THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2006-0006

BETWEEN

T. MALCOLM MILNE & CO.
TERENCE MARTIN MILNE
ALLAN ALEXANDER
FRANK SOLOMON
DESMOND ALLUM
REGINALD ARMOUR
DOUGLAS MENDES

Claimants

AND

PHILLIP NIGEL CRANE

Defendant

Before the Honorable Mr. Justice V. Kokaram

Date of Delivery: 30th June 2009

Appearances:
Mr. M. Quamina for the Claimants
Mr. S. Roberts for the Defendant

JUDGMENT

1. This is a simple case arising out, of a dispute between a client and his attorneys-at-law, in relation to the payment of the legal fees for services rendered to the client in certain High Court proceedings brought against the State. Those proceedings are High Court Action No. 3788 of 1990, 3961 of 1990, Civil Appeals No. 58 of '91 and 59 of '91 (" the former proceedings").

2. The client is the late Justice Richard Alfred Crane, the Defendant; and the Claimants comprise both his instructing attorneys-at-law, the first named claimant and his counsel in the former proceedings. The Claimants in this action claim to be entitled to the payment by the Defendant's estate, the sum of $2,373,650.00, representing the balance of their legal fees due pursuant to an agreement made between the Defendant and the Claimants. Mr. Justice Crane emerged the victor in the former High Court proceedings and obtained several orders for costs in his favour against the State. Those costs were eventually taxed to get an aggregate sum of $5,123,506.00. The Claimants duly presented their requisitions and received the sum of $2,750,000.00 from Mr. Justice Crane on account of their fees.

3. For the purposes of recovering the outstanding fees owed by Mr. Justice Crane on the attorney requisitions, the Claimants duly commenced proceedings by originating summons, dated 18th October, 2001, in High Court Action 3001 of 2001 which I refer to as 'the costs action', seeking *inter alia* that the Claimants' bill of cost in relation to the said proceedings be referred to the taxing officer to be taxed, giving credit of all the sums of money received by them, from or an account of the refunding what may appear on such taxations to have been over paid.

4. This course of action was indeed quite proper in the circumstances of the dispute that emerged between attorney and client in relation to outstanding fees. A taxation would have resolved the issue of what was a fair and reasonable fee to be payable to the Claimants or claimed by the attorneys and an account would be taken of the sums already received by the attorneys for the client.

5. During the course of those proceedings negotiations ensued between the parties for an amicable resolution of the costs action. This no doubt was also a commendable approach, as attorneys must as far as possible avoid disputes concerning the payment of their fees with their clients. See the Code of Ethics, the **Legal Profession Act** Part A rule 16.

6. It is during the course of those negotiations, however, that the basis of this action emerged. The Claimants contend that during those negotiations, an agreement was arrived at between themselves and the Defendant, whereby the Defendant agreed to pay to them the difference between the aggregate of the taxed costs, less the amount already paid in full and final

settlement of the Claimants claims in the cost action. The Claimants contend that this agreement was contained in a series of letters passing between parties, dated 20th December, 2001, and letters of 3rd January, 2002. The end result of these communications according to the Claimants is that the Defendant agreed to pay to his lawyers the sum of $2,373,506.00.

7. The Defendant mounted a spirited challenge to this claim. The Defendant contends that the offer to pay the said fees was made on a "without prejudice" basis and cannot be relied upon to seek to ascertain or evidence any agreement between the parties. Alternatively, if the parties can rely upon the said letters, the letters dated 3rd January, 2002, constituted a conditional acceptance and was ineffectual in law to create a binding agreement. Even if there was a binding agreement the Defendant contends that any action in the alleged agreement is barred by the effect of the limitation of Personal Actions Ordinance. The Defendant's final plank of its defence to the Claimants' claim is that, in any event this action amounts to an abuse of the process as the Claimants are still prosecuting High Court Action 3001 of 2001 ("the costs action"). Two witnesses gave evidence in this matter on behalf of the Claimants, instructing attorney and counsel. There were no witnesses for the Defendant.

8. Both parties filed written submissions in support of their respective cases. The parties commenced hearing this matter before Justice Stollmeyer, and by their consent, that Court having recused itself after taking the evidence, agreed for the judgment to be delivered by this Court and for this Court to rely upon the transcript of the evidence taken before Justice Stollmeyer.

9. Upon review of the evidence and the parties' submissions the Court holds that there was a binding agreement made between the parties, whereby the Defendant had agreed to pay to the Claimants the difference between the amount of the taxed cost, less the amount already paid on account to the Claimants. The Court is of the view that the terms of that agreement is pellucid and is an irresistible conclusion from a fair reading of the correspondence passing between the parties. Further, the action does not amount to an abuse of the process of the Court as parties are free to negotiate and settle their claim in high court proceedings. There is no inconsistency in keeping that action alive while determining whether in fact an agreement was arrived at. It is expected that this would also bring to an end the cost action. Indeed, this

would not have been the case had the judgment been the other way. The Defendant's submissions at these proceedings amounts to the regurgitation of some of the issues raised in the cost action and it would have been best that those proceedings be stayed, pending the determination of these proceedings. In any event, taking into account all the circumstances of this case, the Claimants are entitled to voice its disagreement arrived at by the parties through the vehicle of this action, which is quite a separate consideration from whether the costs are fair and reasonable after a taxation. The Court is also of the view that the action is not barred by the Limitation Ordinance.

The agreement:

10. There are only two witnesses in this case, both for the Claimants, Mr. Dennis Gurley and Mr. Terrance Malcolm Milne. Both filed witness statements in this action and were cross-examined by the Defendant's attorneys-at-law. The cross-examination was uneventful, in that, it did not shake either of the witnesses' testimony as to their view that an agreement had been made between the Defendant and the Claimants. Mr. Gurley states that the agreement was made by an exchange in correspondence after he had entered into negotiation with Roberts and Company, the Defendant's attorney-at-law, to arrive at an amicable resolution of the cost action.

11. The correspondence which set out the nature of the agreement between the parties and the letter dated 20th December 2001, from Wheeler and Company to Mr. Gurley. Mr. Gurley's reply, dated 3rd January 2002, and the response by Wheeler and Company, dated 3rd January 2002. The contents of these letters are brief and are deserving of reproduction in this judgment. It is accepted that these letters were all written on a without prejudice basis.

A. "20th December 2001

Re: High Court Action No. 2001 –
T. Malcolm Milne & Co. and Ors v Richard Crane

As you are aware we act for the Defendant, Richard Alfred Crane.

Our instructions from our client are to offer to your clients the amount equivalent to the difference between the sums received by them on the account and the

amount of $5,100,000.00 (being the aggregate of the taxed costs) in full and final settlement of their claims and costs.

Kindly take instructions from your client and advise."

B. "January 3, 2002

RE: HIGH COURT ACTION NO. 3001 OF 2001
T. MALCOLM MILNE & CO. & OTHERS v RICHARD ALFRED CRANE

We acknowledge receipt of your letter dated 20th December, 2001.

In accordance with our clients' instructions we hereby accept the offer of the amount which is found to be the difference between the total of the sums received by our clients and the amount of $5,123,506.00 (not $5,100,000.00 erroneously stated in your letter) allowed on taxation.

Please supply us with full details of the amounts (if any) allegedly paid to our clients in excess of and/or in addition to the amounts of the three deposits (totalling $2,750,000.00) acknowledged in the affidavit of the second named Plaintiff sworn to and filed on the 18th October 2001.

This matter is fixed for hearing on the 4th January 2002. We propose that a consent order should be entered on that day.

Please note that the acceptance herein is subject to our receiving payment within a reasonable time. We look forward to hearing from you with your proposal in this regard."

C. "3rd January 2001

Re: High Court Action No. 2001 – T. Malcolm Milne & Co. and Ors v Richard Crane

> We acknowledge receipt of your letter of 3rd January 2002 in acceptance of our without prejudice offer in settlement of your clients' claims and costs.
>
> We have requested urgent instructions from our client on (1) the additional amounts allegedly paid to your clients, and (2) a reasonable time by which payment in accordance with the offer will be made."

12. No words could be clearer, both parties understood as at 3rd January 2001, that the agreement struck in settlement of the Claimants' claims for its cost, was that outlined in the Defendant's letter of 20th December 2001 being the payment by the Defendant to the Claimant of the amount equivalent to the difference between the sums received by the Claimants on account of their cost and the amount of the aggregate to the tax cost. This was the agreed mechanism for settling or comprising two main components: the aggregate of the tax cost in favour of the Defendant, and the amount already received by the Claimants.

13. Mr. Gurley states in his cross-examination, "I thought that although, it would be implied that payment was to be made within a reasonable time, I thought that I should raise it specifically, when the Defendant proposed to make the payment that had been agreed. Agreed pursuant to our formula as it were."

14. Even without this testimony, the conclusion that the formula was arrived at is obvious. This formula as it were, formed the basis of the parties understanding and it would be artificial to analyze the agreement as contingent upon ascertaining those two components. In fact, the Defendant's argument may perhaps have some merit if those components themselves were vague and incapable of being calculated, this is not the case with respect to this formula.

15. The aggregate of taxed costs can simply be confirmed by reviewing the Registrar's allocators in the respective sums, which sums have not been contested or disputed by the Defendant. The sums received by them on account can be ascertained from either party's record; again, that is not a matter in dispute. As it stands the evidence of Mr. Milne and Mr. Gurley demonstrated that the sums were ascertainable.

16. In the attempt to demonstrate that no agreement was arrived at because Mr. Gurley insisted that payment was made within a reasonable period of time. I took careful note of the

exchange in cross-examination of Mr. Gurley and it demonstrated what was a reasonable time. Indeed indicating to a Court that a consent order would be entered is a serious undertaking to give to a Court and ought not to be taken lightly.

Abuse of process:

17. The Defendant contends that these proceedings amount to an abuse of process, as the Claimants have vigorously pursued the costs action and have never indicated in those proceedings that the action was compromised. The Defendant suggests that to allow the Claimants to side step those proceedings by taking another "bite of the cherry" would amount to abuse of process. The nature of this action, however, is founded in contract. This is a separate cause of action against the Defendant, claiming that a contract was made between the parties and that contract has been breached. The commencement of fresh proceedings to enforce a contract to compromise an action is permissible, and it does not run afoul of any rule of the public policy. The compromise is entirely contractual and the usual remedies for breach of contract will lie. See **Law of Compromise** D Foskett para 11-02. The Court therefore does not agree that these proceedings constitute an abuse of the process. It is a legitimate cause of action emerging from the court action. Perhaps, different choices could be made by a case managing judge to stay those proceedings pending the hearing of this claim, but that does of itself constitute an abuse of the process and does not prevent the Claimants from pursuing their claim to remuneration in this forum.

Final and binding agreement:

18. The conclusion that the parties entered into a final binding agreement disposes with the objection that the correspondence were made on a, "without prejudice basis". See **Rush and Tompkins Limited and Greater London Council and Anor** [1988] 3 AER 737, **Tomlin v Standard Telephone** [1969] 1 WLR 1378. Once a "without prejudice" offer is accepted a complete contract is established which is binding on both parties and there is no need for confirmation in an "open" letter. The evidence reveals that there was an agreement with regard to an accepted formula for payment but there is no statement in detail of the terms of the two tangential matters, according to Mr. Gurley. This Court is satisfied that there was a meeting of the minds by both parties as to the methodology of payment. It was left to the parties to activate this agreement by a process of simple mathematics or accounting. See the

Law of Practice and Compromise, Halsbury Laws of England 4th edition Volume 9. It cannot be said in the case, that the parties were left wondering as to whether there was any agreement and what were its terms. If one was to accept, the reasonable man test, the answer would have been, but of course a deal has been struck. It was simply a matter for the attorneys to execute the agreement. The Court agrees therefore with the submission of the Claimants that notwithstanding the without prejudice nature of the communication they are entitled to rely on those communications in support of its contention that an agreement had been struck and so found its cause of action in contract.

The three areas of dispute:

19. The areas of dispute between the parties as alleged by the Defendant were with regard to trivial matters and not germane to the agreed substantive formula and I examine these areas under the following subheads.

Firstly, the aggregate of taxed costs

20. This is a matter that can be easily resolved by examining the certificates and to pay after reasonable time. There was a dispute as to what constituted, reasonable time. The Court accepts that the Defendant was fully aware of the nature of its obligations under the contract and was also in agreement to pay the sum within a reasonable period of time.

21. The exact date of payment was a matter to be determined, however, this does not affect the fundamental fact of an agreement to pay.

Instructions to settle

22. The Defendant contends that the Defendant died prior to giving specific instructions to settle this case. The Court disagrees. The death came after the parties had arrived at the agreement and after attorneys acting on the parties' behalf had worked out the mechanics of settlement. The attorneys had at that time the full authority of the client to compromise the claim through their "without prejudice" communication.

Resolution of claim

23. In the final analysis, the claim of the Claimants succeeds; the Court's order is that there will be judgment for the Claimants against the Defendant and that the Defendant do pay to the Claimants the sum of $2,373,506.00 together with interest.

24. The question of cost and interest is reserved after further submissions are made by the parties on the 3rd July 2009.

25. The decision on cost and interest is reserved to the 3rd July 2009.

Vasheist Kokaram

Judge