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ROYAL COURT
(Samedi Division) 12.

17th January, 1995

Before: P.R. Le Cras, Esq., Lieutenant Bailiff,
and Jurats Coutanche and Le Ruez

Between:	Kenvyn Morgan Jones	Plaintiff
And:	Monica Joan Bryant (née Furlong) t/a Bryant & Co.	First Defendant
And:	Kelvin Peter Myles	Second Defendant
And:	Michael Gilson	Third Defendant

Appeal under Rule 15 of the Royal Court Rules, 1992, as amended, of the First Defendant against the Order of the Judicial Greffier of 8th November, 1994, (*See Jersey Unreported Judgment of that date*) dismissing the First Defendant's application to strike out the Plaintiff's Order of Justice.

Advocate M. St. J. O'Connell for the First Defendant.
Advocate N.M.C. Santos-Costa for the Plaintiff.

JUDGMENT

THE LIEUTENANT BAILIFF: This is an appeal from an Order of the Judicial Greffier dated 8th November, 1994, refusing an application to strike out the action commenced against the First Defendant.

The facts are clearly set out in the Judgment of the Judicial Greffier of 8th November, 1994, included in the Jersey Unreported Series of 1994, and there is no need to rehearse them again, except to elaborate on one or two points.

In particular the suggestion made initially by Advocate Costa as to the abandonment of the proceedings is contained in two handwritten notes, that of Advocate Boxall reading:

"If your client were to abandon procs with no order as to costs.

Y to take instructions".

And that of Mr. T. Hart, his assistant, reading:

"Nuno Costa

Without Prejudice

If your client were to abandon proceedings, would we do it with each party bearing own costs? We to take instructions".

As is stated, Advocate Boxall wrote on 7th April, 1994, and we think it proper to include the whole letter:

"Advocate N.M. Santos Costa,
Messrs. Crill Canavan,
La Chasse Chambers, ***WITHOUT PREJUDICE***
La Chasse,
ST. HELIER.

Dear Advocate Santos Costa,

JONES -v- BRYANT & CO. AND OTHERS

I refer to our telephone conversation of some little time ago regarding the above.

I am able to confirm that my client will, at this stage, consent to an Order that the action be withdrawn in full and final settlement of all matters raised therein on terms that each pay its own costs PROVIDED THAT the caveat presently on the property is cleared off.

Perhaps you will kindly let me know how you wish to proceed.

Yours sincerely,

Advocate G.R. Boxall."

Advocate O'Connell's submission was simple. He did not dissent from the Greffier's view as to the test for striking out: it had to be clear and obvious. In his submission the position was indeed "clear and obvious".

The word "abandon" in the note clearly meant the abandonment of the action for good. Advocate Boxall had then written confirming that he accepted the abandonment but substituting the words "withdrawn in full and final settlement". He dealt with the costs, as in the note, whilst the *caveat* would necessarily fall as it was a mere ancillary adjunct to the action.

The Greffier was thus wrong in saying there were four elements in the letter: there were in fact only three: the abandonment, the costs and the *caveat*.

Mr. Costa's letter of the 11th April must be construed as an acknowledgment of the acceptance and his use of the word "withdrawn" read in that light.

No hint, he submitted, was given in that letter that Advocate Boxall was under any misapprehension.

So far as a concluded agreement was concerned, counsel referred us to Foskett: "The Law and Practice of Compromise": paras: 3-22 & 3-23:

> *"As indicated above, an agreement to agree in the future is not a contract. For example, an agreement, by the parties to stay the proceedings between them "on terms that the issues arising therein be resolved by agreement" would be unlikely to be upheld. This would constitute nothing more than an agreement to agree or negotiate.*
>
> *Problems occasionally arise when the parties have compromised their dispute but speak or write in terms which contemplate the drawing up of some further document setting the seal, as it were, on their agreement. The question arises whether the compromise is immediately binding or not binding until such document is executed. The question has been formulated thus:*
>
> > *"...it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal document may be ignored".*
>
> *Since the question is one of construction with a view to ascertaining the intention of the parties it is impossible*

to describe any particular situation which arises in the context of compromise as being in one category or the other. It is the significance attached by the parties to the future act which is the crucial factor. That is determined by construing the agreement as a whole. An agreement between husband and wife to enter into a separation agreement on specified terms has been held to be binding.

In Morton v. Morton, W had brought proceedings against H in a magistrates' court in 1930 for maintenance for herself and their son. The proceedings were compromised outside the court and the terms were reflected in a document entitled "Heads of agreement" which was drawn up and signed by the respective solicitors. After reciting W's agreement to withdraw her summons, the document recorded that H and W "hereby mutually agree to enter a separation deed containing the following clauses" and the various terms were set out. Although the terms were carried out, no formal agreement was ever prepared or executed. In subsequent proceedings it was argued that the document was nothing more than a contract to contract. A Divisional Court of the Probate, Divorce and Admiralty Division held that there was a binding agreement (subject to the ultimate jurisdiction of the court). Lord Merriman P. said:

> *"[T]he commonest thing in the world, in these matrimonial causes, whether in the courts below or in this court, is to draw up heads of agreement, which are afterwards to be put into more solemn form, if the parties so require; but to say...that this is nothing more than a contract to make a contract seems to me to be impossible...every requisite of the agreement between the parties was here and I think it is the clearest possible case of a concluded agreement, which no doubt either party could have insisted on being put into more formal shape"."*

In the circumstances there is a formal and binding agreement. The Greffier was wrong and the action must be struck out as having been compromised and settled.

Advocate Costa, who was in the embarrassing position of having to construe his own correspondence, put it that the exchange of correspondence does not shew a clear and obvious contract.

In using the word "abandon", which he accepted, he claimed it meant no more than discontinue within the meaning of Rule 6/24: in effect a provisional discontinuation or abandonment.

When Advocate Boxall replied he added "in full and final settlement" confirming thus that which had not been offered. He quite clearly got it wrong and had misunderstood.

In reply Advocate Costa's letter made a careful reservation and by leaving out those words, that is, in full and final settlement, the letter made it clear that only a discontinuance was on offer. Advocate Boxall should have read his letter with care, when it would have been obvious what was meant.

In any case he must have been aware that they were asking for slightly different things or he would not have asked for a draft.

He was asked how he construed the offer to prepare "an agreed order accordingly" which he construed, as we understand it, as being what he, as against both parties, had agreed.

We have no hesitation in accepting the submission of Advocate O'Connell. To our mind the word abandoned, as used here, means to settle and not conditionally to discontinue.

The correspondence makes it quite clear to us that there was an offer to settle and this was accepted and confirmed. The proposed draft order was, to our mind, a mere formality.

We should add that we would find it extraordinary for a member of the legal profession not to write and point out quite plainly should he be of the opinion that the other side was proceeding in error: and that he did not do so was further evidence, if any be needed, that he accepted that there had indeed been a full and final settlement.

The Greffier's Order is therefore reversed, and the action against the First Defendant is struck out.

Authorities

Foskett: "The Law and Practice of Compromise": paras. 3-22 & 3-23.