[2014] JMCA Civ 5

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 16/2012

BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MR JUSTICE DUKHARAN JA
THE HON MISS JUSTICE PHILLIPS JA

BETWEEN	**WILLIAM CLARKE**	**APPELLANT**
AND	**THE BANK OF NOVA SCOTIA JAMAICA LIMITED**	**RESPONDENT**

Mrs Georgia Gibson Henlin and Miss Kamau Ruddock instructed by Henlin Gibson Henlin for the appellant

Michael Hylton QC and Sundiata Gibbs instructed by Michael Hylton and Associates for the respondent

29, 30 July 2013 and 30 January 2014

HARRIS JA

[1] The appellant was a former president and chief executive officer of the respondent. During the currency of the appellant's employment with the respondent, a seven series BMW was purchased by the respondent for the appellant for the sum of £260,008.06. The appellant was in fact entitled to a five series BMW and not a seven series BMW. However, an agreement was brokered by the parties in which: the

appellant was accorded an option to purchase the seven series motor vehicle in exchange for the five series; and he should deposit the difference of the costs of a five series and a seven series vehicle into an account with the respondent and on the exercise of the option, after four years, the amount deposited by the appellant would be deducted from the purchase price of the seven series vehicle. Pursuant to the agreement, the appellant opened an account at one of the branches of the respondent's banks and made payments into the account. The appellant claimed that he made payments amounting to £41,181.06.

[2] The appellant's employment with the respondent ended in 2007 when he retired prematurely. He discontinued making payments into the account in December 2007. On 6 October 2011, the appellant's attorney-at-law wrote to the respondent demanding the return of a balance of £41,181.06 standing in the account. The respondent having not acceded to the demand, on 19 October 2011, the appellant brought a claim against the respondent, seeking an order: for the payment of the sum held by the respondent in trust for him; or alternatively, damages for breach of contract and interest.

[3] On 17 November 2011, the respondent filed a notice of application, seeking a declaratory order that the court was without jurisdiction to hear the claim and that the claim form and particulars of claim be struck out or alternatively, that the proceedings be stayed.

[4] The grounds on which the application was made were in the following terms:

"1. Rule 9.6(1)(a) of the Civil Procedure Rules 2002 ('the CPR') provides that a defendant who disputes the court's jurisdiction to try the claim may apply to the court for a declaration to that effect;

2. Rule 9.6(6) of the CPR provides that any order under this rule may also strike out the particulars of claim or stay the proceedings;

3. The claim has been settled pursuant to a Settlement Agreement entered into between the Claimant and the Defendant on June 7, 2011; and

4. The Settlement Agreement stipulates that all disputes arising out of the agreement must be referred to the named Arbitrator."

[5] The application was supported by an affidavit of Mrs Shaun Lawson-Laing, the legal counsel for the respondent, in which she stated that on 7 June 2011, a Settlement Agreement between the parties was concluded in which it was a term of the agreement that disputed matters emanating from that agreement should be determined by the named arbitrator, Mr Graeme Mew, of the London Court of International Arbitration ('LCIA'). She averred, among other things, that the question as to the motor car was determined under the Settlement Agreement. She exhibited: a copy of the Minutes of Settlement; a copy of a part of the Settlement Agreement and a copy of a Release and Indemnity executed by the appellant. In a further affidavit filed on 25 November 2011, she exhibited extracts from the statement of case, filed by the appellant for arbitration purposes, in relation to the motor vehicle.

[6] In an affidavit by the appellant, sworn on 3 January 2012, he stated that his claim arises out of a breach of a banker and customer contract, and not out of a contract made on 26 March 2010, relating to a dispute between the parties on the question as to what would be a fair and equitable retirement plan for him. He further averred that all facts and issues were covered by the agreement of March 2010. In a further affidavit sworn on 20 March 2012, he stated that there was no agreement to arbitrate and that it is untrue that Mr Mew was a named arbitrator. The sole matter in dispute, he asserted, was the claim for the money with the respondent.

[7] The contract of 26 March 2010, to which the appellant has alluded, was in the form of an arbitration request in which the parties agreed to submit to arbitration before the LCIA. The arbitral process produced a Settlement Agreement. This Settlement Agreement was executed by both parties. That portion of the agreement which was before the court made provision: for the execution of a Release and Indemnity by the appellant in favour of the respondent; that the terms of the settlement should remain confidential; and that any dispute arising with respect to the implementation or interpretation of the agreement be referred to Mr Mew for determination. The full minutes of the settlement were produced. They read:

> "It is hereby agreed between William Clarke ('the Claimant') and the Bank of Nova Scotia Jamaica, Limited (the 'Respondent'), that the matters in dispute, relating directly or indirectly to the Request for Arbitration filed on or about July 21, 2010 and Statement of Case filed on or about March 15, 2011 by the Claimant with the London Court of International Arbitration ('the LCIA') (the 'Arbitration'), and all matters relating directly or indirectly to the Supreme Court of Judicature of Jamaica. Claim No. 2008 HCV 6042, and all matters relating directly or

indirectly to the Jamaican Court of Appeal Civil Division Appeal No. 38 of 2009, and all matters relating directly or indirectly to the Application for Court Orders initiated in the Supreme Court of Judicature of Jamaica (Civil Division) Claim No. 2009 HCV 05137, and all matters relating directly or indirectly to the claim commenced in the Supreme Court of Judicature of Jamaica (Civil Division) Claim No. 2010 HCV 00336 (Claim No. 2009 HCV 05137 and Claim No. 2010 HCV 00336 collectively referred to herein as the "Facebook Claim") are settled on the following basis:"

[8] The statement of case, to which reference has been made in the Minutes of Settlement, was filed by the appellant in support of his request for arbitration. The allegations contained in the statement of case, relating to the motor vehicle, are as follows:

> "3v. The Claimant was provided with a 2007 BMW 750 motor car (0894 EX) by the Respondent. This was also based on his position and service to the Respondent. The Claimant also contributed directly to the purchase price for this car and would have continued to do so but for his early retirement from the Respondent. It was agreed that the Claimant would have the right to purchase this motor car at the market value less the amount of his contribution."

He claimed the following:

> "6.4 (ii) Transfer ownership of the 2007 BMW 750 motor vehicle (0894 EX) that was assigned to the Claimant, to the Claimant free of all encumbrances, without the Claimant being required to make any payments in respect thereof. This was already agreed at a meeting of the Board of the Respondent on October 6, 2008. **A copy of the minutes of October 6, 2008 will be relied on by the Claimant**. The Claimant was required to contribute J$3,524,275.11 with respect to the purchase price of the motor vehicle with an agreement that he would be able to purchase the vehicle at the end of four years. **The Claimant will rely on a copy of the relevant Bank statement at**

the trial. The fact that the Claimant was requested by the Board to retire prematurely in no way negates the agreement. It is for this reason that the Board resolved on October 6, 2008 that the vehicle should be transferred to the Claimant at no cost to him."

[9] Following the execution of the Settlement Agreement, the appellant also signed a form of Release and Indemnity. It states as follows:

"IN CONSIDERATION of the terms set out in the Minutes of Settlement dated June 7th 2011, the sufficiency of which is hereby acknowledged, William Clarke (hereinafter referred to as the 'Releasor') and his heirs, executors, predecessors, successors, assigns and agents do hereby remise, release and forever discharge The Bank of Nova Scotia, its heirs, executors, predecessors, successors, affiliates, subsidiaries (including but not limited to The Bank of Nova Scotia Jamaica Limited), officers, directors, employees, servants, agents and assigns (collectively, the 'Bank') of and from all manner of actions, causes of action, suits, debts, dues, accounts, bonds, covenants, contracts, claims and demands whatsoever which against the Bank the Releasor ever had, now has or hereafter can, shall or may have by reason of any matter, cause or thing whatsoever existing to the date hereof, known or unknown, including, without limitation, all matters relating directly or indirectly to the Request for Arbitration filed on or about July 21, 2010 and Statement of Case filed on or about March 15, 2011 by the Releasor with the London Court of International Arbitration, and all matters relating directly or indirectly to the Supreme Court of Judicature of Jamaica Claim No. 2008 HCV 6042, and all matters relating directly or indirectly to the Jamaican Court of Appeal Civil Division Appeal No. 38 of 2009, and all matters relating directly or indirectly to the Application for Court Orders initiated in the Supreme Court of Judicature of Jamaica (Civil Division) Claim No. 2009 HCV 05137, and all matters relating directly or indirectly to the claim commenced in the Supreme Court of Judicature of Jamaica (Civil Division) Claim No. 2010 HCV 00336.

AND FOR THE SAID CONSIDERATION THE RELEASOR agrees not to make any claims or demands, or commence, maintain or prosecute any action, cause or proceeding for damages, compensation, loss or any other relief whatsoever in connection with the matters released hereby. The Releasor further agrees that

this Release shall operate conclusively as an estoppel in the event of any such claim, action or proceeding, and may be plead [sic] as such.

AND ALSO FOR THE SAID CONSIDERATION THE RELEASOR hereby agrees to indemnify and save harmless the Bank from any claim demand or proceeding against any other person, corporation or other entity in respect of the matters released hereby who may claim contribution and indemnity from the Bank or other relief over from the Bank and this Release may be raised as an estoppel and complete bar to any such claim, demand or proceeding. Moreover, the Releasor shall indemnify and save harmless the Bank against and from all claims, demands, of the sort referred to above and also all legal fees and expenses incurred by the latter in the handling or defending of any of the said claims and/or enforcing this Release estopping and barring such claims, demands or proceedings.

AND ALSO FOR THE SAID CONSIDERATION the Releasor hereby agrees to indemnify and save harmless the Bank from any and all claims or demands with respect to applicable personal tax legislation in respect of any failure of the Bank to withhold income tax from the said consideration and any interest or penalties which might arise out of same, and any costs or expenses incurred by the Bank in defending any claims or demands arising out of any such failure.

I ACKNOWLEDGE AND AGREE that the giving of the consideration herein is not deemed to be any admission of liability on the part of the Bank and, in fact, liability is expressly denied.

THIS RELEASE AND INDEMNITY shall be construed in accordance with the laws of Ontario.

THE RELEASOR UNDERTAKES AND AGREES that the terms of this settlement shall be kept confidential by the Releasor and shall not be disclosed to any third party, other than to the Releasor's legal advisors or as may be required by law, without the express written permission of the Bank.

THIS RELEASE AND INDEMNITY shall enure to the benefit of, and be binding upon the Releasor and his heirs, executors, administrators, legal and personal representatives, successors and assigns.

THE RELEASOR DECLARES THAT he fully understands the terms of this settlement and has had the opportunity to obtain independent legal advice prior to executing this document, and that he voluntarily accepts the consideration offered for the purpose of making full and final compromise and settlement of all claims as noted above."

[10] The respondent's application was heard by Sinclair Haynes J, who ruled that the court had no jurisdiction to try the claim and ordered that the claim form and particulars of claim be struck out.

[11] The appellant's dissatisfaction with the order impelled him to file a notice of appeal. Leave was granted for him to do so. The respondent filed a counter-notice of appeal. The grounds of appeal read:

"a. The learned judge erred as a matter of law in declaring that the court has no jurisdiction to try this claim:

i. There is no question that a court has jurisdiction over a Defendant within its jurisdiction.

ii. The court has jurisdiction over contracts made within its jurisdiction.

b. There is no question of arbitration in this case as Graeme Mew was never appointed as an arbitrator in the original arbitration between the parties.

c. The learned judge erred as a matter of fact in finding that there is a valid and subsisting arbitration agreement other than the one dated the 26th March 2010 between the Appellant and the Respondent:

i. The Settlement Agreement dated the 7th June 2011 did not appoint or purport to appoint Graeme Mew as an arbitrator and neither was he one of the three arbitrators appointed under the agreement of the 26th March 2010.

d. The learned judge erred as a matter of law in placing the onus of disclosing the relevant portions of the Settlement Agreement to the Court on the Appellant or his Counsel:-

i. It is the Respondent's application for the Court to decline jurisdiction under Rule 9.6 of the CPR on the bases set out in the application dated the 17th November 17 [sic] 2011, the burden was therefore on the Respondent:

a. The learned judge erred in failing to treat with the Appellant's submissions that an application under r. 9.6 is essentially an application for *forum non conveniens, which is* that the court is not the proper forum. This application is *distinct from an application for a stay under r.* 26.1 (2) (e).

ii. It is settled law that it is the party seeking a stay on the ground of *forum non conveniens* to persuade the court to exercise its jurisdiction to grant the stay ...' and in respect of any such matter the evidential burden will rest on the party who asserts its existence.' **Spiliada Maritime Corp v Cansulex Ltd. 1987 1 A. C. 460 at 476 - 478.**

iii. Specifically, the learned judge erred in including the Appellant in her indictment that `**Although disclosure would assist, the parties are obviously not interested in assisting the court in determining whether it is a matter that could be dealt with without resort to further litigation:**

a. The burden being on the Respondent to produce the relevant portions of the Settlement Agreement, the learned judge failed to accept or appreciate the submissions made on behalf of the Appellant that the confidentiality argument raised by the Respondent as a bar to producing those portions of the Settlement Agreement was misconceived or an abuse of process. This is because confidentiality is not a bar to disclosure. The Respondent was therefore not precluded from producing the said portions of the agreement in order to discharge its burden of proof. In fact, it produced portions of the Appellant's statement of case that it considered relevant in *breach* of r. 30 of the LCIA rules.

e. The learned judge erred as a matter of fact and/or law in declining jurisdiction. This is because no or no bona

fide dispute had arisen in relation to the Settlement Agreement dated the 7th June 2011 which she could have purported to send to arbitration under an arbitration agreement.

f. The learned judge erred as a matter of fact in finding that a dispute regarding the ownership of the monies in the bank account was a dispute arising on the Settlement Agreement dated the 7th June 2011.

i. The learned judge erred in treating the issues in the statement of case as disputes arising on the Settlement Agreement dated the 7th June 2011.

ii. The learned judge had no basis for making a connection between the issue on the Claim and Particulars of Claim in this matter and the matters that were covered by the Settlement Agreement.

g. Her finding that the [sic] Mrs. Gibson-Henlin's submission that the issue is an independent one of banker-customer contract unconnected to the matter to be resolved by arbitration is therefore not supported by the evidence.

h. The learned judge erred as a matter of fact and law in striking out the Claim and Particulars of Claim."(emphasis as in the original)

[12] The grounds of the counter-notice of appeal state as follows:

"1. Pursuant to rule 26.3(1) (b) of the Civil Procedure Rules, 2002 ('the CPR') the claim is an abuse of the process of the court, the claim having been settled pursuant to a Settlement Agreement entered into between the Claimant and the Defendant on June 7, 2011.

2. Pursuant to rules 9.6(1) and 9.6(6) of the CPR, [sic] court should not exercise its discretion to try the claim, on the ground that the claim has been settled pursuant to a Settlement Agreement entered into between the Claimant and the Defendant on June 7, 2011.

Further and in the alternative, TAKE NOTICE that the Respondent, being the Defendant in the court below, will contend that the

decision of the Honourable Mrs Justice Sinclair-Haynes contained in order dated January 27, 2012 should be varied to direct that the proceedings are stayed pending the referral of the dispute to Graeme Mew on the following grounds:

1. Pursuant to rules 9.6(1) and 9.6 (6) of the CPR, [sic] court should not exercise its discretion to try the claim, on the ground that the claim has been settled pursuant to a Settlement Agreement entered into between the Claimant and the Defendant on June 7, 2011.

2. Alternatively, the proceedings are stayed pending the referral of the dispute to Gaeme Mew because:

   a. Clause 11 of the Settlement Agreement entered into between the Claimant and the Defendant on June 7, 2011 amounts to a submission within the meaning of section 5 of the Arbitration Act;

   b. The court is satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission; and

   c. The court is satisfied that the Defendant/Applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration."

Submissions

[13] Mrs Gibson Henlin submitted that the learned judge wrongly exercised her discretion in ruling that the court was devoid of jurisdiction to try the claim. The court has jurisdiction over the claim, she argued, it being one in contract between banker and customer; the respondent, being resident in the jurisdiction was properly served, and this fact has not been displaced by the respondent's evidence.

[14] She further contended that, despite the lack of an agreement to arbitrate, the learned judge erroneously found that there was no dispute between the parties as a valid and subsisting agreement, by way of the Settlement Agreement was in existence, under which the ownership of the sum claimed was settled. It was also counsel's contention that although Graeme Mew was not appointed an arbitrator, nor was it agreed that he should be the arbitrator, the learned judge erred in finding that by virtue of clause 11 of the Settlement Agreement, he was the named arbitrator of the LCIA. The settlement agreement, she argued, makes reference to the appointment of an LCIA arbitrator, namely, the chairman and not Mr Mew.

[15] In this case, counsel argued, there is no competing forum, there being no valid arbitration agreement which refers matters to another tribunal or a foreign court, therefore the principle of *forum non conveniens* is inapplicable. She cited **Ford v Clarksons Holidays Ltd** [1971] 1 WLR 1412 in support of this submission. Further, citing **Spiliada Maritime Corporation v Cansulex Ltd** [1986] 3 All ER 843, she contended that a burden is placed on the respondent to prove that a more appropriate forum exists, and the only factual material which has been advanced by the respondent is that the claim has been settled by way of the Settlement Agreement. The Settlement Agreement, she argued, was not before the court and therefore, the learned judge could not have found any connection between the present claim and that agreement.

[16] It was her further submission that although the learned judge stated that she needed to inspect the relevant parts of the Settlement Agreement which were not disclosed and that the matter could be resolved without reference to the undisclosed

areas of the agreement, she failed to pay due regard to the confidentiality clause of the agreement and placed the burden of producing the document on the appellant, although the respondent had improperly relied on portions of the statement of claim, which was protected by article 30 of the LCIA confidentiality clause.

[17] The respondent, having alleged that a dispute arose out of the Settlement Agreement, ought to have clearly stated the nature of that dispute, counsel contended, as the appellant is not required to recognize a dispute about which he has no knowledge. Citing **Cruden Construction Ltd v Commission for the New Towns** [1995] 2 Lloyd's Rep 387, she submitted that the learned judge, before deciding on jurisdiction, should have satisfied herself that a valid dispute had arisen. No claim was made in respect of the BMW motor car as it was mentioned in the present claim for the purpose of information only, she submitted.

[18] After making reference to the preamble to the Settlement Agreement or Minutes of Settlement, Mr Hylton QC submitted that the appellant's evidence is that the arbitration agreement of 2010 is the relevant document; however, the present claim relates to the appellant's claim which was settled between the parties under the Settlement Agreement, and his reliance on the arbitration agreement's recital lacks merit. The arbitration agreement, he argued, simply shows that a dispute exists between the parties as to what is a fair and equitable retirement plan for the appellant and the appellant's claim is outlined in the statement of case which speaks to a dispute and to which reference has been made in the Settlement Agreement. Therefore, he argued, the present claim, in contract, would undoubtedly have had its genesis in the

Settlement Agreement, and contrary to the appellant's submission, a dispute is clearly in existence between the parties.

[19] Learned Queen's Counsel also argued that there can be no dispute that Mr Mew was an arbitrator originally selected for the arbitration which has been concluded, the proceedings having terminated on the production of a Settlement Agreement in which it was agreed by the parties that if a further dispute arises with respect to the agreement then that dispute would be submitted to a named person.

[20] In this case a forum does not necessarily mean a court, Mr Hylton submitted. Frequently, he submitted, a person or a body will be chosen to perform the function of an arbitrator. Referring to **Ford v Clarksons Holidays** cited by the appellant, learned Queen's Counsel, after pointing out that arbitrators or a group of arbitrators is often referred to as a "tribunal" or a "forum", went on to submit that at page 1416 Davies LJ cited approvingly, the following extract from Russell on the Law of Arbitration, 18th ed (1970) :

> "Where parties have agreed to refer a dispute to arbitration, and one of them, notwithstanding that agreement, commences an action to have the dispute determined by the court, the prima facie leaning of the court is to stay the action and leave the plaintiff to the tribunal to which he has agreed."

[21] Mr Hylton further argued that the disclosure of a part of the Settlement Agreement to the court was adequate in enabling the court to determine the issue before it, namely whether, the disputed matter in the present claim related directly or indirectly to the appellant's statement of case in the arbitration proceedings.

[22] Referring to the appellant's submissions, in which, on one hand, the appellant stated that the respondent, in placing reliance on portions of the Settlement Agreement was in breach of the confidentiality clause, while on the other hand, contending that the respondent was under a duty to disclose, learned Queen's Counsel argued that those submissions were not only contradictory but clearly erroneous. Alluding to paragraph 4 of an affidavit of Mr Marc Jones speaking to article 30 of the Arbitration Rules as to the requirement of confidentiality by parties in relation to matters in arbitration proceedings, he argued that the proviso to rule 30 is applicable as it allows the respondent to place reliance on the relevant parts of the statement of case, the request for arbitration, the Settlement Agreement and the Release and Indemnity and therefore, the respondent is entitled to enforce the terms of the Settlement Agreement as the matters in the present claim were settled by that agreement.

Analysis

[23] Under rule 9.6(1) of the Civil Procedure Rules (CPR), a defendant who disputes the court's jurisdiction to try a claim may make an application to the court for an order in this regard. Rule 9.6(6)(a) gives the court the power to strike out the particulars of claim where the jurisdiction of the court is disputed.

24] Rule 26.3(1)(b) of the CPR gives the court the power to strike out a statement of case.

[25] Section 5 of the Arbitration Act makes provision for the court to stay proceedings in circumstances where a party to arbitral proceedings commences an action in a

matter, in which it was agreed by the parties, that the matter should be subject to arbitration. It reads:

> "5. If any party to a submission, or any person claiming through or under him, commences any legal proceedings in the Court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to the Court to stay the proceedings, and the Court or a Judge thereof, is satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings."

[26] Two broad issues arise in this case. The first is whether the court has effective jurisdiction to try and determine the appellant's claim. The second is, if the court is seized of jurisdiction, whether it is obliged to exercise it.

[27] In considering the question of jurisdiction, the starting point must be the contract which effectively governs the rights of the parties. The excursion must commence by looking at the statement of case of March 2011, upon which the appellant relied for the purposes of the arbitration. Paragraph 3v of that document recites facts concerning the 750 series BMW motor vehicle. It outlines the issues relating to the respondent providing the motor vehicle to the appellant which include the making of contributions by him towards the purchase price of the motor vehicle and his entitlement to purchase it, less contributions made by him. It follows that, the

statement of case submitted by the appellant in 2011, in particularising the issues on which the appellant relied, clearly shows that the motor car would rank among the disputed items claimed by the appellant in paragraph 6.4 (ii). This surely indicates that Mrs Gibson Henlin's argument that a valid dispute had not arisen is flawed. Consequently, the case of **Cruden Construction Ltd v Commission for the New Town** cited by Mrs Gibson Henlin is of no assistance to the appellant as it is clearly distinguishable from the present case. In that case, the question was whether a valid dispute had arisen between the parties when the notice of arbitration was served. There is a dispute between the parties in the instant case; and there is no issue as to the service of a notice of arbitration.

[28] Curiously, Mrs Gibson Henlin argued that in the present claim, the appellant seeks to recover a certain sum of money, not the motor car. This cannot be accepted as accurate. The court must look beyond the formulation of the present claim. It cannot be denied that the appellant seeks recovery of money in that claim. However, the claim for the money is grounded in a contract born out of the dispute relating to the motor vehicle as specified in the statement of case which was produced for the arbitration proceedings. Consequently, it is without doubt that the issue concerning the motor vehicle must be, intrinsically, a part of the statement of case.

[29] The appellant's argument that it is the arbitration agreement which governs the contractual relationship between the parties is clearly unmeritorious. That agreement in 2010 effectively made provision for the parties to proceed to arbitration in order to decide on a fair and equitable compensation for the appellant. The agreement simply

supplied the catalyst which facilitated the parties in proceeding to arbitration. The parties, having submitted to arbitration, arrived at the settlement agreement.

[30] Although the appellant has contended that no dispute exists between the parties arising from the Settlement Agreement, as can be readily observed from the Minutes of Settlement, reference is made to matters in dispute, directly or indirectly relating to the arbitration request of 21 July 2010 and the statement of case filed on 15 March 2011. Immediately following the recital of the Minutes of Settlement, the terms of the Settlement Agreement were outlined. However, there is the complaint of Mrs Gibson Henlin that the appellant was deprived of the opportunity of knowing the nature of the dispute to which the learned judge made reference as the relevant contents of the settlement agreement were not before the court. It is perfectly true that only a portion of the specific terms of the Settlement Agreement was before the court. However, the fact that there was an absence of full disclosure, this would not have precluded the learned judge from making a decision in the matter, as she rightly stated. Although article 30 of the LCIA rules prohibits the disclosure of all awards in the arbitration, and materials and documents used in the arbitration without the written consent of the parties, in the circumstance of this case, the restriction on disclosure by the confidentiality clause would have been inconsequential. Firstly, it also provided by the article that disclosure may be made if it is required by a party to pursue a legal duty or protect a legal right. The respondent brought the application in pursuance of a legal duty and this would have permitted the disclosure of the requisite material in support of the application. Secondly, the matter giving rise to the dispute would obviously have

been within the appellant's knowledge, he having prepared and submitted a detailed statement of case outlining the issues and had been a signatory to the Settlement Agreement. Therefore, it could not be said that an onus was placed on him to have made the disclosure. It cannot be said that he would not have been fully cognizant of all the facts and the circumstances surrounding the purchase of the motor vehicle.

[31] It was also the appellant's contention that the learned judge, not having seen the relevant portion of the Settlement Agreement, erred in finding that Mr Mew was appointed an arbitrator and that there was a connection between the present claim and the Settlement Agreement. The learned judge was correct in making these findings. In identifying the forum in which a claim under the Settlement Agreement can be suitably considered, clause 11 of the agreement provides as follows:

> "In the event of any dispute concerning the interpretation or implementation of this agreement, such dispute shall be resolved by Graeme Mew who shall determine the appropriate procedure to be used and whose decisions shall be final and binding."

This clearly shows that provision has been made under the Settlement Agreement for an alternate forum and that Mr Mew was appointed the arbitrator.

[32] It is the statement of case of 2011, and not the arbitration agreement, which outlined the issues and further, the claim to the ownership of the money arose out of the Settlement Agreement, as the learned judge properly found. Therefore, it is the Settlement Agreement and not the Arbitration Agreement, as contended for by the appellant, which is the essential contract governing the appellant's rights. Accordingly,

there can be little doubt that the present claim had its genesis in the Settlement Agreement.

[33] The present claim falls within the purview of matters directly or indirectly relating to the Settlement Agreement and is therefore a claim which ought to be regarded as valid and subsisting. It is a claim, founded in a contract, between the parties, emanating from a debt. Such a contract is deemed to originate at the place where the debt is recoverable by action, which ordinarily is the country in which the debtor resides. Judicial support for this proposition is to be found in **Swiss Bank Corporation v Boehmische Industrial Bank** [1923] 1 KB 673.

[34] The present claim is founded on a banker and customer relationship. It has been established by the authorities that a contract between a customer and a banker is one of creditor and debtor. Having regard to the nature of the litigation, in that, the existing claim is a debt born out of a contract made in Jamaica in which the respondent, a bank, is a debtor to the appellant and the respondent is resident in the jurisdiction, the local court would be endowed with jurisdiction to hear and determine such claim. As a consequence, we are constrained to disagree with Mr Hylton that the current claim had been settled. We are also firmly of the view that the respondent's contention that the commencement of the action by the appellant was an abuse of the process of the court is baseless. It also follows that the learned judge was wrong in finding that the present claim was settled. The validity of the claim remains intact and the learned judge was wrong in striking it out for want of jurisdiction.

[35] In the instant case, it cannot be said that the parties did not agree to an alternate forum. Having found that the local court has jurisdiction to adjudicate on the present claim and that the settlement agreement has made provision for an alternate forum, the further issue as to which of the two fora would be more appropriate to hear the matter in dispute, will now be addressed. This brings into focus the question as to whether there ought to be a stay of the proceedings which are now pending before the court. The parties had agreed to submit to arbitral proceedings. As a consequence, the court may give consideration to a stay by virtue of section 5 of the Arbitration Act.

[36] Before proceeding further, it would be appropriate at this juncture to state that the appellant's submission that the court in this jurisdiction is the only forum is without merit. As Mr Hylton rightly submitted, a forum does not always mean a court of law. A person or a group of persons may exercise the duties of an arbitrator.

[37] The respondent contends that Mr Mew is the proper forum. The task of the court therefore, is to consider whether a forum other than the domestic court is more appropriate. The case of **Ford v Clarksons Holidays Ltd**, cited by counsel for the appellant, gives support to the proposition that where parties refer a dispute to arbitration, one of whom institutes action, the court leans in favour of the tribunal to which they have agreed.

[38] In **Spiliada**, Lord Goff, speaking to the principle of forum non conveniens, said at page 853:

"In cases where jurisdiction has been founded as of right, ie where in this country the defendant has been served with proceedings within the jurisdiction, the defendant may now apply to the court to exercise its discretion to stay the proceedings on the ground which is usually called forum non conveniens. That principle has for long been recognised in Scots law; but it has only been recognised comparatively recently in this country. In ***The Abidin Daver*** [1984] 1 All ER 470 at 476, [1984] AC 398 at 411 Lord Diplock stated that, on this point, English law and Scots law may now be regarded as indistinguishable. It is proper therefore to regard the classic statement of Lord Kinnear in ***Sim v Robinow*** (1892) 19 R (Ct of Sess) 665 at 668 as expressing the principle now applicable in both jurisdictions. He said:

> '... the plea can never be sustained unless the Court is satisfied that there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and for the ends of justice'."

[39] In dealing with the application of the principle of forum non conveniens within the context of a stay, he said at page 854:

"When the principle was first recognised in England, as it was (after a breakthrough in ***The Atlantic Star, Atlantic Star (owners) v Bona Spes (owners)*** [1973] 2 All ER 175, [1974] AC 436) in ***MacShannon v Rockware Glass Ltd*** [1978] 1 All ER 625, [1978] AC 795, it cannot be said that the members of this House spoke with one voice. This is not surprising; because the law on this topic was then in an early stage of a still continuing development. The leading speech was delivered by Lord Diplock. He put the matter as follows [1978] 1 All ER 625 at 630, [1978] AC 795 at 812):

> 'In order to justify a stay two conditions must be satisfied, one positive and the other negative: (a) the defendant must satisfy the court that there is another forum to whose jurisdiction he is amenable in which justice can be done between the parties at substantially less inconvenience or expense, and (b) the stay must not deprive the plaintiff of a legitimate

> personal or juridical advantage which would be available to him if he invoked the jurisdiction of the English court'."

[40] After carrying out a review of the authorities, he proceeded to summarise the law. Only such aspects of his summary as are relevant for the purpose of this case will be outlined. At pages 854-856 he said:

> "(a) The basic principle is that a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, ie in which the case may be tried more suitably for the interests of all the parties and the ends of justice.
>
> (b) As Lord Kinnear's formulation of the principle indicates, in general the burden of proof rests on the defendant to persuade the court to exercise its discretion to grant a stay - (see, eg, the ***Societe du Gaz*** case 1926 SC (HL) 13 at 21 per Lord Sumner and Anton *Private International Law* (1967) p 150).
>
> (c) The question being whether there is some other forum which is the appropriate forum for the trial of the action, it is pertinent to ask whether the fact that the plaintiff has, ex hypothesi, founded jurisdiction as of right in accordance with the law of this country, of itself gives the plaintiff an advantage in the sense that the English court will not lightly disturb jurisdiction so established.
>
> (d) Since the question is whether there exists some other forum which is clearly more appropriate for the trial of the action, the court will look first to see what factors there are which point in the direction of another forum. These are the factors which Lord Diplock described, in ***MacShannon's*** case [1978] 1 All ER 625 at 630, [1978] AC 795 at 812, as indicating that justice can be done in the other forum at 'substantially less inconvenience or expense'.
>
> (e) If the court concludes at that stage that there is no other available forum which is clearly more appropriate for the

trial of the action, it will ordinarily refuse a stay: see, eg, the decision of the Court of Appeal in ***European Asian Bank AG v Punjab and Sind Bank*** [1982] 2Lloyd's rep 356. It is difficult to imagine circumstances when, in such a case, a stay may be granted.

(f) If, however, the court concludes at that stage that there is some other available forum which prima facie is clearly more appropriate for the trial of the action, it will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. In this inquiry, the court will consider all the circumstances of the case, including circumstances which go beyond those taken into account when considering connecting factors with other jurisdictions."

[41] As shown in **Spiliada**, in deciding on the appropriateness of the alternate forum, the test is, which of the two competing fora is more suitable in the circumstances of a particular case. In applying the test, the underlying principle is one in which the court is required to look at the forum in which the matter can be dealt with "suitably for the interests of all parties and the ends of justice". In the execution of this function, the court is required to take into consideration all the facts as well as the wording of any relevant clause in a contract.

[42] Mrs Gibson Henlin urged that the respondent had not adduced sufficient evidence to show that a stay should be ordered. With this submission, we disagree. It cannot be said that there is inadequate evidence which would prevent the court from considering a stay. There is, before the court, ample evidential material to support a stay. The appellant agreed to submit to arbitration before the LCIA. A dispute exists concerning the implementation of the settlement agreement. It is clear that the dispute

raised in the present claim is grounded in and relates back to the settlement agreement and accordingly, the terms of the dispute with respect to the 750 series BMW motor car form part and parcel of the present claim. As earlier shown clause 11 of the settlement agreement places the adjudication of any further dispute between the parties, in the hands of Mr Mew. There is evidence demonstrating that the appellant appended his signature to the settlement agreement which signifies that he had consented to Mr Mew adjudicating on the dispute arising out of that agreement in accordance with clause 11. In the Release and Indemnity executed by the appellant, he acknowledged that he fully understood the terms of the settlement. Although the arbitration was amicably resolved, Mr Mew had been initially chosen as an arbitrator. He is best suited to determine the dispute which has now arisen, as he would have been fully seized of all the circumstances surrounding the settlement agreement.

[43] The appellant agreed to arbitrate and ought not to be allowed to renege on that agreement. In **Douglas Wright T/A Douglas Wright Associates v Bank of Nova Scotia Jamaica Limited** (1994) 31 JLR 351 at page 358, Courtney Orr J had this to say on this point:

> "The authorities reveal that the basic stance of the courts has been that parties who have agreed to arbitrate should be held to their agreement. For example, in *Wickham v Harding* (1859) 28 LJ EX 215, Bramwell B against whose order at first instance staying proceedings the plaintiff had appealed, said, in the Court of Appeal at page 217:
>
> > '....a bargain is a bargain and the parties ought to abide by it, unless a clear reason appears for their not doing so.'

The appellant is bound by the Settlement Agreement and ought to honour his commitment and should abide by the terms of clause 11 of the agreement.

[44] Taking all factors into account, we are satisfied that Mr Mew is the proper forum in which the case can be suitably dealt with in the interests of the parties and the interests of justice. It follows that the proceedings in the court below should be stayed pending the outcome of the decision of Mr Mew.

[45] We would allow the appeal in part and dismiss the counter notice of appeal in part. Half costs in the court below and in the Court of Appeal are awarded to the appellant to be agreed or taxed.

ORDER

1. The appeal is allowed as to the striking out of the appellant's claim but dismissed as to the respondent's application for a stay of proceedings.

2. The counter notice of appeal is dismissed as to the striking out of the appellant's claim but allowed as to the stay of the proceedings.

3. Half of the costs incurred in the court below and in the Court of Appeal are awarded to the appellant, to be agreed or taxed.