JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 88 OF 2003

BEFORE: THE HON. MR. JUSTICE FORTE P.
THE HON. MR. JUSTICE SMITH J.A.
THE HON. MR. JUSTICE HARRISON J.A. (Ag)

BETWEEN: WESTERN BROADCASTING SERVICES LTD APPELLANT

AND EDWARD SEAGA RESPONDENT

Charles Piper instructed by J. Daley of Blackridge Covington for the Appellant.

Emil George Q.C and Miss Stacy Powell instructed by DunnCox for the Respondent

October 21, 22 and December 20, 2004

HARRISON J.A. (Ag):

Introduction

This is an appeal against an order made by Norma McIntosh J, at a case management conference held in the Supreme Court on the 30th September 2003. The substantive cause of action is one for libel and is brought by the claimant/respondent (the respondent), against the 1st defendant/appellant (the appellant) and others, for allegedly publishing the libel in a radio broadcast in September 1999. The pleadings have been closed and various orders were made at a case management conference with respect to the future conduct of the case.

We are most grateful for the extensive written submissions that were filed.

Background to the appeal

On September 22, 2003, the parties attended a case management conference with respect to an application to vary an order for substituted service on the 4th and 5th defendants. The order to vary was granted and whilst the Attorneys were still in Chambers, Counsel for the respondent, informed the learned case management judge that negotiations between the respondent and appellant had culminated in a settlement between them. In the circumstances, Counsel for the respondent, requested the learned judge to make an order reflecting the terms of the alleged agreement. Counsel on behalf of the appellant at this stage, informed the learned judge that she was unaware of there being a settlement and that her instructions were, that "without prejudice" negotiations, were proceeding between the parties and they were incomplete.

The learned judge decided then, that the question whether or not there was a settlement, ought to be resolved. She invited the parties to prepare and file affidavit evidence supported by the relevant documents and to return to Chambers on the 26th September, in order to make submissions on their respective positions. The case management conference was then adjourned to the 26th September 2003.

Affidavits were filed and served and, following a hearing on the 26th, the learned judge reserved her ruling until the 30th September 2003. On the 30th September, she decided that a settlement was arrived at between the respondent and appellant and the following order was drafted:

"1. There is a binding agreement between the Claimant and the First Defendant in settlement of the Claim against the 1st Defendant only, in the following terms:

(a). The First Defendant will publish an apology acceptable to the Claimant to be drafted by the Claimant's Attorneys at Law for broadcast on Hot 102 and CVM television. The Claimant's Attorneys at Law to decide on the number of times the apology would be published on each medium.

(b). The First Defendant agrees to pay an amount of Twenty Million Dollars ($20,000,000.00) plus Attorneys at Law Costs to DunnCox as agreed between the Attorneys at Law.

(c). Of the Twenty Million Dollars ($20,000,000.00), an amount of Three Million Dollars ($3,000,000.00) is payable in cash and the balance of Seventeen Million Dollars ($17,000,000.00) would be paid by way of the First Defendant and CVM Television Limited providing the Claimant with Volume Discount Advertising credit on both Hot 102 Radio Station and CVM - TV which advertising credit the Claimant could sell for cash to any third party.

2. The 1st, 2nd and 3rd Defendants have leave to appeal this Order.

3. The action proceeds against the 2nd and 3rd Defendants as well as the 4th and 5th Defendants in the event that the Claimant is able to effect substituted service on the two latter defendants in accordance with the Order of this Court made on the 22nd day of September, 2003, and is hereby adjourned, after consultation with the Registrar, to December 11, 2003 at 11:00am for further Case Management Orders.

4. There shall be costs in the Claim".

The questions for determination

The appellant has now challenged the order of the learned judge and is contending that she erred both in law and on the finding of facts in making this order. The appeal therefore calls for a determination of the following questions:

(a) Did the learned case management judge have the jurisdiction under the Civil Procedure Rules 2002 the ("CPR") to make the said order?

(b) Was the learned case management judge entitled to act upon affidavit evidence in making the order?

(c) Did the judge err in dealing with the matter without the service of a notice of application for court orders; and

(d) Were the facts set out in the affidavit evidence sufficient to support the judge's finding that a binding agreement existed as between the respondent and the appellant?

The grounds of appeal

Ground 1

This ground of appeal reads as follows:

> "1. The learned judge erred in law in holding that she was empowered by Part 26.1(2)(v) of the Civil Procedure Rules 2002, and /or wrongly exercised her discretion in embarking on a determination of the issue as to whether a settlement had been concluded between the Claimant and the First Defendant and a finding as to the terms and conditions of the purported settlement, at the case management conference, for the following reasons:
>
> (i) The overriding objective referred to in Part 26.1(v) and Part 1 of the Civil Procedure Rules, 2002 provide only a procedural guide for the conduct of the action with respect to which the case management conference is being heard and does not vest any special powers in the learned judge, as case management judge, to determine substantive rights between the parties where there are disputes between them relating to a cause of action which is separate and distinct from that to which the case management conference relates;
>
> (ii) In applying the overriding objective, the learned judge failed to have regard to or take into account the following matters which are critical to the just and fair

determination of the issues which were before her on the 22nd and 26th September, 2003 -

(a) the amount of money involved both with respect to the defamation proceedings and the new cause of action raised namely, whether without prejudice negotiations had resulted in a concluded settlement;

(b) the importance of the issues in the defamation proceedings as against the issues raised in respect of the said new cause of action;

(c) the complexity of the issues raised in both causes of action;

(d) the fact that at the stage of the defamation proceedings in which the said determination was made, the fourth and fifth defendants had not yet been served;

(e) the fact that issue was joined on the pleadings in the defamation proceedings between the claimant and the first, second and third defendants and that their defence was so inter-dependant that even the terms of the settlement which she found to exist could not properly be implemented without there being substantial amendment to the pleadings;

(f) the prejudicial effect that her determination of the issue as to whether without prejudice negotiations had been concluded, at the case management conference in defamation proceedings, would or could have on the other defendants at the trial of the said defamation proceedings".

Since this appeal arises from an order made following a case management conference, it is important that the Court does not extend its judgment beyond what is necessary or attempt to state legal propositions which would govern the conduct of the trial of major issues said to be involved.

A proper starting point would be an examination of what are the aims and objects of the CPR. The overriding objective of the CPR is defined in Part 1.1 in the following terms:

> "These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly".

What this involves is amplified in Part 1.1(2), which requires the court to give effect to the overriding objective when it exercises any discretion given to it by the Rules or, interprets any Rule. Such powers include the general powers of management set out in Part 26.1 which includes at 26.1(2)(v):

> "the power 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".

It is also instructive that Part 26.2(1) empowers a judge of the Supreme Court to exercise powers either on an application or of its own initiative except where a rule or other enactment provides otherwise.

Judges are therefore expected to exercise the wide powers of discretion which they have, fairly and justly in all the circumstances, while recognizing their responsibility to litigants in general, not to allow the same defaults to occur in the future as have occurred in the past. When judges seek to do that, it is expected that the Court of Appeal should not interfere with their decisions unless it can be shown that the judge has exercised his or her power in some way which contravenes the relevant principles.

In this appeal, the learned case management judge held that she was empowered by virtue of Part 26.1(2)(v) to deal with the matter in case

management conference and, at page 5 of her written judgment she states as follows:

> "There is no challenge to the Court's jurisdiction to hear the matter as part of its case management functions but says Mr. Piper, in his submissions on behalf of the first defendant, inasmuch as there is a conflict as to whether or not there is a settlement, the Court is not in a position, under CPR 2002, at case management, to make a final determination on the matter. He has pointed me in the direction of the CPR Parts 25.1(f) and 26.1(2)(v), reminding me that these rules do not contemplate the kind of determination being sought here and, I believe, in the manner being adopted, that is, without oral evidence. Mr. George's reminder is as to the overriding objective of the Rules which is set out in Part 1 and the charge of the court thereunder to seek to give effect to the overriding objective to deal with cases justly. Part 26.1(2)(v) empowers the court, after outlining its general powers, to "take any step, give any other direction or make any further order for the purpose of managing the case and furthering the overriding objective." This in my view is what the court is seeking to do here".

Was the learned judge correct when she decided that she had the jurisdiction to deal with the matter? It is now beyond dispute that the key feature of the CPR is that, cases are closely monitored and managed by the court. This management includes: identifying disputed issues at an early stage; fixing timetables; dealing with as many aspects of the case as possible on the same occasion; controlling costs; disposing of cases summarily where they disclose no case or defence; dealing with the case without the parties having to attend court; and giving directions to ensure that the trial of a case proceeds quickly and efficiently. The court will expect the parties to co-operate with each other and

where appropriate, the court will encourage the parties to use alternate dispute resolution or otherwise help them settle the case: see Part 25 of the CPR.

Mr. Piper, for the appellant, has submitted that so far as the exercise of the judge's case management powers relating to the resolution of disputes is concerned, the learned judge at a case management conference has limited powers under Part 25(1) of the CPR. He further submitted that in broad terms, and in the particular circumstances of this case, Part 25 of the CPR empowers the Court:

> (a) to manage the issues and procedures in the case of defamation which was before it, in a manner which furthers the overriding objective; and
>
> (b) where, as in this case, there was reason to believe that there had been negotiations for settlement but there was a dispute as to whether a settlement had been concluded, to actively encourage and assist the parties to settle using, if necessary and, if agreed to by the parties, alternative dispute resolution facilities.

Mr. Piper further submitted that there could be no justification by reference to Part 25 of the CPR by the learned judge, to direct the parties to "proceed on affidavit evidence exhibiting documents". He argued that to do so, it would require the parties to place inadmissible evidence before the Court which would form part of the record of the proceedings and which would be available to the other defendants and to the trial judge resulting in potential prejudice to the appellant.

In response to these submissions, Mr. George Q.C, submitted that in order for the court to fulfill it's duty to exercise its discretion and interpret all rules in furtherance of the overriding objective, a liberal interpretation must be given to

the provisions of Part 26.1(2)(v). He submitted that a just handling of the case before the learned judge necessitated the resolution of the issue of the alleged settlement before the matter could properly proceed.

Mr. George Q.C argued quite forcefully, that the issue of the settlement between the appellant and respondent was incidental to and arose directly out of the action which was before the learned judge. It was therefore impractical he said for the judge to give directions in preparation for the trial of the suit between these parties without first resolving the issue of whether they had in fact arrived at a settlement.

In dealing with the complaint as to whether a separate cause of action arose, Mr. George Q.C, submitted that the learned judge was not embarking on proceedings to enforce or execute the terms of the alleged agreement but she was merely exercising her declaratory jurisdiction in respect of the said agreement that was collateral to the pending suit.

It was also submitted by Mr. George Q.C that new proceedings with fresh pleadings and a trial, would serve to prolong matters between the two parties to this agreement. He submitted that the parties were already before the Court so by staying the main action until a trial takes place between the appellant and respondent could be prejudicial to the other defendants having regard to the possible lapse of time that would ensue. Mr. George Q.C, referred the Court to the English Court of Appeal decision of **Vedatech Corporation v Crystal Decisions (U.K)** ***Limited and Crystal decisions (Japan) KK [2003]EWCA Civ. 1066*** as authority for the proposition that the Court is empowered under its

general powers of case management to resolve issues in relation to an alleged settlement between the parties to an action within the main action itself. Mr. Piper contended on the other hand, that the **Vedatech** case was not relevant to any of the issues in the instant appeal.

In the **Vedatech** case (supra) the parties had arrived at a settlement on quantum following mediation proceedings which took place after the conclusion of a trial on the issue of liability between them. The claimant later sought to have the settlement agreement set aside and applied to the Court for case management directions. The defendants contended that there were no grounds upon which the agreement could be set aside at a case management conference and that in any event the claimant would have to bring a new action if it wished to have the agreement set aside. The Court of Appeal held that no new proceedings were required and that case management powers were quite sufficient to deal with the issue of the settlement.

The U.K Rules of Procedure, like the CPR do not contain any specific provision as to how a dispute as to the existence of a settlement is to be resolved at a case management conference. In the ***Vedatech*** case (supra) the court resorted to Rule 3.1(2)(m) in the English Rules. This rule is similar in terms to our Part 26.1(2)(v) of the CPR.

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.

Ground 2

It was contended in this ground that:

> "2 The Honourable Mrs. Justice Norma McIntosh erred in law and/or wrongly exercised her discretion in holding that, in the circumstances, the Court was entitled to act on the material provided and need not have any oral evidence, and that the material which had been placed before her was sufficient for a determination of the issue as to whether there had been a concluded settlement agreement between the Claimant and the First Defendant, for the following reasons:
>
> (i) contrary to Part 11.6, 11.7, 11.8 and 11. 11 of the Civil Procedure Rules, 2002, the Learned Judge permitted the Claimant and his Attorneys-at-Law to make application for a determination of the issue the subject of this appeal without notice of the intended application having been served on the First, Second or Third Defendants;
>
> (ii) the Civil Procedure Rules, 2002 does not permit any party to proceed without notice of an application in the nature of that which is the subject of this appeal;
>
> (iii) no application was made by the Claimant to dispense with the giving of notice of the said application to the Defendants or any of them, and the Learned Judge neglected or refused to have regard to the need for the giving of notice thereof or of the need to consider an application to dispense with the giving of such notice;

(iv) the First Defendant was prejudiced by the Claimant's failure to give notice of its intention to make the said application in that:

a) the said application was advanced for the first time at the case management conference which was initially scheduled for hearing on the 22nd September, 2003 and in relation to which only Notice of a variation of a previous order for service of the Notice of the renewed concurrent Writ of Summons on the Fourth and Fifth Defendants had been given;

b) by directing that the matters raised by the Claimant's Attorneys - at - Law at the hearing on the 22nd September, 2003 should proceed on affidavit evidence "with such responses as may be found to be necessary" by the date of the adjourned hearing of the 26th September, 2003, the Learned Judge placed the First Defendant in a position whereby it had no reasonable alternative but to respond to any affidavit which was served by or on behalf of the Claimant in time for the adjourned hearing, consistently with its duty to co-operate; and

c) the First Defendant's Attorneys-at-Law were served with the Claimant's Attorneys-at-Law affidavits in support of the said application at 2:11 p.m. on the 24th September, 2003, two (2) days prior to the adjourned hearing;

(v) the Claimant's application, being based upon a separate cause of action from that which is the subject of the Claim, is one which ought properly to have been the subject of pleadings and a trial and ought not to have been determined on the paper evidence which appears in and was exhibited to the affidavits which were before the Court;

(vi) by determining the issue which is the subject of this appeal at a case management conference and in the manner adopted, the Learned Judge placed upon the

> First Defendant a greater burden than it would have been required to discharge under Part 13.3(l) of the Civil Procedure Rules, 2002 (where the Court may set aside a default judgment) and under Part 15.2 of the said Rules (where the Court may grant summary judgment to a Claimant);
>
> (vii) in the circumstances presented on the Claimant's application, where disputed facts on affidavit evidence were before the Court, the Learned Judge wrongfully embarked on a trial of issues which were not properly defined, on facts in relation to which she could not reasonably assess the credit of any witness and with respect to which additional evidence was patently warranted to ensure a just determination".

In dealing with ground 2, Mr. Piper has put forward a number of reasons why the learned judge was in error when she exercised her discretion in determining the issue raised before her. He contended inter alia, that the learned judge acted contrary to Parts 11.6, 11.7, 11.8 and 11.11 of the CPR, in permitting the respondent to make an application at the case management conference without giving notice of the intended application to the other parties.

The Rules have made it abundantly clear that parties should not use the opportunity at case management conferences to make controversial interim applications without appropriate notice to the opposing party. Accordingly, Part 11.3(1) provides:

> "So far as is practicable all applications relating to pending proceedings must be listed for hearing at a case management conference".

Did the proceedings before the learned case management judge in this appeal fall within the ambit of Part 11? Or, was it that the learned judge in

exercising her case management powers dealt with the matter on her own initiative? Part 26.2(2) and (3) state inter alia:

> "(2) Where the court proposes to make an order of its own motion it must give any party likely to be affected a reasonable opportunity to make representations.
>
> (3) Such opportunity may be to make representations orally, in writing, telephonically or by such other means as the court considers reasonable."

Mr. George Q.C submitted that the respondent made no application to the court for a determination of the issue and in those circumstances, he was not under a duty to notify the other parties of an intended application. Rather, he said, Counsel for the respondent merely informed the learned judge that there was a settlement between the appellant and respondent as he was obliged to do at the case management conference. He submitted that it was upon hearing the opposing position put forward by Counsel for the appellant, that the judge on her own motion gave directions for the issue to be determined before her.

It was acknowledged by Mr. Piper that the learned judge could exercise her powers under the rules and inherently make orders on her own initiative. He submitted however, that where the judge proposes to exercise this power, a party likely to be affected by the order must be given reasonable opportunity to make representations. He contended that it would be necessary for the court to give at least seven days notice of the date, time and place of hearing. He further submitted that in the instant case, the learned judge did not indicate that she proposed to hold a hearing on her own initiative. He argued that the record at the

case management conference showed that the learned judge had indicated that she was acting pursuant to the respondent's request for a ruling from the Court.

Having regard to the submissions that were made by Mr. Piper, it is necessary to examine the notes of the proceedings at the case management conference held on the 22nd September. Page 2 onwards of the notes state as follows:

> "Mr. George indicates first application is for variation of order for substituted service on 4th and 5th defendants of the Notice of Concurrent Writ and Statement of Claim made on June 18, 2003. Application granted.
>
> **Mr. George continues**:-
>
> This matter has been the subject of settlement re the 1st defendant Western Broadcasting Services Ltd.
>
> The negotiations took place between the Claimant and the 1st defendant and his attorney Mr. Walter Scott of Chancellor & Co. The Chairman of Western Broadcasting, Mr. Neville Blythe, was present at the negotiations.
>
> Counsel off Island then. The Claimant had with him and was represented by Messrs. Dabdoub and Clough. They were in touch with DunnCox the attorneys on the record for the Claimant. The negotiations ended in an agreement between Western Broadcasting and the Claimant.
>
> Mr. George asks leave for Mr. Dabdoub to deal with settlement details.
>
> Miss Larmond intervenes. Indicates that she was not aware of settlement. Instructed that it was negotiations which are not complete. Said they were without prejudice negotiations.
>
> Mr. George – 3 Million Dollars have even been paid.

Leave granted to Mr. Dabdoub".

Mr. Dabdoub then outlines the details of the negotiation to the learned judge. On completion the judge said:

> "Case (sic) adjourns matter indicating that affidavit needs to be filed exhibiting documents referred to in light of the position taken by the other side and such other affidavit found to be necessary to be filed before 26. 9. 03. Adjourned to 26. 9. 03, 2:00 pm".

I have not seen in the transcript of the proceedings where the respondent had requested a ruling on the matter. One could therefore conclude that the learned judge was acting on her own initiative when she adjourned the matter for hearing on the 26th September. She was under no duty in the circumstances, to ensure that notice of the application was given to the parties before she commenced hearing evidence regarding the settlement.

Was the procedure of ordering affidavit evidence appropriate and in compliance with the Rules? There is no set format by which the court is required to take the evidence, but the judge by virtue of Part 29.1(1) of the CPR has discretion to give appropriate directions with respect to:

(a) the issue on which it requires evidence

(b) the nature of the evidence which it requires to decide those issues; and

(c) the way in which the evidence is to be placed before the court, at a case management conference or by other means."

It is my view, that the learned judge had acted fully within her powers under the rules in directing the parties to produce evidence on affidavit in order for her to decide the issue of the existence of a settlement. It was her duty to give directions as to the nature of the evidence required and the way in which the evidence was to be placed before the court. There was ample opportunity for the Attorneys to cross-examine the deponents in respect of their affidavits. I am further of the view, that the appellant has not been prejudiced by the procedure adopted by the learned judge. Furthermore, the rules prohibit the case management judge from trying the cause of action. Ground 2 of the appeal also fails.

Ground 3

Ground 3 states as follows:

> "3. If, which is not admitted, the Learned Judge was empowered by Part 26.1 (v), Part 1 or any of the remaining provisions of the Civil Procedure Rules, 2002 to determine the said issue at the case management conference, and if she acted in accordance with a discretion properly conferred thereby, then she erred in law and/or misdirected herself with respect to the facts and the law in holding that there was a binding agreement between the Claimant and the First Defendant for the settlement of the proceedings between them, for the following reasons:
>
> (i) at the commencement of the hearing of the issue on the 22" September, 2003, Counsel for the First Defendant informed the Learned Judge that, on her instructions, only negotiations for settlement had been pursued and no settlement had been reached. The Learned Judge therefore knew or ought reasonably to have known that in the absence of unequivocal evidence that the terms of a settlement had been agreed between the contending parties, evidence of the without prejudice negotiations

could not properly be raised unless same was being advanced in furtherance of the Court's duty of management under Part 25.1 (f) of the Civil Procedure Rules, 2002;

(ii) against this background, the Learned Judge erred in law in requiring that affidavit evidence be placed before her after having been alerted to the fact that there was a dispute as to whether the without prejudice negotiations resulted in a concluded agreement for the settlement of the dispute between the Claimant and the Defendants or any of them;

(iii) by embarking on a hearing of the dispute as to whether there had been a binding agreement for the settlement of the claim between the Claimant and the First Defendant on affidavit evidence at the case management conference, the Learned Judge wrongfully dispensed with the need for a trial of the issue, in circumstances in which there were subsidiary issues of mixed fact and law arising from the affidavit evidence, which ought properly to have been the subject of investigation at a trial of this new, separate and distinct cause of action which arose on the disputed facts contained in the said affidavits.

(iv) in finding, on the disputed affidavit evidence which was before her, that there was a binding agreement between the Claimant and the First Defendant for the settlement of the Claim in the defamation proceedings, the Learned Judge neglected to have any or any sufficient regard to the several subsidiary issues which arose on the said affidavit evidence, including the following:

(a) whether there was consensus ad idem between the parties to the without prejudice negotiations;

(b) whether all of the terms of the agreement which she found to exist had been agreed;

(c) the effect of the parties having not agreed the terms of the letter of apology;

(d) the fact that costs remained to be agreed between the Attorneys – at- Law for the parties to the dispute;

(e) the effect of the parties having not agreed essential terms on which the Claimant was being permitted advertisements on Hot 102 and CVM Television to the value of $17,000,000.00, such as the times on which each advertisement was to be aired, the station on which they were to be aired and the cost or value of each such advertisement;

(f) the effect of the parties having been unable to execute any of the draft documents which related to the agreement which she found to have existed;

(g) the effect of the Affidavit evidence that the First Defendant had not yet sought or obtained the approval of its Board of Directors or of its insurers to the purported settlement;

(h) the effect of the affidavit evidence that the First Defendant made the payment of $3,000,000.00 under specific circumstances and expressly without prejudice, at a time when several terms of the agreement which she found to exist remained to be settled and neither of the draft agreements had been executed; and

(i) whether the payment of $3,000,000.00 by the First Defendant to the Claimant, expressly made without prejudice, was capable of having the effect of creating an estoppel in favour of the Claimant as the Learned Judge appears to have found in her reasons for judgment".

Mr. Piper submitted inter alia, in respect of this ground, that evidence of "without prejudice" negotiations could not be properly raised in the absence of unequivocal evidence that the terms of the settlement had been agreed. He further submitted that the learned judge had conducted the "trial" of the question as to whether a binding agreement was reached, on "without prejudice" negotiations without pleadings, oral evidence and the opportunity to pursue

disclosure. In the circumstances, it was his view that the judge had acted pursuant to the Court's powers to deal with the case summarily.

It was further submitted by Mr. Piper that the court's power to deal with cases summarily arose in three main areas of civil litigation, namely:

i) The power to strike out proceedings as revealing no reasonable cause of action or as being frivolous, vexatious and an abuse of its process: see ***Wenlock v Moloney and Others*** [1965] 2 All E.R 871.

ii) The summary judgment application process where on an analysis of the facts against the relevant principles of law, a party's claim or part of it is obviously unsustainable, resulting in the court's determination that a trial will be wasteful: see **Swain v Hillman and Another [2001] 1 All E.R 91; Three Rivers District Council and Others v Bank of England** (No. 3) [2001] 2 All E.R 513.

iii) The power to refuse to set aside a judgment entered in default, thereby refusing to permit the matter to proceed to trial.

Mr. Piper submitted that based on these authorities, it was only in clear and obvious cases, the court exercises its summary powers to forego the need for a trial. He submitted further, that where the case involves disputed issues of fact and law, a litigant ought to be permitted the right to present evidence at trial after disclosure and request for information are administered. He also submitted that, in the matter on appeal, the judge's power was limited to that of encouraging and assisting the parties to settle, upon being informed that the negotiations were incomplete. He concluded that the learned judge was in error when she stated in her judgment that she was entitled to determine the issue on the material provided and that there was no need for the reception of oral evidence.

Mr. George Q.C, submitted that by virtue of Part 25.1 of the CPR, there was no restriction on the judge's powers. These powers, he said are subject to the general powers of management afforded to the court in Part 26 of the CPR and in the circumstances, the learned judge was not confined to merely encouraging the parties to settle their case but, she was at liberty to make such orders and give such directions to enable the court to deal with the case justly.

Having researched the matter, the following principles have been enunciated in the cases:

1. The purpose of resolving issues on a summary basis and at an early stage is to save time and costs and courts are encouraged to consider an issue or issues at an early stage which will either resolve or help to resolve the litigation as an important aspect of active case management: see ***Kent v Griffiths*** [2001] QB 36 at 51B-C. This is particularly so where a decision will put an end to an action.

2. In deciding whether to exercise powers of summary disposal, the court must have regard to the overriding objective: see ***Three Rivers District Council v Bank of England*** (No 3) [2001] 2 All ER 513 per Lord Hope at pp 541-542; in which ***Swain v Hillman*** [2001] 1 All ER 91 at 94-95; was considered.

3. The court should be slow to deal with single issues in cases where there will need be a full trial on liability involving evidence and cross examination in any event and/or where summary disposal of the single issue may well delay, because of appeals, the ultimate trial of the action: see ***Three Rivers District Council v Bank of England*** (No 3) (supra).

4. The court should always consider whether the objective of dealing with cases justly is better served by summary disposal of the particular issue or by letting all matters go to trial so that they can be fully investigated and a properly informed decision

> reached: see ***Three Rivers District Council v Bank of England*** (No 3) (supra).

I am of the opinion, that there is merit in the submissions made by Mr. George Q.C. I hold the view that the learned case management judge was entitled to consider the "without prejudice" communications that had passed between the parties, in order to determine whether a settlement had in fact been concluded. See: **Tomlin v Standard Telephone and Cables Ltd.** [1969] 3 All E.R 201 and **Rush and Tompkins Ltd v Greater London Council and Others** [1988] 3 All E.R 737.

Further, the learned judge, having had access to the material referred to in ground 3(iv)(a) to (i) inclusive, would have given them due consideration. Once the agreements regarding the settlement were considered to be complete, other matters, such as an apology, discontinuance and deed of release, and costs, were merely peripheral and could not be considered essential elements of the agreement.

It is my considered view, therefore, that the learned judge was fully entitled to consider the evidence produced before her on the 26th September 2003. It was an expeditious and just way to resolve the dispute between the parties. There is no merit in ground 3 of this appeal and it also fails.

Ground 4

Ground 4 reads as follows:

> "4. The decision of the Honourable Mrs. Justice Norma McIntosh in holding that a settlement agreement was concluded between the Claimant and the First Defendant on July 11, 2003, was plainly wrong in law and on the facts, having regard to the

material which was before her and the law".

There is no merit in this ground having regard to the conclusions that have been arrived at above.

Conclusion

I would dismiss the appeal with costs to the respondent, both here and below to be taxed if not agreed.

FORTE, P

I agree.

SMITH, J.A.

I agree.

FORTE, P

Appeal dismissed. Order below affirmed. Costs to the respondent here and in the court below to be taxed if not agreed.