

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
FEDERATION OF SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT
(CIVIL)
A.D. 2013**

CLAIM NO.: SKBHCV 2012/0273

BETWEEN:

**DEVELOPMENT BANK OF ST KITTS AND NEVIS
Respondent/Claimant**

And

**[1] MICHAEL HANLEY
1st Defendant**

**[2] CEPHUS AUDAIN
Applicant/2nd Defendant**

Appearances

Mr. Arudranauth Gossai for the Applicant
Ms. Deidre Williams for the Respondent

2013: October 25
2014: February 18, April 8

The underlying claim in this matter was framed as one for the recovery of a debt against the principal borrower, the 1st defendant, and the guarantor of that debt, the 2nd defendant. The 2nd defendant defended the claim, contending the 'bond' that had been executed by way of the guarantee, was unenforceable against him for a number of reasons. Several case management conferences were adjourned at the request of the claimant and the 2nd defendant, to allow them to have settlement talks. Eventually, the present application was filed by the 2nd defendant for an order striking out the claimant's claim against him, on the basis that there was an agreement that the matter would be withdrawn and discontinued against him and that the claimant was now attempting to renege on that agreement. On his application, the 2nd defendant relied on affidavit evidence that the attorneys for both sides had met and agreed that the claimant would withdraw and discontinue the claim against the 2nd defendant and pay his costs. There was no denial by the claimant of this factual assertion contained in the affidavit, but in an affidavit sworn to by a principal of the claimant's company, the claimant asserted that it had not given its attorneys at law any

express authority to settle the matter. The claimant contended that the 2nd defendant should be required to prove the agreement.

Held: Dismissing the claim against the 2nd defendant and awarding his costs on the claim and on the application, that

1. A party who does not deny a clear and proper statement of fact made by the opposite side in an affidavit is to be taken to have accepted that assertion. Quite apart from anything else, it is not sufficient for a party to 'neither agree or disagree' and leave the matter there without even seeking to cross-examine either the deponent of the affidavit, or where that deponent properly relies on first hand hearsay on an interlocutory application, the source of the information on a proper application.

Dominica Agricultural and Industrial Development Bank v Mavis Williams Civil Appeal No. 20 of 2005 Dominica considered; Dicta of Lord Wheatley in **Mckie v Strathclyde Joint Police Board** 2004 S.L.T. 982 Court of Session (Outer House at paragraph 33) considered.

2. An attorney at law retained in a matter by a client even without express authority, has an implied authority as between himself and his client to compromise the suit without reference to the client, provided that the compromise does not involve matters collateral to the action; that a matter was not collateral to the action unless it involved extraneous subject matter.

Waugh v H. B. Clifford and Sons (C.A.) [1982] 1 Ch. 374 applied.

3. An attorney at law has ostensible authority as between himself and the opposing counsel to compromise the suit without actual proof of authority, subject again to the same limitation, namely that the compromise should not involve matters which are collateral to the action. There is no need for opposing counsel to seek to confirm that the claimant's attorney at law has authority to settle the matter. 'The magnitude of the compromise or the burden which its terms impose on the other party is irrelevant.'

Waugh v H. B. Clifford and Sons (C.A.) [1982] 1 Ch. 374 applied.

JUDGMENT

- [1] **RAMDHANI J. (Ag.)** This is a Notice of Application dated the 24th September, 2013 brought by the 2nd defendant seeking inter alia to strike out the claimant's claim against him on the basis that after he had filed a defence in this matter, one or more of the attorneys at law representing the claimant had agreed with his attorney at law to settle the matter and to withdraw the claim against him, as well as to pay certain 'agreed legal's

costs' in the sum of \$7,599.63. There was no denial of the this factual assertion by the claimant, but the claimant, through his affidavit and its attorney sought to argue that it had never authorized any of its attorney at law to settle the matter and further the 2nd defendant should be required to prove the agreement.

The Parties

- [2] The applicant in this application is the 2nd defendant (the '2nd defendant') who together with the 1st defendant has been sued as guarantors on a student loan extended to a third party by the respondent, the claimant in this matter, the Development Bank of St. Kitts and Nevis (the 'claimant'). Both the third party borrower and the 1st defendant could not be found and the only person served with the substantive proceedings was the 2nd defendant.

The Underlying Claim

- [3] The claim was filed on the 27th July 2012, and seeks to recover a debt of \$92,116.66 from both defendants. In the particulars provided by the Statement of Claim, the claimant asserts that the claimed sum comprised of \$69,989.00 lent to the 1st defendant which together with other banking and transactions charges and interests led to the outstanding amount claimed. The claimant contends that the 2nd defendant guaranteed this debt.
- [4] The claimant contends that it was a term of the loan agreement and the guarantee that if there were default in making any of the monthly payments on the load, then the full outstanding amount would become immediately payable from either party as they were jointly and severally liable. There was default the claimant says, and as such it became entitled to seek to recover the full outstanding amount.
- [5] It would appear that the claimant was unable to serve the 1st defendant as he could not be located. The 2nd defendant was served, and on the 21st August 2012, he filed an acknowledgement giving notice that he was not admitting any part of the claim and that he was denying the whole of the claim.

[6] On the 15 October 2012, the 2nd defendant filed a defence in the matter in which he stated *inter alia*, that he did sign a 'Bond document' that related to a sum of \$69,989.00 advanced to the 1st Defendant. The 2nd defendant asserted that he did not get any consideration for this Bond document and that since it was not under seal, it was not enforceable against him. He also challenged the 'other banking and transaction charges'.

[7] The matter came up a number of occasions before the learned Master when there were statements made relating to a settlement. Several adjournments later, and when it was clearly stated by Ms. Deidre Williams for the claimant that the matter was not settled, the Master took the matter off the court's List. The 2nd defendant then filed the present application.

The Application

[8] This application was filed on the 24 September 2013 and seeks the following orders:

1. *That this matter be restored to the Court List*
2. *That the Claimant/Respondent pay the Applicant/2nd Defendant his agreed legal costs in the amount of \$7,599.63.*
3. *That the claim filed by the Claimant/Respondent in this matter be dismissed against the Applicant/2nd Defendant.*
4. *That the Claimant/Respondent be ordered to pay the costs of this Application in the amount of \$759.96*
5. *Such further and or other relied that the Court deems just and proper in the circumstances.*

[9] An affidavit of one Ms. Sherima Richards, a legal clerk in the law of Gonsalves Hamel-Smith, provides the evidential basis of the grounds in support of the application. Ms Richards in her affidavit deposes essentially that she is 'advised' of these salient and relevant matters by Mr. Gossai, who appeared for the 2nd defendant on the hearing of this application. Events involving Mr. Jason Hamilton and Mr. Glenford Hamilton were set out in this affidavit.

[10] She states that after the claim was filed she is advised by Mr. Gossai and verily believes that on the 15 October 2012, the 2nd defendant filed his Defence disputing the claim on

several grounds and certain issues in the claim. She is further advised that when the matter came up before the Learned Master for case management on the 4 December 2012, Mr. Jason Hamilton, appearing for the claimant, asked for an adjournment 'to facilitate discussion on the issues raised in the Defence'. She then states:

"7. I am similarly advised and verily believe the same to be true that following discussions (correspondence) between Counsel (Jason Hamilton) for the Claimant/Respondent and the Applicant/2nd Defendant, the Claimant/Respondent's Counsel decide to discontinue the matter against the Applicant/2nd Defendant and to pay his legal costs. True copies of the correspondence between Messrs Jason Hamilton and Gossai are now produced and shown to me and exhibited hereto as a bundle and marked 'SR2'¹.

"8. I am advised by Mr. Gossai and verily believe the same to be true that he met with Mr. Jason Hamilton in January, 2013 whereby it was agreed that the Claimant/Respondent would discontinue the matter against the Applicant/1st Defendant and pay his costs in the amount of \$7,599.63."

[11] There was no affidavit from Mr. Jason Hamilton or Mr. Glenford Hamilton challenging or contradicting Mr. Gossai's assertion as set out in paragraph 8 of Ms Richards' affidavit. There was no application to cross-examine Ms. Richards, or for that matter, Mr. Gossai, as it was he who was essentially providing the evidence in support of his client's application. The Court was left on this application, with the evidence from this affidavit of Ms Richards, and from the opposing side with an affidavit sworn to by Mr. David Fox, the claimant's Credit Risk Manager.

[12] Mr. Fox essentially deposed that there were monies still outstanding on the loan, and that he had never given any instructions to Mr. Jason Hamilton to settle the matter. I will set out his affidavit in its entirety:

*I, **DAVID FOX**, of Mattingley Heights, Basseterre in the Island of St. Christopher hereby **MAKE OATH** and say as follows:*

1. I am the Manager of the Credit Risk Management Department at the Development Bank of St. Kitts – Nevis, and I am duly authorized to make this affidavit.

¹ "SR 2" – does not show an agreement. It simply shows a request from Mr. Gossai that the matter be settled.

2. *I depose to matters which are in my direct knowledge as Manager of the Credit Risk Department with conduct of the loan giving rise to this claim and where the matters are not within my own personal knowledge, the information contained in this Affidavit is true to the best of my knowledge, information and belief and based on the sources stated herein.*
3. *I have been advised by the Claimant/Respondent's counsel Hamilton & Co., about the content of the Affidavit in Support of Application filed herein on the 24th September, 2013 and I make this Affidavit in Opposition to that said Affidavit in Support and for the purposes of opposing the Application for the orders sought therein.*
4. *Paragraph 4 of the Applicant's Affidavit in Support, is admitted in that I personally know that the Claimant did cause a Claim to be filed against the Applicant/2nd Defendant and 1st Defendant seeking to recover, inter alia the sums of \$92, 116.66 as monies due on owing on a student loan, which the 1st and 2nd Defendants guaranteed for a third person, the principal borrower, Derin Adams – Vidal.*
5. *Paragraph 5 of the Applicant's Affidavit in Support is admitted in that I have been advised by counsel for the Claimant/Respondent and I do verily believe that the 2nd Defendant/Applicant admits inter alia that he signed a bond document for the loan sum limited to \$69, 989.00, and that the sums of \$92,116.66 being sued for in the Claim is wholly incorrect.*
6. *I know the 1st Defendant was never served as his whereabouts could not be ascertained.*
7. *Paragraph 6 of the Affidavit in Support is admitted in so far that I am advised by counsel for the Claimant and do verily believe that when the matter came up for case management before the Learned Master on the 4th December 2012, an adjournment was sought by then Counsel Mr. Jason Hamilton, so that he could discuss the issues raised in the 2nd Defendant's defense with the officers of the Claimant Bank.*
8. *Paragraph 7 of the Affidavit of Support is denied in that a review of the Respondent/Claimant records reveal that the Claimant did not given then Counsel Mr. Jason Hamilton permission to discontinue the claim against the 2nd Defendant, especially in light of the fact that the debt that is subject of this claim has not been paid.*
9. *I have been shown a copy of the letter dated 28th December, 2013 referred to in Paragraph 7 of the Affidavit in Opposition, and which is noted as exhibit "SR2" of the Applicant's certificate of exhibits. I see that the letter was written by Counsel for the 2nd Defendant/Applicant. The letter does not state that the Claimant agreed to discontinue the suit against the Respondent. Rather, the letter dated 28th December, 2012 "threatens that it is in [the Bank's] best*

*interest to discontinue the claim against the 2nd Defendant or be faced with contempt proceedings...and that the Claimant pay cost to the 2nd Defendant in the sum of \$7,599.63." I also see that in the Respondent/Claimant's solicitor's response to Counsel for the 2nd Defendant dated 3rd January, 2013 (**exhibit SR2**) Mr. Jason Hamilton advised that "the letter of 28th December, 2012 had been forwarded to the [Bank] for instructions." From my perusal of both letters, I note that nowhere in those two letters did the Claimant consent to discontinue the claim against the 2nd Defendant.*

- 10. Paragraph 8 of the Affidavit in Support of Application, it is neither agreed nor disagreed that the Respondent/2nd Defendant Counsel had a meeting with Mr. Jason Hamilton in January, 2013. As Manager with conduct of this loan, I know that the Claimant Bank did not and has not consented to discontinue the Claims against the 2nd Defendant or to pay cost to the 2nd Defendant, especially in light of the fact that (1) the Principal Borrower and/or the guarantors to the loan did not clear the arrears on the student loan debt or settle the debt in totality and (2) both the principal borrower and the 2nd guarantor for the debt reside outside of the Federation and are virtually outside the reach of our laws.*
- 11. Paragraph 9 of the affidavit in Support is neither admitted nor denied. I know from my personal knowledge that no settlement was made in this case because neither the principal borrower nor her guarantors of the student loan debt paid off the debt or paid up the outstanding arrears, the latter of which could have placed the loan back in semi-good standing. I also know from my review of the loan repayment records, that though the principal borrower has been making payments on the debt, the payments are not sufficient to clear up the arrears and pay down the principal balance. I also know that at the time instructions were given to the Claimant's solicitors to file the claim in the matter the loan was in arrears in excess of \$20,000.00.*
- 12. Paragraph 10 of the Affidavit in Opposition is neither admitted nor denied. I have been advised by Counsel and I do verily believe that the Claim raises valid issues of fact to be tried and that any issues raised in the Applicant's defence can properly be ventilated at the trial in this matter. I am further advised by Counsel that the Applicant/2nd Defendant has not suffered any detriment as any issues can always be ventilated at trial and to my knowledge the Applicant/2nd Defendant has not been paying on the debt. If this claim is dismissed I know that the Claimant/Respondent will suffer extreme detriment as the loan remains in arrears and the 2nd defendant is the only guarantor residing in the Federation of St. Kitts & Nevis.*
- 13. I have seen paragraph 11 of the Affidavit in Opposition. It is not denied that the 2nd Defendant/Applicant wrote to the Claimant's Counsel on the 3rd April, 2013. I note that in all the Applicant/2nd Defendant's insistence that the claim be discontinued against him and his solicitor's cost be paid that he has not provided any proof of this alleged "settlement agreement." I reiterate that I*

know that the Claimant Bank did not and has not given any instructions to its Counsel to discontinue the claim against the 2nd Defendant and to pay his legal costs. I personally do not understand where this is coming from especially when the debt remains unpaid and the Applicant/2nd Defendant has a responsibility to pay the debt under the bond agreement in the event of default by the primary borrower.

14. Having been advised about the content of the Affidavit in Support of Application and having looked at the actions of the Applicant/2nd Defendant, it would appear that the Applicant is trying to bamboozle the Claimant Bank into discounting its very valid claim. I personally know that it is not uncommon for the Claimant Bank to accept payment on loans while that particular loan is in litigation as any payments received by the Bank is usually accounted for at trial and can be factored into the judgment.
15. I have been advised by Counsel for the Claimant and I verily believe that is highly irregular and unfair for the claimant to be forced to discontinue its Claim simply because payments are now being made on the loan, which had fallen into arrears and is still in severe arrears. A review of our records indicates that the loan account is currently in arrears in excess of \$20, 964.92, and the loan account has not been refinanced.
16. As it relates to paragraph 12 of the Affidavit in Support, I have been advised by Counsel and do verily believe that on the 9th April, 2013 the matter was adjourned so that she [Deidre Williams] could familiarize herself with the claim and so that she could consult with the Claimant Bank about the status of that case and several other such matters that were before the court. I have seen exhibit "SR5", in the Applicant's bundle of exhibits, being the order dated 9th April, 2013 wherein the Learned Master also stated that... "the matter was adjourned to May 08, 2013... **if the parties fail to reach settlement, trial instructions would be given.**" [emphasis supplied].
17. I recall that in or about April, 2013 when Counsel Ms. Deidre Williams contacted the Claimant's officers for an update on this case I was on vacation. However, the Claimant Bank officer advised Ms. Deidre Williams that to the best of his knowledge the loan was not paid off and that the claim had not been settled by either the primary borrower or any of the guarantors under the loan, and that I would return to office by mid-May, 2013 and would better be able to assist her in regards to the status of the claim.
18. I see paragraphs 13 and 14 of the Affidavit in Opposition. I reiterate that I know that no settlement was reached regarding this loan account. I have been reliably advised by Counsel and I do verily believe that when the Claim has not been settled, the Learned master ought to have given instructions for trial pursuant to her Order dated the 9th April, 2013. Instead, the Claim was removed from the Court's list to be restored on the Application of either party.

19. In the interest of fairness to all the parties involved, I respectfully pray that this matter be put back on the Court's list and instruction for trial be given so that the Claim can be properly ventilated at trial. I have been advised by Counsel and do verily believe that there are triable issues of fact for the Court to decide about the status of the loan, the payment obligations under the loan agreement, the debt liability and the payment history on the loan that is the subject of this Claim.

20. I respectfully, pray that the Applicant/2nd Defendant's Application for the Claim to be discontinued against him and for him to be paid \$7,599.63 in cost be dismissed and that there be no order as to cost.

[13] I will now turn to the legal issues raised.

The Legal Issues

[14] The main issue raised is whether the court is entitled to accept that there was an agreement to settle the matter on the basis that the affidavit evidence of the 2nd defendant, stated as a factual matter that the parties had met and agreed to settle the claim on certain specified terms, and that evidence has been neither 'admitted nor denied' by the claimant? In addressing this issue is it relevant that the claimant has never given any express authority to any his attorney at law to settle the matter?

[15] An issue was also raised as to whether there had been a settlement of the matter having regard to the 'without prejudice communications'? For reasons that will soon be obvious I will treat with this latter issue first.

Issue No. 1 – Whether the Correspondence provides a proper Basis for Finding an Agreement to settle the matter?

[16] The written arguments filed by both parties had raised this as a substantive issue. However, Mr. Fox's affidavit has never denied that there was this agreement made between the two lawyers. (This question of the non-denial is dealt with in more detail in the discussion of the next issue) He simply denies that the claimant company ever gave its

lawyers the authority to settle the matter. That being said there is really no need for this court to embark on an examination of the 'without prejudice communication' in this case.

Issue No. 2 - Failure to Deny Material Evidence on the Affidavit – Ostensible Authority to Settle and Compromise a Claim

[17] Mr. Gossai at the hearing approached this matter as his primary submission. He submits that the evidence presented through Ms. Richards that there has been an agreement is a statement of fact, which had not been contradicted or denied by the affidavit of Mr. Fox.

[18] Mr. Gossai says that Mr. Fox's affidavit taken at its highest does not operate to deny that there has been an agreement to settle the matter. He argues that if one side is faced with affirmative evidence, namely the evidence of the meeting between Mr. Gossai and Mr. Jason Hamilton in January 2013, and the agreement to settle, if the other side 'neither agrees or disagrees' with that evidence, that is not a denial; it is not sufficient for the opposite side to neither 'admit nor deny'.

[19] Ms. Williams contends on the other hand, that there must be evidence to prove this agreement. She relies on Mr. Fox's affidavit to argue that the claimant has never given any of its attorneys at law any express authority to settle the matter.

Analysis and Findings

[20] I propose to start this analysis with an examination of the effect of Mr. Fox's statement on his affidavit that no one had given any authority to Mr. Jason Hamilton to settle the matter. What is to be made of this? Could Mr. Hamilton even in the absence of express authority, enter into a binding agreement to settle the matter?

Implied Authority and Ostensible Authority

[21] The law is clear that an attorney at law retained in a matter by a client even without express authority, has an implied authority as between himself and his client to compromise the suit without reference to the client, provided that the compromise does not involve matter collateral to the action; that a matter was not collateral to the action unless it involved extraneous subject matter.²

[22] Further, the attorney at law has ostensible authority as between himself and the opposing counsel to compromise the suit without actual proof of authority, subject again to the same limitation, namely that the compromise should not involve matters which are collateral to the action. There is no need for opposing counsel to seek to confirm that the claimant's attorney at law has authority to settle the matter. 'The magnitude of the compromise or the burden which its terms impose on the other party is irrelevant.'³

[23] All opposing counsel need to do is to ask whether the compromise relates to matters collateral to the action, as if it does, he should require proof of actual authority. As Brightman LJ stated:⁴

"I think it would be regrettable if this court were to place too restrictive a limitation on the ostensible authority of solicitors to bind their clients to a compromise. I do not think we should decide that matter is 'collateral' to the action unless it really involves extraneous subject matter ... So many compromises are made in court, or in counsel's chambers, in the presence of the solicitor but not the client. This is almost inevitably so where a corporation is involved. It is highly undesirable that the court should place any unnecessary impediments in the way of that convenient procedure. A party on one side of the record and his solicitor ought usually to be able to rely without question on the existence of the authority of the solicitor on the other side of the record, without demanding that the seal of the corporation be affixed; or that a director should sign who can show that the articles confer the requisite power on him; or that the solicitor's correspondence with his client be produced to prove the authority of the solicitor."

[24] An attorney seeking to settle or compromise a matter may, depending on the nature of what he proposes to do, may do well to seek the express authority from his client,⁵ but that

² Waugh v H. B. Clifford and Sons (C.A.) [1982] 1 Ch. 374

³ Waugh's case, *ibid* at page 387

⁴ Waugh's case *ibid* at page 388

is a matter between his own client and himself and has nothing to do with the ostensible authority to settle or compromise the matter.

[25] Where a compromise has been made, a court has a limited discretion to intervene. This limited discretion may exist where a client has given his attorney at law specific instructions not to settle the matter, although that position was not known to the other side.⁶

[26] The cases show, however, that 'the court has refused to intervene where a compromise was made in the absence of any express instructions from the client.'⁷

[27] In this case, the affidavit of Mr. Fox does not show at all that the claimant had specifically instructed its attorneys not to settle the matter. The settlement itself did not relate to any matter that was collateral to the suit; what in fact is being contended is that the claimant's attorneys agreed to withdraw and discontinue the entire matter. There would have been no need for the attorney for the 2nd defendant to ask to see the express authority of Mr. Jason Hamilton on this matter.

Proof of the Agreement

[28] I agree that the letter dated the 28 December 2012, referred to in paragraph 7 of the Ms. Richards' affidavit does not show any agreement. It is a fundamentally different matter when it comes to paragraph 8 of the Mr. Richards' affidavit when she states:

"8. I am advised by Mr. Gossai and verily believe the same to be true that he met with Mr. Jason Hamilton in January, 2013 whereby it was agreed that the Claimant/Respondent would discontinue the matter against the Applicant/1st Defendant and pay his costs in the amount of \$7,599.63."

⁵ Note the cases of *Suleman v Shahsavari* [1989] 2 All ER 460; *Penn v Bristol and West Building Society* [1997] 3 All ER 470, CA

⁶ See *Shepherd v Robinson* [1919] 1 KB 474, CA.

⁷ See *Re Newen* [1903] 1 Ch 812; see also the discussions set out in 'Cordery on Solicitors,' Butterworths 1998 at F[26] – Section 1 –The Client.

[29] From a factual standpoint, the 2nd defendant relies on the affidavit of Mr. David Fox to say that in relation to these alleged discussions between the two lawyers in January of 2013, that it is 'neither agreed or disagreed' that these two lawyers met in January of 2013. He states at paragraph 10 of his affidavit:

"...It is neither agreed or disagreed that the Respondent/2nd Defendant Counsel had a meeting with Mr. Jason Hamilton in January, 2013. As manager with conduct of this loan, I know that the claimant bank did not and has not consented to discontinue the claim against the 2nd Defendant or to pay costs to the 2nd Defendant, especially in light of the fact that (1) the Principal Borrower and/or the guarantors to the loan did not clear the arrears on the student loan debt or settle the debt in totality and (2) both the principal borrower and the 2nd guarantor for the debt reside outside the Federation and are virtually outside the reach of our laws."

[30] In this regard, I have no doubt that Mr. Gossai is right on the general legal principle that a party who does not deny a clear and proper statement of fact made by the other side on an affidavit is to be taken to have accepted that assertion. This court also considers that, quite apart from anything else, it is not sufficient to 'neither agree or disagree' and leave the matter there without even seeking to cross examine the deponent of the affidavit or even Mr. Gossai on a proper application.

[31] Mr. Fox also states that he has never given any instructions to Mr. Jason Hamilton to settle the claim and to withdraw the proceedings. I have also noted Ms. Williams submissions that the claimant would 'not have agreed to cancel a valid claim where the debt remains unpaid, the arrears had not been brought up to date so as to a put the loan in good standing, and both the principal borrower and the second guarantor reside outside of the Federation.' Well why then, was there no proper denial?

[32] I am also not satisfied that the matter is as straightforward as Ms. Williams would have me believe. The Defence filed in this matter has raised serious issues of fact and law. The 2nd defendant is contending that he did not get any consideration for this Bond document and that since it was not under seal, it was not enforceable against him. He also challenged the 'other banking and transaction charges'. The claimant's chances of success at the trial were not easily discernible on the pleadings.

[33] Further, the claimant is saying that the 2nd defendant ‘has not provided any proof of this settlement agreement’. Such a response is more properly suited for pleadings and not for evidence. When allegations are made in the pleadings that the opposite side is entitled to require that proof is provided of the allegation or assertion on the pleadings. In fact it is also a matter of law that if the opposite side fails to admit or deny a material assertion on the pleadings if it is expected to be within the knowledge of the opposite side, it will give rise to a presumption that it is admitted.⁸ As Lord Wheatley stated in **Mckie v Strathclyde Joint Police Board**:⁹

“When a party to an action is in a position of knowledge about a disputed central issue in a case, that party cannot, in my view, simply cover his position with a simple denial. Pleadings should not be left in a state where the court has to guess what a party's position on such crucial matters is to be. A failure to admit or deny a fact which is within a party's knowledge yields a presumption that the fact as averred by the other side against him should be held to be admitted.”

[34] In **Dominica Agricultural and Industrial Development Bank v Mavis Williams**,¹⁰ Barrow J.A. accepted as a general proposition that when a fact is pleaded in pleadings and it not denied, it is deemed to be admitted. Barrow J.A. made it clear that an examination must be made to ensure that **the fact has in fact been pleaded**, and that it is not a matter of law which is being relied on, in which case a non-denial does not matter.

[35] Where the clear allegation or assertion is not on the pleadings, but is actually contained in an affidavit as evidence of the truth of the contents, it becomes more crucial that the opposite respond, and to deny it, if that side wishes the court to not rely on it. In the face of evidence, it is not sufficient to simply say that proof must be provided; this is the proof that is being provided.

[36] In fact, no other version is provided to the court with regards the meeting in January 2013 between the Attorneys. One would have expected that an affidavit could have been filed by either Mr. Jason Hamilton or someone with information on his behalf, providing some

⁸ A “failure to admit or deny a fact which is within a party's knowledge yields a presumption that the fact as averred by the other side against him should be held to be admitted.” Per Lord Wheatley *Mckie v Strathclyde Joint Police Board* 2004 S.L.T. 982 Court of Session (Outer House at para, 33)

⁹ 2004 S.L.T. 982 Court of Session (Outer House at para, 33)

¹⁰ Civil Appeal No. 20 of 2005, Dominica (judgment delivered on the 29 January 2007)

details regarding the meeting. The 2nd defendant is relying on an affidavit sworn to by the legal clerk of his attorney at law. Surely, paragraph 8 of Ms. Richards' affidavit, making a clear assertion that there was a meeting and an agreement, required a response. It is not enough to say, that the 'meeting and agreement' is 'neither admitted nor denied'. That takes the matter nowhere. It is tantamount to one side standing in court and making this material assertion, and the other side remaining silent.

[37] Having regard to all of this, I find that Mr. Jason Hamilton, on the basis of the general retainer, had the implied and ostensible authority to settle and compromise this claim. I also find paragraph 8 of Ms. Richards' affidavit is evidence of the fact that the two attorneys had met in January 2013 and had agreed. This is evidence that has not been disputed and nothing has been presented to this court that gives the court any reason to reject this evidence. In the circumstances I find that there was an agreement to settle this matter.

[38] The court hereby orders that the claim be treated as withdrawn and discontinued as against this applicant, the 2nd defendant, and that he be paid his costs of \$7,599.63. The Claimant is to also pay the costs of this Application in the amount of \$759.96

.....
Darshan Ramdhani
Resident Judge (Ag.)