THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV 2011-04336

BETWEEN

Domingo Lamotte

Claimant

AND

Water & Sewerage Authority

Defendant

Before the Honourable Mr. Justice Ricky Rahim

Appearances:

Mr. J. Ottley for the Claimant.

Mr. N. Bisnath instructed by Mrs. L. Mendonca for the Defendant.

Ruling

1. Before the court is an application dated 18th April 2013 to, inter alia, enforce an agreement made between the Claimant and the Defendant. The Claimant contends that the agreement is a Part 36 CPR agreement and that it ought to be enforced pursuant to Rule 36.11(7)(b).

2. These proceedings were instituted by Claim Form and Statement of Case filed on the 7th November 2011, by which the Claimant averred that he had been wrongfully dismissed from his employment at the Defendant.

3. The Claimant contends that the parties entered into negotiations after the Claim was filed, with the eventual result of an offer to settle the Claim being made by the Defendant in the sum of $650,000.00. At the Claimant's attorney's insistence this offer was reduced into writing by letter dated 28th January 2013 whereby the Defendant's attorney wrote:

> *"We refer to the above captioned matter and make the following offer pursuant to Part 36 of the Civil Proceedings Rules. This offer relates to the whole of the claim and is intended to be in full and final settlement of the claim, interest and costs as referred hereinafter.*
>
> *Our client is willing to compromise and settle this matter by the Defendant paying to the Claimant:-*
>
> - *The sum of $650,000.00 in full and final settlement of the Claimant's claim, interest and costs;*
> - *Monthly pension payments of $5,793.00 in keeping with the Authority's pension plan"*

4. By letter dated 21st February 2013, the Claimant's attorney responded to the Defendant's letter whereby the Claimant accepted the offer unequivocally stating:

> *"We refer to the subject at caption ending with your letter of January 28th 2013.*

In this regard please note that our client accepts the offer contained therein that was made by your client pursuant to Part 36 of the Civil Proceedings Rules."

5. The Claimant's attorney deposed in his affidavit in support of the application of the 18th April 2013 that when the matter came up for hearing on the 19th March 2013 the Defendant had not made any payment pursuant to the agreement. The Claimant's attorney contends that at this hearing the Defendant indicated that the offer included interests and costs, a position which the Claimant's attorney was not in agreement with. In this regard, the Claimant's attorney argued that the offer letter was clear and could not be interpreted to mean that the amount offered included interest and costs. Further, the Claimant argued that Rule 36.6 provided that the offer must state whether the amount includes interests and costs and if it does it must indicate the sums being allocated for each. According to the Claimant's attorney, the offer did not specify (1) that the amount offered included interests and costs and (2) the amount allocated for each (interest and costs) thus, the offer did not in fact include interest and costs and the Defendant ought to pay, and the court ought to assess pursuant to Rules 36.13 and 36.16, interest and costs on the settlement amount of $650,000.00.

6. The Defendant submitted that although the offer did undoubtedly say that it included interest and costs, it did not in fact specify the amount to be allocated for each. According to the Defendant, the result was that the offer did not comply with Part 36 and therefore there was no meeting of the minds and as such no agreement.

7. It is clear on the offer that it was a Part 36 offer as the offer was stated to be an "*offer pursuant to Part 36 of the Civil Proceedings Rule"*. A party may make an offer otherwise than a Part 36 offer, but where the offer is made pursuant to Part 36 the parties are taken to accept all the consequences of the part: see ***Onay v Brown*** **[2009] EWCA Civ 775**. Thus, the court is left to determine:

    i. Whether the offer was stated to include interest and costs;

ii. If the answer to (i) above is yes, what is the effect of the failure to comply with the requirement of stating the amount allocated for each pursuant to Part 36.6.

The First Issue

8. Rule 36.6(1) and (2) provides:

> *(1) An offer to settle a claim for damages must state whether or not the amount offered includes*
>
> *(a) interest; or*
>
> *(b) costs.*
>
> *(2) If the offer covers interest or costs it must state the amount which is included for each.*

9. The first issue to be determined is one purely of fact. The court need only look at the letter of offer to determine whether it was contemplated that the settlement amount includes interest and costs. In this regard the court notes the offer stated:

> *"The sum of $650,000.00 in full and final settlement of the Claimant's claim, interest and costs"*

10. It is clear from the wording of the offer that it was contemplated by the Defendant (and the Claimant since it was accepted unequivocally) that the amount stated was to include interest and costs. There is no ambiguity in this statement. The sum is for full and final settlement of the Claimant's **claim, interest and costs**.

The Second Issue

11. What the offer did not state was the specific allocation of the settlement to interest and costs as required by Rule 36.6(2).

12. There is no provision for what obtains if the offer does not comply with Rule 36.6(2). What then is the consequence of non-compliance? The Defendant argues that it means that there was no meeting of the minds and as such no agreement. The court however does not agree.

13. In ***C v D*** **[2011] EWCA Civ 646**, a case cited by the Claimant, the court had to consider the meaning of a Part 36 offer which stated that the offer was "open for 21 days". Although the rule to be interpreted was different to the present case, the court applied this reasoning in interpretation where at para 55 Rix LJ explained :

> *"Another principle or maxim of construction which is applicable in the present circumstances is that words should be understood in such a way that the matter is effective rather than ineffective (verba ita sunt intelligenda ut res magis valeat quam pereat). If the words "open for 21 days" are given the meaning for which the respondent contends, then the offer, intended to take effect as a Part 36 offer, fails as such. If, however, the words are given the meaning for which the appellant contends, then the intention of making a Part 36 offer is fulfilled. There are numerous instances of the application of this maxim. This is how Chitty on Contracts, 30th ed, 2008, Vol 1, at para 12-081 refers to this rule:*
>
> > *"If the words used in an agreement are susceptible of two meanings, one of which would validate the instrument or the particular clause in the instrument, and the other render it void, ineffective or meaningless, the former sense is to be adopted. This rule is often expressed in the phrase ut res magis valeat cum [sc. quam] pereat. Thus, if by a particular construction the agreement would be rendered ineffectual and the apparent object of the contract would be frustrated, but another construction, though by itself less appropriate looking to the words only, would produce a different effect, the latter interpretation is to be applied, if that is how the agreement would be*

understood by a reasonable man with a knowledge of the commercial purpose and background of the transaction. So, where the words of a guarantee were capable of expressing either a past or a concurrent consideration, the court adopted the latter construction, because the former would render the instrument void. If one construction makes the contract lawful and the other unlawful, the former is to be preferred…"" [Emphasis mine]

14. At para 75 Rimer LJ, in agreeing with Rix LJ stated:

> *The relevance, however, of the claimant's expressed intention to make its offer a Part 36 offer is that, if there are any ambiguities in it raising a question as to whether the offer does or does not comply with the requirements of Part 36, the reasonable man will interpret it in a way that is so compliant. That is because, objectively assessed, that is what the offeror can be taken to have intended. That is also in line with the principle of construction to which Rix LJ referred in paragraph [55].[emphasis mine]*

15. The court agrees with this approach and is of the view that despite the ambiguity in the offer, raising the question as to whether the offer does or does not comply with the requirements of Part 36.6(2) the court ought to interpret it in a way that is compliant.

16. This authority provides limited additional assistance as the Rule to be interpreted does not feature in the UK CPR. Under the UK CPR, a Part 36 offer which offers to pay or offers to accept a sum of money will be treated as inclusive of all interest until the date on which the period stated expires; or, in the specified circumstances, a date 21 days after the offer was made: see Rule 36.3 of UK CPR

17. What is more, had it been the understanding of the Claimant, that interest and costs were to be an additional payment, the acceptance should have so stated. There was no

qualification to the acceptance, and the court must take the Claimant to have been accepting the clear terms of the offer. To order that interest and costs now be assessed would be to ascribe a meaning that is in opposition to the obvious intention of the parties evident in the offer letter and **unconditional** acceptance letter. This is therefore not a case of acceptance of the sum offered on the claim to the specific exclusion of interests and costs in which case Rule 36.16(3) would be applicable. The court pauses to remark in passing only that had the original offer been silent on the issue of costs and interest, the position of the Claimant may have been able to argue from a much stronger position that interest and costs were not included and ought therefore to be quantified and assessed respectively in keeping with the authority of **C v D** (supra).

18. Additionally, in interpreting Rule 36.6, Part 36 ought to be regarded as a whole in determining the treatment to be given to non-compliance to Part 36. The court draws reference to Rule 36.8 which deals with offers to settle part of the claim only *(which in the court's view means offers in respect of the whole or part of the claim as relates to the cause of action solely and not the claim in the wider context inclusive of interest and costs).* This rule provides:

    (1) An offer to settle must state whether or not it covers the whole or part of the claim.
    (2) If it does not it is to be taken to cover the whole claim.

19. In contrast to Rule 36.6, this Rule states what must be done and provides the outcome for non-compliance. Any ambiguity in the offer in relation to Rule 36.8(1) is cleared up with reference to 36.8(2). So that in the round when considering Part 36 it appears that non compliance with the requirement for specifics in relation to interest and costs at 36.6 is similar fashion not fatal to an offer being categorized as a Part 36 offer.

Other issues raised

20. The Defendant submitted that no declaratory rights can be obtained on interlocutory proceedings. The court considers that for present purposes it is unnecessary to make a finding in this regard as the application *as permitted* by Part 36 is one not for a declaration but one for the enforcement of an agreement and the notice of application of the Claimant of the 18th April 2013 seeks such enforcement at paragraph 3.

21. Further, the Defendant has argued that the court ought not to grant the application as the Claimant ought to have commenced a new claim in respect of the alleged breach of agreement. The case of ***McCallum v Country Residence Ltd*. [1965] 1 W.L.R.** was cited in support. The court held in this case that where an action had been compromised by a settlement on terms, the compromise gave rise to a new cause of action and its terms could be enforced only by starting new proceedings.

22. The Claimant however replied that before the court was an application, pursuant to rule 36.11(7)(b) to enforce the agreement and there was no need for a new cause of action.

23. The court is of the view that **McCallum** (supra) is inapplicable to the present case, having been founded on entirely different circumstances and rules, dealing particularly with the effect of the Tomlin order in certain defined circumstances. It did not fall to be determined with reference to a rule similar to Part 36. What is more, Rule 36.11(7)(b) specifically provides for the enforcement of an agreement made pursuant to Part 36.

24. The court also notes that the provisions of Rule 36.11 are somewhat instructive in this regard. The rationale of commencing new proceedings where an agreement has been entered into and one party alleges a breach thereof is that breach often times gives rise to a new cause of action on its own for damages for breach of contract. In that case the parties have acquired rights and incurred liabilities by virtue of the new agreement which are usually embodied in the terms of a consent order. That consent order would have brought finality to the original claim in substance. Any remedy for breach could therefore

only be sought by way of fresh action both as a matter of procedure and as a matter of substantive law.

25. Rule 36.11(8) reads as follows:

"If a party claims damages for breach of contract arising from an alleged failure of another party to carry out the terms of an agreed offer, he may do so by applying to the court without the need to commence new proceedings unless the court otherwise orders."

26. In the court's view this rule recognises fundamental procedural and substantive circumstances. Firstly, that the parties are applying to enforce an agreement, a consent order disposing of the claim in final form having *not yet been entered*. The claim has therefore not been finally disposed of by way of final order determining the respective legal positions of the parties. Secondly, that having regard to the overriding objective it would only be just that such an issue be dealt with as part of the original still subsisting claim without the parties having to incur the further costs and inconvenience associated with a new action.

27. In the present case, the claimant has not sought damages for breach of contract arising out of the agreement and there has been no consent order entered in final settlement of the claim. In those circumstances there is no need, in the court's view for the Claimant to commence an entirely separate claim. The Defendant's arguments in this regard therefore fail.

28. The court will therefore enforce the agreement by making an order as follows:

a) That the parties having entered into agreement for the compromise of the claim:
   i) The Defendant shall pay to the Claimant the sum of $650,000.00 in full and final settlement of the Claimant's claim, interest and costs.
   ii) The Defendant shall pay to the Claimant monthly pension payments of $5,793.00 in keeping with the Authority's pension plan.

iii) This order shall be enforceable as a judgment in the event of breach.

Dated this 27th day of June 2013.

Ricky N. Rahim

Judge