

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

SAINT CHRISTOPHER AND NEVIS

NEVHCVAP2019/0001

BETWEEN:

BON BANK LTD.

Appellant

and

GENERAL BUSINESS COMPANY LIMITED

Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE
The Hon. Mr. Mario Michel
The Hon. Mr. Gerard St. C. Farara

Chief Justice
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Ms. JeNise Carty for the Appellant
Ms. Dahlia Joseph-Rowe, Ms. Edisha Greene and Ms. Asha Joseph
for the Respondent

2022: June 22;
July 29.

Civil appeal – Contract Law – Offer and acceptance – Whether 9th January 2015 letter to the respondent amounted to an offer – Whether a binding contract was created by the exchange of letters between the appellant and the respondent – Whether the learned judge erred in finding that a binding contract existed – Principles applicable to the construction and interpretation of a document as an offer

General Business Company Limited (“GBCL”) is a customer of BON Bank Ltd. (previously RBTT Bank (SKN) Limited) (“the Bank”). On 5th September 2016, GBCL brought a claim in the High Court against the Bank claiming, loss and damage for breach of ‘a settlement

agreement'. The alleged 'settlement agreement' related to an issue which arose with one of GBCL's loan facilities with the Bank, whereby in September 2012, the interest rate on the loan facility was reduced from 9% to 8%. However, the Bank continued to deduct monthly from GBCL's account, the sum of EC\$12,385.00, applicable to the 9% interest rate. After several correspondence between GBCL and the Bank, a meeting was held on 14th November 2014 between the Bank's representatives and GBCL and its attorney-at-law. At the meeting, certain issues in dispute relating to GBCL's loan account were discussed. GBCL alleged that, after the meeting, the Bank followed up with a letter dated 9th January 2015 to GBCL whereby the Bank agreed to credit EC\$39,551.34 to GBCL's loan account and made a 'proposal' for a new maturity date of February 2016 for GBCL's loan facility, with a final payment of EC\$2,024.70. GBCL contended that by its letter to the Bank dated 23rd January 2015, it accepted the 'offer' or proposal made by the Bank in its 9th January 2015 letter. GBCL's case was that the effect of these two letters was that a binding 'settlement agreement' between the Bank and GBCL had come into existence with regard to a new maturity date of February 2016. GBCL also pleaded that when a dispute arose regarding the new maturity date, the Bank, by an email sent on 6th July 2016 from its authorised representative, confirmed that it would honour the terms set out in the Bank's 9th January 2015 letter. GBCL claimed that the Bank breached the settlement agreement when in February 2016, it deducted the amount of EC\$12,385.00 instead of the 'agreed' sum of EC\$2,024.70.

The Bank disputed GBCL's claim. In its defence, the Bank contended that no binding agreement or settlement had been reached by the exchange of letters in January 2015 between the Bank and GBCL or during the meeting held on 14th November 2014, with regard to a new maturity date of February 2016. The Bank's pleaded case was that its letter of 9th January 2015 to GBCL, was not, on a proper construction, an offer or proposal to GBCL as to a new maturity date of February 2016 for GBCL's loan facility with the Bank and, in any event, the statement of the maturity date with a final payment of EC\$2,024.70 in its 9th January 2015 letter, was a typographical error. In support of this, the Bank relied on a spreadsheet which accompanied its 9th January 2015 letter which showed the final payment of EC\$2,024.70 to be payable in February 2017 and not February 2016. Furthermore, the Bank contended that its 9th January 2015 letter did not call for or require any response or acceptance on the part of GBCL, and therefore GBCL's letter dated 23rd January 2015 could not constitute an acceptance of any 'offer' or proposal as to a new maturity date giving rise to any enforceable agreement or contract. It was also the Bank's contention that its email of 6th July 2016 to GBCL did not confirm the terms of its 9th January 2015 letter as being correct nor was the said email reflective of any agreement between the Bank and GBCL. Accordingly, the said email did not give rise to any legal obligations on the Bank with regard to a February 2016 maturity date.

On 26th September 2019, after a trial in the High Court, judgment was given in favour of GBCL on its claim. The learned judge found that the Bank by its letter dated 9th January 2015, had made an offer or given an undertaking to settle the dispute between the parties concerning GBCL's loan facility with the Bank and to arrive at an amicable agreement in the manner in which it proposed in its letter. The learned judge also found that GBCL's response dated 23rd January 2015 was an acceptance of the Bank's promises to do the things proposed in the 9th January 2015 letter. The learned judge also dismissed the Bank's counterclaim and ordered the Bank to pay interest at the statutory rate, and prescribed costs in accordance with the **Civil Procedure Rules 2000** ("CPR").

The Bank, being dissatisfied with the decision of the learned judge, appealed. In its notice of appeal, the Bank set out twenty-six (26) grounds of appeal. However, the Court is of the view, that the issue of whether the letter dated 9th January 2015 was an offer capable of being accepted by GBCL is determinative of the appeal.

Held: allowing the appeal; setting aside the judgment and orders of the High Court; dismissing the claim filed by GBCL on 5th September 2016; entering judgment for the Bank on its counterclaim to the extent that the declaration sought at paragraph 1 therefore is granted in part as set out at paragraph [67] of this judgment; ordering that GBCL pay the Bank's prescribed costs of the claim in the High Court pursuant to CPR 65.5(2)(a), costs of the counterclaim pursuant to CPR 65.5(2)(b), and also costs of the appeal limited to no more than two-thirds of the costs in the High Court, to be assessed unless agreed within 30 days, that:

1. When construing a document so as to determine if the statements contained therein amount to an offer capable of acceptance, the court must ask the question whether, objectively, a reasonable man in the shoes of the claimant, having knowledge of the relevant circumstances, would understand that the defendant was making a proposal or offer to the claimant, which the defendant intended to be bound by in the event of an unequivocal acceptance.

Crest Nicholson (Londinium) Ltd v Akaria Investments Ltd [2010] EWCA Civ 1331 applied; **Centrovincial Estates plc v Merchant Investors Assurance Co. Ltd** [1983] Com LR 158 applied; **Harvey v Facey** [1893] AC 552 considered.

2. Evidence as to the intention or understanding of the parties to a binding agreement are irrelevant to the court's determination of what the actual words of the document, which fall to be construed, mean. Therefore, in order to properly determine whether the 9th January 2015 letter was an offer, the court must construe the letter within its four corners and the context in which the alleged 'offer' or proposal was made.

Harvey v Facey [1893] AC 552 considered; **Global 5000 Ltd v Sarang Wadhawan** [2011] EWHC 853 (Comm) considered; **Lovell & Christmas Ltd v Wall** (1911) 104 LT 85 considered.

3. The letter dated 9th January 2015 from the Bank to GBCL, when viewed objectively, does not evince an intention on the part of the Bank to create legal relations, and a reasonable man, in the shoes of GBCL, would not have concluded that the Bank was, by the said letter, making an offer or proposal with regard to a new maturity date of February 2016 for acceptance or rejection by GBCL. The letter is not couched in the language of an offer or a proposal with regard to a new maturity date of February 2016, capable of acceptance by GBCL. Further, it does not invite or require a response from GBCL, whether expressing their agreement, rejection, or to make a counter proposal. Rather, the said letter was informative, directive and declaratory. It was informative that the Bank had credited the sum of EC\$39,551.34 to GBCL's loan account, and declaratory as to a new maturity date which had already been made effective by the Bank in relation to GBCL's said loan facility. Accordingly, the learned judge erred in finding that the letter dated 9th January 2015 was an offer or proposal as to a new maturity date which was accepted by GBCL in its letter of 23rd January 2015 to the Bank, thereby creating a binding agreement between the parties.
4. Contrary to the learned judge's findings, the email from the Bank's new country manager to GBCL's lawyers on 6th July 2016, which expressly stated that the Bank would conform to its letter dated 9th January 2015 and was taking steps to reverse certain entries 'to backdate as at February 2016' with regard to GBCL's loan facility, is not, in the circumstances, evidence of the existence of a binding 'settlement agreement' between the Bank and GBCL. An email simply stating that the Bank would conform to its 9th January 2015 letter could not convert, several months later, the letter dated 9th January 2015 into an offer. Moreover, while GBCL did rely on the 6th July 2016 email in its statement of claim, it did not seek any specific relief in relation to it, such as, for example, based upon the equitable doctrine of estoppel. The crux of GBCL's case was that the Bank had breached the terms of the 'settlement agreement' created by the two January 2015 letters. It was never pleaded or raised before the learned judge in the court below, that the 6th July 2016 email constituted or brought into existence a new contract between the Bank and GBCL with regard to the new maturity date of the loan being February 2016, which new agreement had been breached by the Bank. In those circumstances, the July 2016 email, while of some importance evidentially, does not alter the position that GBCL's case of the existence of a binding 'settlement agreement' had not been made out.

JUDGMENT

- [1] **FARARA JA [AG.]:** The appellant, BON Bank Ltd (previously RBTT Bank (SKN) Limited) (“the Bank” or “the appellant”), appeals against the judgment and orders dated 26th September 2019 of a learned judge of the High Court where, after a trial, the learned judge gave judgment for the respondent, General Business Company Limited (“GBCL” or “the respondent”) on its claim in contract and ordered the Bank to repay to GBCL the sum deducted from GBCL’s loan account with the Bank from February 2016 onwards, less the sum of EC\$2,024.70. The learned judge also dismissed the Bank’s counterclaim, ordered the Bank to pay interest at the statutory rate, and prescribed costs in accordance with the **Civil Procedure Rules 2000** (“CPR”).
- [2] In its appeal, the Bank, as it did in the court below, disputes that a letter dated 9th January 2015 from its lawyers to GBCL amounted to an offer capable of being accepted by GBCL by its response letter dated 23rd January 2015. Accordingly, the main issue in the appeal is whether the letter dated 9th January 2015 is an ‘offer’ in law and whether, together with the letter dated 23rd January 2015, there came into existence a binding agreement between the parties with regard to a new maturity date of February 2016 with respect to GBCL's loan with the Bank.
- [3] In the court below, the learned judge summarised the issues for determination as follows:
- (i) Whether there was an agreement between GBCL and the Bank created by the letters of 9th January 2015 and 23rd January 2015?
 - (ii) If so, did this agreement constitute an enforceable contract between the parties?
 - (iii) Was there a breach of contract by the Bank?

- [4] In its notice of appeal, the Bank set out twenty-six (26) grounds of appeal. However, counsel for both parties accepted that the learned judge's formulation of the three issues for determination was correct and, essentially, the hearing of the appeal proceeded on the basis of these three distilled issues. In our view, the issue of whether the letter dated 9th January 2015 was an offer capable of being accepted by GBCL is determinative of this appeal. This issue is described in the Bank's written submissions as 'the single issue'.¹ If the answer to that question is no, that is the end of the matter and the appeal succeeds, as no binding agreement could come into existence between the Bank and GBCL with regard to a new maturity date of February 2016 applicable to GBCL's loan facility with the Bank. On the other hand, if the answer to that question is yes, and GBCL's letter was an acceptance of a new maturity date, it follows that a binding agreement did come into existence between the parties by virtue of the said two letters, as found by the learned judge, and the appeal ought to be dismissed.

The Pleadings

- [5] On 5th September 2016, GBCL brought a claim against the Bank in the High Court claiming loss and damage for breach of contract. GBCL also sought an injunction restraining the Bank from deducting the sum of EC\$12,385.00 or any sums from its accounts with the Bank; a refund of the sum of EC\$84,730.30 plus any further sum deducted by the Bank from its accounts; interest; and costs. The basis of GBCL's claim is a loan agreement entered into with the Bank whereby GBCL was granted a loan facility of EC\$1.2 million, at an initial interest rate of 12% per annum, repayable over a period of 180 months (15 years) by monthly installments of EC\$14,403.00. This loan, which was not the only facility GBCL had with the Bank, had been the subject of four interest rate changes or reductions between 6th December 2002 and 25th September 2012. Accordingly, the rate of interest chargeable on this loan changed from an initial rate of 12% to 10%, to 9.5%, to 9% and finally to 8% on 25th September 2012. However, the changes in the interest

¹ Hearing Bundle Volume 2, page 17, paragraph 6.

rate to 10% on 6th December 2002 and to 9.5% on 10th June 2005 were, inadvertently, not made by the Bank in its system. As a result, the Bank continued to make deductions of payments of interest from GBCL's account at the initial or higher rate of 12%. By letter dated 25th January 2007, the Bank proposed, and by subsequent letter dated 30th November 2007 confirmed, its refund by credit to GBCL's account of the sum of EC\$9,890.59 representing the overcharge of interest for the period June 2005 to January 2007.

[6] This problem occurred again when the interest rate applicable to GBCL's said loan was reduced from 9% to 8% on 25th September 2012. The Bank continued to make deductions from GBCL's account of interest in the sum of EC\$12,385.00 applicable to the 9% interest rate. After this was discovered by GBCL in April 2013, it was advised by the Bank that the maturity date on its loan had been changed by the Bank from the then applicable date of February 2017 to the extended date of August 2017. The Bank also asserted in written correspondence that GBCL had missed three payments in March 2002, January 2003 and March 2003 on the loan, and made late payments during the periods November 2002 and February 2003. These matters were all disputed by GBCL in a letter dated 12th December 2013 from its managing director, Mr. Evered Herbert ("Mr. Herbert"), to the Bank.

[7] After several exchanges of correspondence between GBCL and the Bank, a meeting took place on 14th November 2014 between the Bank represented by its then area vice president and country manager, Ms. Sandra Fontenelle ("Ms. Fontenelle") and its branch manager, Ms. Diedrea Walters ("Ms. Walters"), and GBCL, represented by Mr. Herbert and his attorney-at law. Certain issues in dispute were discussed at the said meeting. However, on the evidence adduced at trial, the parties were not agreed entirely on what all was discussed and agreed to at that meeting. On the evidence given at trial, however, both sides appeared to accept that no agreement was reached at that meeting.

[8] The November 2014 meeting was followed by the Bank's letter dated 9th January 2015, to GBCL's lawyers. This letter was accompanied by a spreadsheet of the loan payments for a certain period with respect to the said loan facility and in relation to GBCL's other two operating accounts with the Bank. Some two weeks later, GBCL's lawyers sent the letter dated 23rd January 2015 in response by which GBCL purported to accept the Bank's 'proposal' of a new maturity date for the said loan of February 2016. These two letters are of crucial importance to the determination of the central issue of whether a binding contract came into existence between the parties with regard to the new maturity date of February 2016. Also, of some significance to GBCL's case as pleaded, is an email dated 6th July 2016 from Mr. Chad Allen ("Mr. Allen"), the new country manager of the Bank. This email was in response to correspondence from GBCL's lawyers in June 2016 raising certain outstanding issues concerning the company's said loan account.

[9] On its pleaded case, GBCL's claim was based on the terms of an alleged 'settlement agreement' with the Bank as contained in the two letters, which terms were confirmed by the email from Mr. Allen stating expressly that the Bank would conform to the terms in its letter dated 9th January 2015. I set out below GBCL's pleadings at paragraphs 9 and 10 of its statement of claim:²

"9. After several months of exchange of written correspondence and meetings, **the dispute between the parties was settled by way of a settlement agreement contained in correspondence from the [appellant] dated January 9, 2015 and correspondence from the legal Counsel for the [respondent] dated January 23, 2015 ("Settlement Agreement")**. Further to said correspondence, the parties agreed as follows:

- (i) The [appellant] *would* credit the [respondent's] loan account with the amount of EC\$39,551.34 ... back dated to July 01, 2008.
- (ii) The new maturity date for the [respondent's] loan facility with the [appellant] was February 2016, with a final payment of EC\$2,024.70 instead of the regular monthly payments of EC\$12,385.00.

² Hearing Bundle Volume 1, page 252.

The [respondent] will rely on the correspondence referenced herein at trial.

10. In February 2016 in breach of the Settlement Agreement the [appellant] deducted the sum of EC\$12,385.00 from the [respondent's] bank account instead of the sum of EC\$2,024.70 as agreed. By written correspondence dated March 10, 2016, through its legal Counsel, the [respondent] pointed out the [appellant's] breach of the Settlement Agreement and requested that said breach be remedied but the [appellant] failed and or refused to honor the terms of the Settlement Agreement. Further, by written correspondence dated March 29, 2016 the [respondent] put the [appellant] on notice that it was not authorized to deduct any monies from the [respondent's] bank account which notice was disregarded by the [appellant]. The parties exchanged correspondence which included an email dated July 6, 016 wherein an authorized representative of the [appellant] confirmed the terms of the settlement Agreement referenced at paragraph 9 above. Notwithstanding, the [appellant] has failed and or refused to honor the terms of the settlement agreement entered into between the parties. In further breach of the agreement the [appellant] has deducted the sum of EC\$12,385.00 from the [respondent's] account for each of the months of March, April, May, June, July and August 2016." (emphasis added)

[10] GBCL claimed loss and damage against the Bank as a result the latter's alleged breaches of the 'settlement agreement'.³

[11] In its defence, the Bank, in response to paragraph 9 of the statement of claim, pleaded that it:⁴

- "(a) admits that after several months of exchange of written correspondence and meetings the dispute between the parties was **settled**;
- (b) denies that the dispute was settled by way of a settlement agreement contained in correspondence from the [appellant] dated January 9, 2015 and correspondence from Counsel for the [respondent] dated January 23, 2015; and

³ Statement of claim at paragraph 11, Hearing Bundle Volume 1, page 253.

⁴ Statement of claim at paragraph 5, Hearing Bundle Volume 1, page 257.

- (c) denies that further to said correspondence referenced by the [respondent] that the parties agreed as set out in paragraph 9i and ii. [of the statement of claim] as alleged.” (emphasis added)

[12] At paragraph 6 of the defence, the Bank pleaded the prior meeting on 14th November 2014 between its representatives on the one hand and the legal counsel and an officer of GBCL on the other. Paragraph 6(a), (b) and (c) continues:

- “(a) At that meeting **the parties did arrive as the basis for settlement of the dispute. The sole term was that the sum of EC\$39,551.34 would be credited to the [respondent’s] loan account backdated to July 1st 2008 and that as a consequence the maturity date on the [respondent’s] loan account/loan facility would revert to the original maturity date of February 2017.** There was no discussion about or suggestion that the maturity date for the [respondent’s] loan facility would be accelerated from February 2017 to February 2016. Thus there was not discussion or suggestion that the maturity date for the said loan facility would be adjusted to February 2016, with a final payment of EC\$2,024.70 instead of regular monthly payments of EC\$12,385.00. Consequently, the maturity date for the [respondent’s] loan facility was and remained February 2017. (emphasis added)
- (b) The purpose of the said letter from the [appellant] to the [respondent’s] Attorney dated January 9, 2015 was not to make an offer or proposal, (and it did not in fact make any offer or proposal) but **merely to memorialize or record what had previously been discussed and agreed to at the meeting held prior thereto.** This is evident by the very content of and expressions used in the said letter. The said letter was not an offer or proposal to the [respondent] and thus was not open for or capable of acceptance. Consequently no agreement or contract arose or could have arisen by the [respondent’s] purported agreement to what was conveniently mischaracterized by the [respondent’s] attorney-at-law as a “proposal”. (emphasis added)
- (c) The reference in the [appellant’s] said letter to a new maturity date of February 2016 with a final payment of EC\$2,024.70 was in fact **a typing error** as was stated to the [respondent] by letter from the [appellant] dated March 21, 2016. The said letter of January 9, 2015 immediately after the statement therein referring to the maturity date and final payment figure, referred to a copy of an enclosure. Said enclosure was a **spreadsheet** for the [respondent’s] loan account which clearly showed the final payment amount of EC\$2,024.70 to be payable in February 2017 and not February 2016. A further reference was made to the said spreadsheet later in the said letter. Consequently

the maturity date of February 2016 stated in the said letter on which the final payment of EC\$2,024.70 was to be paid, was **inconsistent** with the date shown for said final payment on the enclosed and referenced spreadsheet, which was February 2017.” (emphasis added)

[13] In its defence, the Bank also pleaded in the alternative, that if any enforceable contract had come into existence by virtue of the said two January 2015 letters, such contract had been vitiated or was void *ab initio* or voidable ‘by a mistake in communication or a unilateral mistake as to the terms of the said agreement or contract, in the form of the [appellant] stating that the new maturity date was February 2016 when in fact the maturity date remained February 2017’.⁵ The Bank denied the claim for loss and damage and put GBCL to proof thereof.

[14] In summary, on the competing cases as pleaded in the court below, GBCL, as claimant, pleaded the existence of a binding ‘settlement agreement’ having come into existence between the parties as contained in the two letters of 9th and 23rd January 2015, which terms related to both the amount of EC\$39,551.34 to be credited by the Bank to GBCL’s loan account, and the new maturity date of February 2016; which terms Mr. Allen, in his email dated 6th July 2016 expressly stated that the Bank would conform to and was taking steps to reverse certain charges and credit the resulting amount to GBCL’s loan account. On the other hand, the Bank, as defendant, pleaded that the parties had reached the basis of a settlement of their dispute in the prior meeting of 14th November 2014, but its terms were limited to the agreement to credit GBCL’s loan account with the sum of EC\$39,551.34 backdated to 1st July 2008. No agreement or settlement had been reached at the said meeting for the Bank to change the maturity date on GBCL’s loan to a year earlier, that is, from February 2017 (the original maturity date) to February 2016. Moreover, the letter dated 9th January 2015 from the Bank was not, on its terms, an offer or proposal capable of acceptance by GBCL; and the statement therein of the new maturity date being February 2016 was a ‘typing error’, which error GBCL knew of or ought to have known from the spreadsheet

⁵ Hearing Bundle Volume 1, page 259-260, paragraph 7.

sent with the said letter which clearly showed the maturity date to be February 2017.

The Judgment

[15] At the trial, Mr. Herbert gave evidence on behalf of GBCL. Mr. Allen, the new country manager and Ms. Fontenelle, the previous country manager, gave evidence on behalf of the Bank. The learned judge, having set out the issues for determination, observed that the parties had 'agree[d] that the issue is on the narrow point of whether there was a contract between the parties created by the exchange of the letters'. She also noted that the Bank, having credited GBCL's account with the sum of EC\$39,551.34, 'the outstanding issue is whether the Bank agreed to a maturity date of February 2016 with GBCL instead of February 2017'.⁶ Accordingly, this dispute is limited to the maturity date and whether the letters of 9th January 2015 and 23rd January 2015 constituted a binding agreement or contract in law between the Bank and GBCL as to a new maturity date of February 2016 applicable to GBCL's loan account, with a final payment of EC\$2,024.70. In giving judgment for GBCL, the learned judge concluded that 'there was a contract between the parties created by the Bank's letter of January 9 [2015], and GBCL's letter of January 23, 2015 and that the Bank has breached the terms of the contract that the maturity date of GBCL's loan facility is February 2016'.⁷

[16] In coming to this conclusion, the learned judge was of the opinion that the words 'we are pleased to note that we have come to an amicable settlement' clearly indicates that the Bank had taken a decision to settle the outstanding issues with GBCL and that what followed those words 'are the proposed terms of the settlement'.⁸ Accordingly, the learned judge reasoned at paragraph 39 of the judgment as follows:

"I am of the view that by its letter of January 9, 2015 the Bank was making an offer or promise or giving an undertaking to do certain things i.e. to

⁶ NEVHCV2016/0009 General Business Company Limited and RBTT Bank (SKN) Limited (delivered 26th September 2019, unreported), paragraph 14.

⁷ Ibid. paragraph 66.

⁸ Supra n.6, paragraphs 37-38.

settle the outstanding dispute and to arrive at an amicable agreement and the manner in which it proposed to do so. The fact that the Bank used the term '*amicable settlement*' clearly denotes that it was seeking to have the matter between the parties settled peacefully in order to end the outstanding dispute and satisfy the concerns raised by GBCL. The use of the term '*amicable settlement*' implies that was not an arbitrary or unilateral decision which the Bank could make on its own but one which required consensus ad idem or a meeting of the minds or mutual assent by the parties. Indeed it was open to GBCL to disagree with the Bank's decision and reject the Bank's offer and seek other remedies."

- [17] As to acceptance by GBCL of the Bank's 'offer' of settlement, the learned judge reasoned at paragraph 40:

"I believe that GBCL's response by letter dated January 25 (sic) 2015 was an acceptance of the Bank's promise to do certain things.... This clearly connotes an acceptance of the offer. It was at this stage when the offer was accepted by GBCL that there was an agreement as there was mutual assent or a meeting of the minds of both parties."

- [18] I observe that the learned judge made no finding of a prior oral 'settlement agreement' being reached or coming into existence between the parties at their meeting on 14th November 2014, as pleaded by the Bank. Instead, the judge found that there was an offer by the Bank as settlement of the dispute between the parties by and on the terms of the Bank's letter of 9th January 2015, which offer was accepted by GBCL by its lawyer's letter of 23rd January 2015, thereby giving rise to a binding agreement in law between the parties.

- [19] Having examined the evidence of the two main witnesses for the parties, Mr. Herbert for GBCL and Ms. Fontenelle for the Bank, particularly as to what was or was not discussed at the meeting on 14th November 2014 prior to the two letters being sent, the judge concluded:

"I therefore accept Mr. Herbert's evidence that this issue of the earlier maturity date was raised and discussed at the meeting [of 14th November 2014]. I believe that was always a concern of Mr. Herbert who had made several queries and written to Diedre (sic) Walters by letters dated March 27, 2013 and December 27, 2013 in which he clearly asked '*about the NEW maturity date for the loans for General Business and Evered Herbert*' after the interest was changed. Ms. Walters had responded by

letter dated December 23, 2013. It would therefore be very strange if Mr. Herbert did not raise this issue at the meeting of November 2014.”⁹

- [20] The judge attached much significance in her analysis to the use of the word ‘now’ by the Bank in its letter of 9th January 2015 when stating: ‘The maturity date for that facility is **now** February 2016’. (Emphasis added). She deduced that ‘now’:

“...clearly connotes there was a change in the maturity date from what was previously indicated. As Mr. Herbert had always requested an earlier maturity date it was reasonable for him to believe that this was an offer by the Bank based on his discussions with Ms. Fontinelle (sic) and Ms. Deidre (sic) Walters. Further Ms. Fontinelle (sic) stated in cross-examination that when the interest rate was reduced on a loan either a) *the client pays less per month if it is mutually agreed or b) if not agreed the principal would be reduced faster than originally projected if everything else remained equal*. Therefore, GBCL’s contention that the letter dated January 9, 2015 was a proposal and its acceptance of the proposal was not unreasonable in light of the ongoing discussions and what had transpired at the meeting of 14th November 2014.”¹⁰

- [21] In examining the conduct of the parties after the Bank had issued its letter dated 9th January 2015, the learned judge considered the implications of the email dated 6th July 2016 from Mr. Allen. In that email Mr. Allen, stated:

*“We do recognize the protracted delay in closing on the outstanding matter and confirm that based on all internal discussion **we will conform to letter dated January 9, 2015. We are finalizing the reversal of entries to backdate as at February 2016.***

A subsequent update will be provided advising the completion of same. Please feel free to contact me if you have any questions.” (Emphasis added).

- [22] The learned judge also analysed Mr. Allen’s evidence in his witness statement and his explanation as to the reason why, in a subsequent letter dated 25th July 2016, the Bank resiled from that position. She also analysed his evidence given in cross-examination on these matters. The learned judge concluded that Mr. Allen’s statement that the Bank would conform to the terms set out in its letter of 9th

⁹ Supra n.6, paragraph 44.

¹⁰ Supra n.6, paragraph 45.

January 2015 of the new maturity date for GBCL's loan being February 2016 with a final payment of EC\$2,024.70:

"contradicts his position [given in oral evidence] that it was unimaginable that the Bank would forego one year's servicing of the loan. When he sent the email on July 6, 2016 Mr. Allen seemed to have no difficulty in the Bank foregoing a year's loan service as he believed there was an agreement made between the Bank and GBCL which the Bank should honor. Indeed Mr. Allen was prepared to implement the agreement and indicated [that] he *"was finalizing the reversal of entries backdating as at February 2016"*. This lends further support to the [respondent's] position that there was an agreement."¹¹

- [23] At paragraph 60, the learned judge gave her conclusion as to the existence of a binding agreement between the parties:

"...The parties are to be judged not by what is in their minds but by what they have said, written or done' (See Chitty's on Contract). I therefore find that there was an outward manifestation of an agreement based on what was stated in the Bank's letter of January 2015 and the Bank's conduct thereafter of failing to respond to GBCL's letter of acceptance of January 23, 2015 or to revoke the offer, amounted to consent."

- [24] On the question of whether GBCL had provided 'consideration' for the alleged contract, the learned judge held:

"I therefore agree with counsel for GBCL that GBCL was deprived of the opportunity of negotiating further in an effort to arrive at terms more favourable to it. Applying the principles espoused at para. 7 in **Centrovincial**¹², I find this to be the consideration GBCL gave to satisfy the terms of the contract."¹³

- [25] The learned judge did not accept the Bank's argument (and pleaded case) that GBCL knew or ought to have known that, by its letter dated 9th January 2015, the Bank did not have the requisite intention to be bound by the terms of the said letter. Likewise, the learned judge did not accept that by Mr. Herbert's admitted failure to read the spreadsheet which accompanied the 9th January 2015 letter, GBCL had either deliberately shut its eyes or recklessly failed to make enquiries as to the substantial conflicts between the new maturity date stated in the letter

¹¹Supra n.6, paragraph 59.

¹² Centrovincial Estates plc v Merchant Investors Assurance Co. Ltd [1983] Com LR 158.

¹³ Supra n.6, paragraph 62.

and the maturity dates in the spreadsheet. Furthermore, the judge observed that the Bank had failed, for more than one year, to correct the alleged error regarding the maturity date in the 9th January 2015 letter. She concluded that it was unreasonable for the Bank to expect Mr. Herbert to be the one to realize there was an error. Accordingly, the judge found 'there was *consensus ad idem* or a meeting of minds between the parties. Therefore, the issue of rectification does not arise'.¹⁴

Was the Bank's letter dated 9th January 2015 an offer? Appellant's Submissions

[26] The Bank submits that its 9th January 2015 letter to GBCL was not, on a proper construction, an offer in law. It does not evince a willingness or intention on the part of the Bank to contract or to create legal relations, which is essential to any offer. To the contrary, the letter is not expressed as an offer or a proposal and did not call for or require any response or acceptance on the part of GBCL.

[27] The Bank submits that the correct approach by the courts to determining whether a statement by A to B amounts to an offer capable of acceptance by B, is to ask the question whether, objectively, a person to whom the statement is made, acting reasonably, would understand that A was making a proposal or offer to B, which A intended to be bound by in the event of an unequivocal acceptance. In support of this principle, the Bank cited the decision of the English Court of Appeal in **Crest Nicholson (Londinium) Ltd v Akaria Investments Ltd**.¹⁵ In **Crest**, Sir John Chadwick (delivering the judgment of the court) referred to and adopted as the guiding principle, this statement by Lord Morris in the Privy council in **Harvey v Facey**.¹⁶

"LM Facey's telegram gives a precise answer to a precise question, viz., the price. The contract must appear by the telegrams, whereas the Appellants are obliged to contend that an acceptance of the first question is to be implied. Their Lordships are of opinion that the mere statement of

¹⁴ Supra n.6, paragraph 65.

¹⁵ [2010] EWCA Civ 1331.

¹⁶ [1893] AC 552.

the lowest price at which the vendor would sell contains no implied contract to sell at that price to the person making the inquiry.”¹⁷

- [28] The Bank also submits that the 9th January 2015 letter was an expression of a decision or steps already taken unilaterally by it, as was admitted by Mr. Herbert in cross-examination, which past decisions or actions cannot constitute an offer capable of leading to a binding contract in law. The operative words in the said letter indicative of decisions and steps already taken are: ‘*we have come*’ and ‘*we have credited*’. In **Schuldenfrei v Hilton (Inspector of Taxes)**¹⁸ the question was whether an amended notice of assessment issued by the Revenue contained an offer which was capable of acceptance by the taxpayer for the purposes of section 54 of the Taxes Management Act 1970. Neuberger J concluded it was not. This decision was upheld by the English Court of Appeal in the judgment delivered by Parker J. Neuberger J analysed the notice in question in this way:¹⁹

“However, I have reached the conclusion, with no little hesitation, that the wording of the second notice is not really apt so as to enable it to be accepted. It records something as having happened within the Revenue’s own records. The crucial first line is: ‘This statement shows the adjustments **which have been made** to the assessment’. It does not seek agreement; it does not refer to any dispute or to the appeal... None the less, on a fair reading, I do not think it represents an offer capable of acceptance which can lead of itself without further ado to a s 54 agreement. To use lawyers’ language, it may be an invitation to treat.” (Emphasis added).

- [29] At this juncture, it is convenient to set out the operative portions of the 9th January 2015 letter. It states:

“We are pleased to note that **we have come to an amicable settlement** whereby **we have credited** the above captioned account with the amount of (XCD\$39,551.34) Thirty-Nine Thousand Five Hundred Fifty-One Dollars and Thirty-Four cents backdated to July 01, 2008. The maturity date for that facility **is now** February 2016, with a final payment of XCD\$2,024.70 instead of XCD\$12,385.00. We have enclosed a copy for your record.

¹⁷ Supra n.14 at paragraph 21.

¹⁸ [1998] STC 404.

¹⁹ Ibid. Pages 412-422.

We are also enclosing a spreadsheet of the loan payments for that period which your client raised in our meeting of November 13, 2014 and his other two operating accounts held with us.

We again express our sincere gratitude for patience in allowing us to have with (sic) settled in this manner and at the same time our sincere apologies for the time this took **to be resolved.**" (Emphasis added).

[30] The Bank contends that the said letter, by the use of the words: '[w]e are pleased to note we have come to an amicable settlement', is referring to something passed, something which has already been done. It is simply supplying information in the same sense in which that conclusion was reached by the Privy Council in **Harvey**. Likewise, the words 'we have credited' and 'the maturity date is now' are each referable to something already done by the Bank, a decision already taken, something already acted upon and put into effect without any participation by GBCL. These words do not connote an offer or proposal to do something, if accepted by GBCL. The Bank also argues that these statements of matters already put into effect by it in relation to GBCL's loan account, were not matters which, on the evidence, were the result of negotiations between the parties, since the issue as to changing the maturity date substantively was never discussed at the 14th November 2014 meeting between the parties. The Bank also submits that the learned judge did not, as she was required to do, properly analyse the wording and terms of the said letter. Instead, she focused on the words 'amicable settlement', whereas, the said letter did not contain the words or terms 'offer', 'proposal', 'offer of settlement' or 'proposal for settlement', or any other words or phrases connoting that an offer or proposal was being made or conveyed via the said letter with regard to a new maturity date for the GBCL's said loan account, such as to require a response from or acceptance or rejection by GBCL.

[31] The Bank submits therefore, that the learned judge erred in concluding that the 9th January 2015 letter to GBCL's lawyers was an offer capable of acceptance by GBCL. In those circumstances, it follows that the letter dated 23rd January 2015 from GBCL's lawyers, could not and did not constitute an acceptance of the new maturity date of February 2016, binding the Bank. The Bank also submits that the

burden of proof rested on GBCL, as claimant in the court below, to prove, to the court's satisfaction on a balance of probabilities, that the 9th January 2015 letter was an offer. This they had failed to do on the very terms of the said letter itself and on the evidence adduced.

- [32] In **Cheshire, Fifoot & Furmston's Law of Contract**²⁰ the learned authors dealt with the burden of proof in such cases in this way: 'The first task of the plaintiff is to prove the presence of a definite offer made either to a particular person or, as in advertisements of rewards for services to be rendered, to the public at large'. However, the learned judge never carried out an examination of the text of the letter as was done in **Global 5000 Ltd v Sarang Wadhawan**.²¹ Instead, what the judge did, was to consider the history of the dispute between the parties and whether GBCL was expecting a proposal in light of the ongoing discussions. This the Bank argues was a completely wrong approach as any subjective expectation by Mr. Herbert (on behalf of GBCL) of receiving a proposal from the Bank as to a new maturity date for his company's loan, could not turn the letter dated 9th January 2015 into an offer or proposal capable of acceptance by GBCL.

Respondent's Submissions

- [33] GBCL submits that the learned judge committed no error of principle in concluding that the 9th January 2015 letter constituted an offer or proposal from the Bank of a new maturity date, which offer or proposal was capable of and was in fact accepted by GBCL by its letter dated 23rd January 2015, thereby constituting a binding agreement in law between the parties that the new maturity date of the loan was February 2016. Accordingly, it was not open to the Bank to resile from that binding agreement. GBCL contends that in determining whether the Bank's 9th January 2015 letter is an 'offer', this question cannot be considered in isolation. It must be considered in its proper context.

²⁰ 16th Edn. (2012). Page 42.

²¹ [2011] EWHC 853 (Comm) at paragraph 43.

[34] This contextual approach to a determination of the question of whether the 9th January 2015 letter was an 'offer' or 'proposal', was adopted by the learned judge and is borne out by her analysis and findings at paragraph 44 of the judgment. There the learned judge accepted that Mr. Herbert had made, on behalf on of GBCL, in prior correspondence to Ms. Walters of the Bank, several queries about a new maturity date for the loan after the interest from the reduced rates had been credited to the loan account, and concluded that it would be very strange if he had not raised this issue at the 14th November 2014 meeting.

[35] GBCL contends that the 9th January 2015 letter has two distinct parts to it. The first concerns the Bank having credited the GBCL's loan account with the sum of EC\$39,551.34. This is not and has never been an issue in the case. The second concerns the maturity date being 'now' February 2016, which is the core of the dispute between the parties. GBCL argues that the statement in the said letter regarding this second issue, could only have been a proposal in the context of the prior negotiation discussions between GBCL and the Bank, and the correspondence from Mr. Herbert to the Bank. In this regard, GBCL points to paragraphs 12 and 13 of the witness statement of Mr. Herbert. There Mr. Herbert sets out in some detail his version of what transpired at the 14th November 2014 meeting with the representatives of the Bank. His account includes this statement:

"I showed Ms. Fontenelle correspondence that I had written to the Bank requesting the maturity date on [GBCL's] loan on specific dates, to which I received no response. At one point Ms. Fontenelle commented that the way the Bank should have dealt with the reductions in interest rate was to close off the loan and start a new loan at the new interest rate each time the interest rate was reduced as that would be "cleaner" to deal with and would avoid any errors."²²

[36] Support for this finding, GBCL contends, is also to be found at paragraph 6(a) of the defence and paragraph 12 of the witness statement of Ms. Fontenelle, who gave evidence at the trial on behalf of the Bank. She testified, in part, concerning

²² Witness Statement of Evered "Webbo" Herbert at paragraph 12, Hearing Bundle Volume 1, page 337.

what was discussed by the representatives of the parties at the 14th November 2014 meeting:

“At the aforementioned meeting held in November 2014, the parties agreed to resolve the matter by crediting to the claimant’s loan account the amount of EC\$39,551.34 backdated to 1st July 2008. The effect of the 3 months’ non-payments and the alleged late payments was to extend the maturity date from February 2017 to August 2017. The operational effect of crediting the sum of \$39,551.34 back to [the respondent’s] account as at 1st July 2008 was to return the maturity date to the original February 2017. That is all that was discussed and agreed to at the meeting. The parties came to that agreement and left the meeting with that agreement. Nothing was left open. At no time did we discuss any acceleration of the maturity date from February 2017. Subsequent to the meeting and before the Bank’s letter of January 9, 2015, the Bank implemented the agreement and credited the aforesaid sum back to [the respondent’s] loan account as from 1 July 2008. The purpose of the Bank’s letter of January 9, 2015 was simply to inform [the respondent] that this had been done...”

[37] GBCL submits that if a reasonable person, in the context of the negotiations and correspondence between the parties, would, objectively, have considered the 9th January 2015 letter as a proposal for a new maturity date for the loan, the said letter constitutes an offer or proposal capable of being accepted by GBCL. Furthermore, GBCL, in accepting, by its 23rd January 2015 letter, the new maturity date as proposed by the Bank in its 9th January 2015 letter, did not simply state ‘I accept your proposal’. Instead, it specifically stated or repeated the said proposed maturity date of ‘February 2016’. To this letter the Bank did not respond. Having received GBCL’s ‘acceptance’ letter, it behooved the Bank, if it had not made or intended to make an offer or a proposal of the new maturity date, to have written back stating that its letter of 9th January 2015 was neither a proposal or an offer or, but, as it stated some time thereafter, the said date was a typographic error, and that it never intended to propose a change in the original maturity date from February 2017 to February 2016.

[38] GBCL takes issue with the Bank’s contention that GBCL knew, or ought to have discovered with reasonable diligence from the spreadsheet accompanying its 9th January 2015 letter, that the maturity date for the loan had not been changed to

February 2016 as stated in the letter itself, or there was a clear discrepancy as to what was the maturity date. In answer to this contention, GBCL submits that it was not clear from the said letter why the spreadsheet was being enclosed other than it being something which GBCL had requested at the 14th November 2014 meeting. The said letter did not connect the 'settlement' or terms of settlement to what was in the spreadsheet which, in any event, applied to not just this loan but to all the other facilities which GBCL held with the Bank. Moreover, Mr. Herbert had been told by Ms. Walters, on a previous occasion not to rely on the spreadsheets supplied to GBCL by the Bank. This is to some degree borne out by Ms. Walters' letter dated 12th December 2003 to Mr. Herbert in which she stated: 'Please be reminded that an Amortisation Schedule is used just for the sole purpose for guidance and not to be construed as the actual receipt of timely payments'.²³ Accordingly, even though Mr. Herbert did testify that had he looked at the spreadsheet at the time of receiving the 9th January 2015 letter he would have seen the three different maturity dates, the date 'February 2016' in the said letter and the dates of 'February 2017' and 'August 2017' in the spreadsheet, do not serve to alert GBCL that the Bank did not intend and was not making a proposal of a new and earlier maturity date of 'February 2016' which accorded with the requests made in earlier discussions and correspondence with and by Mr. Herbert. Accordingly, GBCL submits, it would be going too far to say that it had failed to exercise reasonable diligence which would have put it on notice that there was a conflict between the letter and the spreadsheet as to the maturity date for the loan.

- [39] Regarding the issue of the lack of consideration moving from GBCL to the Bank for a binding contract contained in the two January 2015 letters to have come into existence, GBCL submits that by accepting the maturity date of February 2016 proposed by the Bank, it had given up its right to continue to negotiate for more favourable terms – for a more favourable maturity date. However, no such consideration was pleaded by GBCL or referred to in the witness statement of Mr. Herbert. This notwithstanding, the learned judge did make a finding at

²³ Hearing Bundle Volume 1, page 369 at paragraph 12.

paragraph 62 of the judgment that GBCL had in fact given consideration (something of value) in entering into the alleged binding agreement with the Bank. In reaching this conclusion, the learned judge relied on and sought to apply this principle in **Centrovincial**:²⁴

“...while the court will not generally concern itself with the adequacy of consideration, by examining a bargain to see whether it is fair minded and beneficial to both sides, it will generally require some consideration to support a promise. A party to a contract can only enforce a promise not given under seal if in return for it he has given something of value in the eyes of the law (see for example Halsbury’s Laws of England (4th edition) vol.9. paras 316 and 317 and the cases there cited).”

Analysis and Conclusion

[40] I start my analysis with the pleaded cases, witness statements, and evidence led at trial in the court below. GBCL (as claimant) pleaded and relied on breaches of a ‘settlement agreement’.²⁵ Its pleaded case was that after several months of exchange of written correspondence and meetings, the dispute between the parties was settled by way of a settlement agreement contained in the two January 2015 letters. The ‘dispute’ between the parties referred to in the statement of claim, is to be gleaned from paragraphs 6 and 7. This concerned, firstly, that after the interest rate applicable to GBCL’s loan with the Bank had been reduced from 9% to 8% on 14th May 2008, the Bank did not reduce the amount being deducted from GBCL’s account at the Bank to cover the monthly instalment payments on the said loan. Instead, it continued to deduct the sum of EC\$12,385.00, which sum was applicable to a 9% rate of interest. Secondly, the dispute between GBCL and the Bank also concerned the issues raised by the Bank with GBCL after the latter had made queries, on or about 19th April 2013, about the overcharges of interest in light of the rate reduction to 8%. The Bank advised GBCL that the maturity date for its loan facility had been extended from February 2017 to August 2017, and that GBCL had missed three monthly installment payments in March 2002, January 2003 and March 2003 and there were late payments during the period November 2002 and February 2003. That these matters were collectively the ‘dispute’

²⁴ Supra n. 12.

²⁵ Statement of claim at paragraphs 9-10, Hearing Bundle Volume 1, page 252.

between the parties is confirmed by the Bank itself in its letter dated 12th December 2003 from Ms. Walters to Mr. Herbert of GBCL.

[41] From the evidence adduced at trial, one of the issues raised between the Bank and GBCL was the question of the maturity date on the loan and Mr. Herbert's request for the date to be adjusted in light of the reductions over the years in the rates of interest on the loan. Again, this is clearly borne out by the 12th December 2003 letter from Ms. Walters referred to above. It starts by referencing 'your enquiry of the maturity date for the above facility'. While GBCL does not plead the 14th November 2014 meeting and what was discussed or agreed to by the parties at the said meeting, Mr. Herbert, in his witness statement expressly refers to the said meeting (he gives the date as 'November 13, 2014'). He states that at said meeting he 'also set out the various reductions in the interest rate and that it would be illogical for the maturity date on the company's loan to be extended. I showed Ms. Fontenelle correspondence that I had written to the Bank requesting the maturity date on the Company's loan on specific dates, to which I received no response.' Mr. Herbert also recalled Ms. Fontenelle saying to him at the said meeting 'Mr. Herbert you have made your case'. He continues:

"Then Ms. Fontenelle asked me what I wanted by way of settlement to which I responded that I wanted three things:

- (i) The maturity date on the company's loan must be earlier than the original maturity date of February 2017 in light of the reductions in the interest rate and the fact that the Bank continued to take the same monthly loan payment;
- (ii) Compensation for the inconvenience that was caused to me; and
- (iii) Payment of my lawyer's fees.

Ms. Fontenelle indicated that she would consider the matter and that she would need some time to get back to us. It was agreed that the Bank would provide its proposal by Monday December 15, 2014 ... At no time in that meeting did the Bank make any proposal to me for settlement of the matter."²⁶

[42] It is GBCL's case, that the letter dated 9th January 2015 was the Bank getting back to GBCL with a proposal, as Ms. Fontenelle had promised to do at the 14th

²⁶ Supra, n.21. Paragraph 13.

November 2014 meeting, as given by Mr. Herbert in his account of what was discussed and what was agreed at the end of the said meeting. Accordingly, the said letter was the Bank's proposal which it had promised to communicate to GBCL, and GBCL was entitled, in the context of this matter, to consider and to treat the said letter as the Bank's proposal regarding a new maturity date for GBCL's loan in light of the several reductions in the applicable rate of interest over the years. Indeed, during oral argument, Ms. Joseph-Rowe, learned counsel for the respondent stressed that GBCL's case was that: (i) there was no agreement reached at the 14th November 2014 meeting between the parties; (ii) the agreement reached was by virtue of and contained in the letters dated respectively 9th January 2015 and 23rd January 2015; (iii) the first letter was the offer made to GBCL by the Bank and the second the acceptance of that offer by GBCL; (iv) these two letters constituted the 'settlement agreement' pleaded at paragraphs 9 and 10 of GBCL's statement of claim; (v) the evidence of Mr. Herbert, in particular at paragraphs 12 and 13 of his witness statement, supports GBCL's pleaded case and was not disputed at trial; and (vi) the letter dated 9th January 2015 was the Bank getting back to GBCL with a proposal, which proposal as to the new maturity date being February 2016, was accepted by GBCL in its 23rd January 2015 letter to the Bank.

[43] Ms. Carty, learned counsel for the appellant, on the other hand, stressed that the fact that Mr. Herbert had been awaiting a proposal from the Bank following the 14th November 2014 meeting, does not convert the 9th January 2015 letter from the Bank into a 'proposal' of a new maturity date for GBCL's loan. Likewise, whatever occurred after the said letter was sent, cannot convert the said letter into an offer or proposal of a new maturity date capable of being accepted by GBCL.

[44] The difficulty with GBCL's contention on the important and decisive issue of whether the 9th January 2015 letter is an 'offer' or 'proposal' is two-fold. Firstly, GBCL, as the claimant in the court below asserting that a binding agreement was formed by the two January 2015 letters, the burden of proof rested on GBCL to

establish that the 9th January 2015 letter is or can be construed as an 'offer' or 'proposal' of a new maturity date, capable of being accepted by it so as to constitute a binding agreement between it and the Bank with regard to this element of their dispute. The second is that, on the important consideration of the proper construction of the 9th January 2015 letter, the applicable principles and the wording of the letter itself do not support reaching the conclusion in law that the said letter was an 'offer' or a 'proposal' by the Bank for the consideration and acceptance (or rejection) by GBCL.

[45] Before considering each of these two 'hurdles' to GBCL's case and its contention that the 9th January 2015 letter constituted an 'offer' or a 'proposal' as to a new maturity date, and whether these hurdles are insurmountable, I will briefly summarise the Bank's pleaded and evidential case with regard to a 'settlement' having been reached and what transpired or was discussed and agreed, if anything, at the 14th November 2014 meeting.

[46] In its defence, the Bank pleads that the dispute between the parties 'was settled', but not by way of the two January 2015 letters. Its pleaded case is that at the 14th November 2014 meeting, 'the parties did arrive at the basis for settlement of the dispute'; and that the sole issue agreed at the said meeting 'was that the sum of EC\$39,551.34 would be credited to the [respondent's] account backdated to July 1st 2008 and that as a consequence the maturity date on the [respondent's] loan account/loan facility would revert to the original maturity date of February 2017'.²⁷ Implicit in this pleading is that the question or issue of the maturity date for the said loan was discussed or at least mentioned at the 14th November 2014 meeting. It must follow that the learned judge was correct to find at paragraph 44, that it would be very strange if Mr. Herbert did not raise the issue of a new maturity date at the said meeting.

²⁷ Defence and Counterclaim at paragraph 6(a). Hearing Bundle Volume 1 page 257.

- [47] As to the 9th January 2015 letter itself, the Bank's pleaded case is that its purpose was not to make any 'offer' or 'proposal' for consideration and acceptance by GBCL, but purely 'to memorialize or record what had previously been discussed and agreed to' at the said 14th November 2014 meeting.²⁸
- [48] Ms. Walters, who attended the 14th November 2014 meeting as a representative of the Bank, did not give evidence in the court below. Mr. Allen, who provided a witness statement and gave oral evidence at the trial, was not at the said meeting. In fact, he arrived in the Federation of Saint Christopher and Nevis in August 2015, several months after the said meeting and the two January 2015 letters having passed between the Bank and GBCL. Ms. Fontenelle moved to the Federation in February 2014 and assumed the post of country manager of the Bank. In her witness statement she testified that she had been made aware when she arrived of an issue that had arisen between the Bank and GBCL. It concerns GBCL being overcharged interest on its loan account with the Bank. She referred to Ms. Walters' letter to Mr. Herbert of GBCL dated 12th December 2013 'in reference to an inquiry of the maturity date' of facility MG0820900022 in GBCL's name.²⁹ Ms. Fontenelle also referred to Mr. Herbert's letter to Ms. Walters dated 27th December 2013 in which he stated that he 'found it troubling that [the Bank] had made certain determinations regarding the new maturity date and had moved the maturity date of the loan from February 2017 to August 2017 without any evidence'.³⁰ Reference was also made in her witness statement to a letter dated 18th February 2014 from the lawyers for GBCL to the Bank which expressed GBCL's concern about an objection to the maturity date being changed by the Bank from February 2017 to August 2017.³¹ She also referenced in her witness statement, the response letter dated 26th February 2014 from Ms. Walters to GBCL's lawyers giving a detailed history and explanation of what had occurred with regard to the maturity date on this loan, and it having been changed from the

²⁸ Supra n.27, paragraph 6(b).

²⁹ Witness Statement of Sandra Fontenelle at paragraph 5(a), Hearing Bundle Volume 1, page 328.

³⁰ Ibid. Paragraph 5(b).

³¹ Ibid. Paragraph 5(c).

original date of 'December 2016 to August 2017 when the last interest rate adjustment was made to the facility on September 25, 2012'.³² This was followed by a letter dated 17th March 2014, from GBCL's lawyers to the Bank, querying the Bank's responses and laying 'blame on the bank for any errors made in the timing and application of the loan repayments'.³³

[49] It is at this point that Ms. Fontenelle became directly involved in the dispute between the Bank and its customer, GBCL. She wrote a letter dated 1st September 2014 to GBCL's lawyers in her capacity as Area Vice President for the Bank, indicating that, upon a review, 'the Bank hoped to communicate with said legal practitioner shortly'.³⁴ At paragraph 7 of her witness statement, Ms. Fontenelle avers:

"That promised communication came by a letter from Ms. Diedrea Walters dated January 9, 2015 to the [respondent's] legal practitioners. Ms. Walters stated that the Bank was pleased to note that "*we have come to an amicable settlement whereby we have credited.....*" That letter was sent after discussion between Ms. Walters and myself, following a meeting of November 13, 2014 (sic) that we had attended with the [respondent's] representative Mr. Evered Herbert and the [respondent's] legal practitioner, to which I will refer later. I had not seen the actual letter before it was sent by Ms. Walters ..."

[50] Specifically, as to what transpired at the 14th November 2014 meeting, Ms. Fontenelle avers at paragraph 12 of her witness statement that:

" At the aforementioned meeting held in November 2014, the parties **agreed to resolve the matter** by crediting to the [respondent's] loan account the amount of EC\$39,551.34 backdated to 1st July 2008. This was the amount that would have arisen on the alleged 3 months' non-payments of the loan servicing amount, plus alleged late payments. The effect of the 3 months' non-payments and the alleged late payments was to extend the maturity date from February 2017 to August 2017. The operational effect of crediting the sum of EC\$39,551.34 back to the claimant's account as at 1st July 2008 was to return the maturity date to the original February 2017. **That is all that was discussed and agreed to at the meeting. The parties came to that agreement and left the meeting with that agreement. Nothing was left open. At no time did**

³² Ibid. Paragraph 5(d).

³³ Ibid. Paragraph 5(e).

³⁴ Supra n.27 at paragraph 6.

we discuss any acceleration of the maturity date from February 2017.....” (Emphasis added).

[51] I return to the two hurdles which GBCL’s case, that is that the letter dated 9th January 2015 was an offer by the Bank to GBCL, faces, and which it must surmount if it is to succeed. The first is the burden of proof. It is elementary that in a civil case the burden of proving the case rests, throughout, on the claimant – the party which brings the claim. ‘He who asserts must prove’. In the instant matter, it is GBCL who brought the claim for breach of contract. In doing so, it pleaded the existence of a binding contract between it and the Bank formed by or contained in the letters of 9th January 2015 and 23rd January 2015. It asserted that the 9th January 2015 letter was an ‘offer’ or a ‘proposal’ made to it by the Bank with the intention of creating or entering into legal relations, if unequivocally accepted. It therefore fell to GBCL, as a matter of law, to prove to the satisfaction of the judge on a balance of probabilities, that the said letter is or constitutes an ‘offer’ or a ‘proposal’ to it capable of being accepted by it.³⁵ The learned judge found for GBCL on its claim that a binding contract had come into existence between it and the Bank, and thereafter it was not open to the Bank to resile from the terms of that contract as to the new maturity date of February 2016, and to continue to deduct monthly the sum of EC\$12,385.00 from GBCL’s account towards payments on its loan facility. For the reasons which follow, it is our determination that in so concluding the learned judge erred as a matter of law and fact, and accordingly, her decision on this primary issue cannot stand.

[52] The second hurdle GBCL faces is whether, on the applicable law and on a proper construction, the 9th January 2015 letter was an offer or proposal capable of acceptance by GBCL, leading to a binding contract with the Bank.

[53] In **Harvey**, the court was called upon to construe three telegrams and whether the second of these constituted an offer capable of being accepted by the appellants in that case. The first telegram was sent by the appellants (solicitors) to Facey, the

³⁵ Cheshire. Supra n.20.

second on the same day by Facey to the appellants, and the third (also the same day) from the appellants to Facey. The question for determination was whether these three telegrams had given rise to a binding contract between the parties for the sale and purchase of a certain property by Facey to the appellants. The Privy Council agreed with the first instance judge that these telegrams did not give rise to a concluded contract. The Board concluded that the second telegram from Facey, which stated: 'Lowest price for Bumper Hall Pen 900l', did not constitute an unconditional offer to sell the property to the appellants at the lowest price. It merely gave a precise answer to a precise question, 'telegram lowest cash price-answer paid', posited in the first telegram from the appellants. The Board concluded that everything else was left open. Lord Morris opined – 'The contract must appear by the telegrams.... Their Lordships are of the opinion that the mere statement of the lowest price at which the vendor would sell contains no implied contract to sell at that price to the persons making the inquiry'.

- [54] In my respectful opinion, the decision of the Privy Council in **Harvey**, being largely fact sensitive, is of little assistance to the determination of the question in the instant matter – whether the letter dated 9th January 2015 was an offer capable of being accepted by GBCL so as to create a binding contract with regard to the new maturity date of February 2016. That said, the dicta in **Harvey** does serve to direct or to focus the court's attention to construing, in the overall context of the relations between the parties, the particular document or documents which it is alleged constitutes an offer or proposal giving rise to a binding contract. Accordingly, in the instant matter, the court was required to construe the 9th January 2015 letter in order to properly make its determination of this question. This much is made clear by the approach adopted by the judge in **Global 5000 Ltd**. There, the judge scrutinised the language of the letter, the particular words used therein, the absence of certain other words, and the structure of the paragraphs in the said letter. The Bank has criticised the approach adopted by the learned judge in the instant matter. It is argued that she failed to conduct that kind of analysis of the 9th January 2015 letter itself in reaching to her conclusion that the said letter

constituted an offer, or that Mr. Herbert was reasonably entitled to treat with it as a proposal from the Bank with regard to the new maturity date for GBCL's loan.

[55] In my considered view, this criticism of the judge's approach is misplaced. The learned judge did set out clearly, and in some detail, the points or issues raised by the Bank with regard to the said letter not being or capable of being construed as an offer made to GBCL. This much is clear from paragraphs 23 to 26 of the judgment, where the reasons why the Bank contended that the said letter was not an offer are summarised by the judge. At paragraph 34, the learned judge stated she will be applying to this issue 'the principles of contract law enunciated above', to which principles neither party has taken deference before this Court. At paragraph 35, the judge stressed that the background to the transactions between the parties and the relations between them 'are of a business and commercial nature which clearly have legal implications'. This accords with the emphasis placed by GBCL, in oral argument before this Court, on the context in which the said letter was sent, as an important consideration when construing the letter itself.

[56] At paragraph 36, the learned judge stated that in deciding whether there was a binding contract, she will look at 'the terms of the letters and the conduct of the parties'. In support of this principle she referred to an extract from the decision in **Lovell & Christmas Ltd v Wall**.³⁶ There, Cozens-Hardy MR, opined that it is a well-established principle of English law that 'it is for the court to construe a written document'. And it is irrelevant and improper to ask what the parties, prior to the execution of the instrument, intended or understood. In short, evidence as to the intention or understanding of the parties to a binding agreement are irrelevant to the court's determination of what the actual words of the document, which fall to be construed, mean. It is for the court to determine the meaning of the words within the four corners of the agreement and the context in which the agreement was made. Likewise, it falls to the court to construe or to interpret a document to determine whether it is an offer and if so, its terms or proposals.

³⁶ (1911) 104 LT 85.

[57] In **Centrovincial**, a decision of the English Court of Appeal, Lord Justice Slade, who delivered the judgment of the court, formulated the approach to be adopted by a court when interpreting an 'offer' as follows:

"It is a well-established principle of the English law of contract that an offer falls to be interpreted not subjectively by reference to what has actually passed through the mind of the offeror, but objectively, by reference to the interpretation which a reasonable man in the shoes of the offeree would place on the offer. It is an equally well-established principle that ordinarily an offer, when unequivocally accepted according to its precise terms, will give rise to a legally binding agreement as soon as acceptance is communicated to the offeror in the manner contemplated by the offer, and cannot thereafter be revoked without the consent of the other party."³⁷

[58] Finally, at paragraphs 37 to 39, the learned judge conducted an examination and analysis of the wording of the 9th January 2015 letter from the Bank. In doing so, she focused on certain words and phrases used in the said letter. While the judge may be criticised for not focusing on certain other words or phrases in construing the said letter, or that she misconstrued some or all of the words and phrases which she did consider and, ultimately, for reaching a clearly incorrect conclusion that the said letter did constitute or contain an offer by the Bank to GBCL, the approach which she adopted accords, generally, with the correct approach sanctioned in the authorities cited.

[59] In my opinion, on any reasonable construction, the 9th January 2015 letter from the Bank to GBCL is not an offer or a proposal of a new maturity date capable of being accepted by GBCL, so as to give rise to a binding and enforceable agreement between them that the maturity date for the loan was changed to February 2016. The said letter is not couched in the language of an offer or a proposal. It does not invite or require a response from the GBCL, whether expressing their agreement, rejection or a counter-proposal. Instead, the words of the said letter are capable of only one clear meaning, construction and intention. It is informative, directive and declaratory. It informs GBCL of the decisions made and steps taken by the Bank, and declares that these decisions and steps have already been made and

³⁷ Supra n.12.

executed by the Bank. It informs GBCL that the Bank has credited the sum of EC\$39,551.34 to GBCL's loan account. As to the maturity date for the loan, the words used: 'The maturity date for that facility **is** now February 2016...' do not convey a proposal or offer to change the maturity date to February 2016. They are declaratory in their tone and meaning that this change in maturity date has already been made by the Bank and effective in relation to GBCL's loan facility. Those words speak clearly to matters already done, steps already taken by the Bank. The said letter does not, objectively, evince an intention on the part of the Bank to create legal relations, and a reasonable man, in the shoes of GBCL, would not have concluded that the Bank was, by the said letter, making an offer or proposal with regard to a new maturity date of February 2016 for acceptance or rejection by GBCL. Accordingly, the learned judge erred in finding that those words connote an offer or proposal as to a new maturity date which, if accepted by GBCL, would become applicable to GBCL's loan facility with the Bank.

- [60] In my respectful view, the learned judge erred in focusing much of her attention and analysis on the reference in the said letter to the parties having 'come to an amicable settlement' and erred in construing this as the Bank clearly indicating that it 'had taken a decision to settle the outstanding issues with GBCL'.³⁸ These words, when read in the context of the entire letter, can only have one meaning, that is, that an amicable settlement had been arrived at by the parties prior to the said letter being sent, a conclusion which has been disavowed by both sides on their pleaded cases, evidentially, and in their written and oral submissions before this Court. Likewise, the learned judge erred when she construed the words which followed as 'the proposed terms of the settlement'.³⁹ This construction is not borne out by the words themselves when given their ordinary and natural meaning. These words speak to terms of settlement having already been arrived at by the Bank and GBCL, and not to issues outstanding and to be agreed by the parties at some future time. It has been held that past actions or steps already done or

³⁸ Supra n.6, paragraph 37.

³⁹ Supra n.6, paragraph 38.

implemented cannot constitute matters with respect to which an agreement is being sought *de novo*.⁴⁰ Significantly, the word 'offer' or 'proposal' or a like word or phrase, was not used in the said letter. There is no reference whatsoever to the meeting of 14th November 2014 or to any agreement or decision reached at the said meeting, or to the said letter being the Bank's proposal following the said meeting, of a new maturity date for the loan. Moreover, it is the case for both sides on their respective evidence, that no agreement had been reached on changing the maturity date from February 2017 to February 2016, either at the 14th November 2014 meeting or before. It follows that what followed the opening reference in the said letter to an amicable settlement having been reached, did not and could not have included a proposal that the new maturity date would be February 2016.

- [61] The decision of the Privy Council in **Crest** is instructive on this point. The issue of construction in that case concerned the profit-sharing provision in a development agreement, and whether the first instance judge was correct in concluding that the open market rent for each un-let unit as at 13th March 2008, was agreed to be the figure shown in the schedule attached to a letter dated 21st June 2007 in the column headed 'Target Rent'. At paragraph 25 of the judgment of the English Court of Appeal, Sir John Chadwick states:

"In my view the Appellant is correct to **draw a distinction** between the court's task when seeking to ascertain the parties' intention under the terms of a contract **which both accept has been made** and the court's task when seeking to determine **whether or not a contract has been made at all**. In the former case the question is "what did the parties intend by the words used in the agreement which they made"; **in the latter, the questions are (i) "was there a proposal (or "offer") made by one party which was capable of being accepted by the other" and, if so, (ii) "was that proposal accepted by the party to whom it was made"**. In determining the first of those questions – was there a proposal made by one party (A) which was capable of being accepted by the other (B) – **the correct approach is to ask whether a person in the position of B (having the knowledge of the relevant circumstances which B had), acting reasonably, would understand that A was making a proposal**

⁴⁰ See *Schuldenfrei*. Supra n.18.

to which he intended to be bound in the event of an unequivocal acceptance.” (emphasis added)

[62] In **Crest**, Sir John Chadwick, having rejected any analysis or conclusions of a contract based upon an offer, counter-offer and acceptance, went on to consider, as the more correct analysis, whether a letter dated 21st June 2007 contained an ‘offer’ in relation to the treatment of Target Rents as market rents of unlet units. He concluded emphatically that it did not. At paragraph 30, the Justice of Appeal reasoned:

“The final paragraph of the letter of 21 June 2007 invites confirmation that “the above correctly reflects the agreed position”. That final paragraph must, of course, be read in the context of the letter as a whole. **But, unless and to the extent that the context requires some different meaning to be given to the words used in that paragraph, they seek confirmation that what has gone before reflects, or records, matters which have already been agreed: they do not invite agreement *de novo* to matters which have not already been agreed.”** (emphasis added)

[63] Applying these principles to the instant matter, it is pellucid that the 9th January 2015 letter from the Bank did not in any shape, language or form connote an offer or a proposal with regard to a new maturity date. It spoke only to decisions taken and already implemented by the Bank. It did not invite agreement *de novo* by GBCL with regard to the maturity date or a new maturity date for the loan. The clear words and meaning conveyed by the said letter are not, in my view, materially affected or altered by the context of negotiations, discussions and correspondence by and between the Bank and Mr. Herbert on behalf of GBCL concerning the various issues, including maturity date, which embodied the ‘dispute’ between the said parties. While Mr. Herbert may have been expecting or may have reasonably been entitled to expect to receive some proposal from the Bank as to the maturity date, that cannot convert what is clearly not an offer or proposal as to the maturity date, into one which is. Accordingly, GBCL was wrong to treat the 9th January 2015 letter as a ‘proposal’ when responding by its letter dated 23rd January 2015.

- [64] I am satisfied that the learned judge misconstrued the letter dated 9th January 2015. She attached to it a meaning which was clearly not borne out by the words of the letter itself, and arrived at a meaning or construction which was erroneous and clearly wrong. It follows that the judge's conclusion that the letter dated 9th January 2015 was an offer by the Bank which, if accepted by GBCL, would bind the Bank to do certain things with regard to the said loan, and that coupled with the letter dated 23rd January 2015 constituted a binding and enforceable contract in law as to the new maturity date of February 2016, ought to be set aside.
- [65] In reaching this conclusion, I do not need to consider the question of whether GBCL must have known, or ought with reasonable diligence to have known, that the date 'February 2016' stated in the 9th January 2015 letter was an error or that it conflicted with the maturity dates in the accompanying spreadsheet. Likewise, I do not need to consider whether the insertion into the 9th January 2015 letter of a new maturity date of 'February 2016' was a typographical error or some other error or unilateral mistake by the Bank; or whether GBCL had provided any consideration for the alleged binding agreement reached by virtue of the two January 2015 letters.⁴¹
- [66] The only issue remaining for consideration is what effect, if any, does the email dated 6th July 2016 from Mr. Allen, a representative of the Bank, to the lawyers for GBCL, have on the position in law that the letter dated 9th January 2015 did not constitute an offer. The first consideration is that while GBCL does refer to the said email in its statement of claim, it does not seek any relief in relation to it, such as, for example, based upon the equitable doctrine of estoppel. No such issue or claim was before the judge below. GBCL's claim was based purely on the coming into existence of a binding and enforceable contract by the two January 2015 letters, and the alleged breaches of a 'settlement agreement'. The email dated 6th July 2016 was relied on by GBCL in its pleadings in the context of the Bank,

⁴¹ See, for example, *Centrovincial*. Supra n.12.

through its authorised representative, confirming the terms of the settlement agreement already reached by the parties via the two January 2015 letters. The Bank rebutted this assertion contending that its email of 6th July 2016 to GBCL did not confirm the terms of its 9th January 2015 letter as being correct or that they were reflective of any agreement between the Bank and GBCL and therefore could not give rise to any legal obligations on the Bank with regard to a February 2016 maturity date. The learned judge, at paragraph 59 of her judgment, concluded that the said email lent 'further support to the [respondent's] position that there was an agreement'. In my view, this email, while stating that the Bank 'will conform to letter dated January 9, 2015' and that it was 'finalizing the reversal of entries to backdate as at February 2016', could not convert, several months later, the letter dated 9th January 2015 into an offer, which it was not. Moreover, it was not pleaded that the 6th July 2016 email constituted or brought into existence a new contract between the Bank and GBCL with regard to the new maturity date on the loan being February 2016, which new contract had been breached by the Bank. In those circumstances, the said email, while of some importance evidentially, does not alter the position that GBCL's case, which was based on the coming into existence of a binding 'settlement agreement' contained in the two January 2015 letters, was not made out and must, accordingly, fail.

Disposition

- [67] For the reasons given above, the appeal succeeds and is accordingly allowed. The judgment and orders of the High Court are set aside and the claim filed by GBCL on 5th September 2016 is dismissed. Judgment is hereby entered for the Bank on its counterclaim to the extent that the declaration sought at paragraph 1 thereof is granted in part. Accordingly, it is declared that the letter from the defendant/appellant to the lawyers for the claimant/respondent dated 9th January 2015 and the letter from the lawyers for the claimant/respondent to the defendant/appellant dated 23rd January 2015 did not constitute an enforceable agreement or contract between the Bank and GBCL.

[68] GBCL shall pay the Bank's prescribed costs of the claim in the High Court pursuant to CPR 65.5(2)(a), the Banks costs of its counterclaim pursuant to CPR 65.5(2)(b), and also costs of the appeal in this Court limited to no more than two-thirds of the costs in the High Court, to be assessed unless agreed within 30 days.

I concur.

Dame Janice M. Pereira, DBE
Chief Justice

I concur.

Mario Michel
Justice of Appeal

By the Court

Deputy Chief Registrar