REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No**. CV2016-01946**

BETWEEN

JENNIFER MORALDO
(Legal Personal Representative
of Elaine Sandiford)

Claimant

AND

ANTHONY SANDIFORD

Defendant

Before the Honourable Mr. Justice V. Kokaram

Date of Delivery: Thursday 21st June 2018

Appearances:

Mr. Brent Hallpike instructed by Ms. Suzette Althea Bullen for the Claimant

Mr. Ronald Dowlath instructed by Mr. Ramraj Sookhansingh and Ms. Melissa Ramdial for the Defendant

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JUDGMENT

JENNIFER MORALDO'S SETTING ASIDE ACTION

Introduction

1. This claim concerns the setting aside of a consent order which had brought to an end ongoing litigation[1] between the Claimant, Mrs. Jennifer Moraldo and her adversary the Defendant, Mr. Anthony Sandiford. The consent order represented the terms of a mediation agreement executed by their respective attorneys at law. This claim addresses the ability of Mrs. Moraldo as a party to the mediation process to set aside that consent order where she alleges

[1] CV2011-02229

that she did not give her attorney at law any instructions to settle her claim. In a separate action, **Jennifer Moraldo v Kenneth O'Brien** CV2017-00857, she has brought a claim in negligence against her attorney-at-law ("The negligence action"). Both actions were heard on the same day. The negligence action explores the extent to which Mrs. Moraldo's attorney can be liable in an action in negligence for presenting the said consent order allegedly without his client's instructions or whether such acts are protected by "attorney immunity" and "mediation immunity".

2. Disputes such as these highlight the need to ensure that litigants and equally their attorneys understand the importance of mediation as an appropriate dispute resolution process in enhancing the citizens access to justice where the participants are actively engaged in a collaborative problem solving exercise and a working example of social justice.

3. Mediation is an effective and practical means of resolving many commercial disputes in this jurisdiction, as it is globally. Mediation as an "appropriate" dispute resolution ("ADR") mechanism is an important pillar in the achievement of civil justice reform effected by the Civil Proceedings Rules (1998) as amended (CPR). To give effect to the overriding objective[2] the Court must, as one of its case management duties, robustly encourage the parties to use mediation as a means of resolving the claim[3]. The use of ADR and mediation is an integral feature of the pre-action protocols[4]. Parties may be sanctioned in costs for an unreasonable refusal to agree to an ADR process[5]. Many attorneys are certified mediators while others, notably recent graduates of the Hugh Wooding Law School, have been exposed to mediation training and mediation advocacy.[6]

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[2] Part 1 of the Civil Proceeding Rules 1998 as amended (CPR)

[3] Rule 25(1)(c) of the CPR

[4] In Rule 1.4(2) of Pre-Action Protocols, one of the objectives of the pre-action protocols are:

a) To encourage the exchange of early and full information about the prospective legal claim;
b) To enable parties to avoid litigation by agreeing a settlement of the claim before the commencement of proceedings;
c) To support the efficient management of proceedings under the CPR where litigation cannot be avoided.

[5] Rule 66.6 (6) CPR

[6] "Since 2010, the Hugh Wooding Law School has been training persons both with mediation skills and techniques as mediators, or with skills that will equip them to be mediation representation advocates, as attorneys, representing their clients in a mediation. This has been accomplished through early exposure to negotiation and mediation representation techniques. The goal is that by 2020, approximately 1500 attorneys would have been trained. The effects should then be noticed in the next decade or so (between 2020-2030), within the Caribbean region, that we possess within our midst a cadre of robust and well-informed mediation-minded attorneys. The expectation is that these attorneys will be better able to negotiate or mediate the litigated or non-litigated case (recalling that mediation is facilitated negotiation with a third party neutral)– be it family, commercial, shipping or construction matters - with

4. The practice of mediation is regulated by legislation (the Mediation Act 2004 Chapter 5:32) unlike most other jurisdictions in the Commonwealth. The principle of regulation underpinning the Mediation Act is one method of ensuring access to justice through mediation. The Mediation Act establishes among other things the standards to be complied with by mediators, a Code of Ethics to guide mediators and a disciplinary process for mediators. Judges now also increasingly refer matters to judicial settlement conferencing (JSC) another form of consensual dispute resolution with similarities to the mediation process. The Chief Justice of this jurisdiction[7] has piloted two projects on court annexed mediation and JSCs and indicated in his Opening Address for the 2017-2018 law term[8] that a permanent court annexed ADR programme will be introduced in the new term.

5. Routinely our Courts receive draft consent orders and settlement agreements from attorneys at law on behalf of their clients typically by email, setting out terms of compromise obtained through either all parties conferences, mediations or JSCs. With this undoubted support for the increased use of mediation, disputants and their legal advisors must quickly come up to speed with understanding the aims, objectives and their roles in this process.

6. One of the aims of the mediation process and certainly not the only one, is to provide a more meaningful and collaborative problem-solving approach to the practical resolution of disputes as an alternative to the adversarial model in litigation. The key difference in this consensual problem-solving model from adversarialism in litigation is the focus on underlying interests of disputants and not on positions based on rights. As in some cases mediation is seen as a superior form of dispute resolution to litigation, no effort must be spared by all practitioners in the profession to ensure the quality of the process. That is, there must be full agreement to the process engaged and a satisfactory outcome based on informed consent, autonomous decision making and the voluntary submission to terms of settlement

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a tool bag of mixed negotiation techniques and approaches. These attorneys will appear at mediations, be well-prepared and understand the meaning of an opening statement in a mediation, or be ready with a briefing or position paper. These attorneys will understand the importance of an agreement to mediate (before the mediation begins) and their role in drafting the terms of the settlement agreement (at the outcome of the mediation). These attorneys will have done their homework with their analysis of the BATNA (best alternative to a negotiated agreement) and WATNA (worst alternative to a negotiated agreement). These attorneys will also have their prepared representation plans (outlining their negotiating strategies) in advance, with built-in flexibility for creative options and solutions mapped to both their client and the other side's interests." Giselle Yearwood Welch, Course Director ADR, The Resolution Issue II April 2018.

[7] The Honourable Chief Justice Mr. Ivor Archie O.R.T.T.

[8] Speech By The Honourable The Chief Justice For The Ceremonial Opening Of The 2017/2018 Law Term

which represent for the clients and participants their own version of what is known in the mediation world as the "win-win" result. In such an event, both parties would have satisfied their underlying interests in the disputes and to that extent, both parties are winners unlike the adversarial model where justice is characterised by the winning adversary.

7. The two actions before this Court unfortunately deal with a dispute between a client, her own attorney and her adversary concerning whether a mediation agreement and consent order settling High Court proceedings was in fact agreed by her. These two claims, the setting aside action and the negligence action, were not consolidated but were heard one after the other and the parties agreed that the evidence in both matters are to be examined in isolation. The setting aside and the negligence actions represent in effect a continuum in a mediation process of the relationship between the parties in a Court ordered mediation process and the responsibilities of the attorney subsequent to the mediation in drawing up the mediation/agreement or consent order as a result of the mediation discussions.

8. An attractive feature of mediations is its informality, its fluid shape, its control by consensus of the parties and the guiding but not determining hand of the mediator. The informality of mediations should not be underestimated by litigants nor their attorney at law. Parties and their attorneys must be properly prepared for their mediation. They must prepare in advance for all possible options to resolve a claim, be prepared to negotiate in good faith and to share all necessary information to obtain what they will consider the best possible result in the circumstances of the uncertainty, high stakes and risks of litigation. It is not often that a Court will set aside an agreement which was obtained in a mediation. These mediation agreements must be treated with the respect it deserves as an expression of the free will of the parties.[9] Questions may still arise on whether the agreement is final and binding and a body of law founded on the ordinary law of contract has grown to deal with such issues which typically may arise out of a mediation session or any settlement process.

9. Ironically, the two main disputants in the original litigation, Mrs. Moraldo and Mr. Sandiford, are again enjoined in litigation over an agreement which was designed to put their

[9] As Foskett quite correctly observed, "at any stage on the litigation parties may draw back from asking the Court to adjudicate upon their dispute and may resolve it themselves. They have complete freedom to do so without interference for the Court. Having resolved it in this way, it is no less binding on them than if they had asked the Court to resolve it for them" **The Law and Practice on Compromise** by David Foskett

main dispute behind them. However, the setting aside action and the negligence action raises the unique opportunity for the Court to place a marker to highlight the rights and obligations of all parties engaged in the Court ordered mediation process and to stymie further satellite litigation that may arise out of such a process from a misunderstanding of roles and functions.

10. This action raises the following important issues in relation to the mediation process:

    a) Whether the parties had arrived at an agreement at the mediation session;

    b) Whether Mrs. Moraldo's attorney at law had the implied and ostensible authority to bind her to the terms of compromise arrived at the mediation as set out in the consent order;

    c) Can that order be set aside in circumstances where Mrs. Moraldo has allegedly instructed her attorney at law not to enter into those terms or would her remedy be left against the attorney at law.

11. I turn to the main question which is whether an agreement was arrived at by the parties in a mediation which became a consent order of this Court. There is no dispute that the legal representatives for both parties and the mediator signed an agreement after the conclusion of the mediation. There is also no dispute that a consent order was entered by the legal representatives of both parties on the same terms of that agreement bringing the proceedings to an end on those terms. What is in dispute is whether Mrs. Moraldo agreed to those terms or gave her attorney, Dr. Kenneth O'Brien, the authority to enter into a consent order in those terms.

12. The Court will set aside an agreement obtained in mediation in the same manner in which any agreement or contract can be set aside. In this case, the sole ground on which this agreement is said not to be binding on the parties is simply that Mrs. Moraldo alleges she did not agree to those terms at the mediation and after the mediation, she alleges she expressly told her attorney that she did not agree to those terms. She seeks an order setting aside that consent order and to restore the trial for action.

13. For the reasons set out in this judgement, there are no exceptional reasons to set aside this consent order. Mrs. Moraldo attended a Court ordered mediation together with her then

Attorney-at-Law, Dr. Kenneth O'Brien, to discuss the resolution of pending litigation[10]. The mediation was conducted by a certified mediator[11] under the Mediation Act 2004. On a balance of probabilities the parties themselves agreed to the terms of settlement at that mediation which was read out by the mediator and gave their attorneys the authority to execute the agreement on those terms. Those terms were subsequently at a later stage drawn up by the mediator and sent to the attorneys at law on both sides for their execution. Those attorneys executed the settlement agreement and issued it to the Court. The pending litigation was fully compromised in terms of that agreement for which full consent was obtained at the mediation session. In so far as Mrs. Moraldo complains that she never gave her attorney at law any authority to enter into an agreement or consent order after she left the mediation room, quite apart from such an allegation being a departure from her pleaded case, this was never communicated to the mediator nor to Mr. Sandiford nor his attorney at the mediation session nor was it brought to the attention of the Court in a timely manner. If indeed it is being asserted that after the mediation she changed her mind or that she made a mistake, this is simply not enough to set aside this order when both parties had communicated their acceptance of terms without demur in the mediation room.

14. It is undisputed that Mrs. Moraldo's attorney at law had the implied and ostensible authority to settle and compromise the proceedings on her behalf. It would be a rare event for a Court to set aside a consent order made after such representations were made by parties at the mediation session and their Counsels to the Court.

15. Although the authorities demonstrate there is a discretion to set aside such an order where there is in fact no authority by the client or the attorney has acted in excess of his authority, it is a discretion that is to be exercised with caution. There is absolutely no evidence from Mrs. Moraldo's attorney at law in this case as to whether or not there was any communication as alleged by her to have been made after the mediation session was over. It would be unfair, unjust and prejudicial to Mr. Sandiford for this agreement to be set aside in the circumstances as was known and made known to him before the consent order was entered. I have therefore found that:

    (a) The parties did arrive at the said agreement at the mediation session.

[10] High Court Action CV2011-02229
[11] Mr. Anthony Vieira

(b) The proceedings should not be set aside as the attorney had the implied and ostensible authority to compromise the proceedings based upon the agreement arrived at the mediation.

(c) Mrs. Moraldo's remedy for any alleged failure to comply with her instructions lies against her attorney at law and not Mr. Sandiford.

16. I now set out the brief facts and evidence and address the issues of whether an agreement was arrived at the mediation session and whether the consent order, in the circumstances as determined in this action, can be set aside. I turn first to the factual background.

Factual background

17. On December 2012 by the consent of the parties Mrs. Moraldo and Mr. Sandiford were ordered by the Court to attend mediation. The mediator that was appointed was Mr. Anthony Vieira, a certified mediator under the Mediation Act. The parties attended the mediation session with Mr. Vieira on February, 2013.

18. At the mediation session, Mrs. Moraldo was represented by her then attorney at law, Dr. Kenneth O'Brien. At the mediation session, Mr. Sandiford proposed certain terms of settlement which Mrs. Moraldo contends that she did not expressly or impliedly agree. Upon the conclusion of the mediation session, she contends that she instructed Dr. O'Brien that she could not agree to the terms proposed by Mr. Sandiford. She alleged she was informed by Dr. O'Brien that the matter would be listed for hearing before this Court. She contended she continued to make enquiries after the mediation session as to when the matter would be listed but she did not receive a response from Dr. O'Brien.

19. On 8th March 2013 an email was sent to the Court containing the terms of the consent order which was signed by both attorneys Ms. Turkessa Blades for Mr. Sandiford and Dr. O'Brien for Mrs. Moraldo. On 13th March 2013, the consent order was entered in CV2011-02229 which reflects the terms of the mediation agreement. Mrs. Moraldo contends that the consent order was entered without her knowledge and consent and was a consequence of the unilateral mistake of Dr. O'Brien. Mrs. Moraldo claims a declaration that the consent order dated 13th March 2013 in CV2011-02229 is null void and unenforceable, an order that the consent order be set aside and costs.

20. The consent order in fact brought to an end three sets of proceedings arising out of a dispute over possession of premises at No.104 Capildeo Lands, Cleaver Road, Arima. That dispute had a long and convoluted history.

Background to the parties' dispute

21. In CV2011-02229, Mr. Sandiford claimed possession against a number of unknown Defendants who were residing at No. 104 Capildeo Land, Cleaver Road, Arima ("the Cleaver Road property"). He contended that he was the owner in fee simple of the said premises and that the Defendants were in occupation without his licence or consent.

22. By Deed of Gift dated 8th November 1995 registered as Deed No.977 of 1996, Mr. Arnold Sandiford (now deceased) conveyed the premises unto Mr. Anthony Sandiford. There were two buildings on the land, the front dwelling house known as the "East Apartment" and the back dwelling house known as the "West Apartment." The deceased resided at the East Apartment which was an old dilapidated building and the West Apartment was an unfinished concrete structure. Mr. Sandiford renovated the East Apartment and completed the West Apartment. This West Apartment was then rented to tenants and the rent was collected by the deceased who deposited it in a joint account with Mr. Sandiford.

23. In 2005, Mr. Sandiford returned to Trinidad with his wife and stayed with the deceased at the East Apartment until June 2006 when they moved into the West Apartment after the tenants vacated same. He returned to the USA in March 2007. In April 2008, he received information that the deceased left the East Apartment to spend a weekend with his daughter, Jennifer Moraldo. Thereafter, the deceased indicated to him that he wished to reside for the time being with his daughter. The deceased then visited the said premises and disputed Mr. Sandiford's entitlement to rent out the finished building.

24. On 8th May, 2008, Mr. Sandiford sought an injunction in CV2008-01690 restraining the deceased from remaining in possession of the West Apartment. The matter was heard by the then Justice Tiwari. On 9th May, 2008 an interim order was made restraining the deceased from entering in the West Apartment. On 25th November 2008 the order of 9th May 2008 was vacated and it was ordered inter alia that Mr. Sandiford would continue to occupy the West Apartment and him and the deceased gave undertakings not to interfere with each other's use and occupation of the respective apartments.

25. On 11th December, 2008 the deceased died and on 15th March, 2010 his daughter, Carol Sandiford was substituted as a defendant in the CV2008-01690 action.

26. In May 2011, Mr. Sandiford became aware that the East Apartment was occupied by persons unknown to him and he sought possession of same.

27. Mrs. Jennifer Moraldo applied and was joined as a party and became a Defendant in CV2011-02229 wherein she contended that the deceased through fraudulent acts caused Elaine Sandiford to be removed and his name substituted in Deed of Conveyance dated 18th March 1977 No. 4637 of 1977. This caused Elaine Sandiford to suffer loss of her property rights which Mrs. Moraldo only discovered on 23rd July 2008. She further contended that the Deed No. 977 of 1996 is based on a voidable conveyance which the deceased admitted prior to his death.

28. She contended that Mr. Sandiford was aware of her challenge to the deeds of the deceased and of the Claimant. She then brought Claim Number CV2009-04330 and CV2010-5045 intituled **Jennifer Moraldo and Anthony Sandiford and the Administrator of the Republic of Trinidad and Tobago**.

29. She sought inter alia a declaration that the estate of Elaine Sandiford was entitled to the entire interest in the said lands.

30. After such a long and bruising battle over the Cleaver Road property, it was fortuitous that the parties agreed to mediate their dispute. The consent order in fact reflected a final resolution of three High Court actions and where Mrs. Moraldo would obtain possession of the home and Mr. Sandiford paid a sum of money. The full terms of the mediation agreement and the consent order are as follows:

The mediation agreement

"*This Agreement dated and effective this day of February 2013 is made between (1) Jennifer Moraldo; and (2) Anthony Sandiford.*

It is Agreed:

1. *Matter settled for Nine Hundred Thousand Dollars (TT$900,000.00) and a congruent transfer of property, specifically:*

a) *Jennifer Moraldo will pay Anthony Sandiford the agreed sum of TT$900,000.00 on or before 31 December 2013; and*

b) *Anthony Sandiford will convey the property in Arima known as 104 Capildeo Land, Cleaver Road in Arima to Jennifer Moraldo (preferably by Deed of Gift but if that's not feasible then otherwise by Deed of Conveyance; the costs and charges associated with the transfer to be borne by Jennifer Moraldo). The Deed of Gift/Transfer shall be prepared and signed forthwith and in any event before 31 December 2013, but will be held in escrow until the agreed sum has been paid. If Jennifer Moraldo needs more time to pay the agreed sum Anthony Sandiford will be entitled to statutory interest (12%) from 31 December 2013 to the date of final payment inclusive.*

2. *All further proceedings (including HCA CV2008-01690 and HCA CV2010-5045) stayed upon the terms set out above.*

3. *The parties acknowledge that the above terms represent their complete agreement relating in property and finance and it constitutes full and final satisfaction of all and any claims either may have against the other.*

4. *Each party acknowledges and agrees that upon complete compliance by each other with the terms of this Agreement and with any Order made embodying or reflecting it, these proceedings and all other proceedings (including HCA CV2008-01890 and HCA CV2010-5045) do stand dismissed and neither party will have any further claims upon the other including any claims upon her or his respective estates.*

5. *Each party will bear their own costs with respect to this Agreement and there shall be no order as to costs in these and the other proceedings.*

6. *This Agreement shall be filed and made an Order of the Court.*

7. *There shall be liberty to both parties to apply as to carrying the agreed terms into effect.*

Concurrence of the Mediator

The general provisions contained in the foregoing Agreement were reached by the parties in mediation conducted by the undersigned mediator. Legal advice and services required for vetting and approving this agreement were provided by the independent advisory attorneys whose signature appear above."

The Consent order

a) *That the matter is settled for Nine Hundred Thousand Dollars (TT$900,000.00) and a congruent transfer of property specifically:*

   Jennifer Moraldo will pay Anthony Sandiford the agreed sum of Nine Hundred Thousand Dollars (TT$900,000.00) on or before 31st day of December 2013 and; Anthony Sandiford will convey the property in Arima at 104 Capildeo Lane, Cleaver Road in Arima to Jennifer Moraldo (preferably by Deed of Gift but if that is not feasible then otherwise by deed of conveyance; the cost and charges associated with the transfer to be borne by Jennifer Moraldo. The Deed of Gift/Transfer shall be prepared and signed forthwith and in any event before 31st December 2013, but will be held in escrow until the agreed sum had been paid. If Jennifer Moraldo needs more time to pay the agreed sum Anthony Sandiford will be entitled to statutory interest of twelve perfect (12%) from 31st day of December, 2013 to the date of final payment inclusive;

b) *All further proceedings (including HCA CV2008-01690 and HCA CV2010-05045) are stayed upon the terms set out above;*

c) *The parties acknowledging that the above terms represent their complete agreement relating to property and finance and it constitutes full and final satisfaction of all and any claims that either may have against the other;*

d) *Each party acknowledges and agrees that upon compliance by each other with the terms of this agreement and with any Order made embodying or reflecting it, these proceedings and all other proceedings (including HCA CV2008-01690 and HCA CV2010-05045) do stand dismissed and neither party will have any further claims upon the other including any claims upon her and his respective estates;*

e) Each party will bear their own costs with respect to this Agreement and there shall be no order as to costs in these and the other proceedings;

f) Liberty to apply; and

g) *The parties shall bear their own costs.*

31. Importantly, by this consent order two further high court proceedings concerning the property were to be stayed pending the completion of the transfer of the property from Mr. Sandiford to Mrs. Moraldo. On the transfer those actions would have stood dismissed and both parties would finally be free of three set of proceedings.

32. A consent order like any agreement is liable to be set aside on various grounds. The sole ground relied upon in this case is that there was no authority by Dr. O'Brien to enter into such agreement. To analyse Mrs. Moraldo's claim the starting point must be the pleadings. I will then analyse the evidence of both parties, Mrs. Moraldo, Mr. Keith Moraldo, Mr. Sandiford and importantly that of the mediator and then determine the three main questions in this setting aside action.

The pleadings

33. Mrs. Moraldo contends that upon the conclusion of the mediation proceedings she expressly instructed her then attorney at law, Dr. O'Brien, that she could not agree to the terms proposed by Mr. Sandiford as she was unable to source the funds due to her advanced age (60 years). Mrs. Moraldo states that she was then advised by Dr. O'Brien that the matter would be relisted before this Court. Mrs. Moraldo further stated that thereafter she was repeatedly advised by Dr. O'Brien that steps would be taken to have the matter relisted for hearing before this Court. Importantly, in paragraphs 4 and 5 of the Statement of Case, no mention is made of any private or separate conversation with Dr. O'Brien after the mediation session:

> "4. In or around the month of February 2013 the parties attended mediation proceedings facilitated by Mr. Anthony Vieira, Attorney at Law. At the conclusion of the mediation session the Defendant proposed certain terms of settlement of the said proceedings filed in CV2011-02229 and referred to above. The Claimant avers that at no time did she expressly or impliedly agree to the said proposal for settlement. Further, the Claimant

states that at no time did she expressly or impliedly authorize her former Attorney at Law to agree to the terms of settlement proposed by the Defendant.

5. The Claimant states that upon the conclusion of the mediation proceedings she expressly instructed her former Attorney at Law that she could not agree to the terms proposed by the Defendant as she was unable to source the funds due to her advanced age (60 years). The Claimant states that she was then advised by her then Attorney at Law that the matter would be listed for hearing before Mr. Justice Kokaram. The Claimant further states that thereafter she was repeatedly advised by her former Attorney at Law that steps would be taken to have the matter relisted for the hearing before the learned Judge."

34. Her case was that she never responded to the proposal in the mediation room, never agreed to it and at the conclusion of the mediation told Dr. O'Brien not to enter in any agreement in those terms. Indeed, in the Claimant's submissions she identified as the first issue whether the Claimant entered into an oral agreement with the Defendant at the close of the mediation session. It is clear from her pleaded case that no such agreement was made at the close of the mediation session and that all that was advanced was a proposal for her consideration.

35. She contends that the consent order was entered without her knowledge and consent. She further contends that at no time did she authorise the entry of the consent order by Dr. O'Brien.

36. In the alternative, she avers that there was agreement made by the parties and the consent order was entered as a consequence of the unilateral mistake of Dr. O'Brien.

37. By his Defence[12], Mr. Sandiford contends that the consent order was entered into by Counsels for both parties based on the actual authority of the Defendant's attorney at law and the ostensible authority of the Claimant's attorney at law. At paragraphs 4 and 6 of his Defence, it is stated:

"4. The Defendant denies paragraph 4 of the statement of case save that the parties held mediation proceedings on the 14th, 17th and 18th January 2013 before Mr. Anthony Vieira,

[12] Defence filed 4th January, 2017

Attorney at Law and the parties reached an agreement to be reduced into writing by the said mediator and sent to the respective attorneys at law for the parties.

6. The Defendant admits paragraph 6 of the statement of case and avers that the said consent order was entered by the respective attorneys at law for the parties based on the actual authority of the Defendant herein attorney at law and the ostensible authority of the Claimant herein attorney at law."

38. The Mediation Settlement Agreement was also sent to this Court's Judicial Support Officer (JSO) under cover of letter 6th March 2013 on the letterhead of Wheeler and Co. and was jointly signed by Dr. O'Brien as Counsel for Mrs. Moraldo and Ms. Turkessa Blades as Counsel for Mr. Sandiford.

39. Mr. Sandiford contends that the consent order did not involve matters collateral to those in CV2011-02229 and as such it cannot be impeached if Mrs. Moraldo's attorney at law did not have any implied authority to act on her behalf.

40. Although there were other persons present with the Moraldos at the mediation, the only person to testify on their behalf were those interested in the outcome, Mr. and Mrs. Moraldo.

Analysis of the evidence

41. At the trial the Claimant led evidence from herself and her husband, Mr. Keith Moraldo. The Defendant led evidence through himself. Mr. Anthony Vieira was initially summoned by the Defendant. After discussion with the parties he was summoned as a witness by the Court and treated as the Court's witness. He attended a case management conference (CMC) and openly disclosed material aspects of the mediation which suggested quite candidly that all parties had arrived at an agreement at the mediation session. Further the agreement that was shown to him and the consent order was consistent with the agreement that the parties had arrived at in the mediation room. With the consent of the parties, his evidence was taken under oath at the CMC and Mrs. Moraldo was given time to consider this evidence before pursuing the matter further. It was then agreed, upon the indication that Mrs. Moraldo insisted on trying the matter, that Mr. Vieira would be treated as the Court's witness and his evidence used in both the setting aside action and the negligence action. The transcript of his

evidence taken at the CMC[13] was tendered as his evidence in chief and he was cross examined by counsel for Mrs. Moraldo and Mr. Sandiford at the trial.

42. Before analysing the evidence, an important issue of the confidentiality of the mediation process must be addressed. Mrs. Moraldo had in fact taken evidential objections to certain aspects of the evidence of Mr. Sandiford on the grounds that it was inter alia a breach of the confidentiality of the mediation. I allowed the evidence de bene esse. After consideration of the matter, I have overruled those objections and allowed the evidence but ascribe the appropriate weight to such communications which in this case was evidently not entirely completely representative of all that transpired at the mediation session.

Analysis of the evidence-Admissibility of evidence in confidential mediation sessions

43. Mediation is a confidential process. Parties in a mediation session conducted by a certified mediator meet and discuss their disputes under the protection of the statutorily provided confidentiality provided by the Mediation Act. Subject to certain exceptions:

    a) A certified mediator shall not disclose any confidential information obtained in the mediation session;

    b) The certified mediator is not compellable as a witness to give evidence of any matter which occurred during the mediation session or to provide any confidential information which came to his knowledge during the process [14]; and

    c) Evidence of communications or documents made or prepared for in the mediation session are not admissible in any proceedings.[15]

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[13] Transcript of Mr. Vieira's evidence dated 19th January, 2018

[14] "12(3) Subject to subsection 11(2), the certified mediator or any other person involved in the mediation process is not compellable as a witness, to give evidence of any matter which occurred during the mediation session or any confidential information which came to his knowledge during the mediation process."

[15] 13. (1) Evidence of—

(a) a communication made in a mediation session; or

(b) a document, whether delivered or not, prepared—

(i) for the purposes of;
(ii) in the course of; or
(iii) pursuant to a decision taken or undertaking given in a mediation session,
is not admissible in any proceedings."

44. Section 10 defined confidential information as follows:

> "10. For the purposes of this Part "Confidential information" means any information expressly intended by the source not to be disclosed, or which is otherwise obtained under circumstances that would create a reasonable expectation on behalf of the source, that the information shall not be disclosed and includes—
>
> *(a)* oral or written, communications, made in the mediation process, including any memoranda, notes or work-product of the mediator, mediation party or non-party participants;
>
> *(b)* an oral or written statement made or which occurs during mediation or for purposes of considering, conducting, participating, initiating, continuing or reconvening mediation or retaining a mediator; and
>
> *(c)* any other information expressly intended by the source not to be disclosed, or obtained under circumstances that would create a reasonable expectation on behalf of the source that the information shall not be disclosed."

45. The compellability of a mediator as a witness was dealt with recently in this region in the High Court of Jamaica in **Margarette Macaulay v Harold Brady and Bruce Golding** [2014] JMSC Civ. 33. In that case Ms. Macaulay was the mediator who facilitated a mediation between Mr. Brady and Mr. Golding in an action for damages for libel. The parties were unable to arrive at an agreement at the mediation and Mr. Brady was of the view that the mediation failed because of the conduct of Mr. Golding in the mediation session. Mr. Brady filed an application seeking to strike out the Defence while Mr. Golding denied that he demonstrated any attitude or behaviour during the mediation to frustrate the process. A witness summons was served on Ms. Macaulay to testify on behalf of Mr. Brady regarding the conduct and attitude of Mr. Golding at the mediation session. Ms. Macaulay thereafter applied to have the witness summons set aside on the ground that it was a breach of the mediation agreement; a breach of Part 74.10(4)(a) of the Civil Procedure Rules[16] and; it was contrary to the spirit of mediation where the parties have agreed on confidentiality were

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[16] Part 74.10(4) (a) of the Civil Procedure Rules of Jamaica provides:

> "Mediation is a confidential process such that:
>
> (a) Discussions during the mediation and documents prepared solely for the purposes of mediation are confidential and may not be disclosed in any other proceedings or context….."

encouraged to be frank and free in their discussions during the mediation process. In setting aside the witness summons, P.A Williams J in recognising that the interest of justice will not be served by compelling Ms. Macaulay to give her evidence as to Mr. Golding's conduct in the mediation stated at paragraph 46:

> "The mediation process remains undoubtedly an important part of new dispensation in the judicial system. The fact that it is mandatory does in fact point to the significant role it plays in assisting the process. Parties must indeed be encouraged to be frank and free in their discussions with each other and the mediator. The need for the participants to trust that their discussions will not be used for any other purpose is what ensures that the process works. One must therefore be very mindful of not doing anything that would cause participants to feel restrained in their discussions. The removal of expectations of confidentiality privilege and non-disclosure of documents must be done in exceptional circumstances. It may well be that in being free and frank a person may not want to settle- if this is said expressly it may well be considered privileged or confidential. To say that one's attitude and conduct should be interpreted and then be disclosed to my mind would contribute to diminishing the process."

46. The confidentiality of the mediation sessions are important. It assures parties the freedom to express themselves without the fear of incrimination or that any matter said or exchanged can be used in the pending litigation. Lord Jackson in his useful ADR handbook outlined the importance of maintaining the confidentiality of these proceedings[17]:

> "5.01 Privacy can be a particular attraction of an ADR process. Whereas litigation normally takes place in open court, ADR process are normally private, which may be particularly relevant where there is commercial or personal sensitivity as regards the subject matter of a case. An ADR process, and the outcome of it, are normally protected from publicity by a confidentiality clause, save the extent that it may be agreed something be made public.
>
> 5.02 Separately from the attractions of privacy parties, it is important for public policy reasons that attempts to resolve a dispute take place in confidence. Parties must be able to communicate and feel free to make potential concessions with a view to settlement

[17] The Jackson ADR Handbook 2nd Edition paragraphs 5.01 and 5.02

without fear that if the process does not succeed the potential concession might prejudice their position in any litigation. This has led to the development by the courts of the "without prejudice" principle, which means that a communication made in a genuine attempt to settle an existing dispute cannot normally be referred to in court in proceedings."

47. Apart from statute, parties frequently agree on the confidentiality of their mediation sessions. Some jurisdictions do not statutorily preserve the confidentiality of these sessions, however, in that event, it is recognised as settlement negotiations protected similarly by the "without prejudice" rule.

48. In **Farm Assist Ltd v Secretary of State for the Environment, Food and Rural Affairs** [2009] EWHC 1102 a mediator was issued a witness summons to give evidence of negotiations between the parties at the mediation and she sought to have the witness summons set aside. Interestingly, in that case, the parties waived their "without prejudice" privilege whereas the mediator was seeking to uphold the confidentiality clause in the mediation agreement. Mr. Justice Ramsey explained:

"44. Therefore, in my judgment, the position as to confidentiality, privilege and the without prejudice principle in relation to mediation is generally as follows:

(1) Confidentiality: The proceedings are confidential both as between the parties and as between the parties and the mediator. As a result even if the parties agree that matters can be referred to outside the mediation, the mediator can enforce the confidentiality provision. The court will generally uphold that confidentiality but where it is necessary in the interests of justice for evidence to be given of confidential matters, the Courts will order or permit that evidence to be given or produced.

(2) Without Prejudice Privilege: The proceedings are covered by without prejudice privilege. This is a privilege which exists as between the parties and is not a privilege of the mediator. The parties can waive that privilege.

(3) Other Privileges: If another privilege attaches to documents which are produced by a party and shown to a mediator, that party retains that privilege and it is not waived by disclosure to the mediator or by waiver of the without prejudice privilege."

49. The witness summons was not set aside. Mr. Justice Ramsey commented that in the interest of justice, the mediator should give evidence as to what was said and done in the mediation for a number of reasons namely, the mediator's evidence would not be contrary to the express terms of the mediation agreement and the parties waived any without prejudice privilege in the mediation which they were entitled to do.

50. In **Brown v Rice** [2007] EWHC 625 (Ch), it fell for determination whether the proceedings had been settled at the mediation session. One of the issues was whether without prejudice communications could be admitted into evidence. It was held that it was permissible and necessary for the Court to consider evidence relating to the issue of whether there was a concluded settlement and the admission of without prejudice communications into evidence had not been prevented by the without prejudice rule. Mr. Stuart Isaacs QC commented at paragraph 13, 14, 15, 16 and 21:

> "13. Mediation takes the form of assisted without prejudice negotiation. In **Aird v Prime Meridian Ltd** [2006] EWCA Civ 1866, the Court of Appeal recognised that "with some exceptions not relevant to this appeal ", what goes on in the course of mediation is privileged, so that it cannot be referred to or relied on in subsequent court proceedings if the mediation is unsuccessful: see at para 5 per May LJ, with whom the other members of the court agreed. The court rejected the claimants' submission that a joint experts' statement ordered under CPR rule 35.12 in the litigation between the parties and used in an unsuccessful mediation between them was a privileged document which could not thereafter be used in the resumed litigation.
>
> 14. In **Reed Executive plc v Reed Business Information Ltd** [2004] 1 WLR 3026, following a successful appeal by the defendant, the claimant sought to argue that it should be awarded a substantial part of its costs on the basis that the defendant had unreasonably refused ADR and, for that purpose, unsuccessfully sought disclosure of the details of the without prejudice negotiations which had taken place between them.
>
> 15. The judgment of Jacob LJ, with whom Auld and Rix LJJ agreed, shows that no distinction is to be made between party-to-party negotiations and negotiations conducted within a mediation: both are to be treated as subject to the without prejudice rule. Jacob LJ's judgment also shows that he did not regard mediation as a distinct type of without

prejudice negotiation to which the exceptions to the without prejudice rule listed by Robert Walker LJ in Unilever were inapplicable. In arriving at its conclusion on the issue before it, the court in Reed observed that this list did not include an exception relating to the question of costs.

16. Referring to the requirement in CPR rule 44.3(4) that the court should have regard to "all the circumstances ", Jacob LJ highlighted, at para 17, the inherent difficulty that:

> " 'without prejudice' negotiations, including offers and counter-offers, whether there should be an ADR, what form an ADR should take or what actually happens in an ADR (e.g. one side being recalcitrant) are all in principle relevant. Yet the 'without prejudice' rule apparently makes them inadmissible on the question of costs."

……..

21. The issue here is whether the without prejudice communications in question have resulted in a concluded settlement. In my judgment, in the circumstances referred to later, the admission of those communications in evidence is not prevented by the without prejudice rule since the situation is fairly and squarely within the recognised exception to the rule in respect of such communications listed by Robert Walker LJ in *Unilever*. The fact that the communications took place in the context of a mediation – a form of assisted without prejudice negotiation - does not confer on them a status distinct from any other without prejudice communications such as to take them outside the scope of the exception or otherwise to render them inadmissible. This much is clear from *Reed and Hall v Pertemps Group Ltd*. No investigation of the underlying merits of the dispute is involved. Like Jacob LJ in *Reed*, I do not regard this conclusion as running counter to the public policy which exists in favour of mediation. It would be an odd result if in any given case the court was prevented from determining the existence of a concluded settlement solely because the alleged settlement arose within the context of a mediation."

51. Lord Jackson also recognised the necessity for limited disclosure notwithstanding the confidentiality of proceedings:

"5.07 While confidentiality is of such importance, there may be good reasons for wishing to make use of information derived from an ADR process. The main difficulties that may arise are:

- There may be a dispute about the precise terms of settlement which cannot be resolved without reference to the ADR process;
- A settlement might be challenged on the basis it was reached improperly, for example through fraud or misrepresentation during ADR process;
- If an ADR process is not successful, a party may wish to use a communication made during the process as evidence relevant to an issue in the course of litigation;
- An allegation of potential negligence or breach of professional conduct on the part of a lawyer or third party involved in an ADR process may be difficult to pursue if it is not possible to use information from the ADR process itself."

52. The Mediation Act reflects the learning of **Farm Assists** and **Brown v Rice** by providing for the disclosure of information exchanged in mediation under limited circumstances set out in section 11(2) and 13(2) of the Mediation Act.

53. The section 11(2) disclosures are not relevant to this but it provides:

"11(2) Subsection (1) does not apply where—

(a) the disclosure is required by or under an Act of Parliament;

(b) the disclosure is made with the consent of the mediation parties;

(c) the disclosure is made with the consent of the person who gave the confidential information; or

(d) the person referred to in subsection (1), believes on reasonable grounds that—

(i) a person's life or health is under serious and imminent threat and the disclosure is necessary to avert, or mitigate the consequences of its realisation;

(ii) the disclosure is necessary to report to the appropriate authority the commission of an offence or prevent the likely commission of an offence; or

(iii) the disclosure becomes necessary for the purpose of disciplinary proceedings by the Panel."

54. Pursuant to Section 13(2) the exceptions to the inadmissibility of mediation communications in legal proceedings are where:

(a) the mediation parties consent to the evidence being adduced in the proceedings concerned;

(b) any of the mediation parties has tendered the communication or document in evidence in proceedings in a foreign Court and all the other mediation parties so consent;

(c) the substance of the evidence has been disclosed with the express or implied consent of all the mediation parties;

(d) the substance of the evidence has been partly disclosed with the express or implied consent of the mediation parties, and full disclosure of the evidence is reasonably necessary to enable a proper understanding of the other evidence that has already been adduced;

(e) the document or communication includes a statement to the effect that it was not to be treated as confidential;

(f) the evidence tends to contradict or to qualify evidence that has already been admitted, about the course of an attempt to settle the dispute;

***(g)* the proceeding in which it is sought to adduce the evidence is a proceeding to enforce an agreement between the mediation parties to settle the dispute, or a proceeding in which the making of such an agreement is in issue;** or

(h) evidence that has been adduced in the proceeding, or an inference from evidence that has been adduced in the proceeding, is likely to mislead the Court,

unless evidence of the communication or document is adduced to contradict or to qualify that evidence.

55. Clearly, as these proceedings deal with the enforcement of a mediation agreement, the communications and documents exchanged in the mediation are disclosable pursuant to section 13(2)(g) of the Mediation Act. In this way section 13(2) preserves the common law position of the disclosure of confidential information or "without prejudice" communications where there is a dispute concerning whether an agreement was made during settlement discussions in the mediation. To this extent, the evidence of the parties and the mediator as to what happened in this mediation are admissible and relevant to determining whether an agreement was made between Mrs. Moraldo and Mr. Sandiford at the mediation. However, equally recognising the principle of confidentiality, there was no extensive examination of the minutiae of detail of what transpired in the mediation session. The critical evidence related to the end of the mediation session and whether it ended as Mrs. Moraldo has pleaded with a proposal and nothing more or whether there was an agreement arrived at by the parties at the mediation session. I turn now to the parties' evidence.

Analysis of the evidence – the parties' respective versions

56. The main question in dispute as to whether an agreement was arrived at is a factual inquiry. There was hard swearing on both sides and the determination of this fact depends on a large measure on the credibility of witnesses. The well-known authorities of **Reid v Dowling Charles and Percival Bain** Privy Council Appeal No. 36 of 1987 and **The Attorney General of Trinidad and Tobago v Anino Garcia** Civil Appeal No. 86 of 2011 are pertinent guides in determining the credibility of witnesses where less emphasis is placed on demeanour and more emphasis is placed on a forensic analysis of the witness testimony.

57. In **The Attorney General v Anino Garcia** CA Civ. 86/2011 Bereaux JA placed emphasis on the assessment of the credibility of witnesses as against the pleaded case, contemporaneous documents and the inherent probabilities of the rivalling contentions. He adopted the guidance of the Privy Council in **Reid v Dowling Charles and Percival Bain** Privy Council Appeal No. 36 of 1987 at page 6 where the Court noted:

> "Where the wrong impression can be gained by the most experienced of judges if he relies solely on the demeanour of witnesses, it is important for him to check that

impression against contemporary documents, where they exist, against the pleaded case and against the inherent probability or improbability of the rival contentions, in the light in particular of facts and matters which are common ground or unchallenged, or disputed only as an afterthought or otherwise in a very unsatisfactory manner. Unless this approach is adopted, there is a real risk that the evidence will not be properly evaluated and the trial judge will in the result have failed to take proper advantage of having seen and heard the witnesses. ”

58. In **Mahabir Industries Limited v Winston Moore**, Mohammed J opined at paragraphs 31-33:

“[31] Before arriving at a conclusion, the court ought to “weigh in the balance matters of substantive evidence which bear on the question of whether a particular witness was or was not telling the truth”: **Ramsaran v Hoodan** (unreported) Privy Council App. No 5 of 1997 (the Privy Council noting with approval the words of de la Bastide CJ in the Court of Appeal judgment of that case). It is well-established that in doing so, a first instance trial judge can take into consideration observations in respect of the non-verbal communication that accessorizes a witness’ oral testimony while the witness is being examined or cross-examined. Where the version of facts proffered by each side is diametrically opposed the court ought to consider the credibility and reliability of the witnesses in determining what is more likely to be the truth.

[32] Throughout, however, as cautioned by the Privy Council in **Attorney General and anor. v. Kalicklal Bhooplal Samlal** (1987) 36 WIR 382 it must be borne in mind that the trial judge must balance the demeanor of the witnesses against the rest of the evidence. The trial judge must, when weighing the credibility of a witness, put correctly into the scales the important contemporaneous documents and inherent improbabilities. This principle was concisely put in the headnote of the Privy Council’s judgment in **Kalicklal** (supra), per curiam, as follows: "Before a trial judge forms a view based on the demeanour of a witness on a matter on which there is a conflict of evidence, he must check his impression on the subject of demeanour by a critical examination of the whole of the evidence (in this case, the contemporaneous documents and the inherent improbability...).”

[33] The court's final determination on the issue of fact should: (i) be based on the facts as properly deduced from the matter; (ii) have much support in the evidence; and (iii) be a decision which a reasonable judge could have reached: deduced from **Attorney General of Trinidad and Tobago and Anino Garcia** CA No. 86 of 2011. Of course, a court should always have due regard to the particular circumstances of a matter when determining an issue of fact: **Attorney General for the Isle of Man v Moore** (1938 3 All ER 263 (Privy Council)."

59. In this case I recognise that there is no "transcript" of the mediation session and clearly not everything was discussed at the mediation was disclosed in these proceedings[18]. The focus on this case was whether there was an agreement arrived at the end of the mediation session.

The Claimant's evidence

60. Mrs. Moraldo in her examination in chief[19] contends that prior to the mediation session, Mr. Sandiford indicated that he was prepared to accept the sum of $313,000.00 but Mrs. Moraldo thought the sum was excessive and therefore hoped that in the mediation session, Mr. Sandiford would accept a lower sum.

61. Upon attending the mediation session, Dr. O'Brien indicated to her that it was his first experience doing a mediation, that she was not obligated to sign any documents and that he would speak on her behalf. After a lengthy exchange between the attorneys during the mediations session, Mr. Sandiford proposed a sum of $900,000.00 for the settlement of the matter which, Mrs. Moraldo contends was an increase from the original sum that was proposed.

62. Mrs. Moraldo contends that when they left the mediation session she had to consider the terms of settlement proposed by Mr. Sandiford. She contends that she never agreed to the proposal nor did she authorize Dr. O'Brien to sign on her behalf. She informed Dr. O'Brien when they **left the room** that she could not agree to the terms proposed by Mr. Sandiford

[18] "WITNESS: Mr. O'Brien suggested that there be some escrow account which my wife did not entertain. Mr. Vieira said something that changed the whole aspect of that mediation because I believe as a mediator you should mediate and you should not say things that could sway what is taking place in that mediation and that change the whole, I was ready to get up and leave that mediation with what he said because it changed everything in the mediation. What he said was nothing that could've assisted it only made more turmoil in the mediation. Would you like to know what he said sir?." See Notes of Evidence

[19] Witness statement of Jennifer Moraldo filed 30th June 2017

given her advanced age. This was the first time it was being suggested that she said this which was a material departure from her pleaded case which gave the impression that this was said at the mediation session itself. Dr. O'Brien assured her that the matter would be listed before this Court.

63. In November, 2014, her husband visited Dr. O'Brien's office and met with Ms. Thandiwe Hove-Masaisai. She received a call from him informing her that a consent order was entered in the matter. She and her husband subsequently received confirmation that a consent order was received by the Civil Registry, Hall of Justice. She discovered that on 13th March 2013 a consent order was entered in the following terms:

    a) "*That the matter is settled for Nine Hundred Thousand Dollars (TT$900,000.00) and a congruent transfer of property specifically:*

    Jennifer Moraldo will pay Anthony Sandiford the agreed sum of Nine Hundred Thousand Dollars (TT$900,000.00) on or before 31st day of December 2013 and; Anthony Sandiford will convey the property in Arima at 104 Capildeo Lane, Cleaver Road in Arima to Jennifer Moraldo (preferably by Deed of Gift but if that is not feasible then otherwise by deed of conveyance; the cost and charges associated with the transfer to be borne by Jennifer Moraldo. The Deed of Gift/Transfer shall be prepared and signed forthwith and in any event before 31st December 2013, but will be held in escrow until the agreed sum had been paid. If Jennifer Moraldo needs more time to pay the agreed sum Anthony Sandiford will be entitled to statutory interest of twelve perfect (12%) from 31st day of December, 2013 to the date of final payment inclusive;

    b) *All further proceedings (including HCA CV2008-01690 and HCA CV2010-05045) are stayed upon the terms set out above;*

    c) *The parties acknowledging that the above terms represent their complete agreement relating to property and finance and it constitutes full and final satisfaction of all and any claims that either may have against the other;*

    d) *Each party acknowledges and agrees that upon compliance by each other with the terms of this agreement and with any Order made embodying or reflecting it, these proceedings and all other proceedings (including HCA CV2008-01690 and HCA*

CV2010-05045) do stand dismissed and neither party will have any further claims upon the other including any claims upon her and his respective estates;

e) Each party will bear their own costs with respect to this Agreement and there shall be no order as to costs in these and the other proceedings;

f) Liberty to apply; and

g) *The parties shall bear their own costs."*

64. Mrs. Moraldo contends that the consent order was entered without her knowledge and consent. She thereafter visited Dr. O'Brien's office around November/December 2014 and he neither omitted nor denied that the consent order was entered. He informed Mrs. Moraldo that the matter would be relisted and that he would have the consent order set aside.

65. Dr. O'Brien requested that she obtain a forensic examination report from Mr. Glenn Parmassar. Dr. O'Brien wrote to Mr. Parmassar by letter dated 22nd January 2015 requesting a forensic examination of the Deed of Conveyance No. 4637 of 1977. The report was prepared on 31st July 2015 and delivered to Dr. O'Brien who then informed Mrs. Moraldo that he received the report and that he would inform her when the matter was re-listed for hearing.

66. Mrs. Moraldo contends that she did not receive any further information from Dr. O'Brien and no steps were taken by him to set aside the consent order. As a result, she sought new representation. She obtained an office copy of the mediation agreement which was undated but signed by Dr. O'Brien. She contends that the mediation agreement was not signed in her presence nor did she give instructions to Dr. O'Brien to sign same.

67. She contends if the agreement is allowed to stand that she would suffer financial loss since she is not in a financial position to pay the sum of $900,000.00.

68. By letter dated 19th July, 2016, Mr. Sandiford's attorney wrote to her attorney advising that Mr. Sandiford was ready to execute the Deed of Conveyance of the land in dispute in the sum of $900,000.00 and interest of $279,000.00. She contends that prior to that, she did not receive any request for payment from Mr. Sandiford.

69. In cross examination when questioned if she ever attempted to contact Mr. Sandiford when she discovered the consent order, she stated she did not and that she contacted Dr. O'Brien.

She also stated that Mr. Sandiford did not contact her. She was firm in her stance that did not agree to anything in the mediation session and that there was no agreement arrived at the mediation. She stated that Dr. O'Brien did not have any authority to enter the consent order.

70. Mr. Keith Moraldo in his examination in chief[20] contends that in February, 2013, he attended a mediation session with Mrs. Moraldo, Mr. Sandiford and her sister. Dr. O'Brien accompanied them and the mediation session was facilitated by Mr. Anthony Vieira. The sum of $900,000.00 was proposed in the mediation session as settlement for the matter and Mrs. Moraldo was asked to consider the proposal. The mediation session then ended and Mrs. Moraldo informed Dr. O'Brien that she could not pay the sum proposed to which he assured her that the matter would be relisted before this Court.

71. After the mediation session, he visited Dr. O'Brien's office from time to time to enquire about the progress of the matter and was assured by Dr. O'Brien that the matter would be relisted and that he was on top of it.

72. In November 2014, he visited the office again and met with Ms. Thandiwe Hove-Masaisai who informed him that a consent order was entered in the matter. Upon making enquires at the Hall of Justice, Mr. and Mrs. Moraldo received confirmation of the entry of the consent order. He subsequently had discussions with Dr. O'Brien who stated that the matter would be re-listed and that the order would be set aside.

73. In cross examination Mr. Moraldo stated that Dr. O'Brien stopped being Mrs. Moraldo's attorney sometime after November, 2014. He confirmed that Dr. O'Brien was Mrs. Moraldo's attorney. He contended that they all chatted at the end of the mediation session but they did not have any personal conversation with Mr. Sandiford. He stated that no agreement was reached at the mediation session.

The Defendant's evidence

74. Mr. Sandiford in his examination in chief[21] contends that the proceedings in CV2011-0229 concerned his property at 104 Clever Road, Arima being unlawfully occupied by persons who were unknown to him. Mrs. Moraldo applied to be joined as a party and became a Defendant to those proceedings. He stated that in 1995, his uncle, Arnold Sandiford

[20] Witness statement of Keith Moraldo filed 30th June 2017
[21] Witness statement of Anthony Sandiford filed 15th November, 2017

transferred the said property to him by Deed No. 977 of 1996. He was not present when the deed was executed since he had migrated to the United States of America (USA) since 1986. Upon discovering that the property was in his name, he reconstructed the two buildings on the property. In 1995 the West building was unfinished and the East building was dilapidated where his uncle lived. He returned to Trinidad in 2005 and resided with his uncle in the East building. When the tenant in the West building left, he and his wife moved in there before they returned to the USA in 2007.

75. He stated that at the mediation proceedings, the mediator spoke to both parties and the representatives and explained the mediation process. The parties were placed in separate rooms and he was asked by the mediator what he hoped to achieve at the end of the mediation. He indicated that he wanted to recover the amount of money he spent on the property which was about US$200,000.00 and he was prepared to accept the equivalent of TT$1,200,000.00. He also informed the mediator that his attorney at law had disclosed his receipts to Mrs. Moraldo's Attorney at law.

76. The mediator then left to speak with Mrs. Moraldo but when he returned he informed him that Mrs. Moraldo was not prepared to pay that amount. After further discussions were conducted, it was agreed that a Valuator would be contacted so that both parties can obtain an opinion of the market value of the property. Mr. Sandiford contends that he spoke to the valuator who suggested that the market value of the property would be higher than the figure he was proposing.

77. After further discussions with the mediator going back and forth, Mr. Sandiford contends he was prepared to accept the value of $900,000.00. He proposed that he would waive interest under 31st December, 2013 after which Mrs. Moraldo would have to pay the additional sum of 12% interest per annum. Further negotiations ensued and eventually an agreement was arrived at that Mrs. Moraldo would pay the sum of $900,000.00 with Mr. Sandiford giving her until 31st December, 2013 to pay and if more time was needed, she would pay interest of 12% per annum. They also agreed that all existing Court matters between them would come to an end.

78. Mr. Sandiford contends that both parties then returned to the same room with the mediator and the agreement was repeated to the parties. He further contends that both he and Mrs.

Moraldo orally confirmed that they were in agreement with the details of the agreement. Due to the late hour, Ms. Sharmaine King indicated that she had to leave and in those circumstances, Mr. Sandiford contends that the parties told the mediator that their respective attorneys at law were authorised to sign the agreement which he would prepare for the Judge.

79. After the mediation came to an end, he spoke to Mrs. Moraldo and he remembered asking her about his uncle's funeral and she informed him of same.

80. On 11th April, 2013, his then attorney at law wrote to the Dr. O'Brien and reminded him of the consent order of 13th March 2013 as well as the discussions on the issue of the rental of the two structures on the property and that a joint account in the names of the attorneys representing the parties be opened to deposit all rental monies. On 17th April, 2013 Dr. O'Brien acknowledged and replied to his then attorney's letter of 11th April, 2013.

81. In my view Mr. Sandiford was unshaken in his testimony in cross examination. One of the troubling features of the cross examination was the attempt by Counsel for Mrs. Moraldo to interrogate the merits of the settlement by cross examining Mr. Sandiford on certain aspects of his pleaded claim in the compromised claim. Not only is that unfair to the witness, it is simply irrelevant. The trial never took place. Mr. Sandiford did not advance his full case for trial nor was any evidence taken. Such cross examination ignores the basic premise of a mediation which distinguishes it from adversarial proceedings. It is not restricted by the pleadings or the legal issues identified in the litigation. It focuses on parties' underlying interests and desires which many times are not reflected in any of the pleadings or Court documentation. For example, the exchange in cross examination demonstrates the point:

> "Q: Ok. Well I'm saying to you that Ms. Moraldo indicated that she didn't speak to any valuator and not aware that such transaction happened. Ok. What do you have to say to that?
>
> A: I just told you she were not in the room.
>
> Q: So paragraph 11, you said I proposed that was prepared to accept the value of $900,000.00 instead of $313,000.00 as we spoke about before. Correct?
>
> A: After speaking to the valuator.

Q: I am saying originally in your claim you wanted $313,000.00, but at the mediation you were willing to accept $900,000.00.

A: I supply bids for that amount.

Q: Mr. Sandiford, were you prepared after the mediation to move from the original figure of $313,000.00 to $900,000.00?

A: No from $1.2 to $900,000.00 that is where it moved from.

Q: So you ignored your claim for $313,000.00 your revised it."

82. What was Mr. Sandiford's "claim" in the mediation room? To interrogate that calls for a complete unravelling of all the details of the mediation which includes Mr. Sandiford's expectations, his desires, his interest and his future goals, none of which is tied to any pleadings filed in the Court but all of which is relevant to the live and real issues relevant to the parties and the Cleaver Road property. Ultimately, in cross examination, Mr. Sandiford was unshaken on the material aspects of his case that Mrs. Moraldo was not in the room when he and Mr. Vieira spoke to a valuator on the phone. This obviously relates to a caucus held by the mediator. He stated that there was a handwritten agreement at the end of mediation session which was initialled by the parties. He stated that the agreement was read out to both parties and Mrs. Moraldo agreed to it.

83. The proceedings in the compromised action also reveal that after the consent order was entered, Mr. Sandiford attempted to enforce his judgment by filing an application on 6th April, 2016. That application was withdrawn when it was indicated that Mrs. Moraldo intended to set aside the judgment. It was the first time that this was being communicated to Mr. Sandiford.

84. As this evidence stood, it was a case of Mr and Mrs. Moraldo's word against that of Mr. Sandiford. Mrs. Moraldo's evidence that she spoke to her attorney outside the mediation room after she left is not only a departure from her case, it is strictly hearsay and little weight can be attached to it in the absence of assessing Dr. O'Brien's version of that allegation. In any event, her main testimony was that no agreement was arrived at in the mediation room. Against this evidence is that of the mediator which corroborated Mr. Sandiford's version of events.

The mediator

85. On the question of whether or not an agreement was made at the mediation session, is the composed and direct evidence of the mediator, Mr. Vieira himself. Apart from some minor discrepancies in his evidence raised in cross examination which are immaterial, his testimony was largely consistent and established the following facts:

    (a) The parties and their attorneys at law attended the mediation session.

    (b) There was a pre-mediation and a main mediation session.

    (c) It was a difficult mediation.

    (d) He employed the process of caucusing to break the deadlocks between the parties and to keep the negotiations continuing.

    (e) Mrs. Moraldo was represented by her attorney Dr. O'Brien and Mr. Sandiford represented by Ms. Blades. All present had full authority to settle the claim.

    (f) All parties present were allowed to speak and to participate in the negotiations.

    (g) The mediator recorded the terms of settlement. This was read over to the parties at the end of the session and all agreed to the terms.

    (h) The mediator was unsure as to whether the parties had themselves initialled his draft of the agreement however he took his notes back to his office and as agreed by them he later typed up the agreement, signed it and sent it to the respective attorneys.

    (i) Both attorneys eventually executed the agreement.

86. It can reasonably be inferred from this evidence that an agreement was arrived at by all parties and in particular by Mrs. Moraldo together with her attorney at law, with Mrs. Moraldo being fully informed of the nature of the agreement. Importantly, the agreement that was read to the parties was the same agreement typed by the mediator subsequently which was signed by the attorneys and presented to the Court.

87. It is inherently implausible that Mr. Vieira as the impartial mediator with no interest to serve will draft up an agreement in his own terms as it were "out of thin air" and send it to the parties. It clearly represented what he understood and what was recorded by him to be the

agreement by the parties. The attorney for Mr. Sandiford executed it without demur and so did Dr. O'Brien as was directed and agreed to by both parties at the mediation. Importantly, one of the terms of the agreement which was read to the parties was that "this agreement would be made an order of the Court."

88. It is this agreement which was sent to the Court and which was reflected in the consent order. There was no indication to Mr. Sandiford or his attorney at law that Mrs. Moraldo or her attorney, Dr. O'Brien, did not agree to those terms or changed her mind or relented. The first that Mr. Sandiford would have learnt of Mrs. Moraldo's disagreement would have been when the action was filed in March 2016 some three (3) years after the fact and after he tried to enforce the order.

Jurisdiction to set aside consent orders

89. Lord Denning MR explained the nature of consent orders in **Siebe Gorman & Co Ltd v Pneupac Ltd** [1982] 1 All ER 377 at page 380:

> "There are two meanings to the words 'by consent'. That was observed by Lord Greene MR in *Chandless-Chandless v Nicholson* [1942] 2 All ER 315 at 317, [1942] 2 KB 321 at 324. One meaning is this: the words 'by consent' may evidence a real contract between the parties. In such a case the court will only interfere with such an order on the same grounds as it would with any other contract. The other meaning is this: the words 'by consent' may mean 'the parties hereto not objecting'. In such a case there is no real contract between the parties. The order can be altered or varied by the court in the same circumstances as any other order that is made by the court without the consent of the parties. In every case it is necessary to discover which meaning is used. Does the order evidence a real contract between the parties? Or does it only evidence an order made without obligation?"

90. A party bound by a consent order must obey it until it is set aside. Until then the matter had been effectually compromised in terms of the consent order of March 2013. As observed in **Halsbury Laws of England Vol 37, 4th Edition**, paragraph 390:

> "A party cannot arbitrarily avoid a consent judgment or order, but before such a judgment or order is entered or passed, a consent given by mistake or surprise may be withdrawn,

and a consent order, even if approved by the court, may be set aside if it appears that the consent was given under a misapprehension or misrepresentation ...moreover, where the consent order or judgment is still executor, the courted may refuse to enforce it if it would be inequitable to do so."

91. In **Alric C Hillocks Agencies Ltd v Saunders International Sales Corporation** [1993] 46 WIR 110 it was observed at 114:

> "The need to discover the meaning in which the words 'by consent' were used in this case would have been relevant, had there been an application to set aside, or vary the order, and the court had to consider what method could be employed to effect that objective. In this appeal, however, we are not faced with any such application, the appellant has merely questioned the ruling of the trial judge that the parties were in fact bound by that 'consent order'. The answer is supplied by the words of Lord Blanesburgh in *Kinch v Walcott* [1929] All ER Rep 720 at page 725:
>
> > "A party bound by a consent order, as was tersely observed by Byrne J in *Wilding v Sanderson* [1897] 2 Ch 544, "must when once it is completed, obey it, unless and until he can get it set aside in proceedings duly constituted for the purpose". In other words, the only difference in this respect between an order made by consent and one not so made is that the first stands unless and until it is discharged by mutual agreement or is set aside by another order of the court; the second stands unless and until it is discharged on appeal. And this simple consideration supplies at once the answer to this appeal."

92. Lord Herschell L.J. In **Re South American and Mexican Co., ex parte Bank of England** [1895] 1 Ch. 37, 50 commented:

> "The truth is, a judgment by consent is intended to put a stop to litigation between the parties just as much as is a judgment which results from the decision of the court after the matter has been fought out to the end."

93. The Court is not concerned to approve or disapprove its terms and has no power to give such a judgment or make such an order in terms different from those actually agreed. Parties, however, cannot escape from their obligations under the contract giving rise to the consent

order as the Court has passed and has given its authority to the making of that order. Moreover, no appeal lies to the Court of Appeal from a consent judgment or order without the leave of the Court.

94. In these circumstances, practitioners would be failing in their duty if they should allow a consent order to be made which does not fully and precisely give effect to the terms agreed and intended to be agreed between the parties and which does not entirely and effectively prevent further disputes and, even worse, further litigation between the parties. Ordinarily, a consent judgment or order can only be set aside or varied on the grounds on which a contract may be set aside or rectified, such as mistake, misrepresentation and the like and for this purpose a fresh action must be brought.

95. Jones J, as she then was, dealt with a similar matter in **Joash Morris v Curtis Johnson and Capital Insurance Limited** CV2007-00987. In **Joash Morris** the Claimant had sought damages for personal injuries arising from an accident. Attorneys for the Claimant and the Second Defendant of the matter eventually advised the Court that the matter had been settled and the Court entered an order that the matter was settled on the terms endorsed on Counsel's brief. The Claimant thereafter complained that he never authorised the consent order that was entered by his attorney at law. Jones J in dismissing the application to set aside the consent order observed that the Claimant cannot complain when his attorney at law who had implied authority to act on his behalf to compromise a suit represents to the Court that a consent order had been arrived at between the parties.

96. Although having grave reservations of Counsel acting on behalf of the client in that matter without his instruction, Jones J held that the client was bound to the terms of the consent order entered into despite the complaint that it was done without the client's authority. The Court felt compelled to hold that in the face of the client's complaint that it did not give the attorney clear instructions to settle the claim that it could not set aside such a consent order as the consent was not in relation to matters collateral to the suit. Further, the attorney had the implied authority of his client to settle the claim and the ostensible authority to bind his client.

97. I now turn to the three main issues in this case.

<u>The parties' agreement at the mediation</u>

98. I have considered the criticisms made by Counsel for Mrs. Moraldo of the Defendant and Mr. Vieira's evidence, however, they are simply not sustainable. I am convinced that it is more probable that the parties had agreed at the mediation room to the terms as set out in the mediation agreement drafted by Mr. Vieira. Mr. Vieira was unshaken in his evidence. He had no interest to serve. His testimony was consistent with the documentary evidence and the evidence of Mr. Sandiford. I took careful note of the fact that the Moraldos' themselves were not harshly critical of Mr. Vieira and paused when they were asked to say in cross examination whether Mr. Vieira was lying. It is certainly more probable based on their responses that they did agree to the terms at the mediation room and simply changed their mind at a later stage unknown to Mr. Sandiford. It is implausible for Mr. Vieira to have manufactured such a detailed agreement without reference to the parties themselves. It was the Moraldos who had the greater motive to fabricate a story that there was no agreement arrived at in the mediation room rather than Mr Vieira.

Implied and Ostensible Authority of Attorney to Compromise

99. Where express authority to compromise an action is given by a client to his attorney no question can arise as to the binding nature of the agreement. The authority of the legal adviser is conferred directly by the instructions given by the client. As Foskett recognises (para 29-05) the law of agency can clothe the attorney with the authority to bind the client to terms of compromise notwithstanding the absence of instructions or worse instructions to the contrary. Brightman L.J explained in **Waugh And Others V. H. B. Clifford & Sons Ltd. And Another** [1982] Ch. 374 at 383:

> "In approaching this appeal it is, in my opinion, necessary to bear in mind the distinction between on the one hand the *implied* authority of a solicitor to compromise an action without prior reference to his client for consent: and on the other hand the *ostensible or apparent* authority of a solicitor to compromise an action on behalf of his client without the opposing litigant being required for his own protection either (1) to scrutinise the authority of the solicitor of the other party, or (2) to demand that the other party (if an individual) himself signs the terms of compromise or (if a corporation) affixes its seal or signs by a director or other agent possessing the requisite power under the articles of association or other constitution of the corporation."

100. In **Matthews v Munster** [1887] 20 Q.B.D. 141 at 142 to 143 Lord Esher observed that:

"No counsel can be advocate for any person against the will of such person, and as he cannot put himself in that position so he cannot continue in it after his authority is withdrawn. But when the client has requested counsel to act as his advocate he has done something more, for he thereby represents to the other side that counsel is to act for him in the usual course, and he must be bound by that representation so long as it continues, so that a secret withdrawal of authority unknown to the other side would not affect the apparent authority of counsel. The request does not mean that counsel is to act in any other character than that of advocate or to do any other act than such as an advocate usually does. The duty of counsel is to advise his client out of court and to act for him in court, and until his authority is withdrawn he has, with regard to all matters that properly relate to the conduct of the case, unlimited power to do that which is best for his client.

I apprehend that it is not contended that this power cannot be controlled by the Court. It is clear that it can be, for the power is exercised in matters which are before the Court, and carried on under its supervision. If, therefore, counsel were to conduct a cause in such a manner that an unjust advantage would be given to the other side, or to act under a mistake in such a way as to produce some injustice, the Court has authority to overrule the action of the advocate.

I have said that the relation of an advocate to his client can be put an end to at any moment, but that the withdrawing of the authority must be made known to the other side, and this shews that the client cannot give directions to his counsel to limit his authority over the conduct of the cause and oblige him to carry them out, all he can do is to withdraw his authority altogether, and in such a way that it may be known he has done so.

Now let me consider what authority there is on this point. In *Swinfen v. Lord Chelmsford*, Pollock, C.B., in delivering the judgment of the Court said,

> "We are of opinion, that although a counsel has complete authority over the suit, the mode of conducting it, and all that is incident to it - such as withdrawing the record, withdrawing a juror, calling no witnesses, or selecting such as, in his discretion, he thinks ought to be called, and other matters which properly belong

to the suit and the management and conduct of the trial - we think he has not, by virtue of his retainer in the suit, any power over matters that are collateral to it."

The instances that are given shew that one of the things that counsel may do, so long as the request of the client to him to act as advocate is in force, is to assent to a verdict for a particular amount and upon certain conditions and terms; and the consent of the advocate to a verdict against his client and the withdrawing of imputations is a matter within the expression "conduct of the cause and all that is incidental to it."

101. In **Development Bank of St Kitts and Nevis v Michael Hanley and Cephus Audain** CLAIM NO.: SKBHCV 2012/0273 the Court recognised the implied and ostensible authority of the attorney to compromise a claim on behalf of the client. The Court correctly observed that "An attorney seeking to settle or compromise a matter may, depending on the nature of what he proposes to do, may do well to seek the express authority from his client, but that is a matter between his own client and himself and has nothing to do with the ostensible authority to settle or compromise the matter.."

102. As **Joash Morris** demonstrates above the scope of ostensible authority may even be greater. Ordinarily it is not necessary for advisers for the either side in a dispute to question the extent of the actual authority when a settlement proposal is decided. Limitations on the ostensible authority doctrine appear to be whether the opposing Counsel is aware of limitation of the authority of Counsel or aware of formal procedures which must be undertaken before counsel can be bound by the agreement or that it extends to matters collateral to the action. See **Foskett on Compromise, 5th Edition** para 29-15 and 29-16[22].

[22] Foskett on Compromise, 5th Edition:

> 29-15. … A legal adviser's ostensible (or apparent) authority may be more extensive than his actual authority, whether the actual authority is express or implied. It follows that ordinarily it is not necessary for the advisers for the other side in a dispute to question the extent of the actual authority when a settlement proposal is discussed. If the legal representative agreeing to a settlement is doing so on behalf of a party that needs to execute certain formal procedures before even it can be bound by the settlement, then the ostensible authority of the legal representative will not be sufficient to make good that deficiency if its exists. Equally, if the other party knows that the actual authority of the representative acting for the opposing party is limited notwithstanding the position apparently being taken, the ostensible authority will not be operative.
>
> 29-16 The other limitation upon the operation of the principle of ostensible authority is that it does not extend to "collateral matters". A matter obviously outside the ambit of the dispute being discussed would be regarded as "collateral" for this purpose, but presumably a legal representative may bind his client by

103. It is also acceptable for attorneys to issue consent orders to the Court and for those orders to be made and entered without a hearing. Foskett in paragraph 10-03 observed that where the Court will enter a consent order it must be satisfied that the appropriate consents have been given. "If the parties are not physically present before the Court but have invited the making of an order by consent the draft order submitted to the Court must be signed by the solicitors or counsel acting for each of the parties to the order…Unless the Court has any reason to doubt the authenticity of the signature or that the consent was given voluntarily the order will be made".

104. In this case, the consent order did not embody any terms that were collateral to the suit. The terms were intrinsically related to the central feature of the dispute of the need for possession of the land on the one part and the need to recover an investment or equity on the other part. Mr. Sandiford and his attorney were not aware of any condition on the authority of Dr. O'Brien to represent his client or to enter into an agreement. The agreement in any event was made orally at the mediation room and subsequently, without demur, drawn up by the mediator. No instructions were given to Dr. O'Brien to indicate to the mediator that the deal was off. Taken at its highest, Mrs. Moraldo's case in this claim is that after the session was ended and without the knowledge of the opposing party or her Counsel, she changed her mind. This change of position after the fact is simply not good enough and suffers from a period of inactivity and delay unlike other cases referred to the Court by Counsel for Mrs. Moraldo where consent orders were set aside on the basis that the client had given clear instructions not to settle.

105. For instance in **Sheppard v Robinson** [1919] 1 K.B. 474 (C.A) the attorney who had entered into the consent order had applied even before the order was perfected to set it aside on the ground of genuine mistake that he did not receive his client's instruction in time which had countermanded his original instructions to settle.

106. Similarly in **Marsden v Marsden** [1972] 3 WLR 136 Watkins J pointed out that it is well settled that the Court would not entertain an application to set aside the order after it was perfected. Since the action had been taken to inform the Court of their intention to make the application before the order was perfected the Court entertained the application. The true

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the operation of the principle of ostensible authority to a general release of all claims, whether foreseen or unforeseen at the time of the settlement.

position in a case where the attorney has limited authority to settle an action is that the Court has power to interfere but must do so with extreme caution and only where a grave injustice would be done to allow the compromise to stand.

107. Counsel for the Claimant referred the Court to a recent decision from the OECS, **Bank of Montserrat v Owen Rooney** CASE MNIHCV 2009/0018. In that case, a mediation agreement was signed by the attorneys acting on behalf of both parties indicating that Rooney will pay off his debt which he owed to the Bank of Montserrat. However, on examination of the events surrounding the agreement, it was discovered that prior to the mediation, Rooney had expressed his frustration about his attorney acting without his instructions and mishandling his matters. Rooney thereafter insisted that his attorney was never instructed to act for him at the mediation and further, he did not even know that a mediation was scheduled, was not informed of its outcome and only knew of its existence from the Court pursuant to a Court order. The Hon. Mr Justice Iain Morley QC found that there was an absence of a record of instructions from Rooney to the attorney and so the mediation agreement could not reflect an agreement by Rooney. The mediation agreement was therefore set aside.

108. However, that case of course is distinguishable from the case at bar. In this case, unlike in **Rooney**, both the attorneys and their clients attended the mediation and the attorneys had the full authority of their clients to negotiate. Both the clients and attorneys entered into discussions and the clients agreed to the terms of settlement after it was re-read to them by the mediator. In **Rooney** the court connected mediation rules specify that all parties must attend the mediation and "a lawyer may not attend in place of a party". Although, in **Rooney**, as in this case, there are no written instructions of the client to settle the matter in terms, there is the compelling evidence of the mediator himself corroborating Mr. Sandiford's version of what transpired at the end of the session. In **Rooney** it was important for the attorney to demonstrate clearly his written instructions from his client as he attended the mediation session without his client. However, in this case the party herself was there and gave her consent to the terms of the mediation agreement.

109. In this case after a period of five (5) years and in the face of Mr. Sandiford himself attempting to enforce the terms of the order, it would be unfair to now set aside such a

compromise and if indeed there was fault on the part of the attorney Mrs. Moraldo must be left with her remedy against the attorney. To this extent I agree with the reasoning and logic of Jones J in **Joash Morris**. See also **Neale v Gordon Lennox** [1902] A.C. 465, **Welsh v Roe** [1918] All ER Rep 620, **Development Bank of St Kitts and Nevis v Michael Hanley and Cephus Audain** SKBHCV 2012/0273.

Unilateral mistake

110. At its highest, Mrs. Moraldo's claim amounts to a unilateral mistake in entering the agreement. She was at best mistaken as to whether she could have raised the money to pay Mr. Sandiford. However, such a mistake was unknown to Mr. Sandiford. When one party to a compromise is labouring under some misapprehension about its terms and this is known to or in some way encouraged by the other party, there cannot really be said to be a genuine agreement. See **Foskett on Compromise** para 424 and **Wilding v Sanderson** [1897] 2 CH 534 1897 2 Ch 534. If the mistake is a one sided affair unknown to or not contributed to by the other party the compromises will be upheld. See **Taylor v Taylor** 1876 CAT 228 and **O.T Africa Line Ltd v Vickers PLC** [1996] 1 Lloyd's Rep. 700.

111. There is further no issue here that the consent order in any event does not accurately reflect the terms of the mediation agreement.

Conclusion-No good reason to set aside order

112. On the facts presented in this case there was a clear agreement made by the parties at the mediation session. The terms of that agreement was drawn up subsequently by the mediator and assented to by the attorneys on both sides. It is implausible that Dr. O'Brien would execute that mediation agreement without the concurrence of his client when at all times there was no evidence that Dr. O'Brien did not faithfully represent the interests of his client in the claim. Mr. Vieira's evidence is clear and consistent with his written concurrence in the mediation agreement that "*The general provisions contained in the foregoing Agreement were reached by the parties in mediation conducted by the undersigned mediator. Legal advice and services required for vetting and approving this agreement were provided by the independent advisory attorneys whose signature appear above."*

113. The evidence of Mrs. Moraldo and Mr. Moraldo would at best be consistent with a change in position after the agreement was executed. However, at that time, the consent order

was entered and at best it was a matter between Dr. O'Brien and his client rather than for Mr. Sandiford to make any enquiry as to the legitimacy of the consent order made by the parties on the basis of the executed mediation agreement.

114. After a period of some five (5) years there is simply no good reason to set aside this order which was settled within the attorneys implied and ostensible authority. The client can only be left with her remedy against her attorney, provided she can make good her case in negligence.

115. For these reasons this action would be dismissed with costs.

116. I now deal with the negligence action of Mrs. Moraldo against her attorney, Dr. O'Brien arising out of the mediation session in a separate judgment, **Jennifer Moraldo v Kenneth O'Brien** CV2017-00857.

Vasheist Kokaram
Judge