



The Court of Appeal for Bermuda

CIVIL APPEAL No. 9 of 2010

Between

DILTON MARTIN ROBINSON

Appellant

-v-

THE BANK OF BERMUDA (HSBC)

Respondent

Before: Auld, J.A.
Forte A.J.A.
Dangor A.J.A.

Appearances: Mr G. Rick Woolridge, Phoenix Law Chambers, for the Appellant
Mr Timothy Marshall, Marshall Diel & Myers, for the Respondent

Date of Hearing 10 June 2013
Reasons for Decision 19 September 2013

REASONS FOR DECISION

Introduction and Background

1. Herein are the Court's reasons for dismissal on 10 June 2013 of an appeal by Mr Dilton Martin Robinson against an Order of Ground CJ made on 6 July 2010, giving effect to his judgment on 1 June 2010, which was:
 - 1) dismissing his action against the Bank of Bermuda (HSBC);
 - 2) prohibiting him from commencing any future claims against the Bank arising from facts alleged by him in the action and in other actions scheduled to the 2010 Order;
 - 3) ordering the Bank to forego claiming costs or enforcing any unpaid costs in those actions and in three other concluded actions between the parties.

Ground CJ so ordered on the basis of his finding that Mr Robinson and the Bank, by their respective legal representatives, had agreed in negotiations culminating on 14 November 2008 to settle the action ("the Settlement Agreement").

2. The action, which Mr Robinson had commenced in 2002, was the last of four

actions by him against the Bank over a period of 14 years arising out of a contract in 1992 under which the Bank had agreed to finance, against security provided by him and his wife, Mrs Robinson, property, acquisitions and other investments (“the 1992 Finance Agreement”).¹ His claim is for:

- 1) rescission of the 1992 Finance Agreement on grounds of fraud and/or constructive fraud and/or misrepresentation and/or misstatement and/or undue influence and/or breach of fiduciary duty and/or breach of confidentiality;
 - 2) alternatively damages to be assessed; and
 - 3) further and other relief.
3. Ground CJ summarised the terms of the Settlement Agreement in schedule 1 to his 2010 Order, namely:
- 1) settlement of all litigation;
 - 2) Mrs Robinson would be a party to the Settlement Agreement;
 - 3) the settlement would be a full and final settlement of all claims between the parties;
 - 4) the Bank would pay to Mr Robinson and his wife BD\$125,000 without acknowledgement of liability on the part of the Bank or on *ex gratia* basis and that the terms of settlement would be subject to a confidentiality covenant; and
 - 5) Mr Robinson and his wife would also receive the re-conveyance of the mortgage of their jointly owned family home, with no further obligation to the Bank in respect of mortgage, principal, interest, arrears or costs.

The Issues before the Court

4. Counsel agreed that the issues to be resolved in the appeal were whether Ground CJ correctly concluded that:
- 1) on 14 November 2008 leading counsel for Mr Robinson, Mr Antonio Bueno QC, had actual or ostensible authority to compromise this and the other actions;
 - 2) the expiry of the work permit of non-Bermudian locally employed junior counsel, Mr M. Anthony Cottle, shortly before the conclusion of the negotiations leading to the Settlement Agreement on 14 November 2008, did not invalidate the

¹ See footnote 16 of para.57 of Ground CJ's judgment.

Agreement;

- 3) the Settlement Agreement was not subject to contract, nor was it a condition precedent that the parties should enter into and sign a formal deed of settlement rehearsing its terms (a reference to a contemplated, but never executed, deed of settlement drafted shortly after the Settlement Agreement, setting out in Clause 6 a proposed acknowledgement of *The Robinsons* that, in executing it, they had entered into it *freely and willingly and after having obtained their own individual independent legal advice*); and
 - 4) the terms of the Settlement Agreement were not unfair to Mr Robinson and were not a grave injustice in economic terms to him.
5. There are two well-known principles of law governing the role of an appellate court, namely:
- 1) except in rare circumstances it should not interfere with a first instance judge's findings of fact on the written and/or oral evidence before him; and
 - 2) it should only interfere with a judge's exercise of discretion, where it is shown that he has either erred in principle, or left out of, or taken into account some factor that he should or should not have considered, or that his decision was wholly wrong for want of a fair balance of the relevant factors.

Actual Authority

The Evidence

6. The Court has reviewed the judgment of Ground CJ and the evidence upon which he based his conclusions, namely:
- 1) the background to Mr Robinson's 2002 Action, including having secured his indebtedness to the Bank under the 1992 Finance Agreement and the mortgage of the family home jointly owned with Mrs Robinson (the subject of the fifth term of the 2010 Order);
 - 2) the spawning by the 1992 Finance Agreement of considerable litigation between the parties;
 - 3) the procedural history leading to the Bank's application in April 2009 for the dismissal of this action; the course of the

negotiations between Mr and Mrs Robinson and the Bank through their respective lawyers, conducted largely by e-mail, leading to the Settlement Agreement on 14 November 2008; and

- 4) Mr Robinson's affidavit and oral evidence of his instructions to Mr Bueno and affidavit and oral evidence of Mr Andrew Martin for the Bank as to the sequence of negotiations. Ground CJ accepted that Mr Martin was, on essential matters, a witness of truth.

7. On the question whether Mr Bueno did have actual authority to settle the 2002 Action, the salient evidence before Ground CJ upon which he based his conclusion that Mr Bueno did have such authority is as follows:

On 11 January 2008

- 1) Mr Larry Scott, Bermudian local counsel of Messrs Scott and Scott, sought permission from the Legal Aid Committee to instruct overseas Queen's Counsel to deal with Mr Robinson's matter.²

On 9 July 2008

- 2) Mr Cottle, non Bermudian local counsel of Messrs Scott and Scott, applied for an extension of the legal aid certificate to instruct Mr Bueno as foreign leading counsel. On 21 July 2008 legal aid was granted with a cap of BD\$20,000 on Mr Bueno's fees.³

In August 2008

- 3) Mr Cottle informally approached Mr Martin about the possibility of settlement negotiations and told him that legal aid had been obtained to instruct Mr Bueno to review the case, to make recommendations and to conduct the negotiations without any appearance of local influence⁴.

In September 2008

- 4) (a) There was a conference in Bermuda between Mr Robinson, Mr Bueno and Mr Cottle where Mr Bueno's instructions to negotiate were established.
(b) On 23 September at a conference between Mr Bueno, Mr Cottle and Mr Martin it was agreed that: i) the negotiations

² email on 11 January 2010 from Mr Leopold Mills of the Legal Aid Committee to Mr Robinson

³ *ibid.*

⁴ para. affidavit 7 October 2009 of Mr Martin

would embrace all the actions between Mr Robinson and the Bank and Mrs Robinson's separate 1999 action against the Bank; ii) the negotiations would be strictly confidential; and iii) Mr Bueno and Mr Cottle would take instructions from Mr and Mrs Robinson on an offer the Bank had made⁵.

(c) Two days later at a conference between Mr Bueno, Mr Cottle and Mr Martin, Mr Bueno put the Robinsons' counter offer to the Bank, which was rejected.

In October 2008

5) (a) In late October in a telephone conference between Mr Robinson in Bermuda and Mr Bueno in England, Mr Robinson was reluctant to discuss the negotiation. Mr Cottle, who was listening in, persuaded him to continue.⁶

(b) On 21 October: i) Mr Cottle emailed Mr Robinson, copied to Mr Larry Scott, that leading counsel must have his instructions "urgently"; ii) Mr Robinson replied that he rejected the Bank's offer and that he had persuaded his wife to reject it; and iii) Mr Cottle by return email said that leading counsel had indicated that he must have "a bottom line" which was acceptable to him and his wife.

(c) The reply email on 22 October from Mr Robinson to Mr Cottle said that he and his wife agreed that the "bottom line" was payment of legal fees, land tax and BD\$250,000.⁷

In November 2008

6) (a) On 3 November in a telephone conference between Mr Bueno and Mr Robinson, with Mr Cottle listening in, Mr Robinson authorised Mr Bueno to propose a settlement in the terms of paragraph 3 of the 2010 Order, with a settlement figure of BD\$150,000, and authorised him to go down to BD\$125,000. (This evidence of Mr Robinson, elicited in cross examination, was in sharp contrast to para. 7 of his 7 May 2009 affidavit evidence that he had had no contact with Mr Bueno since late October and there was no unconditional agreement with full instructions from himself and his wife). Immediately after the

⁵ paras. 20-21 affidavit 7 October 2009 of Mr Martin and pages 132-133 Transcript of Mr Robinson's cross examination

⁶ pages 152-156 Transcript of Mr Robinson cross examination

⁷ para. 14 Ground CJ's judgment

telephone call, Mr Robinson told Mr Cottle he was not willing to go down to BD\$125,000. This change of mind was not communicated to Mr Bueno. Mr Bueno put his instructions to Mr Martin. Mr Martin informed Mr Bueno that the Bank would accept the proposal only at BD\$125,000.⁸

(b) On 14 November the negotiations were concluded in an email from Mr Bueno to Mr Martin, copied to Mr Larry Scott, agreeing to the sum of BD\$125,000 plus the other agreed terms. Mr Martin confirmed receipt of the email and that he would prepare a draft agreement.⁹

(c) On 18 November Mr Robinson's 2002 Action and the Bank's application to stay proceedings had been listed for hearing before the Court of Appeal. Before the hearing, Mr Martin and Mr Scott i) had agreed that in open court there would be no mention that an agreement had been reached and it would be intimated that the application would be withdrawn shortly; ii) Mr Martin acknowledged that he would be dealing with both Mr Beuno and Mr Scott; iii) Mr Bueno confirmed that he agreed with this approach; iv) at Mr Martin's request Mr Scott sent him the details of the account into which the Bank would deposit BD\$125,000; v) Mr Scott and Mr Martin appeared before the Court of Appeal and the matter was taken out of the list; and vi) on 20 November Mr Martin served on Mr Scott a draft deed of settlement and consent orders which accorded with the agreement reached between the legal representatives.¹⁰

In December 2008

7) (a) On 3 December in an exchange of emails between Mr Martin and Mr Bueno, copied to Mr Larry Scott, the amended draft deed of settlement and release were agreed.

(b) On 8 December Mr Larry Scott emailed Mr Martin and said that he agreed with the terms of the amended draft, that the negotiations were complete and that he would ensure that the agreement would be executed¹¹. Mr Martin replied proposing a formal closing date with the exchange of executed documents

⁸ para.15 Ground CJ's judgment and pages 182-184, 192-193 Transcript Mr Robinson's cross examination

⁹ *ibid.*

¹⁰ para.18 Ground CJ's judgment

¹¹ paras.18-19 Ground CJ's judgment

and the need for consent orders. He subsequently delivered to Mr Scott a draft deed of settlement and a draft consent order.¹²

(c) On 15 December by telephone to Mr Martin, Mr Scott confirmed that Mr Bueno was satisfied that the documentation was in accordance with the agreement reached.¹³

(d) On 19 December Mr Martin emailed Mr Scott that there was a settlement on the terms agreed and requested that they should proceed to implement the terms. Mr Bueno emailed Mr Martin that i) the settlement had been reached on the terms of the draft and in accordance with the express authority he and Mr Cottle had received from Mr and Mrs Robinson, and ii) the agreement merely recorded that the agreement was not subject to contract¹⁴.

In August 2009

- 8) On 2 August, seven months after the Settlement Agreement had been reached, Mr Bueno emailed Mr Scott that Mr Martin had made it clear to him that a Deed recording the agreed terms had to be executed by both Mr and Mrs Robinson. It was Mr Bueno's view that as neither had executed such a Deed no legally binding settlement had been concluded¹⁵.

The Law

8. At paras. 24-29 of his judgment, Ground CJ summarised the law on actual authority, applicable to the evidence in the case, by reference to *Halsbury's Laws*, 5th edition 2006 Vol. 66:

Para.11.25: *A barrister's authority to appear in proceedings is conferred by his instructions ... [such authority by instruction is the barrister's actual authority].*

Para.11.36: *Apart from such express authority as is conferred by his instructions, a barrister is ordinarily instructed on the implied understanding that he is to have complete control over the way the case is to be conducted, unless and until his instructions are withdrawn. He has unlimited authority to do whatever he considers best for the interest of his client. This is in regard to all*

¹² *ibid*

¹³ *ibid*

¹⁴ *ibid*

¹⁵ paras.52-53 Ground CJ's judgment

matters relating to the claim ... even to agreeing to a compromise of the claim or ... an order or judgment. The implied authority of counsel to agree a compromise is limited, however, to the issues in the claim and the compromise affecting collateral matters will not bind the client unless he expressly assents?

9. At para. 27 of his judgment, Ground CJ referred to the law on implied authority of an agent, citing the judgment of Brightman LJ in *Waugh v HB Clifford and Sons Ltd* 1982 Ch.374 at p.387:

The law thus became well established that the solicitor or counsel retained in an action has an implied authority between himself and his client to compromise the suit without reference to the client, provided that the compromise does not involve matter collateral to the action ... A compromise does not involve collateral matter merely because it contains terms which that court could not have ordered by way of judgment in the action;

and at p.388

... so many compromises are made in court or in counsel's chambers, in the presence of the solicitor but not the client. This is almost inevitable where a corporation is involved. It is highly undesirable that the court should place any unnecessary impediments in the way of that convenient procedure.

10. The law of agency applied to the relationship between Mr Robinson and his legal representatives, namely that of a disclosed principal and agent, are set out in Chapter 8 of *Bowstead and Reynolds on Agency*, at Article 71:

Para.8-001 - *The general rule is that a disclosed principal ... may sue or be sued on any contract made on his behalf and in respect of any money paid or received on his behalf by his agent, acting within the scope of his actual authority...*

Para. 8-002 – *An agent acting within the scope of his actual authority, express or implied, binds and entitles his principal;*

Para. 8-008 - *If the principal does something indicating he withdraws his authority, but does not communicate this to the agent, between himself and the principal, the agent still has actual authority and is not liable to the principal for exercising it. But if in such circumstances that withdrawal of authority comes to the notice of the third party, the third party probably cannot hold the principal liable, not only as regards the apparent*

authority but also on principles of actual authority.

11. On the evidence before him at paras. 30-37 of his judgment, Ground CJ set out his findings of fact on actual authority, which were correct in the view of the Court.
12. Mr Cottle, as non Bermudian local counsel, engaged in his profession in Bermuda by way of a work permit under a special practising certificate in accordance with Section 10(3)(b)(ii) and Section 12(1) of the *Bermuda Bar Act 1974*. When Mr Bueno was instructed his admission to the Bar was governed by the Bar Council Protocol paras. 3-8 in which para. 6 states:

Where the Bar Council supports an application for leading counsel to appear as an advocate before the Bermuda Courts, local counsel must appear as second or junior counsel.

Subsections 1), 2), 5), 6) of par.7 above make it plain that Mr Robinson was represented by Mr Bueno and Messrs Scott and Scott throughout; local counsel, Mr Larry Scott and Mr Cottle, at the beginning of the process; Mr Cottle during the negotiations; and Mr Larry Scott at the time of the Settlement Agreement and thereafter. Mr Woolridge also challenged Ground CJ's decision on actual authority on the basis that Mr Robinson was totally unrepresented after the expiry on 5 November 2008 of the work permit of Mr Cottle the non Bermudian local counsel.

The Court's Reasons for dismissal of Mr Robinson's appeal on the issue of Actual Authority

13. The reasons that the Court dismissed Mr Robinson's appeal on the issue of actual authority are the following:
 - 1) Messrs Scott and Scott were instructed to act for Mr Robinson with local junior counsel, Mr Larry Scott and Mr Cottle, and leading counsel Mr Bueno.
 - 2) Mr Bueno's instructions were to review Mr Robinson's case and the 14 years of litigation between Mr Robinson and the Bank and to make recommendations for future conduct. These instructions were on the understanding that Mr Bueno was to have complete control over the way he conducted Mr Robinson's case and unlimited authority to do what he considered for the best interest of Mr Robinson. This Mr Bueno did.
 - 3) Throughout the negotiations with the Bank, Mr Robinson's instructions were sought, obtained and acted upon by his legal

representatives.

- 4) Mr Robinson gave Mr Bueno express instructions to compromise in the terms of the Settlement Agreement with a settlement figure of BD\$ 125,000. Any second thoughts that Mr Robinson may have had were not communicated to Mr Bueno.
- 5) There were no collateral terms in the terms of the Settlement Agreement
- 6) The 14 November 2008 email from Mr Bueno to Mr Martin concluded the negotiations and finalised the Settlement Agreement.
- 7) Throughout Mr Robinson was represented as detailed in 13.1) above. Therefore the expiry of Mr Cottle's work permit on 5 November 2008 did not invalidate the Settlement Agreement.

Ostensible Authority

14. Mr Woolridge further submitted that Mr Bueno, as between himself and the Bank, had no ostensible authority to bind Mr Robinson to the Settlement Agreement. He only fleetingly touched upon it before the Court. This became of academic interest only, in the light of Ground CJ's correct ruling on the issue of actual authority.
15. At paras. 38-42 of his judgment, Ground CJ dealt with the issue of ostensible authority. As the Court has upheld his ruling on actual authority, it is unnecessary for the Court to address the issue of ostensible authority, save to say that The Court agreed with his findings and conclusion.

Contract or Condition Precedent

16. Mr Woolridge further asserted that Ground CJ wrongly concluded that the Settlement Agreement was not subject to contract or to a condition precedent that the parties should execute a deed of settlement.

The Evidence

17. The evidence which appears to have given rise to this ground of appeal is found in two conflicting emails from Mr Bueno after the settlement (14 November 2008) namely: the email of 19 December 2008 in para.7.7)(d) above and the email of 2 August 2009 in para.7.8 above.
18. At paras. 52-53 of his judgment, Ground CJ resolved the possible evidential conflict on this issue by recourse to the more contemporaneous email from Mr.

Bueno of 19 December 2008. He rejected Mr Bueno's legal opinion given in the email of 2 August 2009. For reasons, which in the view of the Court were correct, he found that the parties may at one time have contemplated some additional formal document, however, the proposed deed of settlement drafted by the Bank was not a condition to the formation of the contract (the Settlement Agreement) but only a condition precedent to the Bank's obligation to pay BD\$125,000 and release the security.

The reasons the Court dismissed the ground of appeal on the issue of the Settlement Agreement being subject to contract or a condition precedent are the following.

19. 1) The terms of the Settlement Agreement did not stipulate that the agreement was subject to contract or a condition that a deed of settlement be executed.
- 2) The proposed deed of settlement was served by the Bank on Mr Robinson's legal representatives, after the settlement agreement had been reached and after the Court of Appeal hearing on 18 November 2008, where it had been intimated that the matter had been settled.
- 3) No deed of settlement or other written document whatsoever was executed.

Mrs Robinson's Separate Action and Clause 6 of the Draft Deed of Settlement

20. It is common ground that Mrs Robinson was a party to the Settlement Agreement, and that she did not obtain her own individual and independent advice as to its potential effect on her interests arising out of the various transactions and claims including the acknowledgement by her to the contrary in Clause 6 of the draft deed of settlement (referred to in para.4.3) above).
21. Mr Woolridge asserted that Ground CJ was wrong not to include the recorded acknowledgement in Clause 6 in the provisions of the 2010 Order and wrong to make the Settlement Agreement enforceable against Mr Robinson alone. The point taken by Mr Woolridge was that when negotiating the Settlement Agreement, the Bank was aware of the action brought by Mrs Robinson against it, which had commenced in 1999. Her claim is for rescission of mortgage commitments to the Bank she had undertaken jointly with Mr Robinson in respect of two jointly owned properties, one of which was their family home.¹⁶

¹⁶ When Mrs Robinson commenced her 1999 Action, only the family home part of her claim remained; she and Mr. Robinson, not the Bank, had sold the other property and had applied the proceeds in reduction of their joint debt to the Bank.

She claims that she entered into the commitment under duress and/or undue influence of Mr Robinson. Mr Woolridge submitted that Mr Robinson and the Bank intended the Settlement Agreement to cover all the litigation between the parties and that Clause 6 of the draft deed of settlement reflected that joint intention. He argued that the Bank owed Mrs Robinson a duty to ensure that she had separate, independent legal advice or had signed a waiver before agreeing to be party to the Settlement Agreement. It was, he maintained, an all-or-nothing agreement, relying on well-known principles of objective construction of written documents, set out in the 29th edition of *Chitty on Contracts*, at paras.12-043 and 12-044.

22. Mr Marshall argued that the Bank had no duty to ensure that Mrs Robinson had obtained her own independent, individual legal advice before becoming party to the Settlement Agreement. He said that this was the duty of those representing her. He relied, in any event, on the undoubted fact that Clause 6 of the draft deed of settlement is not part of the Settlement Agreement as scheduled to the 2010 Order.
23. On the evidence before him, in paras.43-47 of his judgment, Ground CJ, in the view of the Court rightly, made his findings of fact and gave adequate reasons for his conclusions.

The Court's Reasons for dismissal of the issue of Mrs Robinson and the non-inclusion of Clause 6 in the Order

24. The reasons that the Court dismissed the ground of appeal concerning the issue of Mrs Robinson and the non-inclusion of Mrs Robinson in the Order are the following:
 - 1) Principles of objective construction of a written document do not apply in this matter.
 - 2) Although Mrs Robinson was a party to the settlement negotiations she was not a party in Mr Robinson's 2002 Action, therefore the court had no power to enforce the Settlement Agreement for or against Mrs Robinson in Mr Robinson's 2002 Action.
 - 3) In Mrs Robinson's dormant 1999 Action against the Bank, she still has the option, to continue with her action and/or sue her husband and/or her legal representatives.
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- 4) In any event, the Settlement Agreement, as set out in the 2010 Order, was in her favour as it satisfied the outstanding matter in her claim i.e. the rescission of the mortgage of the jointly owned family home and the re-conveyance of it to her and Mr Robinson free of debt.
- 5) Clause 6 of the draft deed of settlement was not part of the Settlement Agreement and did not accord with the facts.

Unfairness and Grave Economic Injustice

25. A further ground of appeal is that the terms of the Settlement Agreement were unfair, occasioning Mr Robinson such grave economic injustice that he ought not to be bound by the Settlement Agreement. Mr Woolridge asserted that i) the Agreement did not adequately compensate Mr and Mrs Robinson for their claimed losses caused by the Bank, and ii) that Ground CJ wrongly failed to take account of their losses and that, therefore, Mr Robinson should not be bound by the Settlement Agreement. Mr Woolridge sought to bolster his arguments by suggesting that Mr Bueno, when negotiating on Mr Robinson's behalf, could not have been aware of the scale of their losses. However, such a contention does not square with Mr Robinson's evidence in cross-examination before Ground CJ that he had given full instructions to Mr Cottle to provide Mr Bueno with all relevant information and material going to the quantum of his claimed losses.
26. Mr Marshall submitted that these matters are irrelevant to the issue of whether the Settlement Agreement was binding on Mr Robinson.
27. In case he was wrong on his finding of actual authority at paras. 54-65 of his judgment, Ground CJ, on the evidence before him, considered the issue of unfairness and grave injustice. He concluded, in the Court's view rightly, that principles of unfairness and grave injustice may be applicable where settlement is achieved through counsel acting **only** with ostensible authority. In paras. 59-65 he considered the various difficulties Mr Robinson would face in establishing the quantum of his claimed economic losses, **if** he had established that there had been only ostensible authority. In paras. 64-65 of his judgement on the basis of actual authority (and on the basis of ostensible authority only, had it applied) Ground CJ concluded, in the view of the Court rightly, that the compromise as embodied in the Settlement Agreement was objectively fair and reasonable.

The Court's reasons for the dismissal of the issue of unfairness and grave economic hardship are the following:

28. 1) The finding of actual authority was correct.
2) It was not necessary for the Court to rule on the issue of unfairness and grave economic injustice, given the correctness of the finding of actual authority.

Conclusion

29. Accordingly, the Court's reasons for its dismissal in June 2013 of Mr Robinson's appeal are that Ground CJ correctly found on the facts and in law that the parties, by their respective representatives, reached a binding settlement as recorded in his 2010 Order.

Signed

Dangor, A.J.A

I agree

Signed

Auld, J.A

I agree

Signed

Forte, A.J.A