

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

GRENADA

GDAHCVAP2015/0002

BETWEEN:

GRENADA RICE MILLS LTD.

Appellant

and

GRENADA MARKETING AND NATIONAL IMPORTING BOARD

Respondent

Before:

The Hon. Mde. Louise Esther Blenman	Justice of Appeal
The Hon. Mr. Mario Michel	Justice of Appeal
The Hon. Mde. Gertel Thom	Justice of Appeal

Appearances:

Mr. Dickon Mitchell and Mr. Anselm B. Clouden, Ms. Skeeta Chitan and
Mrs. Crystal Braveboy-Chetram for the Appellant
Ms. Lisa Taylor for the Respondent

2021: April 15;
October 6.

Civil appeal – Without prejudice rule – Whether without prejudice rule must be pleaded – Whether it was open to learned judge to hold that the respondent’s letter was privileged – Whether negotiations were ongoing when letter was sent to appellant – Whether letter amounted to an admission by respondent of monies owed to the appellant – Appellate court’s interference with trial judge’s finding of fact – Trial judge’s assessment of credibility of witnesses – Whether learned judge misconstrued appellant’s case – Whether learned judge erred and misdirected herself in holding that there was no agreement for the respondent to purchase rice from the appellant

This appeal arises out of a dispute surrounding agreements made between Grenada Rice Mills Ltd (“GRM”) and Marketing and National Importing Board (“the Marketing Board”), for the milling of rice. GRM is a limited liability company registered in Grenada, engaged in the business of milling rice. While the Marketing Board is a statutory corporation engaged in the importation of rice which is then milled and sold in Grenada.

On 14th February 1995, GRM and the Marketing Board entered into a written agreement in which it was agreed that GRM would store rice imported by the Marketing Board and at the Marketing Board's request, it would mill the rice for the Marketing Board at an agreed price referred to by the parties as "milling fees". Subsequently, GRM and the Marketing Board entered into an oral agreement whereby, it was also agreed that whenever the Marketing Board's stocks of rice were depleted, GRM would loan rice to the Marketing Board. GRM would recover the loaned rice from the Marketing Board's next shipment and bill the Marketing Board for the milling fees. This happened in September 1998 and as a result, GRM submitted invoices in the sum of \$359,643.34 to the Marketing Board for payment of rice delivered to the Marketing Board during that year. However, the Marketing Board rejected the invoices on the ground that they represented the sale price for rice and not the milling fees.

This disagreement between the parties continued from December 1998 to March 1999. GRM sent invoices to the Marketing Board totaling \$204,270.34 being milling fees for rice milled and the Marketing Board disputed this sum, being of the view that, \$185,960.77 was due to GRM. GRM also sent invoices totally \$614,314.84 for rice supplied to the Marketing Board during the period December 1998 to March 1999. The Marketing Board refused to pay the sum contending it amounted to the sale price and not milling fees. Meetings were held between the parties to determine the sums due to GRM and on 21st June 2001, the General Manager of the Marketing Board, wrote to GRM and offered to pay the sum of \$350,803.82 in settlement of the sums claimed by GRM. However, GRM responding by letter, rejected the offer and subsequently instituted proceedings for \$1,180,723.38, being sums due pursuant to the written agreement dated 14th February 1995, together with interest and costs.

During cross-examination in the court below, the issue of whether the letter dated 21st June 2001, being an offer to settle, was an admission by the Marketing Board of monies due to GRM, arose. The Marketing Board contended that the 'without prejudice' rule was applicable to the letter and GRM could not rely on the offer to settle contained in it. Further, the offer to settle was not an admission. While GRM argued that the letter was in fact an admission that the Marketing Board was indebted to GRM in the sum of \$350,803.82. The learned judge having heard the evidence of both parties found that there was no general agreement between the parties for the Marketing Board to purchase rice from GRM. Further there was no agreement for the Marketing Board to purchase rice from GRM in September 1998 nor during December 1998 through March 1999. The learned judge also found that the "without prejudice" rule was applicable to the Marketing Board's letter dated 21st June 2001 to GRM and the letter was therefore a privileged document and was inadmissible in evidence. The learned judge also found that the letter did not amount to an admission that the Marketing Board owed GRM \$350,803.82. The learned judge therefore refused to award GRM the sum claimed save and except the sum of \$21,466.25 which was admitted by the Marketing Board as outstanding milling fees, together with interest at the rate of 3% from the date of filing to the date of judgment and 6% thereafter to the date of payment and costs in the sum of \$6,400.00.

GRM being dissatisfied with the judge's decision appealed on several grounds. The appeal raises the following issues for determination: (i) whether it was open to the learned judge to hold that the Marketing Board's letter dated 21st June 2001 was privileged; (ii) whether the letter amounted to an admission by the Marketing Board that it owed GRM \$350,803.82; and (iii) whether the learned judge erred and misdirected herself in holding

that on the evidence adduced before the court, there was “no agreement” for the Marketing Board to purchase rice from GRM.

Held: dismissing the appeal; and ordering that the appellant pay the respondent the costs of this appeal in the sum of \$4,266.66 being two-thirds of the costs awarded below, that:

1. Where a party seeks to base his case or part of it on a statement made during negotiations, the other party, the author of the statement, could object to the admission of the statement. This is usually done by an application to strike out. However, in this case, where the issue of admission of the sums owed by the Marketing Board contained in the letter of 21st June 2001 arose during cross-examination, it was open to the Marketing Board to contend that the document was privileged by virtue of the ‘without prejudice’ rule in their submissions to the learned judge.

Oceanbulk Shipping & Trading SA v TMT Asia Limited and others [2010] UKSC 44 applied; **Berkely Square Holdings and Others v Lancer Property Asset Management and Others** [2020] EWHC 1015 (Ch) applied; **Ofulue and another (FC) v Bossert (FC)** [2009] UKHL 16 applied.

2. The ‘without prejudice’ rule dictates that communication between parties during negotiations are privileged and are therefore inadmissible in court proceedings unless both parties consent. A document written ‘without prejudice’ that is part of a continuing sequence of negotiations, whether by correspondence or orally, will be privileged and therefore cannot be given in evidence without the consent of both parties, subject to exceptions. In light of this and having regard to the evidence that was before the learned judge, it was open to the learned judge to find as she did, that the ‘without prejudice’ rule applied. While there was documentary evidence in support of the negotiation between the parties, there was no direct evidence that negotiations had ended or evidence from which it could reasonably be inferred that the negotiations had ended during the time that the Marketing Board’s letter dated 21st June 2001 was sent to GRM. In sum, the learned judge did not err in ruling that the letter was a privileged document and therefore inadmissible.

Dixons Stores Group Ltd. v Thames Television plc [1993] 1 All ER 349 considered; **Cutts v Head and another** [1984] Ch. 290 applied; **Unilever plc. v The Procter & Gamble Co.** [2000] 1 WLR 2436 applied.

3. In view of the finding above, GRM’s submission that the letter dated 21st June 2001 amounted to an admission must therefore fall away. In any event, on a proper construction, the letter shows that the Marketing Board was rejecting rather than agreeing that, there was or had been an agreement of sale between the parties. The letter did not amount to an admission of sums due and owing to GRM as contended.
4. It is well settled that an appellate court will only interfere with a judge’s finding of fact where it is demonstrated that the learned judge made some material error of law or there was no basis on the evidence for the finding of fact or the judge failed to consider relevant evidence, or where the findings of fact cannot

reasonably be explained or justified. Further, where the issue is one of credibility of witnesses, the appellate court will exercise caution, bearing in mind that the trial judge is in a privileged position to assess the witnesses' credibility. The judge had the opportunity to both see and hear the witnesses. Therefore, where there is conflicting evidence the judge's view of which witnesses were credible should be given great weight. In this case, where there was conflicting evidence, the learned judge having had the benefit of hearing and seeing the witnesses was entitled to determine their credibility. As such, the learned judge's view of which witnesses were credible should be given great weight.

Clarke v Edinburgh and District Tramways Co. Ltd [1919] UKHL 303 applied; **Watt (or Thomas) v Thomas** [1947] SC (HL) 45 applied; **Ming Siu Hung and others v J F Ming Inc and another** [2021] UKPC 1 applied.

5. The learned judge was also entitled to conclude that GRM could not recover the selling price of the rice since there was no general agreement to purchase rice and there was no agreement to purchase rice in September 1998 or between December 1998 and March 1999. The agreement in September 1998 was for payment in kind being the recovery of rice from the Marketing Board shipment and payment of the milling fees. There was no agreement for rice to be transferred to the Marketing Board between December 1998 and March 1999 since the Marketing Board stocks were not depleted, they had rice in stock. The learned judge carefully analysed the evidence of the witnesses for both parties and she outlined her reasons why she did not accept the evidence of GRM's witness. Both sides agreed rice was to be loaned by GRM to the Marketing Board when the Marketing Board's stocks were depleted and GRM would recover the rice. GRM was the owner and had full control of the silos where all rice was stored. The agreement was for payment in "kind" and the milling fees. The learned judge awarded GRM milling fees she found to be outstanding. There is therefore no basis to interfere with the learned judge's finding of facts.

JUDGMENT

- [1] **THOM JA:** The main issue in this appeal concerns the application of the 'without prejudice' rule.
- [2] The appellant Grenada Rice Mills Ltd. ("Grenada Rice Mills") is a limited liability company registered in Grenada. It was engaged in the business of milling rice. The respondent Grenada Marketing and National Importing Board ("the Marketing Board") is a statutory corporation established by the **Marketing and National Importing Board Act**.¹ The Board was engaged in the importation of

¹ Cap. 183 of the Revised Laws of Grenada.

rice (also referred to as “cargo rice” or “raw rice” by the parties) which was then milled and sold in Grenada.

- [3] On 14th February 1995, Grenada Rice Mills and the Marketing Board entered into a written agreement in which it was agreed that Grenada Rice Mills would store rice imported by the Marketing Board (in its’ Grenada Rice Mills silos) and at the Marketing Board’s request, it would mill the rice for the Marketing Board at an agreed price referred to by the parties as “milling fees”, “transfer fees” or “processing fees”.
- [4] In 1997, Grenada Rice Mills began importing rice into Grenada for processing and export to CARICOM countries. However, in 1998 Grenada Rice Mills was prohibited by CARICOM from exporting rice to CARICOM countries (the reason for the prohibition is not relevant to this appeal). When the prohibition was made, Grenada Rice Mills had more than three hundred metric tons (300 t) of rice in its silos.
- [5] Grenada Rice Mills and the Marketing Board also had an oral agreement whereby, whenever the Marketing Board stocks of rice were depleted, Grenada Rice Mills would loan rice to the Marketing Board. Grenada Rice Mills would recover the imported rice from the Marketing Board’s shipment and bill the Marketing Board for the milling fees. One such occasion was in September 1998.
- [6] In September 1998, Grenada Rice Mills submitted invoices totaling \$359,643.34 to the Marketing Board for payment of rice delivered to the Marketing Board during that year. The Marketing Board rejected the invoices on the ground that they represented the sale price for rice and not milling fees.
- [7] Between December 1998 and March 1999, Grenada Rice Mills sent invoices to the Marketing Board totaling \$204,270.34 being milling fees for rice milled. The Marketing Board disputed this sum was owing to Grenada Rice Mills. They were of the view that \$185,960.77 was due to Grenada Rice Mills. Grenada Rice Mills also sent invoices totally \$614,314.84 being the price for rice supplied to the

Marketing Board. The Marketing Board refused to pay the sum contending that, the sum represented the sale price for the rice and not the milling fees.

- [8] Meetings were held between the parties to determine the sums due to Grenada Rice Mills, however, they were unsuccessful.
- [9] On 21st July 2001, the General Manager of the Marketing Board, Mr. Fitzroy James, wrote to Grenada Rice Mills and offered to pay the sum of \$350,803.82 in settlement of the sums claimed by Grenada Rice Mills. Grenada Rice Mills responded by letter dated 3rd August 2001, rejecting the offer and subsequently instituted these proceedings.

The Court Below

- [10] In its' claim form, Grenada Rice Mills claimed \$1,180,723.30 being sums due pursuant to the contract dated 14th February 1995 together with interest and costs.
- [11] The learned judge having heard the evidence of both parties found that there was no general agreement between the parties for the Marketing Board to purchase rice from Grenada Rice Mills. Further there was no agreement for the Marketing Board to purchase rice from Grenada Rice Mills in September 1998 nor during December 1998 through March 1999.
- [12] The learned judge also found that the 'without prejudice' rule was applicable to the Marketing Board's letter dated 21st June 2001 to Grenada Rice Mills and the letter was therefore a privileged document and was inadmissible in evidence. The learned judge also found that the letter did not amount to an admission by the Marketing Board that it owed Grenada Rice Mills the sum of \$350,803.82.
- [13] The learned judge refused to award Grenada Rice Mills the sum claimed, save and except, the sum of \$21,466.25 which was admitted by the Marketing Board being outstanding milling fees, together with interest at the rate of 3% from the date of filing to the date of judgment and 6% thereafter to the date of payment and interest in the sum of \$6,400.00.

The Appeal

- [14] Grenada Rice Mills being dissatisfied with the judge's decision appealed on several grounds. However, in their written and oral submissions they pursued two grounds which they summarised as follows: firstly, whether it was open to the learned judge to hold that the Marketing Board's letter dated 21st June 2001 was privileged; secondly, whether the letter amounted to an admission by the Marketing Board that it owed GRM \$350,803.82; and thirdly, whether the learned judge erred and misdirected herself in holding that on the evidence adduced before the court there was "no agreement" for the Marketing Board to purchase rice from Grenada Rice Mills.

Ground 1 – 'Without Prejudice' Rule

- [15] This ground of appeal relates to the following letter dated 21st June 2001 written by the Manager of the Marketing Board to the Manager of Grenada Rice Mills:

"Dear Mr. Sampson:

The Board of Directors has carefully considered the various issues surrounding the transfer and purchase of rice from your company during the period 1998 to 2000 and has decided on the basis of the facts, to offer the Grenada Rice Mills Ltd. the sum of E.C. \$350,803.82 as full settlement for all amounts owed to your organization as of that date.

This amount was determined as follows:

- | | |
|--|-------------------|
| • Closing balance as per MNIB official Accounts
as at June 30, 2000 - | E.C \$21,466.25 |
| • Closing balance as per GRM official accounts
as at June 30, 2000- | E.C. \$380,803.82 |
| • Difference | E.C. \$329,337.57 |
-

This difference made up as follows:

- | | |
|---|-------------------|
| • Bill #1185 | E.C. \$287,182.00 |
| • Agreed difference in billing (GRM/MNIB) | E.C. \$ 42,155.47 |
| | E.C. \$329,337.57 |
-

We note that Bill #1185 dated September 1999, is a re-statement of bills #s1097-1100 and 1151 all dated September 1998. The re-statement difference

includes the net additional value of rice which was originally transacted as transfers to MNIB, and for which, one year later, your company has reclassified as direct sales on the argument that at the time of transfer MNIB's stocks had been exhausted. The Board is prepared to concede to you in good faith on this matter even though the price applied had not been agreed upon.

The MNIB is satisfied that it has honored all transactions for authorized transfers of milled rice. Where adequate supplies of our stocks were available it was reasonable to assume that transfers would have been drawn from our stocks rather than from some other sources.

Moreover, the Board has already acknowledged, absorbed, and provided for losses of 5,696 bags equivalent (about 350 MT) valued at over E.C. \$383,000 that was associated with the sortexing and storage losses from the shipment of February 1999 while in your possession.

While the Board has several other concerns related to your handling, storage, and transfer of rice in accordance with [the] contractual arrangement, it presents the payment of E.C.\$350,803.82 as final settlement of all amounts that is properly due to your company.

Please sign and return the attached copy of this correspondence as an indication of your acceptance in this matter.

Sincerely,
MARKETING AND NATIONAL IMPORTING BOARD.
Mr. Fitzroy James
GENERAL MANAGER."

- [16] Grenada Rice Mills advanced two reasons for its contention that the learned judge erred in finding the without prejudice rule was applicable and the letter was a privileged document.
- [17] Mr. Mitchell, counsel for Grenada Rice Mills, submits firstly that the Marketing Board did not raise the issue that the letter was privileged and therefore inadmissible. The issue was raised by the learned judge at the trial.
- [18] It is necessary to put Mr. Mitchell's submission in context. Grenada Rice Mills did not allege in its pleading that the Marketing Board had admitted that it owed Grenada Rice Mills part of the sum claimed. The issue of admission of \$350,803.82 first arose during the cross-examination of Mr. James, the Manager of the Marketing Board. There it was suggested that the offer to settle made in the 21st June 2001 letter, was an admission. This was denied by Mr. James.

The learned judge at the end of hearing the evidence at trial, invited both parties to provide submissions on the legal effect of the offer. Both parties made submissions. The Marketing Board argued strenuously that the 'without prejudice' rule was applicable and Grenada Rice Mills could not rely on the offer to settle contained in the 21st June 2001 letter. Further, the offer to settle was not an admission that the Marketing Board was indebted to Grenada Rice Mills of \$350,803.82 or any sum. Grenada Rice Mills submitted that the letter amounted to an admission.

[19] I agree that where a party seeks to base his case or part of it on a statement made during negotiations, the other party, the author of the statement could object to the admission of the statement. This is usually done by an application to strike out as is illustrated in the cases of **Oceanbulk Shipping & Trading SA v TMT Asia Limited and others**,² **Berkely Square Holdings and Others v Lancer Property Asset Management and Others**³ and **Ofulue and another (FC) v Bossert (FC)**.⁴ However, in this case the issue of admission of sums owed by the Marketing Board contained in the letter of 21st June 2001 having arisen during cross-examination, in my view, it was open to the Marketing Board to contend that the document was privileged by virtue of the 'without prejudice' rule in their submissions to the learned judge. The issue of admission was not raised by the learned judge as contended by Mr. Mitchell but was raised by the Marketing Board in its submissions.

[20] It must be noted that Mr. Mitchell does not complain that Grenada Rice Mills was not given an opportunity or sufficient opportunity to address the issue. Indeed, both parties agree they were given an opportunity to address the issue.

[21] Mr. Mitchell submits secondly, that while documents marked 'without prejudice' which form part of negotiations are privileged, and a letter, containing an offer not marked 'without prejudice' are also privileged if it forms part of continuing negotiations, at the time when the letter was written there was no 'without

² [2010] UKSC 44.

³ [2020] EWHC 1015 (Ch).

⁴ [2009] UKHL 16.

prejudice' negotiations between the parties. The prior negotiations had ceased to bear fruit. The negotiations had ended in 1999. Therefore, the offer having been made on the Marketing Board's own volition, the letter was not privileged and was admissible. To support this argument, Mr. Mitchell relied on the following statement of Drake J in **Dixons Stores Group Ltd. v Thames Television plc**:⁵

"In my judgment, a party may write a letter containing an offer to settle an action without ipso facto attracting to that letter a privilege which the opposing party may then claim if the letter is in reply to a letter written without prejudice or is part of a continuing sequence of negotiations, whether by correspondence or orally, then it will be privileged and cannot be given in evidence without the consent of both parties. But in the present case I am dealing with a letter which was not part of continuing without prejudice negotiations. It was written after certain negotiations and correspondence without prejudice had finished and come to nothing. In my judgment, a letter containing an offer to settle an action may be written and written as an open letter and used by the party writing it, during the action, provided it has relevance to the issues in the action and as I have already made clear, is not part of continuing negotiations."

- [22] Mr. Mitchell also submits that paragraph 24 of Mr. James' witness statement supports his submission that the without prejudice negotiations had ended.
- [23] Ms. Taylor, counsel for the Marketing Board, submits in response that while the letter was not marked 'without prejudice' the letter was a privileged document as negotiations were on going and only came to end when mediation was unsuccessful in 2007. Learned counsel submits further that, the letter of GRM's witness, Mr. W.R. Agostini dated 3rd August 2001, which was Grenada Rice Mills' response to the letter of 21st July 2001, supports her contention. The letter is marked 'without prejudice' thereby affirming that the negotiations were ongoing.
- [24] Mr. Mitchell countered that the letter of 3rd August 2001 was an open letter and it was not in response to any offer nor was it a counteroffer. GRM's letter of 3rd August 2001 did not acknowledge that there were ongoing negotiations. Rather

⁵ [1993] 1 All ER 349.

the letter indicated clearly that Grenada Rice Mills was not negotiating but they would institute proceedings against the Marketing Board.

[25] Mr. Mitchell submits further that the letter being admissible, the learned judge should have found that it amounted to an admission by the Marketing Board that it owed Grenada Rice Mills the sum of EC\$ 350, 803.83.

[26] Mrs. Taylor in response submits that Grenada Rice Mills did not raise the issue of admission in their pleading but only sought to do so at the trial. In any event, the letter does not amount to an admission of sums due and owing to Grenada Rice Mills. The letter does not show that there was an oral agreement for sale of rice in September 1998 or between December 1998 and March 1999. On a proper construction, the letter shows that the Marketing Board was rejecting rather than agreeing that there was or had been an agreement of sale between the parties.

Discussion

[27] The without prejudice rule is a rule governing the admissibility of evidence. It makes communication between parties during negotiations privileged and inadmissible in court proceedings unless both parties consent. The rule is based on public policy reasons. These reasons were succinctly outlined by Oliver J in **Cutts v Head and another**⁶ at page 306 as follows:

“That the rule rests, at least in part, upon public policy is clear from many authorities and the convenient starting point of the inquiry is the nature of the underlying policy. It is that parties should be encouraged as far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said during such negotiations (and that includes, of course, as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings. They should... be encouraged fully and frankly to put their cards on the table... The public policy justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the question of liability.”

⁶ [1984] Ch. 290.

- [28] This statement was approved by the House of Lords in **Unilever plc. v The Procter & Gamble Co.**⁷ Walker LJ also noted that over the years several exceptions to the rule have developed, thus in some instances statements or offers made during without prejudice negotiations are admissible in legal proceedings. Such circumstances include:
- (a) where the issue is whether the communications resulted in a compromise agreement.
 - (b) where the communication will show that the agreement should be set aside on the ground of misrepresentation, fraud, undue influence.
 - (c) where the communication will give rise to an estoppel.
 - (d) where exclusion of the evidence would serve as a shield in a case of abuse of privilege.
 - (e) where the evidence will explain delay or acquiescence on an application to strike out proceedings for want of prosecution.
- [29] The issue is whether negotiations were ongoing when the letter was sent to Grenada Rice Mills.
- [30] Mr. Mitchell argues that the negotiations ended in 1999. However, the difficulty with this argument is that it is not supported by the evidence. While Mr. James stated in his witness statement at paragraph 20 that there was a meeting of the parties on 1st July 1999, which was convened by Grenada Rice Mills, he also stated that at that meeting Grenada Rice Mills informed the Marketing Board that it had supplied its rice to the Marketing Board to create storage space for the Marketing Board's shipment in February 1999. It could not recover the rice because the Marketing Board's shipment was of poor quality. Grenada Rice Mills would therefore bill the Marketing Board at the sale price for all rice transferred to the Marketing Board.

⁷ [2000] 1 WLR 2436.

- [31] The documentary evidence supports Mr. James' testimony. The invoices were resubmitted with the sale price in September 1999. The learned judge also had the evidence of Mr. Elvis Young who was employed as the accountant with the Marketing Board, who stated at paragraph 12 of his witness statement that, in May 2001 the accountants of the Marketing Board and Grenada Rice Mills tried to reconcile the respective accounts, but they were unable to do so.
- [32] Contrary to Mr. Mitchell's submissions, Mr. James' testimony at paragraph 24 of his witness statement does not support Grenada Rice Mills' case. Mr. James stated:
- "Efforts to settle this ongoing matter continued through 2000 (sic) and into 2001. Eventually after deliberations held by the Board of Directors of the MNIB, I was directed to make a settlement offer to GRM on behalf of the MNIB in the sum of \$350,803.82 to bring the matter to an end. This offer was communicated by letter dated 21st June 2001, a copy of which appears in the claimant's list of Documents. This offer was rejected. Mediation held between the parties also failed to resolve the matter."
- [33] In the paragraph Mr. James asserts that the negotiations were ongoing in 2001. This evidence is supported by Mr. Young's evidence referred to earlier where he stated that the accountants could not reconcile the accounts in May 2001. Mr. James' testimony is that the Board met and agreed to settle the matter by offering Grenada Rice Mills the sum of \$350,803.82, which offer was communicated in June 2001. At no time did Mr. James state or acknowledge nor can it be reasonably inferred from his evidence that the negotiations had ended. The learned judge also had Grenada Rice Mills' letter in response which was marked 'without prejudice'.
- [34] Having regard to the evidence that was before the learned judge it was open to the learned judge to find as she did that the 'without prejudice' rule applied. While there was documentary evidence in support of the negotiation between the parties, there was no direct evidence that negotiations had ended or evidence from which it could reasonably be inferred that the negotiations had ended.

- [35] In view of the finding above that the learned judge did not err in finding that the letter was a privileged document and therefore inadmissible, Mr. Mitchell's submission that the letter amounts to an admission falls away. However, in any event, I agree with the submission of Ms. Taylor that on a proper construction of the letter, it does not amount to an admission of the sum offered in settlement of the matter.

Ground 2: Whether there was Agreement to Purchase Rice

- [36] Mr. Mitchell contends that the learned judge erred and misdirected herself in holding that based on the evidence adduced before the court there was "no agreement" for the Marketing Board to purchase rice from Grenada Rice Mills.
- [37] Learned counsel submits that the learned judge misconstrued Grenada Rice Mills' case. He submits that Grenada Rice Mills' case was not that there was a general agreement for the Marketing Board to purchase rice from the appellant. Rather, Grenada Rice Mills' case was that there were specific oral agreements to purchase rice on specific occasions. Also, there were oral agreements on distinct occasions for Grenada Rice Mills to supply rice to the Marketing Board when the Marketing Board's stocks were depleted, and it would be replaced from the Marketing Board's subsequent shipment of rice and the Marketing Board would pay the milling fees. In keeping with this latter arrangement, in September 1998, Grenada Rice Mills loaned rice to the Marketing Board. Grenada Rice Mills was to recover the rice from the Marketing Board's shipment later in September 1998. Grenada Rice Mills did not recover the rice as the Marketing Board's shipment was not in conformity with the US #1 standard. Grenada Rice Mills therefore billed the Marketing Board for the selling price of the rice being \$359,643.34. Mr. Mitchell submits that the Marketing Board admits this transaction in paragraph 6 of its defense and in its letter of 14th July 1999, it acknowledged that its rice shipment was not in conformity with the US #1 standard.
- [38] Similarly, the evidence before the learned judge shows that between December 1998 and February 1999, the Marketing Board was expecting 1,250 tons of rice and orally agreed with Grenada Rice Mills that, Grenada Rice Mills would

process its' (Grenada Rice Mills) rice to make room in the silos for the Marketing Board's rice. Grenada Rice Mills was to recover the equivalent of rice from the Marketing Board's shipment. Grenada Rice Mills was unable to do so due to the poor quality of the Marketing Board's rice. Grenada Rice Mills therefore billed the Marketing Board the sum of \$614,314.84. The Marketing Board admitted the transaction in paragraph 13 (b) of the witness statement of Fitzroy James, and they admitted the poor quality of their shipment of rice in the letter of 1st July 1999 and paragraph 17 of the witness statement of Fitzroy James.

[39] Mr. Mitchell further submits that there was evidence before the learned judge on which the learned judge could have found that there was an oral agreement on the two occasions for Grenada Rice Mills to supply rice to the Marketing Board and Grenada Rice Mills did not receive the milling fees and the rice or alternatively the selling price for the rice. At no time did the Marketing Board in its pleadings or evidence contend that it did not receive the rice or that it paid for the rice.

[40] Mr. Mitchell further submits that the claim was for money due and owing not for breach of an agreement to purchase rice. Grenada Rice Mills therefore was not required to prove that there was an agreement for purchase of rice. The learned judge therefore erred in finding that there was no agreement for purchase of rice when that was not Grenada Rice Mills' case. The learned judge fell into further error by not awarding Grenada Rice Mills the sums claimed to be due and owing.

[41] Ms. Taylor in response agrees that there were specific occasions on which rice was purchased by the Marketing Board from Grenada Rice Mills as submitted by Mr. Mitchell but on those occasions the selling price of the rice was approved by the Minister of Trade. This is not disputed by Grenada Rice Mills. Ms. Taylor also agrees that the Marketing Board borrowed rice from Grenada Rice Mills stocks in September 1998 which Grenada Rice Mills was required to recover from the Marketing Board's shipment later in September 1998. However, she contends that the Marketing Board received shipments of rice in September 1998 and November 1998. Grenada Rice Mills did not complain that the rice in either shipment was not in conformity with the US #1 standard. In the letter

dated 1st July 1999, the Marketing Board did not acknowledge that the rice received in the September or November shipment was of poor quality and did not meet the US #1 standard. This was first raised by Grenada Rice Mills during the trial.

[42] Ms. Taylor further submits that there was no evidence of an agreement in September 1998 for the Marketing Board to purchase rice from Grenada Rice Mills and therefore the learned judge was correct in refusing to award Grenada Rice Mills the \$359,803.82 claimed by Grenada Rice Mills which was the selling price.

[43] In relation to the claim for \$614,314.84 for rice supplied to the Marketing Board between December 1998 and March 1999, Ms. Taylor agrees that the Marketing Board imported 1,250 tons of rice in February 1999 and that this shipment of rice was of poor quality. However, she contends that there was evidence before the learned judge which was not disputed by Grenada Rice Mills that at that time both Grenada Rice Mills and the Marketing Board had rice stored in Grenada Rice Mills' silos.

[44] Ms. Taylor also submits that there was no evidence showing that the Marketing Board requested to loan or purchase rice from Grenada Rice Mills since the Marketing Board had its own rice in stock. Its stocks were not depleted. On the other hand, Grenada Rice Mills had stocks which it could not export to CARICOM countries because of the prohibition imposed on Grenada Rice Mills by CARICOM. The learned judge was therefore correct in finding that there was no agreement for the Marketing Board to purchase rice from Grenada Rice Mills and was not entitled to the sum of \$614,314.84.

Discussion

[45] The complaint made by Grenada Rice Mills is against findings of fact made by the learned judge. It is well settled that an appellate court will only interfere with a judge's finding of fact where it is demonstrated that the learned judge made some material error of law or there was no basis on the evidence for the finding

of fact or the judge failed to consider relevant evidence, or where the findings of fact cannot reasonably be explained or justified.

[46] The principle is demonstrated in a long line of cases from **Clarke v Edinburgh and District Tramways Co. Ltd.**⁸ **Watt (or Thomas) v Thomas**⁹ and more recently in **Ming Siu Hung and others v J F Ming Inc and another**.¹⁰

[47] I will now turn to the learned judge's reasons for making the findings that she made.

[48] In relation to the September 1998 transaction, the learned judge accepted the evidence which was not in dispute that there was an agreement between the parties for Grenada Rice Mills to transfer rice to the Marketing Board in September 1998, but Grenada Rice Mills was to recover the rice from the Marketing Board's shipment. However, the learned judge found that Mr. Sampson could not explain why Grenada Rice Mills failed to recover the rice which it loaned to the Marketing Board in September 1998 from the Marketing Board's shipment in September 1998. The learned judge did not accept his explanation that Grenada Rice Mills' November 1998 shipment of rice was of poor quality. The learned judge noted that his explanation that the November Shipment was of poor quality was first given at trial even though Mr. Sampson had determined it was important to testify about the poor quality of the February 1999 shipment in his witness statement. The learned judge was of the view that in the absence of an agreement for sale of rice, Grenada Rice Mills could not recover the selling price of the rice.

[49] In relation to the December 1998 to March 1999 arrangement, the learned judge found that there was no evidence from Grenada Rice Mills which showed that there was an agreement for sale or that a sale price was agreed between the parties and that the Ministry of Trade had approved the purchase price. The learned judge did not accept the evidence of Grenada Rice Mills' witness

⁸ [1919] UKHL 303.

⁹ [1947] SC (HL) 45.

¹⁰ [2021] UKPC 1.

Mr. Sampson that it was orally mutually agreed between the parties that Grenada Rice Mills should mill all its rice and supply it to the Marketing Board to create storage space for the Marketing Board's shipment in February 1999.

[50] The learned judge found the evidence of the Marketing Board's witnesses to be more credible than Grenada Rice Mills' witnesses. The learned judge found that Grenada Rice Mills' witnesses were not credible. The learned judge noted that Mr. Sampson Grenada Rice Mills' Manager could not give any plausible explanation why Grenada Rice Mills had to deliver its' own rice to the Marketing Board when the Marketing Board's stocks were not depleted. The learned judge found the explanation which Mr. Sampson gave to be incredulous and illogical. Mr. Sampson's explanation was, the Marketing Board agreed for Grenada Rice Mills to mill out its stocks of rice so that the Marketing Board's shipment could be stored in the silo at time when the Marketing Board had its own stock of rice in Grenada Rice Mills two 500-ton silos. The judge was of the view that what made the explanation even more implausible was that the evidence showed that the Marketing Board's rice that was in stock was fresher and of a better quality than Grenada Rice Mills' rice. The learned judge also noted that during this period, Grenada Rice Mills could not export rice due to the CARICOM prohibition. The learned judge found that Grenada Rice Mills unilaterally decided to transfer its own rice to the Marketing Board and claim the selling price for the rice. They could not recover the selling price for the rice as there was no agreement between the parties for the sale of rice.

[51] In my view the learned judge did not misconstrue Grenada Rice Mills' case. Grenada Rice Mills' case is essentially that they were unable to recover the rice from the Marketing Board because of the poor quality of the Marketing Board's rice therefore they should be awarded the selling price of the rice. The learned judge concluded that they could not recover the selling price since there was no general agreement to purchase rice and there was no agreement to purchase rice in September 1998 or between December 1998 and February 1999. The agreement in September 1998 was for payment in kind being the recovery of rice from the Marketing Board shipment and payment of the milling fees. There was no agreement for rice to be transferred to the Marketing Board between

December 1998 and March 1999 since the Marketing Board stocks were not depleted, they had rice in stock.

[52] The letter of 1st July, 1999, on which Mr. Mitchell relied to undermine the judge's findings does not assist Grenada Rice Mills' case. In the letter, Mr. James acknowledged that the Marketing Board's shipment of rice in February 1999 was of poor quality. This was not disputed by the Marketing Board. It was also admitted in paragraph 17 of Mr. James' witness statement. However, the letter did not state that the Marketing Board's shipment in November 1998 was of poor quality which was Grenada Rice Mills' position.

[53] Also, para 13(b) of Mr. James' witness statement to which Mr. Mitchell referred, does not assist Grenada Rice Mills' case. In paragraph 13, Mr. James outlined the various problems encountered by the Marketing Board with the February 1999 shipment. Mr. James asserted that the Marketing Board agreed to accept the shipment because of some assurances given by the West Indian Commodities Ltd (not a party to the proceedings) and Grenada Rice Mills which the Marketing Board contended were not given in good faith. One of the assurances was outlined in 13(b) as follows:

“(b) One of the Silos at GRM capable of holding 1,000 metric tons of rice would be empty and would be filled with MNIB's rice. This would have reduced considerably the need to store rice on pallets. Most of the rest of the rice that could not be held in the Silo would be stored at the GRM premises on pallets.”

[54] The above evidence does not show that the Marketing Board agreed with Grenada Rice Mills for Grenada Rice Mills to transfer its rice to the Marketing Board as a loan as contended by Grenada Rice Mills.

[55] Grenada Rice Mills has not demonstrated that the learned judge failed to consider relevant evidence. This is not a case where it can be said that the learned judge's findings cannot reasonably be explained or justified.

- [56] The case in the lower court turned on the credibility of the witnesses. Appellate courts have been warned repeatedly that where the issue is one of credibility of witnesses, the appellate court should exercise caution and bear in mind that the trial judge is in a privileged position to assess the witnesses' credibility. The judge had the opportunity to both see and hear the witnesses. She sat through the entire trial and heard all the evidence, therefore where there is conflicting evidence her view of which witnesses are credible should be given great weight.
- [57] In my view the learned judge carefully analysed the evidence of the witnesses for both parties and she outlined her reasons why she did not accept the evidence of Grenada Rice Mills' witnesses. Both sides agreed rice was to be loaned by Grenada Rice Mills to the Marketing Board when the Board's stocks were depleted, and Grenada Rice Mills would recover the rice. Grenada Rice Mills was the owner and had full control of the silos where all rice was stored. The agreement was for payment in "kind" and the milling fees. The learned judge awarded Grenada Rice Mills' milling fees she found to be outstanding.
- [58] I can find no basis to interfere with the learned judge's finding of facts. There was both oral and documentary evidence before the learned judge which supported her findings.
- [59] For the reasons stated above I will dismiss the appeal. The appellant shall pay the respondent the costs of this appeal in the sum of \$4,266.66 being two-thirds of the costs awarded below.

I concur.
Louise Esther Blenman
Justice of Appeal

I concur.
Mario Michel
Justice of Appeal

By the Court

Chief Registrar