[2022] JMSC Civ. 174

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU2022CV00530

BETWEEN	**NIGEL JONES & Company (a firm)**	**1st CLAIMANT**
AND	**NIGEL JONES**	**2nd CLAIMANT**
AND	**MEKELIA GREEN**	**DEFENDANT**

IN CHAMBERS (VIA ZOOM VIDEOCONFERENCING)

Mrs. M. Gibson Henlin KC, Mr. Jerome Spencer and Ms. Kashina Moore instructed by Henlin Gibson Henlin for the Claimants

Mrs. Valerie Neita Robertson KC and Mr. John Clarke for the Defendant

Mr. Nigel Jones and Ms. Mekelia Green present.

Settlement Agreement – whether agreement binding – parties agreeing to terms of settlement – Defendant signing Settlement agreement but Claimants not signing due to subsequent conduct of the Defendant – Claimants eventually signing but question arising as to whether the agreement is binding – neither party indicating that they had withdrawn from the agreement – both parties seeming to act as if there was no longer an agreement – Cost awarded against successful party to the application due to conduct resulting in waste of Court time and unnecessary cost

Heard on July 8, 2022

PALMER J

The Application

[1] The 1st Claimant is a Law Firm and the 2nd Claimant, Nigel Jones, is its Managing Partner. The Defendant, Mekelia Green, is a former Associate of the 1st Claimant firm, but also engages in entrepreneurial endeavours which account in part for a very active social media presence. The Claimants filed a claim on February 21, 2022, in which they sought damages and an injunction against the Defendant relating to comments made on different social media platforms, which they say were defamatory. Before the filing of the claim, a Notice of Application for Court Orders was filed by the Claimants on February 18, 2022, for an interim injunction against the Defendant, which was granted pending a fulsome hearing of the application. The Defendant filed an application to have the injunction discharged, and there is a pending motion for contempt against the Defendant. The instant application was filed on June 14, 2022, and seeks to bring the matter to a conclusion based on a purported settlement agreement, and as such, all other applications have been suspended pending its outcome.

[2] It is sufficient to say that the parties have been repeatedly encouraged to settle this matter and have had discussions toward this end. There exists a signed settlement agreement and this application is for the Court to determine whether it is in fact, in binding and enforceable. There is no disagreement that on May 17, 2022, after several Court hearings adjourned to facilitate their discussions, the parties eventually arrive at the terms of a settlement. It is not disputed that the Defendant, who now challenges the validity of the agreement, signed it on that evening, as was agreed. The signed agreement was delivered to the Claimants for signing, but due to events that transpired later that evening, they did not sign until about two weeks later.

[3] Before it was signed by the Claimants, and with an injunction in place restraining the Defendant from "speaking to, communicating with and/or about this Claim and the matters to which it concerns to anyone", and commenting on the 2nd Claimant in any capacity at all, the Defendant made several postings on social media which

the Claimants allege were in breach of the terms of the proposed agreement and the injunction. The postings were alleged to be disparaging to the Claimants' Counsel, to the Court's handling of the matter and to the 2nd Claimant.

[4] The Claimants' application, filed on June 14, 2022, sought the following orders:

> ***1.*** *A declaration that there is a binding agreement between the Claimants and the Defendant in the terms of the Settlement Agreement dated May 17, 2022.*
>
> ***2.*** *Final injunctions be entered in accordance with the terms of the Settlement Agreement dated May 17, 2022 namely:*
>
> *i)* *An injunction restraining the Defendant, her servants and/or agent(s) howsoever, from commenting, publishing, or disseminating statements on social media or any other medium concerning the 2nd Claimant:*
>
> ***a.*** *describing him as her former employer; and/or*
>
> ***b.*** *commenting on him in any capacity at all*
>
> *ii)* *An injunction restraining the Defendant, her servants and/or agent(s) howsoever, from commenting, publishing, or disseminating statements concerning the 1st Claimant:*
>
> **a.** *In the conduct of its trade, profession or business;*
>
> **b.** *and its employees;*
>
> **c.** *and its obligation to the Government of Jamaica including the payment of taxes;*
>
> **d.** *or commenting on the 1st Claimant in any capacity at all.*
>
> *iii)* *The Defendant, whether by herself, her servants and/or agents or howsoever, is restrained from:*
>
> *a.* *commenting, publishing, or disseminating statements on social media or any other medium about the Claimants or this matter save as to the apology set out below;*
>
> *b.* *speaking to, communicating with and/or about this claim and the matters to which it concerns to anyone (except her legal advisors).*
>
> ***3.*** *Costs*
>
> ***4.*** *Such further relief…*

Evidence

[5] In his initial affidavit in support of the application dated June 14, 2022, Mr. Jones outlined the history of the matter up to May 17, 2022. An agreement, he said, was reached after lengthy discussions between the parties on May 17, 2022, that concluded after 7:00 pm. A settlement agreement was prepared and delivered to the Claimants by Mr. Seymour Stewart, signed by the Defendant, as was agreed during the meeting. Mr. Jones alleged that within an hour of the delivery of the agreement, the Defendant made postings on social media that he regarded as attacks on him, his Counsel and the justice system, by innuendo. This, he said, led him to conclude that the Defendant, by her actions, demonstrated that she had no intention of abiding by the terms of the agreement. By that time, there were pending proceedings for contempt for prior postings that were alleged to have breached the terms of the injunction granted in February 2022, and when the matter came on for hearing on May 19, 2022, Mr. Jones said that all Attorneys present, including the Defendant's Counsel, expressed their shock to the Court at the Defendant's conduct.

[6] He recounted that the Claimants' lead attorney e-mailed the Defendant's attorneys on May 18, 2022, outlining his position that he wanted to proceed with the committal proceedings due to the Defendant's breach of the agreement. A solution was offered by the Claimants' Counsel that involved the Defendant issuing an apology, which was received via email on May 18, 2022.

[7] Discussions continued after that date as to how the alleged breach of the agreement would be treated, and Mr. Jones stated that at no point did the Defendant, through her Counsel, or at all, withdraw from, or indicate that she no longer wanted to be bound by the agreement. In fact, he stated, the discussions concerned what more the Claimants wanted, in addition to the agreement, to settle the matter.

[8] According to Mr. Jones, both sides, through respective Counsel, pressed for a resolution of the matter on the basis that there was a subsisting agreement, and the Claimants instructed that the matter be settled in accordance with the agreement, but that a non-disclosure agreement ("NDA") would be also drafted and signed. A draft NDA was prepared and sent to the Defendant's Counsel along with the Settlement Agreement that was now signed by the Claimants, and it was made clear that the proposal for the NDA was never meant to replace the existing agreement.

[9] Mr. Jones says that it was then, after having received the signed agreement, that the Defendant indicated for the first time, that she was unprepared to be bound the terms of the original Agreement, and that she and her Counsel had believed it was no longer on the table. Mr. Jones alleged that the Defendant, in further breach of the Settlement agreement, also caused her unfiled Affidavit to be circulated via WhatsApp, despite the fact that she was not to communicate this claim and the matters it concerns to anyone. He stated that his Attorney-at-Law, Mr. Jerome Spencer, advised him that he received the unfiled Affidavit via WhatsApp from persons inside and outside of the legal profession. Despite the signed agreement Mr. Jones stated further, that the Defendant was trying to solicit information from former employees of the Claimants and filing the affidavits on May 31, 2022 and June 1, 2022. This was while discussions regarding her conduct and the existence of the May 17 2022 agreement were still ongoing.

[10] Ms. Mekelia Green in her first affidavit in response to the application, filed on June 24, 2022, stated that John Clarke wrote multiple letters and emails to the Claimants with a view to settling the matter between February and April 2022, but that the Claimants refused to engage in settlement discussions with him. The parties met to have settlement discussions on May 17, 2022, after Valerie-Neita Robertson QC came on the record. She stated that after settlement discussions took place, the Claimants' counsel emailed all the parties with a proposed settlement agreement and instructions that all the parties were to sign the agreement on the same night, to avoid any changing of minds. She recounted that she signed the agreement,

which was then sent to the Claimants to be signed, but they refused to sign it. Instead, she said, they kept all three signed copies of the proposed agreement, and had not, up to the time of the preparation of her affidavit in response, returned any to her.

[11] Ms. Green denied that the posts made on the night of May 17, 2022 (after the Zoom meeting) were directed at the Claimants or their Counsel. She recounted that contempt hearing on May 19, 2022, she was told that the Claimants wrote to her counsel on May 18, 2022, stating that there was no agreement, as the Claimant refused to sign it, and that the Claimants would proceed with their Application for Contempt on May 19, 2022. She agreed that at the hearing her Counsel expressed shock, not at the Defendant's conduct but at the Claimants' statement in open Court that there was no agreement as the Claimants had not signed any agreement.

[12] Ms. Green stated that her Counsel advised her to send an apology to the Claimants' counsel, who had been offended by the post-May 17, 2022 social media posting, but that she expressed her reluctance to do so I as the comments did not refer to Mrs. Gibson-Henlin QC. She however capitulated by sending an email stating that she was sorry if she felt offended but that the comments were not directed at her. The purported apology was not accepted, and Mrs. Gibson-Henlin QC expressed the Claimants' desire to proceed with the matter. In a later affidavit in response to this application, Ms. Green said that she was informed by her counsel that the Claimants counsel had sent an email on or about May 17, 2022 at about 9:05 pm that "all bets are off" and the Claimants would not be signing the proposed agreement. Her later affidavit repeats much of the content of the first except that copies of communications are attached.

[13] Ms. Green filed a further Affidavit on May 30, 2022, in which she alleged that the Claimants' claim was motivated by malicious intent on the part of the 2nd Claimant, because she had spurned his advances and that an affidavit filed by the Tax Administration of Jamaica ("TAJ") on May 31, 2022, proved that her statement

regarding the Claimants not paying over her taxes were true. She expressed the view that the Claimants are seeking to enforce the previous agreement out of embarrassment. After her affidavit of May 30, 2022 and that of the TAJ, the Claimants' Counsel entered into settlement discussions with her Counsel, Mrs. Neita-Robertson QC, she said, via WhatsApp. She recounted that her Counsel sent a new settlement agreement to the Claimants on June 1, 2022, but that up to that point the Claimants never indicated to her, her Counsel or the Judges before whom the matter was placed, that the May 17, 2022 agreement had been signed. She contended that the June 1, 2022 agreement was sent because the Claimants had proceeded on the basis that there was no agreement.

[14] Ms. Green stated that it was in an e-mail of June 1, 2022, where the Claimants conveyed that the terms of the June 1, 2022 proposal were untenable, that she, for the first time, saw the Claimants' signatures affixed to the May 17, 2022 agreement. She expressed the view that by their conduct, the Claimants had shown that they did not accept the agreement. She posited that it was her affidavit, and the allegations raised therein, that spurred the Claimants to sign the May 17, 2022 document, which was by then, in her view off the table. In regards to the NDA, Ms. Green stated that the NDA was a proposed alternative to the permanent injunction sought by the Claimants, which demonstrated further that the previously proposed agreement was not valid, as the parties had already started new settlement discussions.

[15] In a subsequent affidavit, responding to Ms. Green's second affidavit in response to this application, Mr. Jones stated that the Claimants did not say they would not sign the agreement. The delay in signing was, he posited, prompted by the Defendant's actions that caused the Claimants to question whether the Defendant was acting in good faith or would honour the agreement. He also denied that his Counsel told the Court that there was no agreement, as in an affidavit on May 18, 2022, the Claimants repeatedly referenced the agreement and the Defendant's breach of it. Mr. Jones maintained that Mr. Clarke, Ms. Green's Counsel, repeatedly expressed shock at the Defendant's actions at the contempt hearing on

May 19, 2022. He further detailed that Mr. Clarke in an attempt to explain the posts, indicated that it was his instructions that the comments of Ms. Green related to an 'ex' and her friends who were supporting him.

[16] Mr. Jones stated that his Counsel conveyed that due to the Defendant's breach of the agreement, the Claimants instructions were to proceed with the committal application. He maintained that his Counsel never said that there was no agreement, but that it was arrived at orally and reduced to writing. Further, the agreement contemplated that the contempt proceedings would be adjourned, as they were not withdrawn.

[17] In response to an ulterior motive for pursuing the defamation claim and why the Settlement agreement was finally signed, Mr. Jones denied harassing Ms. Green. She left the 1st Claimant's employ in March 2021 and he stated that he did not attempt to interact with her or interfere with her professional standing. He stated that the Claimants made full and frank disclosure that there was an error with the documents filed with the tax authorities in relation to the accounting for the Defendant as an employee, resulting in the issue concerning the payment of Ms. Green taxes. The claim does not relate, he stated to whether the taxes were paid or not, but the assertion that the Claimants acted deliberately and that there were other employees whose taxes were unpaid in similarly deliberate circumstances. She asserted that the Claimants' conduct necessitated an investigation from the tax authorities, but the affidavit from the TAJ does not support the Defendant's defamatory statements.

[18] Mr. Jones stated that the Defendant's attorney was notified that the Claimants would be proceeding with the existing agreement before any new proposal was advanced. He insisted that Counsel on both sides discussed what more could be done, to ensure there would be no further breach by the Defendant, and there was never an acknowledgement that the existing agreement had been terminated. To the contrary he asserted, the communications showed that the parties were discussing what in addition to the existing agreement should be added. If the

Defendant believed that there was no agreement this, he indicated, was not communicated to the Claimants prior to the agreement being signed, or prior to notifying the Defendant that the Claimants required nothing further. The NDA was the Defendant's idea, he stated, and not theirs.

CLAIMANT'S SUBMISSIONS

Can the Claimants make this application and does the Court have the power to grant the Orders sought?

[19] The Claimants made the application within the existing proceedings, contend that it was properly made and that the Court has the power to hear it. It was submitted that by virtue rule 26.1(2)(v) of the Civil Procedure Rules, 2002, ("CPR"), that the Court has wide case management powers, to "take any other step, give any other direction or make any other order for the purpose of managing the case and furthering the overriding objective." The Claimants submitted that the rule is wide enough to allow the Court to deal with the present application and emphasised that the overriding objective is to ensure that cases are dealt with justly and its resources are properly utilised.

[20] The Claimants relied on the Court of Appeal decision of ***Western Broadcasting Services Ltd v Edward Seaga***, delivered on December 20, 2004, in which the Court specifically considered this issue. In that case the parties had engaged in settlement discussions, and the Court had to determine whether the matter was actually settled. The Court rejected the argument that the question of settlement gave rise to new proceedings, and found that rule 26.1(2)(v) of the CPR empowered a judge to hear and determine applications of this nature. At page 10, Harrison JA said:

> *"Rule 26.1 (2)(v) of the CPR empowers the Court "to take any other step or make any other order for the purpose of managing the case and furthering the overriding objective". Where expenses can be saved and cases are dealt with proportionately, expeditiously and fairly, this will certainly further the overriding objective. There has to be novel and imaginative case management procedures in order to achieve what has hitherto been difficult to achieve. It could be said that a case management judge can do just about anything, provided he or she does so*

> *justly to achieve the overriding objective. In the circumstances, I am of the opinion that, the judge's decision to proceed in the manner in which she did was entirely in accordance with the Rules. This ground of appeal therefore fails."*

[21] The Claimants submitted that it did not matter that they were not at a case management conference ("CMC"), as the Court's general case management powers are not limited to a CMC – they can be exercised at any point to give effect to the overriding objective. ***Western Broadcasting Services*** went on appeal to the JCPC (70 WIR 213), but in relation to the issue of whether the Judge had the power to hear the application, the Court stated at para 16:

> *"It was argued on behalf of the appellant in the Court of Appeal that it was outside the judge's powers under the case management provisions in CPR rule 26.1 to make the order of 26 September 2003, a submission which the Court rejected…Their lordships are content to proceed upon the assumption that the case management powers conferred upon the judge by CPR rule 26.1(2)(v) are broad enough to justify her decision to determine the issue summarily when it came before her as a matter of case management."*

Are the parties entitled to rely on the without prejudice communication?

[22] The Claimants submitted that they were entitled to disclose, exhibit and rely on the without prejudice discussions for the Court to determine whether the parties had an agreement. The English Court of Appeal case of ***Tomlin v Standard Telephones and Cables Ltd*** [1969] 3 All ER 201 was cited in support of the proposition. At page 209 of that judgement, Danckweerts LJ stated that:

> *" …the letters were admissible, because the point was whether there had been a concluded agreement of any kind between the parties in accordance with that correspondence, and it would be impossible to decide whether there was a concluded agreement or not unless one looked at the correspondence."*

[23] That position has been accepted in our Courts, and in ***Candice Lloyd v Dwight H.L. Moore***, delivered February 5, 2009, McDonald J stated that:

> *"I do not find that the Court is prohibited from looking at the without prejudice communication in the context of the Claimant's application for summary judgment in the absence of a request by the Claimant for a declaration that an agreement on the issue of liability was arrived at during the 'without prejudice' communications. I find that the preliminary objection cannot be upheld on a matter of general principle since it is only from an enquiry that the Court will be able to determine whether the parties had arrived at an agreement on the issue of liability."*

[24] In ***Tomlin v. Standard Telephones & Cable*** (supra) Danckwerts L J at page 203 stated:

> *"I feel no doubt, as the learned judge felt no doubt, that the letters were admissible to decide whether there was a concluded agreement of any kind between the parties in accordance with the correspondence and it would be impossible to decide whether there was a concluded agreement or not unless one looked at the correspondence. The Defendant's case is that there was no agreement on the issue of liability. The Court cannot make a determination without first looking at the documentation in question."*

Is there a settlement?

[25] The evidence before the Court is that there was an agreement between the parties on May 17, 2022, Counsel submitted. The terms of the agreement were reduced to writing and signed by the Defendant first and then by the Claimants. The agreement settled all issues between the parties with a view to ending the matter. The signed agreement in evidence clearly showed that:

i. The agreement was certain and its terms clear;

ii. The agreement was intended to be included in a Court order;

iii. The reason the agreement was to be made an order of the Court was to enable the Claimants to have an enforceable judgement in the case of a breach;

iv. The Claimants did not remove the possibility of a contempt/committal application being made in the event of breach and required a penal notice to be endorsed on the final judgement.

[26] The Claimants advanced that the Defendant had breached the agreement on the night of May 17, 2022, which unsettled the Claimants. Therefore, the affidavit of May 18, 2022 was filed outlining the Defendant's actions, and maintaining that the Defendant breached the agreement.

[27] The contempt proceedings matter came on for hearing on May 19, 2022, and the Claimants indicated that they were ready to proceed but the matter was adjourned. The Claimants denied that they told the Court that the parties did not have an

agreement because they did not sign an agreement. Such a statement, even if it was made, Counsel submitted, could not affect the question of whether or not the parties had an agreement.

[28] The Claimants further submitted that while they had desired to proceed, they were hesitant due to their view that the Defendant had breached the agreement, the undertaking and the orders of the Court. Despite the Defendant's view, the agreement did not contemplate a withdrawal of the application for committal for contempt, but only an adjournment. Therefore, there would have been no breach of the agreement in this regard.

[29] The Claimants also submitted that while they would have sought and obtained costs, the parties discussed and agreed that the settlement agreement would not require the Defendant to pay costs. Therefore, each party was to bear their own costs as at the date of the agreement. The Claimants relied on the decision of Simmons J, as she then was in ***Barrett v Desouza*** [2014] JMSC Civ 25 where the Court was to determine whether it could apply interest, prior to the approval of a settlement for a minor, where the agreement did not include interest. Simmons J (as she then was) stated:

> *[47] I am particularly mindful of the fact that although a Mediation Agreement entered into on behalf of an infant claimant is not binding on the parties until it is approved, it does represent an agreement between parties who were competent to settle its terms. Where an agreement is in writing, as in this case, the intention of the parties must be construed by reference to that document. The Court will only permit the insertion of an implied term if it is necessary to give effect to the agreement. It is therefore my view that a Court should not without compelling reasons, depart from the agreed terms.*

[30] The Claimants further said that it was a term of the agreement that the parties were to have the terms of the settlement made a Court order on May 26, 2022 or at such other date that was convenient to the Court. The Claimants' evidence was that Counsel who appeared for the Defendant on May 26, 2022 could not treat with the matter, and so the question of settlement was not raised. The matter was therefore raised on the next hearing date, June 2, 2022. The agreement contemplated that circumstances could have arisen that prevented the parties from treating with it,

and therefore, it was submitted, orders not being entered on May 26, 2022 was not a breach of the agreement.

[31] The Claimants maintained that the discussions that took place on WhatsApp between the parties' Counsel, resulting from the Defendant's breach of the agreement did not change the fact that the parties had an agreement. The conversation detailed in the WhatsApp messages between Mrs. Neita-Robertson and Mrs. Gibson-Henlin made it clear that:

i. Both counsel agreed that there was an agreement;

ii. The Claimants believed the Defendant had breached the agreement and took time to consider how they would proceed, as they had reservations about whether the agreement would be honoured;

iii. The Defendant requested what other terms would be required to settle the matter;

iv. The Defendant never indicated that the contract was terminated;

v. The Claimants indicated that they would proceed on the original agreement.

[32] It was submitted that the Defendant's actions suggested that she did not act in good faith in agreeing to settle the matter, but nothing she said could be used to change the fact that there was a settlement. The statement "all bets are off" needed to be understood in the context of a choice the that Claimants had to make on how to proceed. On May 18, 2022, the Claimants acknowledged the existence of the agreement, and throughout the WhatsApp messages the fact of a settlement was repeatedly acknowledged. The tone of the conversation and the position being advanced by counsel for the Claimants was that it was their view that something was necessary to ensure that the Defendant would honour the terms of the agreement.

[33] Further, the message sent by the Defendant's counsel, it was submitted, clearly shows that both sides still recognised the agreement. She said "…Tell me what more than what we agreed you all want…" The discussions were meant to discover what, if anything would be done to ensure that the Defendant adhered to the existing agreement. Prior to the Claimants confirming that they would proceed with the original agreement with nothing added, the Defendant never indicated that she understood the agreement to have been terminated by the Claimants. She gave no evidence that the Claimants terminated the agreement (per para 16 of ***Perreault v Fearon*** and another, delivered November 24, 2006, if a party to a contract who is not in breach of it wants to terminate it, he must unequivocally communicate this to the other party) and the Claimants maintained that there is an agreement.

Defendant's position in relation to the existence of an agreement

[34] The Claimants submitted that the Defendant could not treat the agreement which was sent by the Claimants' counsel via email for execution, and which the Defendant signed first, as an offer. Insofar as she referred to it as the proposed agreement, the Claimants asked the Court to find that it represented the terms agreed after full discussion.

[35] The Claimants further submitted that insofar as the Defendant said that there was no agreement because there was no withdrawal of the matter on May 19, 2022 and the Claimants stated in Court that there was no agreement, which the Claimants again denied, that could not lead to a finding that there was no agreement. What the Defendant pointed to, did not amount to a breach, and there was no evidence of any step taken to convey that the agreement could and would not be fulfilled. The Claimants further submitted that the Defendant led no evidence to support her contention that there was no agreement.

[36] The Claimants relied on the decision of ***Hong Kong Shipping Company v Kawasaki Kisn Kaisha Limited*** [1962] 1 All ER 474 to support this submission.

In ***Hong Kong Shipping v Kawasaki*** there had been a mutual agreement between owners of a vessel and charterers to hire a vessel for twenty-four months; from the date of delivery of the vessel to the charterers, "she being in every way fitted for ordinary cargo service" and the owners would "maintain her in a thoroughly efficient state in hull and machinery during service". A particular charter hire rate was payable per ton provided that the no hire should be paid for time lost exceeding twenty-four hours in carrying out repairs to the vessel and such off-hire periods might, at the charterers' option, be added to the charter time. When the vessel was delivered the engine-room was undermanned with incompetent staff. The vessel machinery was old and in need of competent staff to maintain it. The result was that the vessel was off-hire for repairs for five weeks during the voyage to make delivery and the engines found to be in such a bad state that it required a further fifteen weeks to make the vessel seaworthy. When the vessel was made, in every respect, seaworthy, and equipped with competent staff, it was still available to the charterers for seventeen remaining weeks. While the vessel was on its voyage and down for repairs, there were reductions in the freight rates and the charterers wrote twice to the owners repudiating the charter. At trial by the owners for wrongful repudiation of the charter agreement, the Court, while holding that the owners had breached the agreement by delivering the vessel in an unseaworthy condition and not having maintained the vessel in an efficient state, found that the charterers were not entitled to repudiate the charter. The Court further held that the neither the unseaworthiness of the vessel, by itself, nor the delay by the owners, entitled the charterers to repudiate the charter agreement. The delay was found to not be so great as to frustrate the commercial purpose of the contract.

The terms of the Agreement

[37] It was advanced for the Claimants that the agreement was complete and settled the issue. No further discussions were needed to complete the matter. The wording of the apology and how it is to be published are clear and the parties agreed to final orders being entered.

Defendant's submissions

[38] The Defendant's submissions relied primarily on the arguments raised in the affidavits, that the words and conduct of the Claimants and their Counsel, gave every indication that there was no agreement. Reference was made to the various communications between Counsel, alleged utterances made in Court, and the fact that the signed agreement was not returned to her until after she raised the allegations in the May 30, 2022 affidavit as to the motive for the 2nd Claimant to pursue the action. She submitted that the Claimants' application to declare the Settlement agreement as binding ought not to be granted.

Analysis

Court's power to hear this application and grant the orders sought

[39] While there was no argument put by the Defendant challenging this Court's power to hear the application and grant the orders sought, I found the dicta in the ***Western Broadcasting Services Ltd v Edward Seaga*** case, cited by the Claimants, to be helpful on this point. The submission of the Claimants is that there is an enforceable agreement signed by the parties that can bring these proceedings effectively to an end, certainly in regards to the substantive claim. The contempt proceedings would remain extant, though it was implied that it would be concluded shortly thereafter when final judgment was entered. If their application is successful it can bring an expeditious conclusion to the matter, save expense and further the overriding objectives of the CPR, in particular as it regards the utilisation of the Court's resources. The Privy Council in that matter also found that the case management powers of the Court were sufficiently broad to allow for such an application to be addressed at case management. The Court under Rule 25 of the CPR has a duty to actively case manage matters and this duty continues throughout. I therefore agree with the submissions of the Claimants on this point, and rule that the Court is empowered to hear and determine the Claimants' application.

Reliance on the 'without prejudice' communication

[40] Both the Claimants and the Defendant had placed reliance on the 'without prejudice' communication between them to support their respective cases. All the authorities submitted by the Claimants support a conclusion that the use of the 'without prejudice' communications is permitted where it is crucial to determining an essential issue at this interlocutory stage. The authorities of ***Tomlin v Standard Telephones*** and ***Candice Lloyd v Dwight H.L. Moore*** are helpful in determining this issue as a matter of law. On the face of it, there is a Settlement agreement signed by the parties that ought properly to bring an end to the substantive matter. One party asserts that the agreement speaks for itself, but that the communications relied upon will assist the Court to determine whether an agreement in fact subsists. The other party says terms were agreed but that it was clear from the events that followed that both sides had taken the approach that there existed no agreement. The communications are admissible at this stage for the limited purpose of determining whether a binding agreement exists between the parties. While there has been no objection to the use of the communications and both have placed reliance on them, I find that the Court is permitted to look at the 'without prejudice' communications at this time in the context of this application to determine whether the agreement is binding. This process would of a certainty have been more difficult without the benefit of their content.

Is there a settlement

[41] It is inescapable as a conclusion that by the close of their discussions on the evening of May 17, 2022, that the parties had arrived at what they determined as acceptable terms for settlement of the matter. However, there was another term of the agreement that parties clearly intended for the Settlement agreement to take effect, and that is, that it would be signed by both sides. The argument for the Claimants is that the agreement became binding from the point that they arrived at its terms via video conferencing, but the communications and the conduct of the parties, cause me to arrive at a different conclusion. Firstly, the Defendant signed

the agreement immediately and the signed Settlement agreement was personally delivered by Mr. Stewart for execution on the part of the Claimants. Almost before the ink of her signature had dried, the Defendant proceeded to act contrary to the agreed terms and all concerned took the view that the conduct of the Defendant put the agreement in peril. There were immediately efforts taken in attempt to cauterize the damage caused by the postings and the risk it posed to the subsistence of the agreement. Even at this point, had an enforceable agreement been in place from the moment of the agreed terms via videoconferencing, of what value would the signature of Mr. Jones been? Was it to evidence to the Court that the parties had arrived at an agreement at the close of discussions or was it to show that the parties did not consider themselves bound to abide by the terms of the agreement until it was signed by them both? I believe the evidence supports a conclusion to the latter.

[42] After the meeting, there was an email sent by Counsel for the Claimants on May 17, 2022 at 7:04 pm in which the electronic version of the agreement was sent to the Defendant's Counsel with instructions that the Defendant sign the agreement in triplicate, and return them to the Claimants' or their Counsel for the Claimants by the following day, for signing. With the hearing of the contempt proceedings adjourned to May 19, 2022, it was clear that the urgency was to have the matter concluded by then, even though the agreement spoke to an adjournment of the contempt proceedings pending the terms of the settlement being entered as a final judgment on May 26, 2022. The necessary inference be taken from the agreement is that the contempt proceedings would be brought to an end shortly after the settlement had been entered as a final judgment.

[43] There is an exchange between Counsel for the parties, minutes after the Defendant made the offending postings, and it is apparent that in the view of both Counsel, the contents of the postings had the appearance of referring to the 2nd Claimant and his Counsel. A portion of the message from the Claimants' Counsel to the Defendant's Counsel reads:

> *"The above [message] was posted 3 mins ago now Nigel does not want to proceed… You have to see if you can salvage the agreement because now all bets are off for Nigel."*

[44] The terms "does not want to proceed" and "all bets are off" could only be a reference to the Claimants pursuing the agreement or not, and whether Mr. Jones would affix his signature to the Settlement agreement and give effect to it. In a message after the adjournment of the contempt hearing to June 30, 2022 the suggestion was made by the Claimant's Counsel for them to "try again" before the parties returned to Court on May 26, 2022 in the applications relating to the injunction. The suggestion was that they could try again later, but at that time of May 19, 2022, feelings were still described as "raw". In a later exchange on May 26, 2022 it was acknowledged by the Claimants' Counsel that the actions of the Defendant revealed that she was clearly not interested in settlement at that point but that when "she is prepared to put her mind and heart into a settlement" that the parties could again speak. The suggestion here was that having seen the offending postings after the May 17, 2022 meeting, Mr. Jones was no longer interested in himself or his firm being bound by the Settlement agreement because it was clear that the Defendant did not have her "heart and mind" in a settlement. The reference earlier of him not wanting to proceed, that all bets were off and that the contempt proceedings that were to adjourned to June 30, 2022 for hearing to allow them to try again at settlement when her heart and mind was in it, were clear indications that whether the parties were still interested in pursuing settlement, was uncertain.

[45] These occurrences make it evident that the signature of Mr. Jones was the final event that was necessary to solemnise the agreement. The parties were in further discussions to determine whether an agreement would be signed on the existing terms or if additional acts would be needed to get Mr. Jones back to a mindset of signing the agreement at all. In the communications on May 27, 2022, Counsel for the Claimants pointed out to the Defendant's Counsel that if the Defendant would pause to consider settlement instead of trying to build a case, that a proposal could be made that could be taken to the Claimants. This further supports a conclusion that whatever the Defendant's mindset was on May 17, 2022, when discussions

were held, by May 27, 2022, it was acknowledged by both Counsel that her mind was no longer there, and neither was that of Mr. Jones.

[46] ***Barrett v Desouza*** speaks of a settlement agreement entered into by the parties at mediation which, according to the rules because it involved a minor, required the approval of the Court before it could be entered as a judgment. The Court had to consider the effect of the exclusion of a provision as to interest on the judgment sum and whether there was a compelling reason for implying a term into the agreement that included interest on the settlement sum. The Court found that there was no compelling reason for so doing. I take the view that the facts of the instant application are distinguishable from ***Barrett v Desouza***, as the implied term is the one that brings the agreement into effect. If the signature of both parties was not the act to bring the contract into binding force, of what moment was it that Claimants refused to sign after the post-May 17, 2022 meeting? Why insist on the Defendant signing immediately and the signed document being conveyed to the Claimants for signing the following day if it was already 'fait accompli' after the meeting ended? The facts support the conclusion that while the terms were settled, the parties did not consider the agreement binding signed by both sides.

[47] ***Hong Kong Shipping v Kawasaki*** was relied upon by the Claimants but this too is distinguishable from the facts of this case, as not only was the fact of an agreement not in issue in that case, but the owners of the vessel had proceeded to perform their obligations under the contract, albeit negligently. The Court ruled that the delay and negligence were insufficient cause to repudiate the charter contract. Here, there is uncertainty as to whether one party was still willing to enter into the agreement by affixing the relevant signatures, and during the time taken to sign, the possibility of different terms was discussed and the circumstances changed. By the time the Claimants signed, the Defendant had filed additional affidavits, in obvious preparation for the substantive claim and pending applications, and this change in circumstances would have been known to the Claimants by the time the signed Settlement agreement was sent on June 1, 2022.

[48] In my view, to reference the circumstances of ***Hong Kong Shipping v Kawasaki*** to draw a parallel, it would have been tantamount to the charterers, while the charter agreement document was before them for signing, learning of the old machinery and incompetent staff of the owner's vessel, opting out of signing the agreement, even before the vessel left port or until the owner can show that they are in a position to carry out the charter agreement. In this application before me, the 'vessel' had not left port, as no party has taken any step to perform any of the terms of the agreement. Before signing of the agreement, the Claimants discovered that the Defendant's ability or willingness to carry out the terms of the agreement, were in question. Yes, there was, in the circumstances, justifiable cause for the Claimants' pause, but unfortunately one cannot have the benefit of pausing while at the same time binding the other party to act as if there had been no pause, especially when there had been no act on either party's part, done to carry out any of the terms of the agreement.

[49] I find that despite the Court's desire to see this matter settled, and itself allowing several adjournments of the applications relating to the injunctive relief sought and the contempt proceedings towards that end, that the apparent *consensus ad idem* that the parties had by the end of the May 17, 2022 meeting, they had lost after the posts made by Ms. Green after she signed the agreement. The implied term of the agreement was that neither party would consider it binding unless the agreement was signed, and every effort was being made to give effect to this before the hearing on May 19, 2022. The postings made by the Defendant were clearly taken as an act of bad faith that appeared to breach the terms of the agreement before the Claimants had signed it.

[50] The pause on the part of Mr. Jones was clearly as to whether he wished to bind himself or his firm to an agreement to discontinue the claim when the other party showed signs that it might not honoured their agreement. It was a justifiable cause to pause, but it also demonstrated that there was no longer any *consensus ad idem* between the parties on the agreement, a factor essential to its subsistence. During that period of pause, the circumstances changed that were relevant to the

agreement. The agreement had clearly not been signed in the time contemplated by the parties and there was no certainty that it would be signed by the Claimants at all. The Defendant continued her preparation for the case as if there was no agreement, as noted by the Claimants' Counsel that if she were to suspend building a case that perhaps settlement could be arrived at. Both parties continued their preparation for their respective injunction applications, and but for the scheduling issues of Counsel on May 26, 2022, there is every indication that the application would have been heard. Discussions were had about apologies and possible supplementation of the agreement with an NDA and an enquiry by Counsel for the Defendant as to what more was needed by the Claimants, all seemingly targeted at encouraging the Claimants to conclude the settlement. It would have been unsurprising at that stage if some of the terms of the agreement were substituted as it is evident that discussions were being had as to what could be done to salvage a settlement.

[51] I find that the agreement was in fact not binding as it was not signed in the time indicated (by the following day) and that both parties regarded the signature by the other as a precondition to the agreement taking effect. The various events that intervened afterwards, caused the parties to no longer be of like minds as to whether an agreement existed or if they in fact wanted to settle at all, which causes me to conclude that by the time of the signature almost two weeks later, that rather than to say that they no longer wished to be bound by the agreement, the parties would have to had said that they still wished to engage in the agreement, as the conduct of the parties after the most recent postings suggest otherwise. I do not find that the agreement is binding. The order sought by the Claimants to declare the agreement as binding is therefore refused.

Costs

[52] The general principle is that an order for costs will follow the event which is reflected in the provisions of the CPR at 64.6:

> *(1) If the Court decides to make an order about the costs of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party.*
>
> *(2) The Court may however order a successful party to pay all or part of the costs of an unsuccessful party or may make no order as to costs.*
>
> *(3) In deciding who should be liable to pay costs the Court must have regard to all the circumstances.*
>
> *(4) In particular it must have regard to -*
>
> *(a) the conduct of the parties both before and during the proceedings;*
>
> *(b) whether a party has succeeded on particular issues, even if that party has not been successful in the whole of the proceedings;*
>
> *(c) any payment into Court or offer to settle made by a party which is drawn to the Court's attention (whether or not made in accordance with Parts 35 and 36);*
>
> *(d) whether it was reasonable for a party -*
>
> *(i) to pursue a particular allegation; and/or*
>
> *(ii) to raise a particular issue;*
>
> *(e) the manner in which a party has pursued -*
>
> *(i) that party's case;*
>
> *(ii) a particular allegation; or*
>
> *(iii) a particular issue;*
>
> *(f) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his or her claim; and*
>
> *(g) whether the claimant gave reasonable notice of intention to issue a claim.*

[53] In determining who should be liable for costs regard should be had to all the circumstances and among other things, to the conduct of the parties. When parties enter into settlement discussions, these discussions are presumed to be in good faith. Here, these discussions bore the fruit of a settlement agreement, which it was agreed that the parties would sign to bring it into effect and enter as the terms of the final judgment just over a week later. Whether the postings made by the Defendant after the meeting in fact breached the terms of the Settlement agreement is not so relevant as the fact that the Claimants, the Defendant and their respective Counsel all believed it did, and responded accordingly. Quite

understandably, the Claimants were reluctant to bind themselves to an agreement that the Defendant had demonstrated she might well act to breach, and in their view already had breached. Learned Queen's Counsel who acts for the Defendant said that the Defendant was even prepared to call the Claimants' Counsel to apologise in an effort to salvage the agreement, which demonstrates that she too knew that her conduct may well have jeopardised the agreement being signed.

[54] After her affidavit of May 30, 2022 was filed and that of the TAJ, the Defendant seems to have seen herself as being in a more advantageous position and the agreement that her Counsel was trying to salvage was no longer enough. Had her position substantially changed after these affidavits were filed? The allegations raised about his affections being spurned, do not seem to have any bearing on the issue of whether or not the words used in her several postings, which she does not resile from and are the subject of the substantive claim, were defamatory. The fact of the non-payment of the taxes was never in dispute, as the Claimants' position is that there was a legitimate excuse for the taxes not being paid over and it was not deliberate, nefarious or widespread amongst his employees as the tenor of the postings, according to the Claimants' claim, suggests. The claim was filed days after the alleged postings, while the alleged motivation for bringing the claim, according to the Defendant, arose a year or more prior. Arguably that would have been mentioned as the motivation for her leaving the 1st Claimant firm, but she said that related to her raising the issue of taxes. I am not here to determine the substantive claim, but as it relates to this issue, I can so no advancement of her case in the new affidavits and the resultant change in posture after May 17, 2022.

[55] If not interested in settlement, why sign the agreement? Why press, through Counsel, to have the Claimants' concerns at the most recent posts addressed and asking what was needed to put the agreement back on track, if when it is finally signed, the position is taken that this was no longer what she was prepared to agree to? Having 'hammered out' an agreement and signed it, it is the subsequent conduct of the Defendant that resulted in the hesitance of the Claimants to sign the agreement and why they were amenable to the inclusion of an NDA to

discourage any similar conduct on the part of the Defendant. Though I cannot rule in favour of their application, the Claimants' hesitance in the face of apparent breaches in the proposed agreement as well as (they allege) the interim injunction and undertakings to the Court, were not unreasonable. The conduct of the Defendant after May 17, 2022 caused them to ponder whether, if they agreed to withdraw the Claim, the Defendant would abide by their agreement. But for the conduct of the Defendant, the matter would have been settled, or the applications relating to the injunctions heard, saving costs and the time of the parties and the Court. Accordingly, I find this to be suitable cause for the Court to exercise its discretion to award costs against the Defendant.

Orders

[56] Based on the foregoing, the orders of the Court are as follows:

i. The order sought in the Claimants' Notice of Application for Court orders filed on June 14, 2022, to declare that there exists a binding agreement in the terms of the Settlement Agreement dated May 17, 2022, is refused.

ii. The orders sought at paragraph 2 of the said application for final injunctions to be ordered, are also refused.

iii. Costs of this Application awarded to the Claimants, to be taxed if not agreed;

iv. The interim injunction is further extended pending the hearing of the applications to extend and to discharge the injunctions, filed by the Claimants and Defendant respectively.

v. Matter fixed to October 7, 2022 at 2 pm for a date to be agreed for the hearing of the Applications.

vi. The Claimants Attorneys-at-Law are to prepare file and serve the orders herein.

vii. Leave to Appeal is granted to both parties to appeal this ruling.