

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

Civil Suit No. 627 of 2014

**LUNAR CAPITAL LIMITED
AJMAL KHAN**

**FIRST CLAIMANT
SECOND CLAIMANT**

AND

LUCIEN RÉMILLARD

DEFENDANT

Before The Hon. Mr. Justice William Chandler, Judge of the High Court

Appearances:

**Mr. Barry L. V. Gale Q.C. in association with Mrs. Laura Harvey-Read for
the Claimants.**

**Mr. Dale D. Marshall Q.C. in association with Mr. Andrew Thornhill and Mr.
Khamaal Collymore of George Walton Payne & Co for the Defendant.**

Dates of hearing: 2014 April 16 and 17

Date of decision: 2014 April 17

DECISION

Brief background

- [1] On 15th April, 2014 the first and second Claimants filed an application for a mandatory injunction against the Defendant together with an affidavit of urgency sworn to by their Counsel, Mr. B. L. V. Gale Q.C. A fixed date claim form was also filed on 15th April, 2014 together with a form 10 application for injunctive relief.
- [2] By virtue of the fixed date claim form the Claimants sought specific performance of the offer to purchase agreement (the agreement) dated 13th September 2013 and also the share purchase agreement dated 14th November 2013 (the share purchase agreement) between the first Claimant (as vendor) and the Defendant (as purchaser) and the second Claimant (as guarantor), in particular the obligations set out in clause 8 and schedule 9 of the agreement.
- [3] They also claim an injunction to restrain the Defendant by himself, his servants or agents or otherwise from breaching clause 6.2 of the agreement or clause 8 and schedule 9 of the share purchase agreement and/or interfering in any way whatsoever with the Claimant's use and enjoyment of the property which situate at The Garden in the parish of Saint James in Barbados is known as Cove Spring House (the property).
- [4] The Claimants by virtue of the form 10 application seek:

An injunction to restrain the Defendant by himself, his servants or agents or otherwise or in any other way from interfering in any manner with the Claimant's use and enjoyment of the property whatsoever between 17th April 2014 and 27th April 2014.

[5] The Application is supported by two affidavits:

(1) of Mr. Ajmal Khan filed 15th April 2014 deposing to the circumstances surrounding the sale and purchase of the property and the removal of some of his personal items from the said property; and (2) of Mr. Steven Parker also filed 15th April 2014.

[6] Mr. Parker is a director of Virtual Winds Capital Inc. which was a director of Suncity Holdings (BVI) Limited which still owns the property. The transaction was by way of share transfer. An affidavit was sworn to by Mr. André Marier before a Notary Public in Canada on 16th April 2014 which has not yet been filed (the Marier affidavit).

The present application/objection

[7] Mr. Gale Q.C. objected to the introduction into evidence of a letter dated 20 March 2014 (the Gagnon letter) written by Messrs. Singleton Urqhart Attorneys-at-Law in Canada per Mr. Charles Gagnon and to paragraphs 17 to 20, 25 and 31 and portions of paragraph 26 of the Marier affidavit.

- [8] The text of his objection is that the affidavit exhibits letters passing between the Claimants' Attorneys-at-law in Canada in which negotiations for settlement were being conducted (the Gagnon letter). Suffice it to say that the Gagnon letter contains the opinion of the Claimant's counsel in Canada with respect to his client's future stays at the property and an intimation of a figure for compensation for the loss of his ability to stay there in the future.
- [9] He submitted that the affidavit paraphrased a "without prejudice" letter dated 10th April, 2014 written by himself to the Defendant in relation a proposed settlement of the matter (Mr. Gale's letter). In summary, his submission is that those letters are inadmissible as they form part of a series of attempts at a settlement of the matter without reference to the Courts. He suggested that the Court could rule on the matter without seeing the affidavit as a matter of law so as to remove any potential prejudice which the Court might be confronted with by reading the correspondence.
- [10] Mr. Marshall Q.C., for the Defendant, was prepared to exclude Mr. Gale's letter but not the letter of the Attorneys-at-law in Canada relating to the negotiating of a settlement. He concedes that the letters written between the Canadian attorneys-at-law do not themselves expressly state that they are "without prejudice" but that it is clear from reading them that they were offers made by both parties to settle the matter which bore no fruit. The

letter written by the Claimants' attorney-at-law expressly reserved the right to commence legal action without further notice if a settlement could not be reached. He relied on **Phipson On Evidence 2005 edition (Phipson)** and several authorities extracted therefrom to ground his submission.

[11] Mr. Marshall submitted that the Court could not rule on the inadmissibility of evidence which it had not seen. He had not filed the Marier affidavit as a courtesy to the Court but was prepared to do so afterwards. He was prepared to withdraw Mr. Gale's letter and to strike out only paragraph 19 of the said affidavit which incorporated Mr. Gale's letter.

[12] Mr. Marshall submitted that the law does not say that every item of correspondence passing between lawyers must be written "without prejudice". Where there is an intention by the parties to embark on "without prejudice" negotiations such protection is offered. In the absence of an evidential basis to show that the parties were involved in negotiations, Mr. Gale could not ask the Court to infer that the correspondence was "without prejudice".

[13] The Second Claimant had removed items from the property which he was prohibited from removing under the agreement and was in breach thereof. Counsel further submitted that a party of 13 persons had checked into the property on 16th April 2014.

[14] Mr. Gale submitted that the Court first had to determine what communications attract without prejudice privilege. The next is to consider whether the Court will admit such communications. He relies on **South Shropshire District Council v Amos [1986] 1 WLR 1271 (South Shropshire)**.

[15] He submitted that it is clear from the surrounding circumstances that the parties were seeking a compromise or settlement. Where there is a series of documents which deal with parties trying to settle or negotiate a dispute, all these documents are within the “without prejudice Rule” and are inadmissible. Conversely, the heading of a document “without prejudice” does not mean it is inadmissible. One has to look at the substance of it.

[16] The overarching consideration is, in his submission, not what label is put on the document but whether it is part of a negotiation process to settle the dispute. The letter of 20th March 2014, he reiterated, made it clear that there was a dispute that the Defendant would not honour his obligations. An offer was made by the Defendant to the Second Claimant to compensate him. The letter went on to state that the Claimants were prepared to accept \$1,500,000.00 market value of the second claimant’s right to occupy the premises.

[17] He handed up a “without prejudice” letter dated 31st March 2014 from Mr. John Fraser to Mr. Gagnon in which it was noted that the offer of settlement was withdrawn since there was no response to the correspondence referenced earlier and outlining that the Defendant was seeking specific performance of the contract.

[18] In summary he submitted that the letter of 20th March 2014 was inadmissible and that all references to it in the affidavit of Mr. Marier should be struck out namely, paragraphs 17 to 20 inclusive 25 and 31 and parts of paragraph 26.

Defendant’s Submissions

[19] Mr. Marshall submitted that there was no evidence of surrounding circumstances other than the letter itself and the law required proof of a genuine attempt to settle by the parties.

[20] He characterised the letter itself as a “stand alone” letter from the Second Claimant’s lawyer to the Defendant’s lawyer. It was not part of a body of correspondence passing between lawyers. It was not headed “without prejudice” and he invited the Court to find that the Second Claimant’s attorney-at-law was not making an offer to settle but was making a demand. It was an open piece of correspondence.

- [21] He also submitted that the onus was on the Claimant's to put before the Court meaningful evidence on which the Court could rule on its admissibility and contended that they had failed to do so.
- [22] He submitted that, whilst reference to without prejudice negotiations could be used to explain delay for the purposes of full disclosure, a party could successfully argue that privilege had been waived. The duty of full disclosure was cast on the Claimants, as applicants for injunctive relief, seeking to invoke the equitable Jurisdiction of the Court. He also submitted that an award of damages would be an adequate remedy if the Claimants were successful in the substantive claim and, therefore, the Court ought not to grant injunctive relief to the Claimants.
- [23] In the Gagnon letter the lawyer stated that it made no sense for the Second Claimant to continue to make arrangements to stay at the property on the mentioned dates or any other date. The fact that the letter referred to another letter made no difference to its admissibility. The Defendants were under a duty to disclose the Gagnon letter and were seeking to shelter under the umbrella of privilege.
- [24] He referred to **Phipson** to support his contention that there were circumstances in which correspondence was headed "without prejudice" but the parties did not intend that correspondence to be "without prejudice".

He submitted further that no evidence had been led as to the parties' intention. The letter was relevant to the issue of adequacy of damages as a remedy and, therefore, ought to be admitted. Finally, he submitted, the paragraphs of the affidavit objected to by Mr. Gale ought not to be struck out for the reasons above advanced.

[25] In reply Mr. Gale submitted that Mr. Marier's affidavit at paragraph 17 provided evidence of an offer of settlement. The matter at hand involved an interim injunction and no duty was cast on persons to make full and frank disclosure of "without prejudice" negotiations.

Issues

[26] The issues are:

- (1) Whether the letter dated 20th March 2014 (exhibit AM7) written by Singleton Urquhart, Attorneys-at-Law per Mr. John Fraser to BC7 Attorneys-at-law (for the attention of Mr. Charles Gagnon) ought to be admitted into evidence? This involves a consideration of whether it is a privileged document which is part of "without prejudice" negotiations for settlement of the matter at hand.
- (2) Whether paragraphs 17 to 20 to paragraphs 25 and 31 and parts of paragraph 26 of the Marier affidavit ought to be struck out?

The Law

[27] Counsel all agreed that the law is contained in the **5th Edition of Phipson on evidence** at para. 24-17 where it is stated that:

“Written or oral communications which are made for the purpose of a genuine attempt to compromise dispute between the parties may generally not be admitted in evidence.”

[28] The public policy behind the rule was enunciated by **Oliver L.J. in Cutts v Head [1984] Ch. 290 at 306** as follows:

“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 in the course of such negotiations (and that includes, of course, as much a failure to reply to an offer 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 with the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the Court as admissions on the question of liability.”

[29] I will return to this public policy rationale later in this decision. The learned authors of Phipson go on to note that:

“The juridical basis of the rule is part contract and part public policy. In part, it depends on an implied agreement between the parties to the effect that what is said in settlement negotiations will not subsequently be relied upon in court.”

[30] The authors further opine that there are logically two stages:

First, is the correspondence protected at all, namely is it within the without prejudice rule at all? And

Secondly, if so, will the court nevertheless admit or order disclosure of the material.

Discussion

[31] The Court must determine whether or not the letter of 20th March 2014 was part of a genuine attempt by the parties at negotiating a dispute. The answer to that question is to be ascertained from the context in which the letter was written. In resolving this issue, the Court must have regard to the letter itself. (I quite understand Mr. Gale's concerns about potential prejudice, if the Court sees the letter however, the Court in the exercise of its judicial functions, cannot be prejudiced). The Court cannot rule upon what it has not seen. This is illustrated in the following extract **South Shropshire** and accords with the common sense approach to evidential issues.

“In order to avoid any possibility of future unnecessary disputes about such matters we conclude by stating that we agree with the judge (a) that the heading 'Without Prejudice' does not conclusively or automatically render a document so marked privileged, (b) that, if privilege is claimed but challenged, the court can look at a document so headed in order to determine its nature and (c) that privilege can attach to a document headed 'Without Prejudice' even if it is an opening shot. The rule is, however, not limited to documents which are offers. It attaches to all documents which are marked 'without prejudice' and form part of negotiations, whether or not they are themselves offers, unless the privilege is defeated on some other ground as was the case in *Re Daintrey, ex p Holt* [1893] 2 QB 116, [1891-4] All ER Rep 209.” (Emphasis mine)

[32] The matrix of facts presented to the Court by the affidavit evidence on both sides does not adequately speak to this issue of whether there was a genuine attempt to negotiate a settlement of a dispute. That does not absolve the Court from of its responsibility to make a determination on the evidence available to it. I bear in mind, in this regard, Mr. Marshall's submission that the onus is on the Claimants to substantiate their case. It is trite law that the onus is on the Claimants, as civil litigants, to prove their case on a balance of probabilities.

[33] The first issue is whether there was a genuine dispute between the parties. I do not think there is any doubt that a genuine dispute arose between the parties. That dispute related to whether the Second Claimant had breached the terms of the contracts by removing items from the property other than those covenanted to be removed. It also relates to whether the Second Claimant was entitled to occupy the premises at the dates and times contracted in the agreements in light of the allegations of breaches of the agreements previously referred.

[34] The more difficult issue is whether the letter of March 20th 2014 is an open letter or part of a process of negotiation of a settlement between the parties.

[35] In this regard, the first paragraph of the letter is instructive. It reads "Contrary to the written assurances that have previously been given, Mr.

Rémillard has now made it known that he has no intention of honouring his obligations to make Cove Spring House available to Mr. Khan as provided for in the offer to Purchase and Share Purchase Agreement - Evidently Mr. Rémillard has offered to pay Mr. Khan US\$525 000.00 to compensate Mr. Khan for foregoing his request to stay at Cove Spring House.”

[36] That paragraph highlights that there had been previous discussions between the parties in which assurances were allegedly given with respect to the Second Claimant’s occupancy of the property. It also makes it clear that a figure of US \$525 000.00 was offered as compensation. The Court has not had the benefit of knowing the content of previous discussions on the matter.

[37] It is also clear that the letter proposes an alternative figure of \$1,500,000.00 which was proffered as the market value of the Second Claimant’s occupancy together with delivery of certain black and white prints and requesting a response by 27th March 2014.

[38] There was no response thereto and hence a letter dated 31st March 2014 was written by Mr. John Fraser to BCF Attorneys-at-Law withdrawing the offer of settlement in the letter of 20th March 2014.

[39] The letter of 20th March 2014 is specifically referred to in the last paragraph thereof as “the offer of settlement set forth in this letter of March 27th 2014”.

[40] From the affidavit evidence, I cannot find that this letter is an opening shot only as Mr. Marshall submitted. It seems to me to be part and parcel of a process of negotiation which had been commenced between the parties. Put another way, it was part of an ongoing process of negotiations.

[41] It is true that the letter of 20th March 2014 was not headed “without prejudice” but this alone is not the sole determinant of the issue. The Court must determine whether it ought to be so treated.

[42] Exhibit “AM6” attached to the Marier’s affidavit is an e-mail by Mr. Marier to Mr. Steven Parker, Mr. Khan’s agent. It points out certain unresolved issues relative to the hold back reserve. In para. 15 of the Marier’s affidavit these are alluded to as “unresolved issues subsequent to closing, including the matter of the items removed from the villa.” The e-mail (dated 05 February 2014) shows such unresolved matters as:

- (1) The Guggenheim release not being registered,
- (2) Non return of named items,
- (3) Failure to account for and have delivery of accounting records,
- (4) Transfer of websites,

- (5) Non receipt of 5% of tips by staff for 2013 non payment of \$US 7000.00 for two pieces of furniture.

[43] The final paragraph reads-

“it is important to inform Mr. Khan that, at this time, we cannot hold any dates for his stay at Cove spring House **because of the nature of the unresolved issues and the difficulties to come to an agreement to resolve them.**”(emphasis mine)

[44] The text of this e-mail to Mr. Khan’s agent gives credence to the proposition that the parties were involved in or had embarked upon a genuine attempt to negotiate a settlement of the dispute. It must be remembered that the disputing parties are all businessmen who had made a substantial financial investment in the property in dispute.

[45] If one has regard to the affidavit of Mr. Steven Parker filed 15th April, 2014 there is additional evidence that there is a genuine dispute between the parties. Mr. Parker provides management services to the claimants. At paragraph 17 of his affidavit he deposed that “André Marier informed me that the Defendant was disputing that the items given to me by Ajmal and Ajmal’s Sculpture of a boat (which Ajmal took with him as one of the personal effects following the completion of the sale) were Ajmal’s personal belongings.”

- [46] The latter part of this paragraph together with paragraph 18 deposed to an alleged agreement for the payment of US \$7,000.00 to the Defendant in consideration of the disputed items.
- [47] Part of paragraph 18 deals with an allegation that Mr. Marier sent an e-mail dated 5th February, 2014 stating, *inter alia*, “it is important to inform Mr. Khan that, at this time, we cannot hold dates for his stays at Cove Spring House because of the nature of the unsolved issue and the difficulties to come to an agreement to resolve them”. Paragraphs 19 and 20 detail an exchange of e-mails between Mr. Charles Gagnon and Mr. John Fraser relative to the Claimant’s stay at Cove Spring House between 17 to 27 April and July and August whilst paragraph 23 deposes to the fact that the House Manager of Cove Spring House informed Mr. Parker that, during the period 17th April to 27th April, 2014, there was another guest coming to the property and that Mr. Khan’s name was not on the schedule of guests anymore.
- [48] Paragraph 24 deposes to an e-mail being written by Mr. Parker to Mr. Marier relative to the occupancy of the property from 17th April, 2014 and informing him that HRM The Duke of York, Prince Andrew, would be coming as a guest of the Second Claimant and that security arrangements would have to be made in advance for the Prince’s arrival.

[49] Of tremendous importance, as well, is paragraph 25 in which Mr. Parker deposed that Mr. Marier sent him an e-mail response dated 9th April, 2014 which informed him that he met with the Defendant who was unwilling to have the Second Claimant stay at the house because of the missing items incident. It went on to state “But for this incident he would have fulfilled his side of the agreement but he considers that the actions of Mr. Khan constituted fundamental breach of the agreement. He will vigorously defend any claim for specific performance but he is willing to consider a monetary settlement”.

[50] At para. 24-16 of **Phipson** the learned authors opine that:

“Correspondence will only be protected by without prejudice privilege if it is written for the purpose of a genuine attempt to compromise a dispute between the parties. It is to be precondition that the correspondence bears the heading without prejudice. If it is clear from the surrounding circumstances that the parties were seeking to compromise the action, evidence of the conduct of these negotiations will, as a general rule, not be admissible. The converse is that there are some circumstances in which the words are used but where the documents do not attract without prejudice privilege. This may be because, although the words without prejudice were used, the negotiations were not for the purpose of a genuine attempt to settle the dispute.”

[51] Having regard to the correspondence above and, in the circumstances, I hold that the parties were in negotiations for the purposes of attempting a genuine settlement of their dispute.

The submission in relation to waiver

[52] I now turn to the matter of waiver raised by the Defendant. Mr. Marshall relied on the following extract from “**The without prejudice rule**” by **Jonathan Ross (Ross) 152 NLJ 1488** where the author opines that “Whilst reference to without prejudice negotiations can be made to explain delay, or for the purposes of full disclosure, where the evidence went further than was necessary, then the other party could successfully argue that all privilege had been waived.”

[53] **Ross** did not cite any authority for this proposition. However, the public policy behind the rule relating to the admissibility of “without prejudice” communications enunciated in **Cutts v Heads [1984] Ch 290** restated at para. 24-17 of **Phipson** (quoted at paragraph 18 above) gives some insight into the approach which the Courts should adopt; namely the encouragement of full and frank discussions relating to settlement without fear that anything said in the course of such negotiations would afterwards be used to their prejudice in subsequent proceedings.

[54] Reference is also made to **South Shropshire** at pg. 6, where the Court approved the decision in **Cutts v Head [1984] Ch 290 (Cutts) where Fox L.J. said:**

“Those cases, I think, emphasise two things. First, that the purpose of the rule is to facilitate a free discussion of compromise proposals by protecting

the proposals and discussion from disclosure in the proceedings. The ultimate aim appears to be to facilitate compromise. Second, whilst the ordinary meaning of "without prejudice" is without prejudice to the position of the offeror if his offer is refused, it is not competent to one party to impose such terms on the other in respect of a document which, by its nature, is capable of being used to the disadvantage of that other. The expression must be read as creating a situation of mutuality which enables both sides to take advantage of the "without prejudice" protection. The juridical basis of that must, I think, in part derive from an implied agreement between the parties and in part from public policy. As to the former, Bowen LJ in *Walker v Wilsher* 23 QBD 335 at 339, after the passage which I have already cited to the effect that it is important that the door should not be shut against compromises, went on to say: "The agreement that the letter is without prejudice ought, I think, to be carried out in its full integrity." As to public policy it obviously is desirable to facilitate compromise rather than forcing the parties to litigate to the end. But to achieve a compromise one of them has to make an offer. He might be apprehensive that his offer might be used against him if the negotiations failed. So he would make his offer without prejudice to his position if the offer was refused. But that was unfair to the other party. It was one-sided. So it was necessary to extend the without prejudice umbrella to cover both parties."

[55] The Court went on to observe that:

"That passage is important for two reasons. First it shows that the rule depends partly on public policy, namely the need to facilitate compromise, and partly on implied agreement. Second it shows that the rule covers not only documents which constitute offers but also documents which form part of discussions on offers, ie negotiations."

[56] The learned authors of **Phipson** at para 25-15 opine that:

"Without prejudice privilege is seen as a form of privilege and usually treated as such. It does not, however, have the same attributes as the law of privilege. Privilege can be waived at the behest of the party entitled to the privilege. Without prejudice privilege can only normally be waived with the consent of both parties to the correspondence"

[57] No evidence has been presented to me by way of affidavit or otherwise to suggest that the Claimants have waived their right to the protection offered by the law of evidence in relation to their communications to support the submission of counsel for the Defendant. Mr. Marshall's submission in respect of waiver is, therefore, overruled.

“Without Prejudice” and Full Disclosure

[58] It is settled law that the applicant for an interlocutory injunction is under a duty to make full and frank disclosure of all matters within his knowledge which materially affect the claim. This is clear from the distillation of the relevant principles in the **Toojays Limited v. Westhaven Limited Civil Appeal No 14 of 2008 unreported decision of [16th September 2011] (Toojays), American Cyanamid v. Elhicon Limited [1975] AC 396** and the other relevant authorities.

[59] Counsel for the Defendant submitted that, in this case, the duty related to disclosure of the letter of 20th March 2014. Counsel for the Claimants submitted that, to do so, would be to run a “horse and cart” through the evidentiary rule of privileged communications.

[60] Herein lies the dichotomy. Whilst the duty of full disclosure is an absolute duty in relation to the substantive law of proceedings, the rule in relation to privilege of communication is a rule relating to evidence or the procedural

law. Is the communication privileged? In which case it is not admissible in evidence or is it not privileged? In which case it admissible.

[61] It may be that the parties are bound to disclose that they are in negotiations but to be duty bound to disclose the contents of without prejudice negotiations is to rob the party of the ability to claim the privilege in the first place. If the issue is raised in bar to the interlocutory application for interim relief, it is for the Court to make the determination as to admissibility of the evidence first so that the public policy reasoning behind the rule of inadmissibility and the privilege itself (if found to exist) are not undermined.

The letter of Mr. B. L. V. Gale Q.C. dated 10th April 2014 (Exhibit AM 2) (the Gale letter)

[62] Mr. Marshall readily conceded that the Gale letter was inadmissible as it was a “without prejudice” letter. This letter refers to previous correspondence between Mr. Gagnon and Mr. Parker (an e-mail) and the position taken by Mr. Rémillard with respect to his obligations under the contracts. Mr. Gale’s letter outlined to Mr. Rémillard a position with respect to proposed settlement which, in clause (1) at pg. 2 thereof, closely resembles the position put by Mr. Fraser to Mr. Gagnon. This letter was an

offer to settle in much the same vein as the Fraser letter but in more selective terms.

[63] As previously mentioned, the Court must look at the tenor of the correspondence to make its determination on the issue of privilege. I refer to Mr. Gale's letter to reinforce the point made earlier that, whether so entitled or not, the Court must look at the substance of the correspondence in the context of the relationship between the parties to determine whether the correspondence is a genuine attempt at settlement. I hasten to add that, in referring to Mr. Gale's letter, I am not going behind Mr. Marshall's concession on the matter of the privilege of this communication.

The submission that the letter is a "stand alone" letter.

[64] I have had regard to the decision in **Buckinghamshire County Council v. Moran (Moran)** referred to in **Phipson at footnote 2** at pg. 657 relied upon in support of the Defendant's submission that the letter was, a "stand alone" letter asserting the Claimants' rights. My reading of the letter which was the subject of the decision in **Moran** reveals that it was not an attempt at negotiation. The said letter enclosed a copy of the agreement between the parties and the writer's brief account of the history of the transaction. It did not invite the other side to enter into negotiations. **Moran** is, therefore, distinguishable from the present case on its own peculiar facts.

[65] In the context of my discussion and findings that the parties were engaged in genuine negotiations aimed at resolving the issues arising under the contracts and that this letter was part of this process, I reject the Defendant's submission that the letter was a standalone letter asserting the Claimants' rights.

Conclusion

[66] In the circumstances, I am of the opinion and hold that, though not headed "without prejudice", the letter dated 20th March 2014 was part of a genuine attempt by the parties at settlement of the matters in dispute between them. It was intended to be, and must be treated as, "without prejudice" correspondence and is not an open letter. It cannot, therefore, be admitted into evidence. The paragraphs numbered 17 to 20 inclusive, para 25, and 31 and parts of paragraph 26 which contain references to the said letter are also inadmissible in evidence.

[67] Disposal:

It is, therefore, ordered that:

1. The letter dated the 20th day of March 2014 is inadmissible in evidence.
2. The paragraphs numbered 17 to 20 inclusive and 25 and 31 of the Marier's affidavit be struck out, and

3. The words “This position was also accepted by Mr. Khan as is evident from the content of a letter from his Counsel, Mr. John Fraser, being **Exhibit AM7**” are struck out in paragraph 26 of the Marier affidavit.
4. It is further ordered without objection, that the arguments with respect to costs, are reserved.

William J. Chandler
Judge of the High Court