

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

ANTIGUA AND BARBUDA

ANUHCVP2023/0010

BETWEEN:

CARIBBEAN DEVELOPMENT (ANTIGUA) LIMITED

Appellant

and

[1] **STUART LOCKHART**
[2] **GEERT DUIZENDSTRAAL**
[3] **GAYE HECHME**

Respondents

Before:

The Hon. Mde. Esco L. Henry	Justice of Appeal
The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal [Ag.]
The Hon. Mr. Brian Cottle	Justice of Appeal [Ag.]

Appearances:

Mr. Hugh Marshall and Ms. Kema Benjamin for the Appellant
Mr. Andrew Young and Dr. David Dorsett and for the Respondent

2025: November 24;
2026: June 04.

Civil appeal – Scope and breadth of leave to appeal - Whether the compromise agreement was invalidated because it was not in writing – Ratio decidendi – Obiter dicta – Per incuriam – Whether Court of Appeal is bound to follow a decision of its own – Summary judgment application – Part 15 of the Civil Procedure Rules (Revised Edition) 2023 ('CPR') – Striking out – CPR 26.3 – Whether the learned judge failed to give sufficient consideration to the appellant's strike out application and application for summary judgment in the court below

This is an appeal filed by Caribbean Development (Antigua) Limited ('the appellant') against the Order of the learned judge dated 27th January 2023 granting judgment to Stuart Lockhart ('the first respondent') on the matter of a breach of a compromise agreement he had reached

with the appellant and that damages for such breach be determined by a Master in Chambers. This Court granted the appellant leave to appeal on 14th October 2024. The appellant thereafter filed its notice of appeal on 24th October 2024.

The appellant advanced 10 grounds of appeal in its notice of appeal. Arising from the ten grounds of appeal and this Court's judgment dated 14th October 2024 granting leave to appeal, two principal issues arise for determination by the Court: (i) whether the compromise agreement was invalidated because it was not in writing and (ii) whether the judge failed to give sufficient consideration to the appellant's 3rd June 2022 application to strike out the first respondent's claim and to give summary judgment.

Held: allowing the appeal in part, remitting the appellant's application of 3rd June 2022 to the High Court for determination, dismissing the challenge to the validity of the compromise agreement on the grounds that it is not in writing and ordering each party to bear their own costs, that:

1. As gleaned from the judgment of this Court dated 14th October 2024 granting leave to appeal, it is clear that the Court found that there was a reasonable prospect of success on two issues: (1) whether the compromise agreement was invalidated because it was not in writing; and (2) whether the judge failed to give sufficient consideration to the appellant's 3rd June 2022 application to strike out the first respondent's claim and to give summary judgment. These were the two issues upon which leave to appeal was granted. However, the Court of Appeal's finding that one of the legal requirements for a compromise agreement to be legally binding is that it must be in writing, is obiter. This issue was introduced *sui motto* by the Court of Appeal. It was expressly stated that the applicant did not take that point. The Court of Appeal did not receive argument on that question or let alone decide it. The decision was made in the context of an application for leave to appeal and therefore on those premises that issue fails.
2. The applicable principles in deciding a summary judgment application are well established. The court must consider whether the claimant has a 'realistic' as opposed to a 'fanciful' prospect of success. A realistic prospect is one that carries some degree of conviction. This means a claim that is more than merely arguable. Where there are significant differences between the parties so far as factual issues are concerned, the court is in no position to conduct a mini trial, but it is not obliged to accept without analysis everything that a party has said in its statements before the court. The judge has to make an assessment of the claimant's prospects of success. Moreover, it is not appropriate to resolve a complex question of law and fact on an application for summary judgment the determination of which necessitates a trial of the issue having regard to all the evidence.

Swain v Hillman [2001] 1 All ER 91 applied; **ED&F Man Liquid Products v Patel** [2003] RWCA Civ 472 applied; **Three Rivers District Council v Governor and Company of the Bank of England** [2001] UKHL 16 applied; **Apovdedo NV v Collins** [2008] EWHC 75 (Ch) applied; **ICI Chemicals & Polymers Ltd v TTE Training Ltd** [2007] EWCA Civ 725 applied; **Royal Brompton Hospital NHS Trust**

v Hammond No.5 [2001] EWCA Civ 550 applied; **King v Stiefel** [2021] EWHC 20145 (Comm) applied.

3. In light of the guiding principles in relation to determination of a summary judgment application, the learned judge failed to give consideration to or to pay any, or sufficient regard to the appellant's application of 3rd June 2022 to strike out the first respondent's claim and to give summary judgment against him as seen in paragraph (c) of the order of the learned judge. The learned judge made no assessment of the appellant's prospects of success on the application. The learned judge did not engage with any of the principles pertinent to the application. The learned judge gave no express reason for dismissing the application. The learned judge failed to apply the necessary tests for summary judgment and strike out and failed to deal or properly deal with the appellant's application. The appellant therefore prevails on the second issue.

JUDGMENT

[1] **BAPTISTE JA [AG.]:** This is an appeal against the Order dated 27th January 2023 of a judge granting judgment to the first respondent (the claimant in the court below) on the matter of a breach of a compromise agreement he had reached with the appellant and that damages for such breach to be determined by a Master in Chambers. The Court of Appeal granted the appellant leave to appeal in its judgment delivered on 14th October 2024.¹ The appellant thereafter filed its notice of appeal on 24th October 2024.

[2] The appellant filed ten grounds of appeal:

- (1) The learned judge erred in law by failing to apply the test for summary judgment in its entirety or sufficiently when considering the application of the appellant filed on 3rd June 2022.
- (2) The learned judge erred in law when she considered the admissions of the second and third respondents as evidence against the appellant on the basis that they had filed a joint defence.

¹ ANUHCVP2023/0010 (delivered 14th October 2023, unreported).

- (3) The learned judge erred in law in failing to consider whether upon the pleaded case of the first respondent there were sufficient pleadings to support evidence that he was the sole shareholder of the appellant company.
- (4) The learned judge erred in law in failing to consider whether upon the pleaded case of the first respondent there were sufficient pleadings to support evidence that he was the sole Director of the appellant company.
- (5) The learned judge erred in failing to consider whether upon the pleaded case of the first respondent there were any pleadings and/or sufficient pleadings to support evidence that he was entitled to possession of the Bearer Shares of Jolly Harbour Ag.
- (6) The learned judge erred in law in failing to consider whether upon the pleaded case of the first respondent there were sufficient pleadings to support evidence that he was entitled to an order for liability upon an agreement for remuneration having regard to the provisions of the Legal Profession Act.
- (7) The learned judge erred in law in failing to consider whether upon the pleaded case of the first respondent there were sufficient pleadings to support evidence that he was entitled to an order for liability upon an agreement for remuneration having regard to the circumstances that a company can act only by its Board of directors when there was no resolution of the Board upon an arrangement expressly conditioned upon such approval.
- (8) The learned judge erred in law in making the order that the appellant breached a contract in relation to the provision of legal services with the first respondent when there were no pleadings to support such a claim.

- (9) The learned judge erred in law in failing to consider whether upon the pleaded case of the first respondent there were sufficient pleadings to support evidence that he was entitled to an order for liability upon a compromise agreement that was not finalized, was not in writing and was not executed in a recognized manner or in the prescribed form and was therefore invalid.
- (10) The learned judge failed to consider the application of the appellant first or properly at all, as it was essentially a strike out application which ought to have been heard first in time.

Parties' Submissions on the Scope of the Appeal

- [3] The first respondent contends that the appellant's notice of appeal includes grounds for which no leave had been given. The Court of Appeal gave leave to appeal on two issues: (1) whether the compromise agreement upon which the judgment was given had to have been in writing to be valid; and (2) whether the Court ought to have considered the appellant's strike-out application before giving judgment. Therefore, all other grounds of appeal should be rejected.
- [4] The first respondent asserts that the only possible error of law identified by the Court of Appeal was that the compromise agreement was oral and not in writing. The issue identified by the Court of Appeal was whether the compromise agreement had to be in writing to be valid. The Court of Appeal expressly gave leave to appeal on the ground that to be legally valid, a compromise agreement must be in writing. The first respondent also posits that the notice advances grounds of appeal against judgments that have not yet been made in circumstances where the court below ordered the issues to be listed for hearing, these are:
 - (1) A Shareholding issue raised at Ground 3 and 5 of the notice
 - (2) A declaration which has not been made that the first respondent is a director of the appellant – Ground 4

- [5] The first respondent further contends that the appellant includes grounds which in so far as its submissions to the Court of Appeal for leave could be understood, were refused. These are Grounds 2,6,7 and 8. Ground 9 also contains a mishmash of issues with only one of them being subject to appeal - the latter part of Ground 9 - that the compromise agreement was not in writing. However, there is no issue before the Court as to whether the oral agreement was not executed in a recognised manner or in the prescribed form.
- [6] The first respondent submits that the Court of Appeal gave leave to appeal on two issues only: firstly, whether the compromise agreement, which was oral, was invalidated because it was not in writing; and secondly, the learned judge's lack of consideration of the appellant's application of 3rd June 2022 to strike out the first respondent's claim.
- [7] In response, the appellant states that leave to appeal was granted against an interlocutory order. The Court of Appeal made no order limiting the grounds or restricting the appeal.

Discussion

- [8] In view of the lis between the parties on the scope and breadth of the leave granted and in light of the first respondent's invitation to reject the grounds on which he says that permission was not given, it is imperative to ascertain the issues upon which the Court of Appeal granted leave to appeal. The answer would determine the propriety of most of the grounds of appeal. Evidently, if the Court finds that grounds of appeal were filed outwith the permission given, these grounds will not be entertained. The starting point necessarily entails an examination of the Court of Appeal's judgment dated 14th October 2024 wherein granting permission for leave to appeal.²

² ANUHCVP2023/0010 (delivered 14th October 2025, unreported).

[9] As gleaned from the Court of Appeal's judgment, the application before the Court was for the following orders:

- (1) That time be extended to the applicant to file an application for leave to appeal the decision of the judge given on 27th January 2023.
- (2) That the applicant be granted leave to appeal the decision of the judge.
- (3) That a Notice of Appeal be filed within 21 days of the making of an order for leave to appeal.
- (4) That the proceedings in the Court below be stayed pending the determination of the appeal.

[10] The Court of Appeal recognised that the orders sought were linked, and examined the applicant's contention that it has very good prospects of success on appeal if leave were granted to appeal. The Court of Appeal noted that the applicant stated that there were two applications before the court below at the hearing on 6th October 2023. The first was the first respondent's application filed on 17th March 2022 to strike out the joint defence filed on behalf of the second and third respondents. The second was the applicant's application filed on 3rd June 2022 to strike out the first respondent's claim in the court below because the first respondent did not set out in his pleadings a basis on which the court could make the order sought and for summary judgment against the first respondent on the basis that, given the pleadings and the evidence, the first respondent did not have a real prospect of success on his claim.

[11] In delivering the Court's decision on the application for leave to appeal, Michel JA addressed the issue of prospect of success at paragraphs [19], [20] and [23]. The learned Justice of Appeal said at paragraph [19]:

"In terms of success on the appeal, it is apparent that the learned judge's decision to make the orders that she did was based on the purported breach of a compromise agreement between the first respondent on the one hand and the applicant and the second and third respondents on the other hand.

Three of the four findings of the learned judge on which she grounded her order were based on the purported breach of the compromise agreement. The first paragraph of the ensuing order of the learned judge states:

‘a. Judgment be granted to the Claimant on the matter of the breach of the compromise agreement and that damages for such breach be determined by a Master in Chambers.’”

- [12] Michel JA proceeded at paragraph [20] to discuss what constituted a compromise agreement and at paragraph [21] discussed the legal requirements for a compromise agreement to be binding, “one of which is that the agreement must be in writing.” At paragraph [22] Michel JA said:

“So although the applicant did not take this point, a judgment based on breach of a compromise agreement, when the purported agreement is not in writing, is a product of error of law by the judge, because the purported agreement not being in writing is fatal to its validity. The compromise agreement allegedly breached in this case was not in writing. What was referred to in the court below as a compromise agreement is a handwritten memorandum apparently written and signed by the first respondent only.”

- [13] Michel JA held at paragraph [22] “A judgment founded on the breach of the agreement is, therefore, the product of an error of law by the judge. There must, in the circumstances, be (at least) a realistic prospect of success of an appeal against that judgment.”

- [14] At paragraph [23] Michel JA found:

“The applicant’s realistic success on appeal can also be grounded on the submission by the applicant that the learned judge failed to give consideration to or to pay any, or any sufficient, regard to the applicant’s application of 3rd June 2022 to strike out the first respondent’s claim and to give summary judgment against them.”

Conclusion

- [15] From a perusal of the judgment of the Court of Appeal, it is clear that the Court found that there was a reasonable prospect of success on two issues: (1) whether the

compromise agreement was invalidated because it was not in writing; and (2) whether the judge failed to give sufficient consideration to the appellant's application to strike out the first respondent's claim and to give summary judgment. These were the two issues upon which the Court of Appeal granted leave to appeal.

- [16] Notwithstanding the numerous grounds of appeal in the notice of appeal, the order granting leave to appeal was not one granting leave to appeal at large. It was necessarily circumscribed by the two issues upon which the Court of Appeal found there was a reasonable prospect of success on appeal. The Court will accordingly address its mind to those two issues. The appeal will be decided on these issues.

Issue 1: Whether the compromise agreement was invalidated because it was not in writing

The Parties' Submissions

- [17] The appellant submits that the compromise agreement is invalid in law as it was not in writing. It is not a legally binding agreement as it fails to meet the various legal requirements for a compromise agreement as determined by the Court of Appeal in its judgment of 14th October 2024, granting leave to appeal.
- [18] The first respondent states that the appellant quite properly submits that a compromise agreement is subject to the same common law principles as any other agreement and may be oral or in writing. The first respondent also agrees with the extract from **Foskett on Compromise**, Essential Requirements of a Valid Compromise:

"Since a compromise is a contract, the ordinary principles of contract law applies with as much force as in other contractual contexts. Under the ordinary law a contract will not be found to have arisen unless:

- (1) Consideration exists;
- (2) An agreement can be identified which is complete and certain;
- (3) the parties intend to create legal relations;
- (4) In some cases, certain formalities have been observed."³

³ David Foskett, *Foskett on Compromise* (9th edn, Sweet & Maxwell 2020) pt 1, ch 3.

[19] Further, the agreement that was found by the court below and recognised as such by the Court of Appeal was oral. At paragraph [22] of its judgment, the Court of Appeal stated:

“But, if it was necessary to erase any remaining doubt, the notice of admissions filed by the second respondent on 5th May 2021, and relied on by the learned judge to reach her conclusion (at paragraph [5] of her order) that the applicant is bound by the compromise agreement negotiated on its behalf by the second respondent, clearly states (at paragraph [2] d.) that ‘the agreement was an oral agreement.’”

[20] The first respondent asserts that the only suggestion that a compromise agreement has to be in writing is found in the Court of Appeal’s judgment granting leave to appeal. This, the first respondent says, is no more than obiter and was not intended to be authoritative. Further, if the first respondent is wrong on this and there is an authoritative ruling, it was per incuriam and it is not binding. In that regard it falls within one of the exceptions stated in **Young v Bristol Aeroplane Company Limited**⁴, in which the Court of Appeal is not bound to follow its own decision. The Court of Appeal is not bound to follow a decision of its own if it is satisfied that the decision was given per incuriam. It follows that the sole permissible ground of appeal against the judgment relating to the contractual issue has no foundation in either common or statutory law.

Discussion on Issue 1

[21] In summary, the first respondent submits that the Court of Appeal’s reasoning for granting leave to appeal does not amount to a binding decision; it was obiter; in the alternative, the decision was per incuriam. Therefore, it would follow that the Court of Appeal had misdirected itself in ruling that the appellant had a good prospect of success on the point that a compromise agreement must be in writing. In view of the arguments advanced, it is prudent to consider the principles of ratio decidendi, obiter dicta and per incuriam.

⁴ [1944] K.B. 718.

Ratio Decidendi, Obiter Dicta and Per Incuriam

- [22] In **Finzi v Jamaican Redevelopment Foundation Inc and others**⁵ the Privy Council said at paragraph [60]:

“It is important to bear in mind the basic tenet of the common law that every judgment must be read in context, by reference to what was in issue in the case, and that it is only the ratio of the decision which establishes a precedent and not the obiter dicta.”

- [23] While there is a need to read judgments in light of arguments advanced and the questions decided, it is a mistake to treat what was said as authority on a point which the Court was not addressing.

- [24] In **R (Youngsam) v Parole Board**⁶ Leggatt LJ said at [51]:

“The ratio decidendi of a case is often described by judges and jurists as a reason or rule of law which ‘is necessary’ to the court’s decision. Conversely obiter dicta are described as statements which are not ‘necessary’ to the decision or which go beyond the occasion and lay down a rule that is unnecessary for the purpose in hand: see Halsbury’s Laws of England, vol 11 (2015), para 26.”

- [25] At paragraph [51] Leggatt LJ also said:

“... when the ratio decidendi is described as a ruling or reason which is treated as ‘necessary’ for the decision, this cannot mean logically or causally necessary. Rather such statements must, I think, be understood more broadly as indicating that the ratio is (or is regarded by the judge as being) part of the best or preferred justification for the conclusion reached: it is necessary in the sense that the justification for that conclusion would be, if not altogether lacking, then at any rate weaker if a different rule were adopted.”⁷

⁵ [2023] UKPC 29.

⁶ [2019] EWCA Civ 229.

⁷ Ibid.

[26] Leggatt LJ explained at paragraph [58]:

“In looking for the ratio decidendi of a case, the starting point is always the rulings and reasons given in the judgment(s) to justify the court’s decision, read in the light of the facts of the case and the issues that arose. Generally, this is also where the inquiry ends. But where there is scope for argument that a rule or ruling stated in the precedent case was framed too broadly, or that the decision is for some other reason better explained on a different basis which would enable it to be distinguished, the search for the ratio will also involve an evaluation of the strength and persuasiveness of the reasons expressed in the judgment(s) or otherwise advanced or available for the ruling. Such an evaluation will require consideration of a wider legal context in order to assess whether and to what extent the reasoning and the result reached in the precedent case are consistent with other authorities and legal principles.”⁸

[27] Leggatt LJ at paragraph [40] stated:

“Statements made by judges in the course of giving reasons for their decisions which do not form part of the ratio, known as obiter dicta, may be strongly persuasive - particularly when they are the carefully considered observations of eminent judges. But it is generally accepted that the ratio decidendi alone is binding as a precedent: see e.g Halsbury’s Laws of England, vol 11 (2015), para 25”.⁹

[28] As stated in **Young v Bristol Aeroplane Company Limited**, the Court of Appeal is not bound to follow a decision of its own if it is satisfied that the decision was given per incuriam. In **Cassell & Co. Ltd. v Broome & Another**¹⁰, it was mentioned that the label per incuriam is relevant only to the right of an appellate court to decline to follow one of its own previous decisions.

[29] In **Morelle Ltd v Wakeling**,¹¹ Evershed MR said at 406:

“As a general rule the only cases in which decisions should be held to be given per incuriam are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned: so that in such cases some part of the decision or some step in the reasoning on which it is based is found, on that

⁸ Ibid 7.

⁹ Ibid.

¹⁰ [1972] A.C. 1027.

¹¹ [1955] 2 QB 379.

account, to be demonstrably wrong. This definition is not necessarily exhaustive, but cases not strictly within it which can properly be held to have been decided per incuriam must, in our judgment, consistently with the stare decisis rule which is an essential feature of our law, be ... of the rarest occurrence.”

Conclusion on Issue 1

- [30] In my judgment, having considered the relevant principles, there are several indicia supportive of a conclusion that the Court of Appeal's finding that one of the legal requirements for a compromise agreement to be legally binding is that it must be in writing, is obiter.
- [31] Firstly, the issue was introduced sui motto by the Court of Appeal. This is seen at paragraph [22] of its judgment, where the Court of Appeal expressly stated that the applicant did not take the point.
- [32] Secondly, the Court of Appeal did not receive argument on that question or let alone decide it. The finding was made in the context of an application for leave to appeal, which is an ex-parte application.
- [33] Thirdly, no authority was cited in support of the finding.
- [34] The Court of Appeal's judgment must be read in this light. So read, it was not part of the ratio decidendi and was an obiter dictum. In the premises, it is not binding on this Court. As was said in **Regina (Kadhim) v Brent London Borough Council Housing Benefits Review Board**¹² at paragraph [33]: a subsequent court is not bound by a proposition of law assumed by an earlier court that was not the subject of argument before it for consideration by that court.
- [35] In the premises, the appellant fails on the first issue. I decide that issue in favour of the first respondent.

¹² [2001] QB 955 (CA).

Issue 2: Whether the learned judge failed to give sufficient consideration to the appellant's strike out application and to give summary judgment in the court below.

The Appellant's Submissions

- [36] The second issue on which leave to appeal was granted was the strike out issue. The appellant contends that its application filed on 3rd June 2022 was not considered by the court below while it was considering the first respondent's strike out and summary judgment applications dated 9th November 2020 and 17th March 2022.
- [37] The appellant states that the test for summary judgment - that the claimant has no real prospect in succeeding on the claim or issue, is well - developed in the case law. Namely, there must be an assessment as to whether a case has sufficient merit to proceed to trial at all and the criterion to be applied by the Court is not one of probability but it is the absence of reality. The claim must be more than merely arguable. Equally, the requirement of rule 26.3 of the Civil Procedure Rules (Revised Edition) 2023 ('CPR') which gives the court power to strike out a statement of case where it discloses no reasonable grounds for bringing a claim is firmly established. Namely, where a case is obviously unsustainable and cannot succeed.
- [38] The appellant argues that none of the above tests were considered or applied by the learned judge. No regard was had to the appellant's application for strike out and summary judgment of 3rd June 2022. This was a fundamental procedural error on the part of the learned judge who had an obligation to deal with the strike out application before considering any other application. The application to strike out was grounded on the first respondent's failure to set out in his pleadings the basis on which the court could grant the relief that he claimed. The summary judgment application was grounded on the fact that with this fundamental flaw, the further amended Claim and Amended Statement of Claim and any evidence that was before the court on behalf of the first respondent were seriously lacking, and

therefore that the first respondent does not have a real prospect of success on the claim.

First Respondent's Submissions on Issue 2

[39] With respect to the appellant's application of 3rd June 2022, the first respondent asserts that notwithstanding the learned judge did not expressly give her reasons for dismissing the appellant's application to strike out for non-compliance with the **Legal Professions Act**, on any sensible view, the first respondent had not brought a claim to enforce payment of bills he had not raised for work he had not done. This application was absurd.

[40] The first respondent states that should the Court of Appeal remit the appellant's application back to the High Court it should lift the stay it imposed upon the first respondent's earlier application which should be heard first, or in the alternative decide the issue itself based upon the transcript of the hearing below.

Analysis: Striking Out and Summary Judgment

[41] Rule 26.3 of the CPR gives the court power to strike out the whole or a part of a statement of case if it discloses no reasonable grounds for bringing or defending the claim. Rule 15.2 provides that the court may give summary judgment on the claim or on a particular issue if it considers that (a) the claimant has no real prospect of succeeding on the claim or the issue or (b) the defendant has no real prospect of successfully defending the claim or the issue.

[42] Under rule 26.3 the court has a very salutary power, both to be exercised in a claimant's favour, or where appropriate in a defendant's favour. It enables the court to dispose summarily of both claims or defences which have no real prospect of being successful: **Swain v Hillman**.¹³

¹³ [2001] 1 All ER 91.

[43] The applicable principles in deciding a summary judgment application are well established. The burden of proof is on the applicant for summary judgment. The court must consider whether the claimant has a 'realistic' as opposed to a 'fanciful' prospect of success: **Swain v Hillman**. A realistic claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: **ED&F Man Liquid Products v Patel** at paragraph [8].¹⁴

[44] Where there are significant differences between the parties so far as factual issues are concerned, the court is in no position to conduct a mini trial: **Swain v Hillman** at paragraph [95]. The court must not conduct a mini trial but it is not obliged to accept without analysis everything that a party has said in its statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporary documents. If so, issues which are dependent upon those factual assertions may be susceptible of disposal at an early stage so as to save the cost and delay of trying an issue the outcome of which is inevitable: **ED&F Man Liquid Products v Patel** at paragraph [10].

[45] As Lord Hobhouse said in **Three Rivers District Council v Governor and Company of the Bank of England** at paragraph [158]:¹⁵

"The judge has to make an assessment of the claimant's prospects of success. The important words are 'no real prospect of succeeding'. It requires the judge to undertake an exercise of judgment. He must decide whether to exercise the power to decide the case without a trial and give a summary judgment. It is a 'discretionary' power, i.e. one where the choice whether to exercise that power lies within the jurisdiction of the judge. Secondly, he must carry out the necessary exercise of assessing the prospect of success of the relevant party. If he concludes that there is 'no real prospect of success' he may decide the case accordingly. ...[T]he judge is making an assessment not conducting a trial or fact - finding exercise. Whilst it must be remembered that the wood is composed of trees some of which may be needed to be looked at individually, it is the assessment of the whole that is called for."

¹⁴ [2003] RWCA Civ 472.

¹⁵ [2001] UKHL 16.

[46] An application for summary judgment is not appropriate to resolve a complex question of law and fact, the determination of which necessitates a trial of the issue having regard to all the evidence: **Apovdedo NV v Collins**¹⁶.

[47] If there is a short point of law or construction and, the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him. Similarly, if the applicant's case is bad in law, the sooner that it is determined the better: **ICI Chemicals & Polymers Ltd v TTE Training Ltd** at [12].¹⁷

[48] The court should take into account, not only the evidence that it has, but also the evidence that can reasonably be expected to be available at trial: **Royal Brompton Hospital NHS Trust v Hammond No.5**¹⁸. In **King v Stiefel**¹⁹ the court stated at [21]:

“The authorities make it clear that in the context of summary judgment, the court is by no means barred from evaluating the evidence, and concluding that on the evidence there is no real (as opposed to fanciful) prospect of success. It will of course be cautious in doing so. It will bear in mind the clarity of the evidence available and the potential for other evidence to be available at trial which is likely to bear on the issues. It will avoid conducting a mini trial.”

Conclusion

[49] I am of the view that the learned judge failed to give consideration to or to pay any or sufficient regard to the appellant's application of 3rd June 2022 to strike out the

¹⁶ [2008] EWHC 775 (Ch).

¹⁷ [2007] EWCA Civ 725.

¹⁸ [2001] EWCA Civ 550.

¹⁹ [2021] EWHC 1045 (Comm).

first respondent's claim and to give summary judgment against him. This is also borne out by paragraph 'c' of the order of the learned judge. At paragraph [6] of her reasoning the learned judge stated:

"On the matter of the application filed on 3rd June 2022 the Amended Claim and Statement of Case filed on 22nd June 2012 be struck out and for judgment to be entered in favour of the First Defendant or that there be summary judgment in favour of the First Defendant this court notes that:

(a) The Second and Third Defendants have admitted the compromise agreement in the terms stated by the Claimant.

IT IS ORDERED THAT:

(c) "The application filed on 3rd June 2022 by the first Defendant [Caribbean Development (Antigua) Ltd] is dismissed."

[50] This essentially is the extent of the learned judge's engagement with the appellant's application of 3rd June 2022. The learned judge made no assessment of the applicant's/appellant's prospects of success on the application. The learned judge did not engage with any of the principles pertinent to the application. The learned judge gave no express reason for dismissing the application. I agree with the appellant that the learned judge failed to apply the necessary tests for summary judgment and strike out and failed to deal or properly deal with the appellant's application. The appellant therefore prevails on the second issue.

[51] The appellant having prevailed on the second issue, the appropriate course would be to remit the appellant's application of 3rd June 2022 to the court below for determination.

Conclusion

[52] Each party has prevailed on one of the two issues on which the Court of Appeal found that there was a reasonable prospect of success on appeal. The appellant prevailed on the striking out issue and the first respondent prevailed on the issue relating to the compromise agreement. The appeal is accordingly allowed in part. The appropriate costs order would be for each party to bear their own costs.

Disposition

[53] It is ordered that:

- (1) The appeal is allowed in part. The appellant's application of 3rd June 2022 is remitted to the High Court for determination.
- (2) The challenge to the validity of the compromise agreement on the ground that it is not in writing, is dismissed.
- (3) Each party to bear their own costs.

I concur.
Esco L. Henry
Justice of Appeal

I concur.
Brian Cottle
Justice of Appeal [Ag.]

By The Court

Chief Registrar