In The Supreme Court of Bermuda

CIVIL JURISDICTION

2002: No. 241

BETWEEN:

DILTON MARTIN ROBINSON

Plaintiff

- and -

THE BANK OF BERMUDA LIMITED

Defendant

Dates of Hearing: 7th – 9th April 2010
Date of Judgment: 16th June 2010

Mr. Woolridge of Phoenix Chambers for the Plaintiff;
Mr. Marshall and Ms. Tornari of Marshall Diel & Myers for the Defendant.

NOTE: Parts of this Judgment have been redacted where indicated to give effect to the parties' agreement that the terms of settlement would be confidential: see further paragraph 67 below.

JUDGMENT

INTRODUCTION

1. This judgment is given on the defendant's application by summons of 7th April 2009 seeking an order staying the action on the grounds that the parties by their legal representatives have reached a binding settlement agreement. There are also claims for other consequential relief to which I will return at the end of this judgment[1].

[1] The full terms of the summons are:
"(i) An Order staying all further proceedings in this action save for the implementation and execution of a Deed of Settlement and Release and the filing of Consent Orders pursuant thereto as negotiated and agreed between the parties respective legal representatives in the terms set out and exhibited to the Affidavit of David J. Addington in support hereof;
(ii) An Order that the Registrar of the Supreme Court is directed and authorized pursuant to section 19 (b) of the Supreme court Act 1905 to execute the Deed of Settlement and Release, the Deed of Reconveyance and

2. The action itself concerns the defendant bank's conduct in respect of its refinancing of the plaintiff's financial affairs, which was consummated by a refinancing package of 23rd June 1992, pursuant to which the plaintiff gave the defendant various securities, including mortgages over his real property, and in particular a mortgage over the family home at 35 Town Hill Road, Flatts. The essence of the matter is that the plaintiff says that defendant persuaded him to enter into the agreement and give the securities whilst withholding from him its intention to disclose to his employer confidential information about his affairs that would cost him his job, and render him unable to service the debt.

3. There are in fact eight separate actions between the parties, or related entities, arising out of the same underlying facts[2]. Of these, three were brought against the plaintiff and his wife by the defendant or a related entity, and have resulted in judgments against them. Of the remainder, four were brought by the plaintiff, and one by his wife alone. The alleged compromise, which is the subject of this application, is intended to deal with all this litigation, and in particular to secure the dismissal on terms of the various claims brought by the plaintiff and his wife.

4. As the number of this action shows, it is old. Furthermore, it relates to events which took place in 1992, although the plaintiff says that some of the facts giving rise to the action did not come to his knowledge until 1997. The defendant raised a limitation point in respect of that, and there was to have been a trial of the limitation objection as a preliminary issue in 2007, pursuant to an order for directions given by consent on 15th January 2007. However, the trial of the preliminary issue was combined with a strike-out application, and in the event the Judge approached both on a strike-out basis, and came to no concluded decision on the limitation point, simply holding that the plaintiff's case on it was arguable, and she dismissed the defendant's applications.

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the Consent Orders dismissing the proceedings set out in the Schedule of the Release on behalf of Mr. Dilton Robinson and Mrs. Sharon-Lee Robinson in the event that they shall refuse to do so after having been given notice of a time and date by which they must execute the documents.
(iii) An Order that the costs of the application be awarded to the Defendant in any event."

[2] These are listed in paragraph 2 of Mr. Martin's second affidavit.

5. The defendant was aggrieved by the Judge's decision on the limitation point, and by notice of 13th August 2007 sought to appeal to the Court of Appeal. The matter came before the Court of Appeal, but there was then an issue as to whether the defendant's appeal was from an interlocutory order, in which case it was out of time, and the Court of Appeal did not hear it. The defendant then, by an application of 26th June 2008, sought leave from the Supreme Court to appeal out of time, and by an order of 27th June 2008 the Judge refused that application, apparently on the basis that the parties could then go straight to the full Court of Appeal for a rehearing, it being hoped that the Court might be persuaded to treat that as the full hearing of the appeal.

6. The matter was then listed to come before the Court of Appeal on the 18th November 2008. It appears that by that time Mr. Robinson, who has been legally aided throughout these proceedings[3], had secured the services of leading counsel from England, Mr. Anthony Bueno QC. Mr. Bueno did not appear before the Court of Appeal on the 18th November. Instead, Mr. Andrew Martin, the Bank's local counsel, appeared and intimated to the Court that the matter was in the process of being resolved. It is the defendant's case on this application that a binding agreement was reached between Mr. Bueno QC and Mr. Martin at about that time.

PROCEDURAL HISTORY

7. As noted above, the application for a stay was made by summons of 7th April 2009. It was supported by an affidavit of David John Addington of 16th March 2009. On 16th April Greaves J gave directions for the plaintiff to file an affidavit "setting out his position in relation to the Defendant's application within 21 days (including on the position on representation by counsel)", and put the matter for mention on 28th May 2009. On that occasion Mr. Robinson seems to have appeared in person. He then filed his affidavit on 7th May, in which he deposes that "there was no unconditional agreement with full instructions from the plaintiff and his wife." On the 28th May 2009 the matter came back before the Court pursuant to Greaves J's earlier order, and on that occasion Greaves J gave a direction

[3] The certificate on file is dated 30th March 2000 and was for 25 hours work. Obviously that must have been extended.

that the plaintiff clarify his representation by filing the appropriate notice, and "thereafter, a hearing date is to be set by the Registrar to determine the Defendant's Summons".

8. The plaintiff objected to that order for directions, on the grounds that "his attorney of record" was not present, and that it had no regard to his affidavit, and he filed a summons on 11th June to contest it. The Registrar did not issue that summons until 13th November 2009, and the reason for the delay is not clear from the file. However, when she did issue it she made it returnable of 15th December 2009. At the same time, by a Notice of Hearing of 16th November, she also fixed that date for the hearing of the defendant's summons for a stay. This was apparently in response to prompting from the defendant's attorneys.

9. Despite the terms of Mr. Robinson's summons of 11th June, it was not entirely clear who his attorney of record was at that point. Indeed that has been unclear since the work-permit of Mr. Cottle, his previous attorney, had expired on or about 5th November 2008. The failure of the plaintiff to clarify his representation, and file the proper notices as required by RSC Ord. 67, added considerably to the delay in getting this matter on for hearing. Eventually, however, Mr. Woolridge, who appeared for the plaintiff on this application, came on the record and filed the appropriate notice on 16th March 2010.

10. In the meantime the plaintiff had also raised an issue over the defendant's representation. The affidavit the defendant had filed in support of summons to enforce the settlement had been sworn by a Mr. Addington, a Legal Executive employed by Mello, Jones & Martin, the firm who had acted for the defendant in the settlement negotiations. He had not been directly involved in the settlement negotiations, but swore the affidavit to avoid the counsel who had, Mr. Martin, from giving evidence in a matter in which he continued to appear. However, the plaintiff took the point in paragraph 1 of his affidavit of 7th May 2009, and thereafter it was inevitable that Mr. Martin could not continue to act. Marshall, Diel & Myers therefore came on the record in their stead on 24th July 2009[4].

[4] They initially purported to file a notice on behalf of *the plaintiff* on 22nd July, but that was plainly an error and was corrected by a replacement notice of 24th July.

11. As noted above, on 16th November 2009 the Registrar issued a Notice fixing 15th December 2009 for the hearing of the defendant's application for a stay. It was not however heard on that date, and there followed a series of adjournments at the plaintiff's request, largely due to the issues over his representation and his health. Eventually the matter was put for mention on 29th January 2010, and on that date it was set down by agreement for a three day hearing commencing on 7th April 2010. The matter then duly commenced on that date, although in the interim there was a further issue over discovery, to which I return below.

THE BACKGROUND FACTS

12. The defendant's case is set out primarily in the second affidavit of Andrew Martin[5]. Most, if not all, of the salient primary facts are not contested, but in any event, having seen him cross-examined and having considered his testimony in the context of all the other evidence in the case, I accept Mr. Martin as a witness of truth. Mr. Martin deposes that the first approach came from the plaintiff's then attorney, Mr. Cottle, to see if the Bank would entertain settlement negotiations. This was in mid-August 2008. Mr. Martin says that Mr. Cottle told him that he had obtained a Legal Aid Certificate for an English Queen's Counsel to review the case and to make a recommendation in respect of settlement. One of the reasons given for instructing overseas counsel was that the plaintiff had come to distrust local counsel, who he felt were unduly deferential to the defendant. Mr. Martin then obtained the necessary instructions, and met with Mr. Cottle and Mr. Bueno QC, the leading counsel from England brought in by Mr. Cottle under the umbrella of his legal aid certificate[6]. The meeting was on Tuesday 23rd September 2008, and was without prejudice. At that meeting the parties agreed ground rules for the way ahead: namely that any settlement would be a complete one, embracing all eight actions pending between the plaintiff and his wife and the Bank, and would be strictly confidential. Mr. Martin then put the bank's offer, and the meeting concluded on the basis that the Messrs. Cottle and Bueno would confer with Mr.

[5] i.e. his affidavit of 7th October 2009. Although described as his second affidavit, it was his first in respect of the issue whether there was a settlement. His actual first affidavit was that of 24th June 2008 in support of the application for leave to appeal on the limitation point.

[6] The plaintiff produces a letter from Legal Aid that states that on 9th July 2008 Mr. Cottle of Scott & Scott had requested an extension of the plaintiff's Legal Aid certificate to allow him to be represented by Mr. Bueno QC, and that the Legal Aid Committee had approved that with a cap of $20,000 on his fees, and communicated that to Scott & Scott by letter of 21st July 2008.

and Mrs. Robinson and revert. Mr. Martin states that Mr. Bueno expressly confirmed that he and Mr. Cottle acted for both Mr. and Mrs. Robinson in the context of the negotiations.

13. Two days later, on Thursday 25th September 2008, there was a further without prejudice meeting between the lawyers, at which Mr. Martin deposes that Mr. Bueno QC stated that he had the authority and instructions to make counter-proposals for both the Robinsons, which he did. There were then discussions, after which Mr. Martin took the offer back to his clients, who eventually rejected it.

14. Mr. Bueno QC then followed that up with a revised proposal on 23rd October 2008, which was again rejected by the Bank. At this point it is worth comparing Mr. Martin's evidence with the disclosure provided by Mr. Robinson of his e-mail correspondence with the attorneys. This disclosure was not given voluntarily, but pursuant to an order made at the start of the trial[7]. It shows a sequence of e-mail correspondence between Mr. Robinson and Mr. Cottle, commencing at 5.48 a.m. on 21st October with Mr. Cottle asking for instructions before the return of leading counsel, and concluding at 6.24 a.m. with a response from Mr. Robinson which reads:

> "On same page with wife bottom line [*redacted*]"

In the circumstances I find that that must relate to Mr. Bueno's counter-proposal of 23rd October 2008.

15. Mr. Martin then deposes that Mr. Bueno made a further proposal on 3rd November for a full settlement of all current litigation, to include Mrs. Robinson and to be confidential, on terms that the defendant would [*redacted*]. Mr. Martin took instructions and reverted with a

[7] The question of disclosure first came before me on 25th March on the defendant's summons of 15th March. Mr. Woolridge, who had eventually come on the record on 16th March, did not appear, instead sending in a letter saying that he did not have time to take instructions. In the face of that I stood the application over until trial, but ordered that the plaintiff have the subject documents available with him in Court ready to produce should I order their production. In the event on the 7th March I did order their production, considering that any privilege had been waived when Mr. Robinson put his instructions to his attorneys in issue.

counter-offer [*redacted*]. In response, on Friday 14th November 2008, Mr. Bueno e-mailed from a Blackberry[8], at 6.12 pm:

> "Ok, we have a deal [*redacted*] plus other agreed terms. I have left lengthy message on your voicemail confirming this and other previously agreed terms."

16. The defendant produces a copy of that e-mail. I do not understand its authenticity to be disputed in any way. Mr. Martin also says that a message was indeed left on his voicemail. He then responded saying that he would prepare a draft in the terms agreed.

17. The Court of Appeal hearing was set for 18th November. Mr. Cottle's work-permit had by then expired, so Mr. Martin liaised with Mr. Scott, the principal of the firm Scott & Scott, who had held Mr. Cottle's work permit, presumably as his employer, about how to deal with the appeal. Mr. Martin was cautious about withdrawing it until the settlement documentation was completed. In the upshot they agreed to delist it by consent, and that happened, although both Mr. Martin and Mr. Scott attended before the Court on the 18th and intimated that the matter was in the process of being resolved.

18. Mr. Martin then drafted a Deed of Settlement and Release which he sent to both Mr. Scott and Mr. Bueno on the 20th November. Eventually on 3rd December Mr. Bueno replied "Subject to odd points, deed seems fine to me. It's certainly comprehensive!". He went on to make his "odd points", which Mr. Martin accepted and embodied in a revised deed the same day. On 8th December 2008 Mr. Scott then wrote:

> "Have been copied in on Tony's emails to you, and wish to indicate that we agree with our leaders position. He has suggested that you send the doc to us for signature, please do, negotiation are complete, there is no need for amendments, the terms are agreed by counsel, as I understand, after consultation with client.
> I will ensure that the agreement is executed."

[8] The e-mail address incorporates the name Christine Bueno, which I assume is his wife's name, but that appears to be the e-mail address he used throughout this matter, and nothing turns on it.

19. Mr. Martin replied to that proposing a formal closing with an exchange of the executed documents [*redacted*], and flagging the need for consent orders to deal with the proceedings. Mr. Martin then delivered a complete package of documents to implement the settlement, including a deed of settlement and draft consent orders, and deposes that on 15th December he had a telephone conversation with Mr. Scott who confirmed that Mr. Bueno QC was satisfied that the documentation was in accordance with the agreement reached, and essentially conveyed that they had a deal.

20. At that point things seem to have started to unravel. Mr. Martin pressed for a settlement before Christmas. On 19th December he e-mailed Mr. Scott, saying:

> "Obviously as far as we are concerned there is a settlement on the terms agreed between us and we should now proceed to implement the terms."

21. On the same day Mr. Bueno QC replied:

> "I agree that a settlement was reached between us on the terms of the agreed draft, for my part in accordance with the express authority Tony Cottle and I received from both Mr. and Mrs. Robinson. Likewise, you were duly authorized.
> The agreement merely records the agreed settlement, which was not subject to contract.
> I suggest that you call Larry for an update, but if I can be of any help, please call.
> This is an emotional time of the year ....and Dilton has lived with this for a long time.
> With my best wishes for a very happy Christmas,
> Tony"

22. In the event the documents were not signed, and on 5th March Mr. Martin wrote to Mr. Scott a formal letter before action, as it were, notifying him of the Bank's intention to seek an order for specific performance of the settlement agreement, and recording that the Bank remained "ready, willing and able to complete the settlement according to the agreed terms." At that point he also threatened to call Mr. Bueno QC and Mr. Scott in support of the Bank's case, although he seems to have thought better of that.

23. The plaintiff sets out his case in response in an affidavit of 7th May 2009. Much of that is argumentative, but the essence of his case on the settlement is that "there was no

unconditional agreement with full instructions from the Plaintiff and his wife" and "we have never wavered from our position, once having decided not to enter into an agreement." He reiterated his position that the case should go to trial. This was repeated in a further affidavit of 16th November 2009.

THE LAW

24. The law on compromises entered into by counsel is well settled. There is implied into the retainer between an attorney and his client the authority to compromise the case: it does not have to be spelled out or expressly agreed. As a corollary of that, as between the attorney and third parties, the attorney has ostensible authority to settle the case. "Ostensible authority" is a concept from the law of agency. An agent who has ostensible or "apparent" authority to bind his principal can do so even if he is not in fact so authorized. In the normal course, counsel has ostensible authority to settle a case in which he appears, and his client will be bound by such a settlement even if he did not authorize it in fact or even expressly forbad it.

25. The law on counsel's implied authority is summarized in Halsbury's Laws, 5th ed., vol. 66 (2009) at para. 1136:

> "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 in which the case is conducted, and has, unless and until his instructions are withdrawn, unlimited authority to do whatever he considers best for the interests of his client with regard to all matters that properly relate to the conduct of the case. This authority extends to all matters relating to the claim . . . and even to agreeing to a compromise of the claim, or to a verdict, order or judgment. The implied authority of counsel to agree a compromise is limited, however, to the issues in the claim, and a compromise affecting collateral matters will not bind the client unless he expressly assents."

26. The law in respect of counsel's ostensible authority is dealt with at Ibid., para. 1138:

> "Questions of difficulty have arisen where the authority of counsel to compromise a case has been expressly limited by the client, and counsel has entered into an

agreement or consented to an order or judgment in spite of the dissent of the client, or on terms differing from those which the client authorised.

If the limitation of authority is communicated to the other side, consent by counsel which exceeds the limits of his authority will be of no effect. The position is more uncertain where the authority of counsel is limited, but the limitation is unknown to the other side, who enters into the compromise believing that the opponent's counsel has the ordinary unlimited authority. Counsel has an apparent or ostensible authority, at least as wide as his implied authority, to compromise a claim; and in some cases, where the matter is within the apparent authority of counsel, the courts have refused to inquire whether there was any limitation, when it was not communicated to the other side, and have refused to set aside a compromise entered into by counsel."

27. Despite the learned author's reference to questions of difficulty and the point being 'more uncertain', the law in this respect is really quite clear and well understood. It was set out and explained by Brightman LJ in Waugh v H. B. Clifford & 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 as 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"; and ostensible authority, as between himself and the opposing litigant, to compromise the suit without actual proof of authority, subject to the same limitation; and that 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; for example; the return of the piano in the *Prestwich* case, 18 C.B.N.S. 806; the withdrawal of the imputations in the *Matthews* case, 20 Q.B.D. 141 and the highly complicated terms of compromise in *Little v Spreadbury* [1910] 2 K.B. 658.

In none of the cases cited to us has there been any debate on the question whether the implied authority of the advocate or solicitor as between himself and his client is necessarily as extensive as the ostensible authority of the advocate or solicitor vis-à-vis the opposing litigant. The possibility of a difference seems to have been adverted to by Byles J. in the *Prestwich* case. 18 C.B.N.S. 860, 809. In my judgment there is every reason to draw a distinction.

Suppose that a defamation action is on foot; that terms of compromise are discussed; and that the defendant's solicitor writes to the plaintiff's solicitor offering to compromise at a figure of £100,000, which the plaintiff desires to accept. It would in my view be officious on the part of the plaintiff's solicitor to demand to be satisfied as to the authority of the defendant's solicitor to make the offer. It is perfectly clear that the defendant's solicitor has ostensible authority to comprise on behalf of his

client, notwithstanding the large sum involved. It is not incumbent on the plaintiff to seek the signature of the defendant, if an individual, or the seal of the defendant if a corporation, or the signature of a director.

But it does not follow that the defendant's solicitor would have implied authority to agree damages on that scale without the agreement of his client. In the light of the solicitor's knowledge of his client's cash position it might be quite unreasonable and indeed grossly negligent for the solicitor to commit his client to such a burden without first inquiring if it were acceptable. But that does not affect the ostensible authority of the solicitor to compromise, so as to place the plaintiff at risk if he fails to satisfy himself that the defendant's solicitor has sought the agreement of his client. Such a limitation on the ostensible authority of the solicitor would be unworkable. How is the opposing litigant to estimate on which side of the line a particular case falls?

It follows, in my view, that a solicitor (or counsel) may in a particular case have ostensible authority vis-à-vis the opposing litigant where he has no implied authority vis-à-vis his client. I see no objection to that. All that the opposing litigant need ask himself when testing the ostensible authority of the solicitor or counsel, is the question whether the compromise contains matter "collateral to the suite." The magnitude of the compromise, or the burden which its terms impose on the other party, is irrelevant."

And also at Ibid., p. 388:

"I think it would be regrettable if this court were to place too restrictive a limitation on the ostensible authority of solicitors to bind their clients to a compromise. I do not think we should decide that matter is "collateral" to the action unless it really involves extraneous subject matter, as in *Aspin v Wilkinson* (1879) 23 S.J. 388, and *In re A Debtor* [1914] 2 K.B. 758. 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. A party on one side of the record and his solicitor ought usually to be able to rely without question on the existence of the authority of the solicitor on the other side of the record, without demanding that the seal of the corporation be affixed; or that a director should sign who can show that the articles confer the requisite power upon him, or that the solicitor's correspondence with his client be produced to prove the authority of the solicitor. Only in the exceptional case, where the compromise introduces extraneous subject-matter, should the solicitor retained in the action be put to proof of his authority. Of course it is incumbent on the solicitor to make certain that he is in fact authorized by his corporate or individual client to bind his client to a compromise. In a proper case he can agree without specific reference to his client. But in the great majority of cases, and certainly in all cases of magnitude, he will in practice take great care to consult his client, and I think that his client would be much

> aggrieved if in any important case involving large sums of money he relied on his implied authority. But that does not affect his ostensible authority vis-à-vis the opposing litigant."

28. The one area of difficulty is whether, in the case of a compromise made by counsel acting with ostensible but not actual authority, the court can interfere in cases of grave injustice. Halsbury's Laws, concludes paragraph 1138 by stating that it can:

> "The true rule seems to be, however, that in such a case the court has power to interfere; that it is not prevented by the agreement of counsel from setting aside the compromise; that it is a matter for the discretion of the court; and that when, in the particular circumstances of the case, grave injustice would be done by allowing the compromise to stand, it may be set aside, even though the limitation of counsel's authority was unknown to the other side."

29. I have reservations about whether that is a correct statement of the law. It is hard to see how a court can, in the absence of legislation, set aside a contract on the grounds of unfairness. The cases can perhaps be distinguished on their facts. In Neale v Gordon Lennox [1902] AC 465, HL, Lord Halsbury regarded the agreement in that case as an attempt to fetter the jurisdiction of the Court. The modern example of the principle cited by Halsbury's Laws, Marsden v Marsden [1972] 2 All ER 1162, concerned ancillary relief in a matrimonial case, where the courts have always asserted a jurisdiction to override the consent of the parties. It may be that the correct approach is that, to the extent that the enforcement of a compromise involves specific performance or something analogous thereto, that is an equitable remedy, and is discretionary, one of the grounds for refusing it being severe hardship. However, whatever the correct legal analysis may be, for the purposes of this case I accept the principle as stated in Halsbury's Laws, but, for the reasons given below, do not consider that it is engaged by the facts.

THE ISSUES

30. On the face of the documents there was a concluded settlement agreement when Mr. Bueno sent his e-mail of 14th November saying that they had a deal. In his affidavits the plaintiff raised an issue over the date, being that in the letter of 5th March 2009 giving notice of this application, Mr. Martin had given a different date for the conclusion of the

compromise. I do not think that this is a real issue in these proceedings, but as it has been raised I think it best to get it out the way at the outset. In the letter of 5th March 2009, threatening to take legal action to enforce the alleged compromise, Mr. Martin wrote:

> "We refer to the settlement agreed between Mr. Martin of this firm on behalf of the Bank and Mr. Bueno QC as leading counsel on behalf of Mr. and Mrs. Robinson in October 2008."

Mr. Robinson pounces on this and in his affidavit of 16th November 2009 refers to –

> "Two entirely contradictory statements which, amongst numerous others, questions the creditability of Mr. Martin."

31. I do not think that the discrepancy does bring Mr. Martin's credit into question. His evidence was that he simply made a mistake in the letter, and I accept his evidence on that. As it turns out there was no challenge to the authenticity of Mr. Bueno's e-mail of 14th November, whatever the other arguments might be. There is, therefore, no issue of credit for the discrepancy to go to. At best it is a cross-examination point, but in the event the cross-examination of Mr. Martin on that point was cursory, and it was not suggested to him that he was not telling the truth on the date issue. Indeed Mr. Martin was scarcely cross-examined about the making of the alleged settlement at all, nor about the terms of the offers and counter-offers, and when Mr. Marshall attempted to re-examine on such matters Mr. Woolridge objected, pointing out that he had not cross-examined on that and his case was that the plaintiff was not made privy to the negotiations[9]. There is, therefore, nothing in the discrepancy as to the date in the letter of 5th March 2009, and the alleged settlement upon which the defendant relies is that effected by Mr. Bueno's e-mail of 14th November 2008.

32. From his affidavits, and from the arguments advanced at the hearing by Mr. Woolridge[10], the plaintiff's case appears to be:

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[9] As it turns out that was not his client's case, as the plaintiff admitted being privy to the negotiations. The plaintiff's eventual case in his evidence was that he withdrew his instructions at the last minute, for which see further below.

[10] I am somewhat hampered by Mr. Woolridge's failure to file written submission in advance of trial, despite directions requiring him to do so. Eventually I made an unless order on 25th March, requiring submissions by

(i) that Mr. Bueno, and later Mr. Scott[11], were acting outside their instructions, and had no authority to conclude a settlement ("the Actual Authority Issue");

(ii) that there could be no ostensible authority as Mr. Bueno was instructed in respect of the appeal only and did not have the necessary immigration approval nor the approval of Legal Aid to conduct settlement negotiations ("the Ostensible Authority Issue");

(iii) that the alleged involvement of the plaintiff's wife in the settlement gives rise to various difficulties, including (a) that counsel had no actual authority from her; (b) that they had no ostensible authority to act on her behalf as Mr. Bueno did not have the necessary immigration approval nor the approval of Legal Aid to do so; (c) that she is neither a party to these proceedings nor to the application for a stay; and (d) that a reference in the draft Deed of Settlement to her having received independent advice were fictitious;

(iv) that any agreement was in any event subject to a written contract, alternatively a written contract was a condition precedent of the agreement ("The Condition Precedent Issue"); and

(v) that if a compromise was in fact effected by counsel, it should not be enforced on the grounds that to do so would cause a grave injustice to the plaintiff ("The Injustice Issue").

31st March, but that was not complied with. At the end of the hearing I adjourned overnight to give an opportunity for the preparation of closing submissions, but in the end Mr. Woolridge elected to proceed orally.

[11] I have not included Mr. Cottle in the statement of this issue, as he appears to have played no part in the making or subsequent affirmation of the settlement.

DISCUSSION AND FINDINGS ON THE ISSUES

(i) The Actual Authority Issue

33. Given counsel's ostensible authority, it may not strictly be necessary to decide this. It is in the nature of things a difficult inquiry to conduct. Mr. Martin is not going to know about his opponents instructions unless they tell him, and it was not suggested to him in cross-examination that any limitation in this respect was conveyed to him at the material time. I have not heard from any of the attorneys involved on the plaintiff's side, neither side having chosen to call them. In any event, in the case of Mr. Bueno, he is not Bermudian, does not reside here and apparently practices in London.

34. On the other hand I do have, in the evidence, various written statements from Mr. Bueno upon which the defendant relies. Thus in an e-mail of 19th December 2008 (see above) he said:

> "I agree that a settlement was reached between us on the terms of the agreed draft, for my part in accordance with the express authority Tony Cottle and I received from both Mr. and Mrs. Robinson."

Later, in an e-mail of 2nd August 2009, addressed to Mr. Larry Scott, the principal of the firm retained by the plaintiff, Scott & Scott, he said:

> "As to the terms of the settlement itself, my instructions, which I expressly confirmed with TC before agreeing the terms with AM, reflected the negotiating authority I was given."

That latter e-mail was in fact put into evidence by the plaintiff, in support of his contention that any agreement was subject to a condition precedent, and I have dealt with that further below. At this point, however, it is important to note that Mr. Bueno never wavered in what he was saying about his instructions.

35. Although it is the plaintiff's case that neither Mr. Bueno nor Mr. Cottle had his instructions to conclude a settlement, it does seem that he now accepts that he did give them instructions to negotiate, which he later withdrew. In evaluating that there is a complete

absence of e-mail or other correspondence between counsel and principal on the settlement point at the relevant time. The plaintiff has disclosed material from September and October concerning the offers exchanged then, but in November the only correspondence is that passing between him and Mr. Scott concerning representation on the appeal. Mr. Marshall invites me to draw adverse inferences from that, but I decline to do so. The earlier e-mails were exchanged between the plaintiff and Mr. Cottle, with the latter acting as the go-between with overseas counsel, Mr. Bueno. By the time of the alleged settlement Mr. Cottle no longer held a work-permit, it having expired, and I accept that thereafter Mr. Cottle was wary of engaging in e-mail traffic with Mr. Robinson, whom he could no longer legally represent. On the other hand, Mr. Robinson now admits some form of direct telephone contact in November 2008 with Mr. Bueno, who had by then returned to England. As to that, Mr. Robinson said in cross-examination that he was aware in November 2008 that Mr. Bueno was going to make an offer in the terms set out in paragraph 23 of Mr. Martin's second affidavit. I find that that was the offer, made by telephone on 3rd November, [*redacted*]. I accept Mr. Martin's evidence that that was rejected by the Bank, but that, after taking instructions, he indicated that the Bank would settle on the same terms but with [*redacted*]. I cannot put an exact date on that, but Mr. Cottle's e-mail to the plaintiff of 5th November 2008, in which he says "you have to proceed as if there is no settlement", is likely to mean that the counter-offer had not been communicated at that date. I also find, on that evidence, that as at the 5th November an offer to settle on terms [*redacted*] was on the table with the knowledge and authority of Mr. Robinson.

36. There was then a further telephone conversation between the plaintiff and Mr. Bueno, with Mr. Cottle present. I extract that from two pieces of evidence in Mr. Robinson's cross-examination. The first is that he said that "there was further talk about [*redacted*] – I told Mr. Cottle no, it's off." That must be a reference to the Bank's counter-offer to Mr. Bueno's proposal to settle on terms [*redacted*]. And the second piece of evidence is that he was asked directly if he authorized his attorney to [*redacted*], and he said:

> "Yes, . . . subject to . . . yes . . . and most important it was withdrawn immediately afterwards with Mr. Cottle outside off the phone because of things that went on – it was withdrawn and then there was a further affirmation of it."

37. There was no re-examination on that. On that basis I find as a fact that the plaintiff authorized Mr. Bueno in terms that he then communicated by the e-mail of 14th November. The plaintiff may well then have had second thoughts when he got off the phone, and he may even have communicated them to Mr. Cottle, who, as he says, was by then acting for nobody because of his work-permit position. But I do not consider that the plaintiff communicated any second thoughts to Mr. Bueno. He does not say in terms that he did, and in any event it is inconceivable that Mr. Bueno would have then acted as he did had any such limitation been communicated to him. Nor, for the same reason, do I think that he communicated any withdrawal or limitation to Mr. Scott.

(ii) The Ostensible Authority Issue

38. Given my finding as to actual authority, I do not strictly need to deal with ostensible authority, but in case I am wrong on actual authority, I now go on to deal with it. I think that each of Messrs. Cottle, Scott and Bueno QC had ostensible authority to conclude a settlement of all the litigation between these parties. In the case of Mr. Cottle that may have come to an end on 5th November, when the plaintiff says that Mr. Cottle's work permit expired. I do not think that that matters as it was not he who effected the settlement.

39. In the case of Mr. Bueno there is an issue as to what he was instructed in respect of. As noted above, Mr. Martin says that Mr. Cottle told him that he had obtained legal aid to pay for an English QC to review the case and make a recommendation in respect of settlement. I accept Mr. Martin's evidence on what he was told, which was not really contested. The plaintiff, on the other hand, says that it was decided to retain a QC to fight the Bank's appeal, and he explains that a foreign QC was engaged primarily because it was felt that the Courts gave deference to the large businesses and the big white Law Firms[12]. I have not been shown the Legal Aid certificate. Mr. Robinson does produce a letter from the Legal Aid office, but that only addresses the point that the certificate was for his representation alone, and not his wife's. Mr. Martin was only briefly asked about legal aid in cross-examination,

[12] See paragraph 19 of the plaintiff's second affidavit, dated 16th November 2009, which appears to have been drafted and filed when he was acting in person.

and he then said that he was not aware what the certificate related to, although that again was really in the context of whether or not Mr. Bueno could properly be regarded as representing the plaintiff's wife. In deciding the extent of Mr. Bueno retainer, I think it is significant that he was in Bermuda in September 2008, when he met twice with Mr. Martin, but not in Bermuda for the hearing of the appeal, in November. Against that background, I find as a fact that what Mr. Cottle told Mr. Martin, namely that Mr. Bueno was instructed in respect of a settlement, was true.

40. But in any event, even if I were wrong on that, I do not think that Mr. Bueno's apparent authority would have been limited even if he had only been instructed in respect of the appeal on the limitation point. Nor would it have been limited by the ambit of his immigration permission or the extent to which legal aid had approved his retainer. Those were all matters between him and his client, but as regards third parties they were behind the veil. Mr. Bueno was instructed in the case. That is not contested and that is enough.

41. As to the other litigation, it may be that Mr. Bueno was not directly involved in any of those actions, and the extent to which Mr. Cottle or Scott & Scott had formally come on the record in respect of them is also not clear. But it seems to me that the subject matter of all these actions is interrelated, and they arise out of a common set of underlying facts. Mr. Martin deposes to that in his second affidavit, and the plaintiff himself affirms that.[13] It also seems that it was this action (2002 No. 241) which had assumed primacy. For those reasons I think that whoever was acting for the plaintiff in this action had ostensible authority in respect of all the plaintiff's litigation concerning the Bank.

42. Moreover, and in any event, it is uncontested that the plaintiff allowed Mr. Bueno to negotiate on his behalf in October and early November, and thus clothed him with apparent authority which would have overridden any such technical arguments. Thus, on 21st October 2008 Mr. Cottle emailed the plaintiff:

[13] In paragraph 2 of the plaintiff's second affidavit he deposes:
"As acknowledged by Mr. Martin and the Bank the Plaintiff and wife's claims arise out of common underlying facts and as such there should be no objection to a consolidation of the actions to which the defendant has admitted commonality."

> "Urgent
> Leading counsel must have your instructions by return
> TC"

And the plaintiff replied that he was not comfortable with the Bank's offer, explaining why, and saying:

> "My suggestions are that we go back as discussed asking that [*redacted*] and let the chips fall where they may.
> No doubt we will have to go to the appeal which is not that far away then we may have to reassess our position."

In context it could only have been leading counsel who was to go back and ask this, and it illustrates that the plaintiff knew and intended throughout that Mr. Bueno would conduct negotiations with the other side.

(iv) The Issues concerning Mrs. Robinson

43. The plaintiff makes much of the fact that Mr. Bueno was not instructed by his wife, was not approved by legal aid to represent her, and did not have immigration permission to represent her. He therefore argues that counsel could have no authority, whether actual or ostensible, to compromise the separate action (Civ. 1999 No. 312) brought by her against the Bank to set aside the mortgage over the family home on the grounds of undue influence.

44. The short answer to that is that Mrs. Robinson has not been made a party to this application, and I cannot therefore at this point enforce any compromise against her, whatever the terms of the defendant's summons. I am therefore, only concerned with the plaintiff and whether he in fact is bound by the alleged compromise. Should his wife later seek to pursue her action, it may become an issue whether she is also bound, but her action has been dormant for some time, and in any event the compromise disposes of the primary claim in her action [*redacted*][14].

[14] [*redacted*]

45. In addition, I find as a matter of fact that the plaintiff, in the correspondence of 21st October 2008 referred to above, was purporting to give instructions on behalf of his wife and with her agreement. Thus in his email at 6.05 a.m. on 21st October the plaintiff said about the defendant's then offer – "This is something that I cannot live with and my wife has been persuaded and is in agreement." In a similar vein on 23rd October he responded to Mr. Cottle's request for instructions: "On same page *with wife* bottom line [*redacted*]" [my emphasis]. Having given those instructions I think that he cannot now be heard to say that his wife was not a party to the settlement negotiations.

46. I also accept Mr. Martin's evidence, which was reiterated on cross-examination, that Messrs. Bueno and Cottle had given him the clearest understanding that they had instructions to represent both Mr. and Mrs. Robinson, and that in the course of the negotiations, Mr. Bueno made representations as to what they both wanted to achieve in respect of a settlement. I do not think that Mr. Bueno would have said that if it were untrue, and it is born out by a piece of indirect evidence from the plaintiff himself, who gave evidence that at one stage Mr. Bueno had said to him words to the effect "let's settle, make your wife happy and get on with your life. Consider it like a business deal that went bad."

47. I also note that the wife has not sought to join in these proceedings and contest the alleged settlement, nor has she appeared and given evidence on behalf of the plaintiff. I have, therefore, no evidence from her to contradict either the plaintiff's own statements in his e-mails that she concurred in the early stages of the settlement negotiations, nor the inference that I draw from that that she continued to concur in the plaintiff's instructions up to the end. I therefore find as a fact as against the plaintiff (appreciating that she is a party to neither this action nor this application and that any such finding may not therefore bind her) that his wife was a party to the settlement negotiations.

48. There is one further point that the plaintiff makes concerning his wife's involvement, or lack of it, and it is a point which straddles both this issue and the separate question whether a Deed of Settlement signed by both the plaintiff and his wife was a condition precedent, but I will deal with it here. Clause 6 of the draft deed provides:

> "The Robinsons acknowledge that in executing this Deed on the terms set out herein they have done so freely and willingly and after having obtained their own individually independent legal advice."

49. It appears from Mr. Martin's evidence that that was inserted by him in an attempt to make the settlement water-tight from challenge by the wife on the grounds that it had been procured by her husband's undue influence, in the same way that she had sought to challenge her participation in the mortgage over the family home in her separate action to set that mortgage aside. As it is, the statement appears to be a fiction, and there is nothing to suggest that Mrs. Robinson was individually advised separately from her husband. But I think that that is neither here nor there. The inclusion of such a provision was not in fact one of the terms of the settlement agreement, which I find to be those set out in paragraph 23 of Mr. Martin's second affidavit (with the necessary substitution [*redacted*]), and it can, I think, be severed from the documentation without interfering with the essence of what I have found to be agreed.

(v) The Condition Precedent Issue

50. As noted above, Mr. Martin, having received Mr. Bueno's e-mailed "OK," went away and produced a Deed of Settlement and Release. This was no doubt a prudent thing to do, both in light of the history, and [*redacted*]. I do not think that that made the agreement subject to contract, nor was such a deed a contractual requirement to give effect to the compromise.

51. The waters on this have been muddied by an e-mail from Mr. Bueno to Mr. Scott dated 2nd August 2009 – i.e. nearly a year after the events – in which he said, among other things:

> "I also explained that AM [*i.e. Andrew Martin*] made it clear to me that a condition precedent of the settlement was that a Deed recording the agreed terms had to be executed by both Dilton **and** Mrs. Robinson. As neither executed such a deed it seems that **no legally binding** settlement was concluded. Presumably you passed this on to Dilton and his new attorney (if any)?

> As to the terms of the settlement itself, my instructions, which I expressly confirmed with TC [*i.e Tony Cottle*] before agreeing the terms with AM, reflected the negotiating authority I was given. What is your position? Have you checked your and Dilton's telephone records. What is the current status of Legal Aid (which I do not believe can any longer be justified)?"

52. This document is put before me by the plaintiff as an exhibit to his third affidavit of 25th January 2010, in support of the proposition that the agreement was subject to a condition precedent. It is not clear what Mr. Bueno thought he was doing at this point, and in particular whether he intended this to be given in evidence. To the extent that it is now put before me by the plaintiff as evidence of the truth of its contents, it is not helpful to his case that Mr. Bueno was exceeding his authority (as I have noted above). But to the extent that it is put before me as evidence of a condition precedent, I reject it. It is at odds with the contemporary documentation, and in particular Mr. Bueno's own e-mail of 19th December 2008, referred to above, in which he said to Mr. Martin:

> "I agree that a settlement was reached between us on the terms of the agreed draft, for my part in accordance with the express authority Tony Cottle and I received from both Mr. and Mrs. Robinson. Likewise, you were duly authorized.
> The agreement merely records the agreed settlement, *which was not subject to contract*." [Emphasis added]

53. Nor, as a matter of law, does what Mr. Bueno now says establish a condition precedent. It may well be that the Bank wanted the formal documentation in place before it [*redacted*]. Who would not? That does not mean that the compromise was subject to a condition precedent. It simply means that one of the terms of the agreement was that the plaintiff was to execute a formal deed of settlement. Such a term is not a condition precedent to the formation of the contract. It is simply a 'promissory condition'[15], and as such only a condition precedent to the Bank's obligations to, *inter alia*, [*redacted*]. To the extent that Mr. Bueno is purporting to give legal advice to the contrary, I am not bound by his legal opinion, and indeed, with great respect, reject it.

[15] See Lord Denning's discussion of this term in Trans Trust S.P.R.L. v Danubian Trading Co. Ltd. [1952] 2 QB 297 at 304. If the requirement for a Deed of Settlement had indeed been proposed by the defendant for its benefit, I would, had it come down to it, also have held that it could be waived by the defendant, but that is not how they put their case.

(vi) The Injustice Issue

54. The question whether any settlement should be set aside on the grounds of grave injustice, or some similar test, only arises in the case of a compromise which is binding solely on the grounds of counsel's ostensible authority. It has no application if the compromise was within his actual authority at the time. As I have found that this compromise was in fact within Mr. Bueno's actual authority at the time it was made, the question simply does not arise. However, lest I was wrong on that, I have gone on to deal with the question of whether the settlement is unjust to the plaintiff.

55. Mr. Marshall argues that this question has no application if the compromise was within counsel's implied authority at the time. I do not think that I am concerned with that. The question of implied authority operates as between attorney and client. To the extent that Mr. Woolridge argues that the authority extended to the attorneys carried with it a duty to negotiate terms that reflected the plaintiff's actual losses, that may or may not apply as between attorney and client, but unless communicated to the other side, any such duty would not limit counsel's ostensible authority *vis à vis* the opposing litigant: see Brightman LJ in Waugh v H. B. Clifford & Sons (*supra*). Nor was Mr. Martin for the Bank obliged in any way to give credence to the plaintiff's alleged losses when negotiating the settlement, or to satisfy himself that the plaintiff's counsel was properly taking those losses into account. Mr. Martin owed the plaintiff no duty, and he was perfectly entitled to proceed on the basis that, as he said in his evidence, there was no substance to any of the plaintiff's claims whatsoever.

56. As to the fairness of the compromise, the short answer may be that it only differed by [*redacted*] from the offer which the plaintiff now acknowledges he knew Mr. Bueno was going to make. In those circumstances it is hard to see how any question of grave injustice could arise. Nevertheless, given that much of the plaintiff's case was directed to this question, I have gone on to look at the overall picture, albeit in general terms and bearing in mind that I have not heard full and proper evidence on the complex issues which the plaintiff seeks to raise.

57. Under the compromise the plaintiff and his wife [*redacted*]. In that context it is worth remembering that this action started out as a claim for rescission of the loan agreement with an alternative claim in damages[16], although I accept that, like Topsy, it has grown over time. On the other hand, there can be little doubt that the plaintiff is dissatisfied with what he got. It is also plain that he entertained high expectations of this litigation [*redacted*]. And in paragraph 4 of that affidavit he said:

> "The main point of contention with the purported agreement is that it does not adequately compensate me and my family for our losses as a result of the conduct of the Defendant. It is apparent that Mr. Bueno had no idea as to the extent of those losses and the type of settlement that would be equitable in the circumstances."

Much of the cross-examination of Mr. Martin was then directed to that question.

58. Originally the plaintiff's damages were inadequately pleaded[17], but, in a second attempt to get leave to amend, Mr. Cottle did formulate a "Schedule of Loss and Damage", and it seems that Simmons J was minded to allow that[18], although such an amendment was never formally made. That proposed amendment pleaded that "The Plaintiff's primary case is that but for the Defendant's wrongdoing the Plaintiff would have retained the benefit of the assets (including that jointly owned with his wife) forming the security purportedly taken by

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[16] Thus the writ was endorsed:

> "The Plaintiff's claim is for:
> 1) Rescission of a contract for finance between the Defendant and the Plaintiff entered into on or about 23.6.92 on the 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
> 3) Further and other relief"

[17] On the inadequacy of the pleadings, see my comments in paragraphs 17 – 20 of my ruling of 26th January 2005 on the plaintiff's first application to amend. In particular, at paragraph 19, I said:

> "19. I think that the plaintiff's loss should be pleaded properly at the outset. It is obvious from the circumstances of the case that the plaintiff was already heavily indebted before entering into the refinancing arrangements. In such circumstances there may be difficult arguments about the causation of any loss, some of which may go to the heart of the whether the plaintiff has a cause of action at all. Moreover, insofar as the action is brought in Tort for fraud, damage is an essential component of the cause of action (see Clerk & Lindsell, 17th ed., para. 14-39) and must, therefore, be properly pleaded. Similarly, paragraph 33 simply pleads that the plaintiff disposed of the defendant's assets at an undervalue. For that claim to be maintained the plaintiff needs to plead the particular assets disposed of, the price realized, and the value alleged. Until that is done there is no properly pleaded cause of action."

[18] See p. 5 of her judgment of 11th July 2007 on the preliminary issues: "In retrospect I should have made it clear that the plaintiff had leave to amend by including the schedule of loss."

the Defendant respecting the financial accommodation provided by the Defendant to them in 1992." There is then a second, alternative pleading, that if, contrary to the Plaintiff's primary case, it was held that the Bank was entitled to realize the securities, it did so at an undervalue.

59. An evaluation of that requires a brief consideration of what is really at issue in the main proceedings. The plaintiff complains of two things. The first is that in 1992 the Bank released information concerning his involvement in a property transaction to his then employer, which led to his dismissal. He therefore lost his income, and as a result could not service his substantial debts. The second is that the Bank, prior to releasing that information, offered to refinance his debts, on the basis that they took substantial securities over his various properties, and that they concluded that refinancing in the knowledge that they were about to reveal information which would cause him to lose his job, and without telling him that that was what they were about to do. There is evidence, in the form of e-mails, that the Bank took an internal decision to secure their position by concluding the refinancing and taking the various securities, before releasing the damaging information to the plaintiff's employer. It is very important to keep these two causes of complaint separate for at least two reasons: (1) different limitation considerations apply to them; and (2) different damages may flow from them.

60. On the limitation question, any cause of action concerning the release of information to the plaintiff's employer back in 1992 is likely to be statute barred, because he knew about it at the time. For that reason on 28th November 2002 the Court of Appeal in a related action (Civ. 1998 No. 251), set aside leave to amend to plead causes of action arising from that, holding that, *inter alia*, the plaintiff adduced no evidence to show that the defendant did not have a reasonably arguable case on limitation. The alleged internal conspiracy for the Bank to secure its position to the plaintiff's detriment, without telling him what they were about to do, may not be statute barred. This is because the plaintiff alleges that he did not find out about it until an undisclosed source gave him the relevant e-mails in or about mid-1997, and thus he argues that the limitation period should not start to run until then. That involves disputed issues of fact as to when the plaintiff became aware of the e-mails, and it is those

issues which should have been conclusively determined on the trial of the preliminary issue, but were not.

61. On the damage question, in 1992 the plaintiff owned considerable properties but also had considerable debts. As assessment, apparently made by the Bank, in 1994 is exhibited to Mr. Martin's fourth affidavit, and it shows assets of $2,793,060 as against debts of $1,949,642, for a net worth of $843,418. However the notes to that statement also show that the Bank considered $314,000 of the assets to be receivables of dubious value. Of the remaining assets the property at 35 Town Hill, Flatts, is shown at $425,000 and there is other real estate valued at approximately $1.6M. It appears that over time all the real estate except 35 Town Hill, Flatts, was sold, and some or all of it went towards payment of the plaintiff's debts. Much of the real estate realized less than the value attributed to it. Some but not all of it was sold by the Bank in exercise of its security. How much recoverable loss that gave rise to will depend upon many factors, and will be different depending on the cause of action. If the release of information to his employer was an actionable wrong, then, subject to questions of causation and remoteness of damage, loss flowing from his loss of employment might be recoverable. That might conceivably extend to his loss on the properties. But if that cause of action is statute-barred, then that question does not arise at all. In respect of his second subject of complaint, the alleged internal conspiracy, the recoverable damages are likely to be very different. Indeed, his remedy may be restricted to setting aside the securities which the Bank obtained from him. It is unlikely that the debt he undertook to the Bank would itself be set aside, because he received value for that in that the Bank advanced him monies to refinance his other existing liabilities. He was in cash terms no worse off as a result of the Bank's refinancing. The only way that he might have been worse off was by reason of the securities that he had given.

62. As the pleadings stand there are disputes as to which properties were sold by the Bank exercising its security, and which were sold voluntarily by the plaintiff to pay down his debts, not all of which were to the Bank. But to the extent that properties were sold and the proceeds applied to the Bank's debt, the odds are that the plaintiff will only be able to recover if he can demonstrate a sale at an undervalue. The question of value does not depend

on the allegations of fraud and conspiracy. Even if he makes out his case on those, it will not improve his position on the question of whether the properties were sold at an undervalue. That is a notoriously difficult cause of action to make out; is dependent upon valuation evidence; and is at present inadequately pleaded. But unless he can make out that allegation, his remedy in respect of the alleged fraudulent conspiracy may well be limited to setting aside the mortgage over the remaining property, the family home. It would not necessarily relieve him of the remaining debt, which the Bank currently estimates as being in the region of $900,000.

63. There is a different argument in respect of that balance of $900,000, namely that it is now made up entirely of interest, but unless it can be shown that that interest was unlawful it is not an answer to the liability: as Mr. Martin said in his evidence, the obligation remains a real one. The plaintiff says that it is made up of compound interest, which he says is unlawful. Mr. Martin says that it is his belief that it is simple interest. In any event, if it is contractual interest there may be no objection even if it were compound.

64. The above is intended to be the very highest-level overview of the issues which the plaintiff faces on the question of damages. I appreciate that this is all highly controversial, and that the plaintiff has an unshakeable belief in the justice of his cause. But in considering whether the settlement works a grave injustice, I have to look at the realities. The realities are that the plaintiff faces very real difficulties in making any significant recovery, even were he to succeed on his primary case on the facts. These difficulties must have been apparent to senior counsel, Mr. Bueno. The plaintiff asserts that Mr. Bueno told him that he had a strong case on fraud and breach of fiduciary duty. That may well be right, but the remedies that flow from that will not necessarily meet the plaintiff's expectations. There may have been other difficulties which I cannot see at the moment, and these may have included the willingness or otherwise of Legal Aid to continue funding this litigation. It is possible that some or all of these difficulties may have been overcome, but any compromise involves taking a commercial decision on the chances of success and the risks of failure. In my judgment there is nothing to show that the assessment embodied in this compromise does not represent a fair and reasonable one. There is certainly nothing to suggest, when viewed

objectively, a grave injustice or a severe hardship to the plaintiff. I stress the words "when viewed objectively". The plaintiff may entertain high hopes of this litigation, and consider that his entitlement runs into the millions, but those hopes are not, frankly, very realistic.

Conclusions

65. For the reasons given above I consider that the e-mail from Mr. Bueno QC of 14th November 2008 effected a concluded settlement of this matter. I find that that settlement was concluded with the actual authority of the plaintiff, but in any event it was also within counsel's ostensible authority to conclude such a compromise, and it was therefore binding on the plaintiff even if he had not in fact agreed to it or given instructions to enter into it. I do not think that that settlement, properly considered, was subject to contract or a condition precedent that the plaintiff and his wife enter into a formal Deed of Settlement. As the settlement was, in my judgment, concluded with the plaintiff's actual authority, no question of its fairness or otherwise properly arises, but if it did then I would have seen no reason to interfere with it, there being no injustice to the plaintiff in what is, when properly considered, a favourable outcome.

66. I therefore stay all further proceedings in this action. I will hear the parties as to what further relief, if any, I should grant on the defendant's summons of 7th April 2009. If I am to order the execution of a formal Deed of Settlement, it will have to omit paragraph 6 of the existing draft, for the reasons given above. The defendant may, however, in view of this judgment, want to consider whether a formal Deed is now necessary.

67. There is also the question of confidentiality. One of the terms of the agreement which I have found was that it be kept confidential. I have already made interlocutory orders to protect that confidentiality in the event that I found for the defendant. If the defendant still wishes to enforce that provision, I will extend those orders as necessary, and will also hear submissions as to the extent that the published version of this judgment will need modifying to respect it.

68. I will hear the parties on costs. In that respect I would welcome assistance on the question of how the fact that the plaintiff was receiving legal aid for this litigation will impact upon that question.

Dated this 16th day of June 2010

Richard Ground
Chief Justice