appellant

and

ANTIGUA COMMERCIAL BANK

Respondent

Before:

The Hon. Mr. Davidson Kelvin Baptiste — Justice of Appeal
The Hon. Mde. Louise Esther Blenman — Justice of Appeal
The Hon. Mr. Anthony Gonsalves, QC — Justice of Appeal [Ag.]

Appearances:

Mr. Frederick Gilkes, with him, Ms. Laurie Freeland-Roberts holding for Mr. Clement Bird for the Appellant
Ms. Kamilah Roberts and Ms. Safiya Roberts for the Respondent

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2015: July 16;
October 26.

Civil appeal – Oral agreement – Whether the learned trial judge erred in finding that there was no enforceable oral agreement – Letter of credit – Application for letter of credit signed in blank – Whether a party to an agreement who signs the agreement in blank is bound by whatever terms the other party to the agreement inserts thereafter – Claimant confined to case as pleaded

In or about 2002, the appellant, Montpellier Farm Ltd ("Montpellier") entered into a bank/client relationship with the respondent, Antigua Commercial Bank ("ACB"). Pursuant to that relationship, Montpellier obtained credit facilities from ACB to cover operational expenses for a farm it operated. By letter dated 12th August 2002, Montpellier approached ACB to obtain financing to acquire a reverse osmosis plant ("RO plant") and in a letter dated 17th October 2002, ACB notified Montpellier of its approval of Montpellier's

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application. The terms and conditions upon which ACB were prepared to grant the loan were outlined in a loan facility letter from ACB dated 18th October 2002.

Montpellier settled on a RO plant to be manufactured and installed by a company called Crane Environmental ("Crane"). In October 2002, Mr. Micha Peretz, a director of Montpellier, attended Crane's offices in Florida to finalize the purchase of the RO plant. On 31st October 2002, while Mr. Peretz was at Crane's office, he arranged a conference call with Mr. Karl Gardner, also a director of Montpellier, and Mr. David Stevenson, who was then the loans manager of ACB, both of whom were at Mr. Stevenson's office in Antigua. During the meeting, Mr. Peretz faxed to Mr. Stevenson, a preliminary pro forma invoice for US$254,500.00. This was not the finally agreed contract as some adjustments were subsequently made to the scope of works Crane was to undertake. The pro forma invoice in relation to the RO plant included the payment term that 20% of the payment was payable upon commissioning, not to exceed 90 days from date of shipment accompanied with shipping documents. Later that day Mr. Peretz signed, what he referred to in his evidence as an 'agreement/contract', and left it for signature by Crane, and requested that it be faxed to Montpellier and ACB. The copy of the 'agreement/contract' that was faxed, being the purchase order showing a total cost of US$220,800 signed by Mr. Peretz, contained the same payment scheduled set out in the pro forma invoice except in relation to the LOC which provided for payment of 20% by LOC to be payable subjected to a successful commissioning, not to exceed 90 days from date of shipment accompanied by shipping documents.

Subsequent to 31st October 2002, Mr. Peretz went to ACB's office and signed a partially blank letter of credit ("LOC") form. The LOC form was later completed/filled in by ACB; however, instead of there being inserted that payment was to be payable after successful commissioning not to exceed 90 days from date of shipment, there was inserted at 90 days BL date.

As events unfolded, the RO plant was not successfully commissioned within the period of 90 days from date of shipment. Montpellier wrote two letters to ACB advising ACB not to pay the final sum covered by the LOC as the RO plant had not been successfully commissioned. However, ACB, having issued the LOC on the basis that payment was due at 90 days BL date, paid in accordance with that obligation. Montpellier subsequently commenced proceedings against ACB alleging that Montpellier and ACB made an oral agreement during the meeting of 31st October 2002, and that it was a term of the said oral agreement that payment of the sum secured by the LOC would be subject to the successful commissioning of the RO plant not to exceed 90 days from the date of shipment accompanied by shipping documents and that ACB acted in breach of the oral agreement by issuing a LOC at 90 days BL date.

In its defence, ACB admitted the meeting of 31st October 2002, but denied that the alleged or any contract between the parties was made or concluded at the meeting. According to ACB, what occurred between Montpellier and ACB during the meeting were pre-contractual discussions and did not constitute a legally enforceable contract. ACB

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contended that the LOC was signed by Mr. Peretz as director on behalf of Montpellier before issuance to Crane's bank and as such Montpellier was bound by the terms of the LOC. In its reply to ACB's defence, Montpellier stated that Mr. Peretz signed a blank LOC form on the representation of an employee of ACB that the relevant information would be inserted thereafter and that Mr. Peretz assumed that ACB would have issued the LOC in accordance with the instructions Montpellier had previously given and the oral agreement between the parties made on 31st October 2002.

Following the trial of the matter, the learned trial judge dismissed Montpellier's claim. The judge found that the discussions held between the parties on 31st October 2002 constituted pre-contract negotiations between the parties en route to entering into a contract for the issue of a LOC by ACB to Montpellier. The learned judge also found that Montpellier was bound by the terms of the contract for the issue of the LOC by ACB as per the application form signed by Mr. Peretz, even though Mr. Peretz signed a blank form with the expectation that it would be completed in accordance with the pre-contract discussions of 31st October 2002. In the end, the learned judge concluded that ACB did not breach its contract with Montpellier when it issued the LOC as per the application form signed by Mr. Peretz.

Montpellier, being dissatisfied with the learned judge's decision, appealed the decision on a number of grounds.

Held: dismissing the appeal; and awarding costs in favour of ACB in the sum of EC$13,333.33, that:

1. Whether or not parties intend an agreement between them to give rise to legal relations between them will depend on the circumstances of each case and must be judged objectively. Contracts are not lightly to be implied by a court. Having examined what the parties said and did, a court must be able to conclude with confidence, both that the parties intended to create contractual relations and that the agreement was to the effect contended for. In reaching this conclusion, the court must first find that there is an agreement of the type pleaded. On the evidence in the present appeal, this could not be the case. It was Mr. Peretz's own evidence that he reminded the parties attending the meeting that what the bank had received by fax was only a draft that no one had signed as yet, which, he said, was only to show the spirit of the contract and that the permanent contract would be signed when he was finished with Crane the next day. This clearly left open the possibility of substantial revision. It was therefore incorrect to say and it was not supported by any evidence that at the conclusion of the discussion there was any consensus or certainty on all essential matters.

   Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council [1990] 3 All ER 25 applied.

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2. It has long been a well-recognized principle of contract law that an agreement between two parties to enter into an agreement in which some critical part of the contract matter is left undetermined is no contract at all. 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 to be settled by agreement between the parties. In the present case, Montpellier is confined by its statement of case as pleaded which was that an agreement was made on 31st October 2002 with nothing left to be done and that certain things were finalized. The contract that was pleaded was not that ACB had agreed with Montpellier that it would issue the LOC on payment terms pursuant to whatever LOC term was finally determined between Montpellier and Crane as would be reflected on the final purchase order that would be submitted to ACB. Even if that were Montpellier's case, there still would have been the requirement (as in fact occurred) that ACB and Montpellier agree on the actual terms for the issue of the LOC by ACB. On Mr. Peretz's own evidence, he still had to come into ACB to make the application for the LOC; consequently, there could not have been a concluded agreement on 31st October 2002 whereby ACB had agreed to issue an LOC, when in fact the terms for the issue of the LOC, as per the LOC application form, were still to be agreed. Accordingly, there was ample evidence before the learned trial judge to permit him to properly conclude that what transpired on 31st October 2002 were merely pre-contractual negotiations and his findings in that regard were not against the weight of the evidence.

   May and Butcher v The King [1934] 2 KB 17 applied; **Blay v Pollard and Morris** [1930] All ER Rep 609 applied; **Esso Petroleum Co. Ltd. v Southport Corporation** [1956] 2 WLR 81 applied.

3. Where a party carelessly signs a document in blank and leaves it to another person to fill it in in a particular way (that person not being the agent of the other contracting party) and that other person fills it in, whether by fraud or mistake, in some different way and that document is then relied on by an innocent third party, (the third party having had no reason to suspect that the document was something other than what it purported to be) then as between the signer and the innocent third party, the signer will be bound. In this matter, in making the statement of law in relation to Mr. Peretz's signing of the LOC form in blank, the learned trial judge was simply stating what may be described as the basic proposition. That this is so is supported by the fact that the statement represents the resulting legal position where a party is unable to successfully bring himself either within the established confines of a plea of non est factum or is unable to successfully mount a case for relief via some other avenue, such as misrepresentation, fraud or mistake. Taken out of context, the learned trial judge's statement could have been interpreted to mean that in no circumstance could a person in the position of a party who signs a form in blank knowing it will be filled in by the other party ever escape from the legal effect of his signature. That would not be correct. However, that was not what the statement, considered against the backdrop of the case, intended to

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convey. Accordingly, in the circumstances of the case as pleaded, the learned trial judge was correct in finding that Montpellier was bound by the terms of the LOC which Mr. Peretz signed in blank.

United Dominions Trust Ltd. v Western B.S. Romanay (trading as Romanay Car Sales), Third Party [1976] QB 513 applied.

JUDGMENT

[1] **GONSALVES JA [AG.]**: This is an appeal from a judgment of Michel J dated 11th February 2011. The action below was for breach of an alleged oral contract said to have been made between the parties on 31st October 2002, whereby the respondent, Antigua Commercial Bank ("ACB"), agreed to issue a letter of credit ("LOC") guaranteeing the payment to the bankers of Crane Environmental ("Crane"), of a sum equivalent to 20% of the purchase price of a Seamega-120K Sea Water Reverse Osmosis System ("RO plant") which the appellant, Montpellier Farm Ltd. ("Montpellier"), had agreed to purchase from Crane. It was Montpellier's case that it was a term of the said oral agreement that payment of the sum to be secured by the LOC (which was the final portion of the purchase price for the RO plant) would be subject to '*the successful commissioning (of the said RO [plant]) not to exceed 90 days from the date of shipment accompanied by the shipping documents*'.[1]

[2] Subsequent to 31st October 2002, Mr. Micha Peretz, a director of Montpellier, attended at ACB and signed a partially blank LOC application form, which form was later completed by an employee of ACB who inserted the payment term 'at 90 days BL date'.[2] Thus, the LOC issued by ACB did not include the term allegedly agreed to on 31st October 2002, but provided for payment of the final sum 'at 90 days BL date.' Montpellier encountered serious difficulties in getting the RO plant successfully commissioned and instructed ACB not to pay the final sum. Notwithstanding and considering itself bound by the terms of the LOC it

[1] Statement of claim, record of appeal, trial bundle "A", p. 4, at para. 5.
[2] Ibid, p. 5, at para. 6.

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had issued, ACB made the final payment. Montpellier alleged that the issue by ACB of the LOC for the payment of the final purchase price sum 'at 90 days BL date' was a breach of the terms of the said alleged oral agreement and that it suffered loss and damage.

[3] In his judgment, Michel J did not find that any oral agreement was made between the parties as alleged. He found that the discussions between the parties on 31st October 2002 constituted pre-contract negotiations en route to entering into a contract for the issue of an LOC. He further found that Montpellier was bound by the terms of the contract for the issue of the LOC as per the application form signed by Mr. Peretz on behalf of Montpellier, even though Mr. Peretz had signed a blank form with the expectation that it would be completed in accordance with the pre-contract negotiations of 31st October 2002 and the form was not so completed. Consequently, the learned trial judge dismissed Montpellier's claim. ACB made a counterclaim against Montpellier for loan sums due, which succeeded in the court below. The only issue taken on appeal in relation thereto concerned the calculation of interest but that was abandoned before this Court. This appeal is concerned with whether the learned trial judge erred when he found that no enforceable oral agreement was concluded between the parties on 31st October 2002 and whether the trial judge erred when he held that a party to an agreement who signs such an agreement in blank is bound by whatever terms the other party to the agreement thereafter inserts in it, even if those terms are entirely different from what the parties agreed to insert.

Background Facts

[4] Montpellier carries on the business of cultivating melons. In or about 2000 it entered into a bank/client relationship with ACB. Pursuant to that relationship, Montpellier obtained credit facilities from ACB to cover operational expenses of a farm it operated. In 2002, Montpellier decided that it needed to acquire a desalination plant to overcome a chronic water supply problem that constantly threatened its melon crops. By letter dated 12th August 2002, Montpelier

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approached ACB on the issue of acquiring a reverse osmosis plant and specifically obtaining financing from ACB for this purpose. The overall cost was approximately EC$800,000.00 including a windmill and backup generator. By letter dated 17th October 2002, Montpellier was notified of ACB's approval of Montpellier's loan application. There then followed from ACB a loan facility letter dated 18th October 2002 outlining the terms and conditions upon which ACB was prepared to grant the loan. In March 2003, ACB and Montpellier eventually agreed terms in relation to this loan.

[5] Montpellier settled on a reverse osmosis plant to be manufactured and installed by Crane. In October 2002, Mr. Peretz visited Crane's offices in Florida to finalize the business of arranging the purchase of the RO plant. On 31st October 2002, while Mr. Peretz was at Crane's offices in Florida, Mr. Karl Gardner, also a director of Montpellier, was in the office of Mr. David Stevenson, then the loans manager of ACB, in Antigua. Mr. Peretz had arranged for Mr. Gardner to be there as he intended to call Mr. Stevenson and wanted Mr. Gardner to be part of the discussion. The events that transpired in Mr. Stevenson's office constitute the crux of Montpellier's case because it is there that Montpellier alleges the oral agreement in relation to the LOC was made.

[6] The evidence that came out at the hearing below in relation to what transpired in Mr. Stevenson's office was provided by Mr. Peretz. His evidence was given by way of witness summary, which subject to two corrections, he confirmed in his examination in chief and was as follows:

> "25. When Peretz personally visited Crane's offices in Venice Florida in October to finalize the business, Crane had one condition in order do it in very tight schedule. They needed to ensure Claimant would stand behind our payment including the 25% down payment. This would be ensured by Claimant executing a Letter of Credit (LOC).
>
> "26. At that time Karl Gardiner was sat [he explained he meant "sitting"] in Mr. Stevenson's office in Antigua. Peretz had earlier telephoned him and asked him to go to the bank as Peretz intended to call Mr. Stevenson and wished him to be part of the discussion. Peretz

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particularly needed the input as we had not yet settled on scope and extent of the contract.

"27. The three spoke on a conference call and were able to discuss matters simultaneously when and as they arose. Peretz faxed through to them the preliminary Pro Forma Invoice #021030 for US$254,500.00. This was not the finally agreed contract as some adjustments were subsequently made to the scope of works Crane was to undertake.

"28. The preliminary Pro Forma Invoice did contain important clauses such as the schedule of payments, and Crane's obligation to be ready for shipment in 8 weeks. All understood that sometime in the end of Jan 2003 the RO plant would be up and running in Antigua.

"29. Having received the fax, Mr. Stevenson confirmed verbally during the aforesaid conference call that the payment schedule as outlined was fine – that the bank would make the original deposit payment and follow up with the others as scheduled. Peretz reminded them that what the bank received by fax was only a draft that no one had signed as yet. This was only to show the spirit of the contract. When Peretz was finished with Crane the next day he would sign the permanent contract.

"30. Later that day Peretz did however sign an agreement/contract, leaving same for Crane for their signature, requesting that it be faxed to Montpellier/the bank. This document with his sole signature was faxed to both bank and the Claimant's offices in his presence. Montpellier subsequently received a faxed copy of the completed document with Crane's signature on 31st October 2002. The adjusted contract was for US$220,800.00, as some items such as the generator had been removed.

"31. The main issues on this final contract were the following:

- Crane standing behind the schedule 8 weeks from deposit
- Crane standing behind the technical issues such as amount of gallons per day etc.
- Payment of LOC upon commissioning of the Plant and the plant was running. The commission would have to comply with A and B above.

"32. From this point on Claimant did not play any part in payment to or transferring monies to Crane. Claimant came to understand that the bank made all payments from a special account in which

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> Claimant had no input or control; a special account opened for this purpose."[3]

[7] The payment terms stated in pro forma invoice #021030 that was faxed to ACB during the meeting were as follows:

> "PAYMENT TERMS: 10% with order/ 35% 30 days from date of order, 35% prior to shipment and 20% by Irrevocable & Confirmed Letter of Credit to be payable upon Commissioning, not to exceed 90 days from date of shipment accompanied with shipping documents. Letter of Credit to be provided 30 days from date of order"[4]

[8] A copy of what Mr. Peretz referred to as the 'agreement/contract' that was subsequently faxed to ACB, being the purchase order showing a total cost of US$220,800.00 signed by Mr. Peretz alone, appeared at page 248 of the record of appeal trial bundle "C" (continued) and, a copy of that document but bearing the signatures of both Mr. Peretz and a Crane representative appeared at page 249. This purchase order contained the same payment schedule as was set out in the pro-forma invoice, except that in relation to the LOC, it stated as follows:

> "20% by Irrevocable & Confirmed Letter of Credit to be payable subjected to a successful Commissioning, not to exceed 90 days from date of shipment accompanied by shipping documents. Letter of Credit to be provided 30 days from date of order."

Therefore, pursuant to the purchase order, payment by LOC was changed from 'upon Commissioning' to 'subjected to a successful Commissioning.'

[9] In cross examination, the following additional facts relating to the teleconference were elicited from Mr. Peretz:

(a) that the teleconference lasted approximately about 15 minutes, 20 minutes at the most.

(b) that the fax copy with his signature was faxed on the day of the meeting and a copy with both signatures was faxed the next day;

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[3] Claimant's Witness Summary per Micha Peretz, record of appeal, trial bundle "B" at p. 18 – 20.

[4] Crane Environmental pro form invoice #021030 (dated 30th October 2002), record of appeal, trial bundle "C" at p. 247.

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(c) that both of the above mentioned copies would have been faxed after the meeting between Mr. Gardner and Mr. Stevenson;

(d) at the time of the meeting between Mr. Gardner and Mr. Stevenson, he Mr. Peretz was still negotiating the terms of the contract with Crane, not in relation to price, but in relation to how soon Crane would 'sell out' the RO plant and then how soon Crane would come to set it up;

(e) that there was an adjustment to the price after the first draft (of the pro forma invoice) in relation to accessories;

(f) that the final contract as between Montpellier and Crane was not signed until the following day;

(g) that there was not a finalized agreement between Montpellier and Crane at the time of the meeting between Mr. Gardner and Mr. Stevenson;

(h) that at the meeting between Mr. Gardner and Mr. Stevenson there was no document signed by Montpellier or ACB in relation to the issue of the LOC;

(i) that at the time of the meeting there were still things to be done before a letter of credit could be finalized;

(j) that one of those things to be done was that he Mr. Peretz had to come into ACB to sign an application form.

[10] In relation to that last item, that is the signing of the application form, Mr. Peretz's evidence was that he was summoned to ACB by Mr. Stevenson and directed to a female officer (whose name Mr. Peretz could not recall). He was told that she had prepared the paperwork for the LOC and that he should go to her to sign it. He did as instructed. At the time of signing the LOC it was blank. The lady in question

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advised Mr. Peretz that she had been strapped for time and had prepared most of the formal documents and would fill in/complete the LOC details afterwards. He was satisfied with this explanation, signed as instructed and left. As it happens, the LOC was filled in/completed. However, instead of there being inserted that payment was subjected to a successful commissioning not to exceed 90 days from date of shipment, there was inserted payment 'at 90 days BL date'. In the events which transpired, the RO plant was not successfully commissioned within the period of 90 days from the date of shipment. Montpellier wrote two letters to ACB advising ACB not to pay the final sum covered by the LOC as the RO plant had not been successfully commissioned. However, ACB, having issued the LOC on the basis that payment was due 'at 90 days BL date,' paid in accordance with that obligation. Montpellier argued below that having been deprived by ACB's breach of contract of the considerable leverage that the said condition in the LOC would have afforded it, it incurred considerable expense in securing the RO plant's eventual commissioning. Consequent thereon, Montpellier instituted the present action against ACB for breach of contract. The actual claim made against ACB was expressed as follows:

"4. By an oral agreement made between the Claimant and the Defendant on October 31, 2002, the Defendant agreed to issue a Letter of Credit guaranteeing the payment to the bankers of Crane Environmental, a corporation based in Venice, Florida, U.S.A., ("the Vendor"), of a sum equivalent to 20% of the purchase price of a Seamega-120K Sea Water Reverse Osmosis System ("RO System") which the Claimant had agreed to purchase from the Vendor.

PARTICULARS

Mr. David Stevenson acted on behalf of the Defendant in making the said agreement and Mr. Karl Gardner acted on behalf of the Claimant. The agreement was made at the offices of the Defendant at Thames Road, St. John's.

"5. It was a term of the said agreement that payment of the sum secured by the Letter of Credit would be subject to *"the successful*

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> *commissioning* (of the said RO System) *not to exceed 90 days from the date of shipment accompanied by shipping documents*".[5]

[11] To Montpellier's claim of an oral contract, ACB at paragraph 3 of its Defence stated:

> "Paragraph 4 of the Statement of Claim is denied. The Defendant states that the discussion between the Claimant and the Defendant in relation to the issuing of a Letter of Credit guaranteeing the payment to the bankers of Crane Environmental…a corporation based in Venice, Florida, U.S.A. of a sum equivalent to 20% of the purchase price of a Seamega-120K Sea Water Reverse Osmosis System ("RO System") was an agreement subject to contract and not a legally enforceable oral agreement as alleged."[6]

[12] ACB in its defence admitted the meeting on 31st October 2002, but denied that the alleged or any contract between the parties was made by or concluded at the meeting. According to ACB, what occurred between Montpellier and ACB at the meeting were pre-contractual discussions which did not constitute a legally enforceable contract. According to ACB, the LOC was signed by Mr. Peretz, director on behalf of Montpellier, before issuance to Crane's bank and as such Montpellier was bound by the terms therein.

[13] In its reply to the defence, on the issue of the signing of the LOC by Mr. Peretz, Montpellier averred that Mr. Peretz signed a blank form of a LOC on the representation by one of ACB's employees who presented the document to him for signature that the relevant information would be thereafter inserted before formal issue of the LOC. According to Montpellier, Mr. Peretz assumed, as Montpellier suggested that he was entitled to do, that ACB would have issued the LOC in accordance with the instructions that Montpellier had previously given to ACB and the oral agreement between the parties made on 31st October 2002.

[14] In dismissing Montpellier's claim, the learned trial judge stated at paragraph 12 of the judgment:

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[5] Statement of claim, record of appeal, trial bundle "A" at p. 4.
[6] Defence and counterclaim, record of appeal, trial bundle "A" at p. 9.

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"[12] Having seen and heard the witnesses who gave evidence in this case, having read the several documents put into evidence in this case, having perused the closing submissions made on behalf of the parties and read the accompanying authorities, the Court concludes as follows:

1. That the Claimant and the Defendant did enter into a contract for the issue by the Defendant of a Letter of Credit to the bankers of the company from whom the Claimant was purchasing a desalination plant

2. That the discussions held on 31st October 2002 between Messrs Micha Peretz and Karl Gardner on behalf of the Claimant and Mr. David Stevenson on behalf of the Defendant (partly by telephone and partly in person) constituted pre-contract negotiations between the parties en route to entering into a contract for the issue of a Letter of Credit by the Defendant to the aforesaid bankers."

3. That the Claimant is bound by the terms of the contract for the issue of the Letter of Credit by the Defendant as per the application form signed by Mr. Peretz on behalf of the Claimant, even though Mr. Peretz signed a blank form with the expectation that it would be completed in accordance with pre-contract negotiations of 31st October 2002 and the form was not so completed. No other conclusion is possible if this Court accepts that the judgments of the Court of Appeal of England and Wales are at least persuasive authority on matters in which the law of Antigua and Barbuda is either very similar to or is the same as the law of England and Wales by virtue of being derived from English common law. The English Court of Appeal was unanimous and unequivocal in its ruling in the case of **United Dominions Trust Ltd v Western B.S. Romanay**[1] [*[1976] 1 Q.B. 513*] that if a person signed in blank an agreement which he knew would be completed by some other person, it is not open to the signatory to say that he did not consent to whatever figures the completed document contained, even though they differed with the figures previously discussed by the parties. So too if a party signed an application form in blank with the terms to be filled by the other party and the terms contained in the completed form differ from what was discussed in pre-contract negotiations.

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4. That the Defendant did not breach its contract with the Claimant when it issued a Letter of Credit as per the application form signed by Mr. Peretz."[7]

[10] Montpellier being dissatisfied with the judgment, filed a notice of appeal. In the notice of appeal, Montpellier sought to challenge the learned trial judge's findings of fact:

(1) that no agreement was made for the issue of an LOC at the meeting on 30th October 2002, when: (a) the parties reached a consensus as to the instalments that were to be paid by ACB on behalf of Montpellier for the purchase of the RO plant, (b) the parties reached a consensus as to the requirement that the last payment be made only upon the commissioning of the plant, (c) the respondent received the pro forma invoice for the said RO plant dated 30th October 2002 containing the aforementioned payment terms;

(2) that what transpired between the parties on that day were no more than pre-contractual negotiations en route to entering into a contract of sale;

(3) that the agreement between the parties for the issue of the LOC was made on 31st October 2002 when Mr. Peretz signed an application form in blank for the issue of a LOC.

[11] In relation to the learned trial judge's findings of law, Montpellier sought to challenge the view that as a matter of law, if one party to an agreement chose to sign the agreement in blank on the understanding that the terms of the agreement would be inserted by the other party to the agreement, it was not open to the party signing subsequently to assert, as against the party inserting the information, that he did not consent to the information that was actually inserted in the document, even if that information differed entirely from what the parties agreed to insert.

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[7] Judgment of Michel J (delivered 11th February 2011), record of appeal (i) pleadings, submissions, judgment & notice of appeal at p. 123.

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[12] The actual grounds of appeal were as follows:

(1) The learned trial judge's finding that the consensus reached by the parties at their meeting on 30th October 2002 regarding the terms of payment for the desalination plant that Montpellier was purchasing, which included a term that the last instalment for the said desalination plant in the sum of US$50,900.00 be made by Letter of Credit, such instalment to be paid only upon the commissioning of the plant, amounted to no more than pre-contractual negotiations, is unsupported by any evidence and entirely against the weight of the available evidence.

(2) The learned trial judge's finding that the agreement for the issue of the Letter of Credit was made on 31st October 2002 when Montpellier's representative signed the application form in blank, is unsupported by any evidence and is entirely against the weight of the available evidence.

(3) The learned trial judge failed to draw a proper distinction between the various contractual relationships that exist when a letter of credit is issued to secure payment for goods being sold, namely, the contract between the issuing bank and receiving bank embodied in the letter of credit itself, the contract between the buyer and the seller of the goods in question, the contract between the issuing bank and its customer for the issue of the letter of credit to secure payment for the goods upon the terms specified and the contract between the receiving bank and its customer to collect payment for the said goods.

(4) The learned trial judge failed to draw a distinction between the agreement between the Montpellier and ACB for the issue of a Letter of Credit and the ACB's performance of that agreement by the actual issuing of the Letter of Credit.

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(5) The learned trial judge erred in law in concluding that a party to an agreement who signed such an agreement in blank is bound by whatever terms the other party to the agreement thereafter inserts into it, even if those terms are entirely different from what the parties agreed to insert.

(6) The learned trial judge also erred in law in failing to appreciate that in the circumstances described above, the aggrieved party would be entitled to have the agreement rectified to reflect the terms that were agreed.

Analysis

[13] Ground 1of Montpellier's appeal was that the learned trial judge's finding that the consensus reached by the parties in the meeting of 30th October 2002 amounted to no more than pre-contract negotiations was unsupported by any evidence and was against the weight of the available evidence. It is noted at this point that the reference to the meeting date may be incorrect but there can be no uncertainty as to the meeting intended.

[14] In approaching this ground, it should be noted that the learned trial judge did not express any finding that there was a 'consensus' reached by the parties in the meeting of 31st October 31 2002. 'Consensus' is a word used by Montpellier, not by the court below. At paragraph 12(2) of the judgment, the learned trial judge referred to what occurred on 31st October 2002 between the representatives of the parties as 'discussions'. Montpellier in its skeleton refers to paragraphs 25 to 30 of Mr. Peretz's Witness Summary (set out above) as containing the evidence from which the court can find the alleged oral agreement. Consequently, this and the evidence elicited from Mr. Peretz in cross examination (also set out above), would constitute the material in which Montpellier suggests there could be found no evidence to support the learned trial judge's findings that the discussions amounted to no more than pre-contract negotiations and that the weight of this evidence supports the conclusion that there was an oral contract.

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[15] The facts of the meeting, the verbal exchanges and the faxing of the first pro forma invoice, along with the faxing of the subsequent purchase order, are not in issue. What is in issue is whether or not this all resulted in a contract, or merely attained the pinnacle of pre-contractual negotiations. This is a matter of fact. It is relevant to note that the learned trial judge did not provide any analysis or reasons for his finding that the discussions held at the meeting amounted to no more than pre-contact negotiations. This Court does not know the basis or reasoning for his conclusion. It is therefore for this Court to consider whether the evidence supported the learned trial judge's finding.

[16] Montpellier at paragraphs 42, 43 and 44 of its submissions stated:

> "42. At the **conclusion of the said discussions**, there was clear consensus as to what the schedule of payments was to be and that the last payment was to be made by LOC. It was also clear that the last payment by LOC was to be conditional on the commissioning of the plant." (My emphasis).
>
> "43. The discussions yielded consensus as to how many payments were to be made, what percentage of the purchase price would be the subject matter of each payment and when those payments were to be made. It was to be a payment of 20% of the purchase price and that payment was to be made upon the commissioning of the plant.
>
> "44. Mr. Peretz made it clear in the course of the discussions that a final purchase order was to follow setting out the final purchase price. That document was, in fact, faxed to the Bank later that day. When the discussions concluded, there was certainty as to the payment instructions and as to how the quantum of each payment was to be determined, that is, by applying the agreed percentages to the price stated on the purchase order that would follow. There was nothing left to be discussed or settled."[8]

[17] The first point that needs to be considered is whether a 'consensus' or an 'agreement' had in fact been reached on 31st October 2002 as was pleaded by Montpellier in paragraphs 4 and 5 of its statement of claim.

[8] Appellant's skeleton submissions (filed 7th July 2014) at p. 19.

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[18] Learned counsel for ACB, Ms. Roberts, at paragraph 14 of her submissions, outlined why the learned trial judge's finding that what transpired at ACB's office were pre-contract negotiations only was correct based on the evidence before him. According to Ms. Roberts, these factors would have precluded any finding that the alleged or any oral agreement could have been reached, namely that:

(a) Mr. Peretz had stated that the contract he had faxed through, based on the pro forma invoice #021030, was not the finally agreed contract as some adjustments were subsequently to be made to the scope of works Crane was to undertake;

(b) Mr. Peretz reminded them that what ACB had received by fax was only a draft and that no one had yet signed. That this was only to show the spirit of the contract. When Peretz was finished with Crane the next day he would sign the permanent contract;

(c) at the time of the meeting at the office, Montpellier and Crane were still negotiating terms;

(d) the final version of the contract between Crane and Montpelier was signed the day after the conference call occurred after certain adjustments to the contract price and the removal of certain items;

(e) during the conference call no documents were signed by the parties in relation to the issue of the LOC; and

(f) at the time of the conference call, there were still further steps to be taken in order for the issue for the LOC to be finalized which included attending at ACB to sign the application form.

[19] Counsel for ACB submitted that for there to be a legally binding agreement, there must be present, offer, acceptance, consideration and an intention to create legal

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relations and that Montpellier had failed to prove any of these existed at the time of the conference call.

[20] Whether or not parties intend an agreement between them to give rise to legal relations between them will depend on the circumstances of each case and must be judged objectively. The Court readily accepts the admonition by Bingham LJ in **Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council**[9] that contracts are not lightly to be implied and having examined what the parties said and did, the court must be able to conclude with confidence both that the parties intended to create contractual relations and that the agreement was to the effect contended for.

[21] Firstly there must be an agreement of the type pleaded. On the evidence this could not be the case. It was Mr. Peretz's own evidence that he reminded the parties attending the meeting that what the bank had received by fax was only a draft that no one had signed as yet. According to Mr. Peretz this was only to show the spirit of the contract. When Mr. Peretz was finished with Crane the next day he would sign the permanent contract. This clearly left open the possibility of substantial revision.

[22] It was therefore incorrect to say and it was not supported by any evidence that at the conclusion of the discussions there was any consensus or certainty as to what the schedule of payments was to be, how many payments were to be made, what percentage of the purchase price would be the subject matter of each payment and when those payments were to be made, or that the last payment would be by way of LOC, its percentage and its condition.

[23] The impression given by the submissions is that according to Mr. Peretz's statement to ACB, the only thing that was left for possible revision was the final purchase price. This was not the case. There was nothing in the statements from Mr. Peretz to ACB that suggested that all the elements except price had

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[9] [1990] 3 All ER 25 at p. 31.

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been finalized and therefore would not change and that the only possible revision on the final purchase order might be to the price.

[24] Montpellier has sought to rely on the fact that the various payments made by the bank, were made in the percentages 'agreed' at the meeting including the percentage of the payment made by the LOC. But this would have been a mere coincidence by virtue of the fact that the final purchase order did have an unchanged payment schedule. It would not and could not be evidence to detract from the clear fact that at the end of the meeting there could not have been consensus in relation to matters that, on Mr. Peretz's own evidence, had not been finalized.

[25] Additionally, in cross examination, Mr. Peretz acknowledged that at the time of the meeting there were still things to be done before a letter of credit could be finalized and one of those things was that he, Mr. Peretz, had to come into the bank to sign an application form. This application form was included in the record and contained a number of standard terms.[10] There is no evidence that these terms, though standard terms, were at the date of the meeting even considered, much less agreed to by the parties. Thus there was something still left to be done by the parties before the contract for the issue of the LOC could be considered completed.

[26] Even in relation to the other payments, Mr. Peretz had suggested in his evidence that from the date of the meeting, Montpellier played no part in the transferring of monies to Crane and that the Montpellier came to understand that ACB made all payments from a special account in which Montpellier had no input or control. But Ms. Roberts was able to demonstrate via cross examination that this statement did not paint an accurate picture and that on a number of occasions Montpellier was involved in the payment of monies to Crane through letters giving

[10] Record of appeal, trial bundle "C" at pp. 172 – 173.

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instructions to ACB in relation to payments to Crane for the RO plant. Mr. Peretz sought to characterize these actions by Montpellier simply as reminders.

[27] In **May and Butcher v The King**,[11] Lord Buckmaster stated that 'it has long been a well-recognized principle of contract law that an agreement between two parties to enter into an agreement in which some critical part of the contract matter is left undetermined is no contract at all.' In that case Viscount Dunedin stated that '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 to be settled by agreement between the parties.'[12]

[28] In **May and Butcher**, Viscount Dunedin did recognize that if there is something left to be determined, that may not necessarily prevent a contract from arising if the thing left to be determined does not depend on agreement between the parties.[13] But it is important to note that the contract that was pleaded was not that ACB had agreed with Montpellier that it would issue the LOC on payment terms pursuant to whatever LOC term was finally determined between Montpellier and Crane as would be reflected on the final purchase order that would be submitted to ACB. Montpellier would be confined by its statement of case as pleaded.[14] But even if that were Montpellier's case, there still would have been (as in fact occurred) the requirement that ACB and Montpellier agree on the actual terms for the issue by ACB of the LOC. Though described as having been signed in blank, the application form contained a number of what appeared to be standard terms to which Montpellier and ACB were agreeing. Mr. Peretz during cross examination admitted that he would have had to come into ACB to make the application for the LOC. Consequently, there could not have been a concluded agreement on 31st October 2002 whereby ACB had agreed to issue an LOC when in fact the terms for the issue of the LOC (as per

[11] [1934] 2 KB 17 at p. 20.
[12] At p. 21
[13] Ibid.
[14] See: Blay v Pollard and Morris [1930] All ER Rep 609; Esso Petroleum Co. Ltd. v Southport Corporation [1956] 2 WLR 81.

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the LOC application form) were still to be agreed. Counsel for Montpellier sought to answer this by suggesting that there is a distinction between the agreement to issue the LOC and the implementation of that agreement. But for the reason just explained, that argument is unsustainable. This can be easily be demonstrated by posing the following question: Had Mr. Peretz refused to sign the LOC application form when he attended at ACB's offices due to his disagreement with any of the standard terms, could ACB have successfully argued that Montpellier was contractually bound to proceed with the application by virtue of what had transpired on 31st October 2002? Certainly Montpellier would have been able to successfully argue that the terms for the actual issue of the LOC were never discussed on 31st October 2002 and were never agreed to.

[29] The learned judge gave no explanation for his decision. But having reviewed the evidence that was before him, there was ample evidence to permit him to properly conclude that what transpired on 31st October 2002 were merely pre-contractual negotiations and his finding in that regard was not against the weight of the evidence. For these reasons Montpellier fails in relation to ground 1.

[30] In relation to ground 2, I must agree with the submission of learned counsel for ACB that this ground of appeal does not accurately reflect the findings of the learned trial judge. The learned trial judge did not find that the agreement was made on 31st October 2002 when the form was signed in blank by Mr. Peretz. The learned trial judge found at paragraph 12(1) of the judgment that the parties did enter into a contract for the issue by ACB of a letter of credit to Crane's bank but he did not specify the date of formation of the contract. At paragraph 12(2) the learned trial judge then found in effect that the conference call on 31st October 2002 constituted pre-contract negotiations, thereby rejecting Montpellier's assertion that a binding oral agreement was formed in that conference call. At paragraph 12(3) the learned trial judge found that Montpellier was bound by the terms of the contract for the issue of the LOC as per the application form signed by Mr. Peretz even though Mr. Peretz signed the form in

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blank with the expectation that it would be completed in accordance with pre-contractual negotiations and it was not so completed. The learned trial judge's finding was therefore that the terms of the contract were as contained in the application form and not that the contract was formed when Montpellier signed the application form. This ground of appeal is based on an incorrect factual premise. The learned trial judge did not make the finding which Montpellier is seeking to challenge under this ground. For this reason Montpellier fails in relation to ground 2.

[31] In relation to ground 3, I am again inclined to the view of learned counsel for ACB that the basis for this ground is unclear. Firstly, there is no particular finding referred to in the judgment where it can be shown that the learned trial judge failed to draw the above distinction. More importantly, Montpellier has failed to show that the learned trial judge would have been required to draw this distinction as a necessary part of his reasoning process. As suggested by counsel for ACB at paragraph 30 of her submissions, the learned trial judge's findings clearly related to the issue of the contract between ACB and Montpellier and this did not in and of itself suggest any failure on the learned judge's part to distinguish this contract from the other three contractual relationships that would exist in relation to the issue of an LOC. If what Montpellier was contending was that the learned trial judge failed to distinguish between the contract between Montpellier and ACB as buyer and issuing banker on the one hand and the contract between Montpellier and Crane as buyer and vendor on the other, I would think that the learned trial judge could not disregard the relationship between the two, but that this would not mean that he failed to appreciate that they were separate contracts. It was Montpellier's pleaded case that an agreement was made on 31st October 2002 with nothing left to be done and that certain things were finalized. However, Montpellier's own evidence demonstrated that to be incorrect because Mr. Peretz's statements made all of that conditional on the finalizing of an agreement between Montpellier and Crane. It was by Mr. Peretz's very

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evidence that Montpellier's case of a contract between itself and ACB for the issue of the LOC became linked at the hip to Montpellier's conclusion of a contract with Crane. There was no evidence that the learned judge actually considered this in arriving at his decision that no oral contract was made but if he had he could not have been faulted. For this reason Montpellier fails in relation to ground 3.

[32] In relation to ground 4, this can only succeed if in fact there was a finding that an oral contract had in fact been made on 31st October 2002. It has already been determined that this was not the case and it has already been explained above why the application for the LOC could not be characterized as mere implementation. Consequently this ground fails also.

[33] Ground 5 was expressed as follows:

> "The Learned Trial Judge erred in law in concluding that a party to an agreement who signs such agreement in blank is bound by whatever terms the other party to the agreement thereafter inserts into it, even if those terms are entirely different from what the parties agreed to insert."

[34] The learned trial judge purported to extract this general principle that Montpellier complains of from **United Dominions Trust Ltd. v Western B. S. Romanay (trading as Romanay Car Sales), Third Party**.[15]

[35] At paragraph 12 (3) of his judgment the learned trial judge stated:

> "That the Claimant is bound by the terms of the contract for the issue of the Letter of Credit by the Defendant as per the application from signed by Mr. Peretz on behalf of the Claimant, even though Mr. Peretz signed a blank form with the expectation that it would be completed in accordance with the pre-contract negotiations of 31st October 2002 and the form was not so completed. No other conclusion is possible if this Court accepts that the judgments of the Court of Appeal of England and Wales are at least persuasive authority on matters in which the law of Antigua and Barbuda is either very similar to or is the same as the law of England and Wales by virtue of being derived from the English common law. The English Court of Appeal was unanimous and unequivocal in its ruling in the case of **United Dominions Trust Ltd v Western B.S. Romanay**[1]

[15] [1976] QB 513.

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> [*[1976 1 Q.B.* 513] that if a person signed in blank an agreement which he knew would be completed by some other person, it is not open to the signatory to say that he did not consent to whatever figures the completed document contained, even though they differed with the figures previously discussed by the parties. So too if a party signed an application form in blank with the terms to be filled by the other party and the terms contained in the completed form differ from what was discussed in pre-contract negotiations."[16]

[36] The ground of appeal does not accurately reflect what the learned judge stated. The ground ends with the words 'even if those terms are entirely different from what the parties agreed to insert'. The learned judge's words did not refer to the terms being different from 'what the parties agreed to insert' but rather 'from what was discussed in pre-contract negotiations.'[17]

[37] In **United Dominions Trust**, the defendant wished to purchase a car from R and agreed the price with him. A deposit amount was agreed and the defendant indicated that he wished to have a hire purchase agreement. The defendant understood that R was in a position to arrange for a hire purchase agreement with the plaintiff finance company. The defendant paid the deposit and signed a blank form which was a standard form of the plaintiff company applicable not to a hire purchase agreement but to a loan for the purposes of the purchase of car. The defendant expected that R would fill it in with the figures that had been agreed, namely the price of £550, showing a deposit of £34, and making the consequential calculations as to the appropriate monthly payments. When the form was submitted to the plaintiff company the figures that had been filled in were different from what had been agreed. Upon the form going to the plaintiff company the contract was formed between the plaintiff and the defendant. The issue before the court was whether in law there was a contract between the plaintiffs and the defendant at all as a result of the transaction.

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[16] Judgment of Michel J (delivered 11th February 2011), record of appeal (i) pleadings, submissions, judgment & notice of appeal at p. 126.
[17] Ibid.

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[38] In the events that transpired the defendant paid no installments and the plaintiff company commenced proceedings against him to recover the amounts which they said were due under the agreement. The court there found that there was no reason to suppose that the plaintiff company was aware, or that anything existed which might reasonably have brought to their notice, that the document, apparently signed by the defendant was anything other than what it purported to be, namely, something that was put forward by the defendant as being what he was asking in the way of a contract with the plaintiffs. The court also noted that it was with the consent of the defendant that the third party R had filled in the document and that the defendant had well known and understood that the third party was going to fill in this document in order to submit it to the plaintiffs for the purpose of seeking to obtain a contract between the plaintiffs and the defendant.

[39] In rendering his decision, Megaw LJ referred to **Saunders (Executrix of the Will of Rose Maud Gallie, Deceased) v Angilia Building Society** and quoted Lord Wilberforce who said:

> "In my opinion, the correct rule…is that, leaving aside negotiable instruments to which special rules may apply, a person who signs a document, and parts with it so that it may come into other hands, has a responsibility, that of a normal man of prudence, to take care what he signs, which, if neglected, prevents him from denying his liability under the document according to its tenor. I would add that the onus of proof in this matter rests upon him, i.e., to prove that he acted carefully, and not upon the third party to prove the contrary." [18]

[40] Megaw LJ went on to state at page 522:

> "For the defendant appellant in this case Mr. Eady, to whose argument I would like to pay tribute, has submitted - and this really is the essence of his submission - that there is a material distinction, for the purpose of the doctrine of non est factum, between, on the one hand, the careless signing of a document which is complete when it is signed, as in *Gallie v. Lee* [1971] A.C. 1004 and, on the other hand, the sort of situation that arose in this case, the careless signature of a document in blank; where it is left to somebody (not being an agent of the other party) who is trusted to fill it in in a particular way but who, perhaps from fraud (as it would

[18] [1971] AC 1004 at p. 1027.

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seem to have been in this case), or perhaps from mistake, in fact fills it in in some different way. Mr. Eady argues that the principles which apply to the former type of case do not apply to the latter. With great respect to Mr. Eady's argument, I am unable to see either that that is right on authority or that it would be acceptable to common sense. Why should a careless act which results in the opposite party being misled as to one's contractual intentions be of less legal significance and effect than a careless act of not reading, or failing to understand, an existing completed document which is put before one to sign?" [19]

[41] I think the principle to be extracted from **United Dominions Trust** is this, that where a party carelessly signs a document in blank and leaves it to another person to fill it in a particular way (that person not being the agent of the other contracting party) and that other person fills it in, whether by fraud or mistake, in some different way and that document is then relied on by an innocent third party, (he having had no reason to suspect that the document was something other than what it purported to be) then as between the signer and the innocent third party, the signer will be bound. The court was there concerned with the protection of an innocent third party who had relied on the signed document.

[42] However, it would appear that in making the statement of law to which Montpellier objects, the learned trial judge was simply stating what may be described as the basic proposition. That this must be so is supported by the fact that the statement will represent the resulting legal position where a party is unable to successfully bring himself either within the established confines of a plea of non est factum or is unable to successfully mount a case for relief via some other avenue, such as misrepresentation, fraud or mistake.[20] Counsel for

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[19] Dominions Trust Ltd. v Western B. S. Romanay (trading as Romanay Car Sales), Third Party [1976] QB 513.

[20] See: (1) See Blay v Pollard and Morris [1930] 1 KB 628 where the defendant signed a document that he knew to concern the dissolution of a partnership of which he was a member. Unknown to him the document contained a term which had not been mentioned in a previous oral agreement and which made him liable to indemnify his fellow partner in respect of certain partnership liabilities. It was held that he was bound by his signature. (2) Curtis v Chemical Cleaning and Dyeing Co., Ltd. [1951] 1 All ER 631 at page 633 where Denning LJ stated "If the party affected signs a written document knowing it to be the contract which governs the relations between him and the other party, his signature is irrefragable evidence of his assent to the whole contract, including the exempting clauses, unless the contract is shown to be obtained by fraud or misrepresentation…" (3) Lloyds Bank Plc. v Ronald Waterhouse 1990 WL 10631277, Purchas LJ stated

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Montpellier made it clear that Montpellier was not attempting to rely on non est factum. The issue only came up when ACB pleaded in its defence that Montpellier was bound by the contents of the LOC application form signed by Mr. Peretz to which Montpellier replied that Mr. Peretz had signed the form in blank in the expectation that it would have been filled in pursuant to the instructions previously given and the agreement said to have been made on 31st October 2002. Counsel for Montpellier indicated that Montpellier was not seeking to rely on non est factum as Mr. Peretz would in any event have been under no disability when he signed the LOC application and that he could not argue that there was no carelessness on Mr. Peretz's part. With Montpellier failing on its sole claim based on breach of an alleged oral contract, there was no other claim for the learned trial judge to consider. Counsel for ACB was astute to point out that no attack had been pleaded by Montpellier other than breach of the alleged oral contract. It is in that context that the statement of law must have been made by the learned trial judge. Taken out of context, the statement could be interpreted to mean that in no circumstance could a person in the position of a party who signs a form in blank knowing it will be filled in by the other party, ever escape from the legal effect of his signature. That would not be correct, but I do not think that that is what the statement, considered against the backdrop of the case, intended to convey. Consequently, Montpellier fails in relation to ground 5.

"Even if the defence of non est factum were to fail I would consider that in the conduct of the bank's negotiations by Mr. Farmer with the father and Paul the father was misled by the particular answer given by Mr. Farmer when the father enquired why the bank needed a guarantee of an amount over and above the value of the land." Woolf LJ went on to state "did the representatives of the bank by the manner in which the negotiations were conducted either make a misrepresentation or misled the father as to the contents of the guarantees which the bank wanted him to sign?...Mr. Falconer, whose able argument I would like to acknowledge, conceded that the bank owed a duty of care to the father not to mislead him as to what the contents of the guarantees would be when they came to be presented to him for signature. He also accepted that if there was a breach of that duty, the father would be entitled, if he could establish that but for that breach of duty he would not have entered into the guarantees to recover damages in the amount of the bank's claim which would then extinguish that claim." See also: Foster v Mackinnon 17 W.R. 1105; Khatijabai Jiwa Hasham v Zenab (as legal representative of H.G. Harji) [1960] AC 316; FBC Bank Ltd. v Dunleth Enterprises (Pvt) Ltd & Others [2014] ZWHHC 568.

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[43] In relation to ground 6, Montpellier argues that the learned trial judge failed to appreciate that in the circumstances described, the aggrieved party would be entitled to have the agreement rectified to reflect the terms that were agreed to. This issue did not arise on the pleadings, or in the arguments or the submissions before the learned trial judge. There would have been no reason for the learned trial judge to consider whether or not Montpellier would have been entitled to rectify the agreement.[21] In the circumstances, that issue would not have been relevant to the learned trial judge's findings. Consequently, this ground of appeal fails also.

[44] The appellant Montpellier having failed on grounds 1 through 5 of the appeal, and having abandoned ground 6, the order of this court is that the appeal is dismissed. Costs were ordered in the court below in favour of ACB in the sum of EC$20,000.00. Costs on the appeal are awarded in favour of ACB in the sum of EC$13,333.33.

[45] The Court records its thanks to counsel for their helpful submissions.

Anthony E. Gonsalves, QC
Justice of Appeal [Ag.]

I concur.

Davidson Kelvin Baptiste
Justice of Appeal

I concur.

Louise Esther Blenman
Justice of Appeal

[21] See Blay v Pollard and Morris [1930] 1 KB 628.

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