IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1999/S-243

BETWEEN	EDWARD SEAGA	CLAIMANT
A N D	WESTERN BROADCASTING SERVICES LIMITED	1ST DEFENDANT
A N D	THE BREAKFAST CLUB LIMITED	2ND DEFENDANT
A N D	ANTHONY ABRAHAMS	3RD DEFENDANT
A N D	LAURIE GUNST	4TH DEFENDANT
A N D	JEFF STEIN	5TH DEFENDANT

Mr. E. George, Q.C. and Miss Powell, instructed by Dunn Cox for the Claimant. Mr. A. Dabdoub and Mr. R. Clough also present.

Mr. Charles Piper and Ms. Andrea Walters instructed by Ms. Carlene Larmand of McGlashen Robinson and Company for the First Defendant.

Miss Andrea Messam and Dr. David McBean present as representatives of the First Defendant.

Mrs. Sharon Usim, instructed by Chancellor and Company previously appearing for the First, Second and Third Defendants and still on the records for the Second and Third Defendants also present.

Mr. D. Wong Ken appearing for the Second and Third Defendants on an undertaking to file Notice of Change of Attorney forthwith.

IN CHAMBERS
CASE MANAGEMENT CONFERENCE
September 22, 26 and 30, 2003

N.E. McINTOSH, J.

On the 22nd September, 2003 this matter which involves an action of libel, came up for further Case Management. There was an application on behalf of the Claimant to vary an Order for substituted service on the Fourth and Fifth Defendants which had been granted on the 18th of June, 2003. The variation sought was granted and then, as they were quite entitled to do, the Claimant's legal representatives sought to bring to the attention of the Court, the terms of a settlement which they said had been reached between the Claimant and the First Defendant.

Miss Larmand, now appearing for the First Defendant, sought to intervene to say that her instructions were that only negotiations had been held and that no settlement had been reached. I found the view thereafter that, in the circumstances, the matter should best proceed on affidavit evidence on behalf of the Claimant, exhibiting documents to which reference was being made, with such responses as may be found to be necessary. That was the extent of my direction. The matter was then adjourned to the 26th of September, 2003.

I have one preliminary comment on the Proceedings held on September 26. In future I will be insisting that when submissions are being made to this Court, I hear only from lead Counsel. If it is necessary for any instructions to be given in the course of the submissions it must be done in the form of notes or in a manner which does not interfere with the smooth flow of the submissions being made. Proper briefings should really take place before the hearing.

That being said I turn now to the affidavit evidence and the submissions made in furtherance of the management of this case. The Claimant's Attorneys-at-Law seek a ruling from the Court, acknowledging the settlement which they say was reached on the

11th of July, 2003 between the Claimant and the Representative of the First Defendant, Mr. Neville Blythe, who describes himself in his affidavit, sworn to on the 26th of September, 2003, as Chairman of the First Defendant. This they say, was the result of a meeting which was held in the Claimant's office and was attended by the Claimant, his legal representatives Mr. Abe Dabdoub and Mr. Raymond Clough, Mr. Neville Blythe and Mrs. Andrea Messam, representatives of the First Defendant, along with the Attorney-at-Law, Mr. Walter Scott, then representing the First, Second and Third Defendants.

At that meeting it is contended, on behalf of the Claimant that a settlement was arrived at in the following terms:

(a) That the First Defendant would publish an apology acceptable to the Claimant to be drafted by the Claimant's Attorneys-at-Law for broadcast on Hot 102 and CVM Television. The Attorneys-at-Law to decided on the number of times the apology would be published on each medium,

(b) The First Defendant agreed that it would pay an amount of Twenty Million Dollars ($20,000,000) plus Attorneys-at-Law Costs to Dunn Cox to be agreed between the Attorneys-at-Law

(c) An amount of Three Million Dollars ($3,000,000.00) would be payable in cash and the balance of Seventeen Million Dollars ($17,000,000.00) would be paid by way of the First Defendant and CVM Television Limited providing the Claimant with Volume Discounting Advertising credit on both Hot 102 Radio Station and CVM-TV which advertising credit the Claimant could sell for cash to any third party.

In the affidavit evidence advanced on behalf of the Claimant it is further contended that it was expressly understood and agreed that "settlement related solely in respect to the liability of the First Defendant" and further, that it was expressly understood that the offer of apology and amends was not made in respect to any of the other four Defendants.

The affidavit evidence also disclosed that Mr. Scott then indicated that in view of the settlement agreement arrived at he would have to cease representing one or other of the Defendants and that the Claimant's Attorneys-at-Law should expect to receive a Notice of Change of Attorney.

On July 18, 2003, the Claimant received a cheque from the First Defendant in the amount of $2,000,000.00 under cover of a letter which bore the words, in bold letters, **'WITHOUT PREJUDICE'** and was expressed as follows:

> "Please find enclosed, NCB cheque number 103602 in the amount of Two Million dollars ($2,000,000.00) representing an on account payment of the Three Million Dollars ($3,000,000.00) cash settlement as per our negotiated agreement on Friday, July 11, 2003".

On August 27, 2003 the Claimant received the balance of the One Million Dollars on the cash component of the agreement, the covering letter referring to it as "representing advance on the captioned", that caption being: Re: Suit C.L. S-243 of 1999 Edward Sega v. Western Broadcasting Service. That caption is if great significance in this matter.

Between July 11 and September 17, 2003 correspondence passed between the Attorney-at-Law Mr. Walter Scott and Mr. Abe Dabdoub and Mr. Raymond Clough for the Claimant. Further meetings also took place. The Attorneys for the Claimant had prepared a draft Deed of Settlement and sent it to Mr. Scott for approval. On August 7, 2003 they received an electronic communication from Mr. Scott in the following terms:

> "I have obtained written instructions from my client. The draft deed of settlement is in order and may be executed in its current form. Accordingly I would be grateful if the Deed is engrossed and forwarded to me for execution by my client."

Subsequently that position changed and in another electronic communication Mr. Scott indicated that:

"It seems that I misunderstood my Client's instructions. My client, for the reason already discussed with you, need the settlement to include The Breakfast Club Limited. My Client is contractually bound to indemnify the Breakfast Club Limited. In the circumstance where my client has to pay for the third party it wishes to have one complete settlement.....".

Further meetings were held with a view to 'including' the Second Defendant in the settlement but that never materialized. At one point it appeared that the obstacle to that course was the unwillingness of the Third Defendant to apologize, then at another stage it was said that he had agreed to apologize but there was the matter of the sum being requested by the Claimant which seemed unacceptable. As far as the Claimant is concerned, that left the agreement with the First Defendant in place and unaltered and the Court is being asked to give effect to that agreement.

In their affidavits both Mr. Blythe and Mrs. Messam refer to discussions which took place on July 11, 2003, in the Claimant's office, while they were in the company of the Attorney-at-Law for the First, Second and Third Defendants. Indeed Mr. Blythe avers in paragraph 6 of his affidavit that he "knew that throughout the proceedings Mr. Walter Scott had been representing the said Defendant and had filed their Defence....."

Mr. Blythe further avers in paragraph 7 that "It was accepted in the discussions on that day that an apology would be drafted by the Claimant's Attorneys-at-Law to be broadcast on Hot 102 FM and CVM Television and that an amount of Twenty Million

Dollars ($20,000,000.00) (of which Three Million Dollars ($3,000,000.00) was to be paid in cash and the balance be given in advertising rights on Hot 102 FM and CVM Television) plus Attorneys' costs, would be paid to the Claimant." This 'acceptance' is precisely the agreement to which the Claimant refers.

In paragraph 9 of her affidavit Mrs. Messam also speaks of this 'acceptance' although she goes on to say that it was her understanding that the parties were "to meet again to work out details with respect to the payment of Three Million Dollars ($3,000,000.00) to the Claimant, the terms of the letter of apology and the details regarding the placement of the advertisements". This of course would be matters pursuant to the 'acceptance'.

Mrs. Messam says it was her 'intention' that any settlement arrived at was to include all the Defendants and that Mr. Blythe had indicated this during the course of the discussions that the Second and Third Defendants were to be included in the settlement. Mr. Blythe says he made it clear during the course of the negotiations that neither the Second or Third Defendant can be excluded having regard to the First Defendant's contractual obligations to the Second Defendant and to the goodwill between them. This is the real point of departure from the Claimant's position.

It is Mr. Blythe's affidavit evidence (paragraph 10) that the payments made to the Claimant were as a result of financial difficulties being experienced by the Claimant whose representatives had approached him to make a good faith advance on the cash payment of Three Million Dollars ($3,000,000.00). He says he understood that "the Claimant's representatives were urging that this advance be made as there was an imminent settlement which was likely to be finalized." He says it was the Claimant

himself who requested the further payment of One Million Dollars ($1,000,000.00) after the first payment was made and it is certainly interesting to note that that payment was made after or at the time when negotiations were going on in relation to including the Second Defendant and is delivered with a letter the caption to which makes mention of the First Defendant only.

By that time, it appears that the Second and Third Defendants were than represented by Mr. Wong Ken and at a meeting held on August 28th 2003, in Mr. Blythe's office, Mr. Blythe avers that Mr. Scott assured Mr. Wong Ken that it is only a proposed settlement that was on the table and that it would not be signed to exclude the 'Breakfast Club' . It is to be noted that neither the Claimant nor his legal representatives were present at that meeting.

At the conclusion of his affidavit Mr. Blythe says "I have no desire to renege on any agreement properly reached in the course of my business...." and expresses his willingness to be subject to 'the ruling of this or any other Court.'

In paragraph 10 of Mrs. Messam's affidavit, she refers to instructions received from Mr. Blythe "to obtain funds in the amount of Two Million Dollars ($2,000,000.00) as a good faith advance to the Claimant". Yet she prepares a letter which does not reflect that position. In the letter it is referred to as an on account payment and is related to "our negotiated agreement" She says she "sought and obtained Mr. Scott's approval regarding the contents of the said letter". That wording which received the approval of the First Defendant's legal representative is, in my view, supportive of the Claimant's contention that there was in effect an agreement between the First Defendant and the Claimant.

Mrs. Messam further avers that on receipt of the draft Deed of Settlement, she was obliged to remind Mr. Scott that the Agreement ought to be in respect of the First to Third Defendants and indeed she exhibits a copy of an e-mail message to Mr. Scott in the following terms.

"Mr. Blythe is of the view that he cannot go ahead with this Deed if the Breakfast Club is not included as a settlement with Breakfast Club will also fall to Western Broadcasting because of our contractual arrangements. My note to you today was not intended to be a go ahead but rather a confirmation that those were the terms discussed at the meeting. Mr. Blythe needs a meeting with Abe Dabdoub et al along with the Breakfast Club to arrive at a full settlement".

It is not disclosed to which meeting Mrs. Messam refers but this seems to recognize a settlement though not a **FULL** settlement.

There is no challenge to the Court's jurisdiction to hear the matter as part of its case management functions but, says Mr. Piper, in his submissions on behalf of the First Defendant, inasmuch as there is a conflict as to whether or not there is a settlement, the Court is not in a position, under the CPR 2002, at case management, to make a final determination on the matter. He has pointed me in the direction of the CPR Parts 25. 1(f) and 26.1(v), reminding me that these rules do not contemplate the kind of determination being sought here and, I believe, in the manner being adopted, that is, without oral evidence. Mr. George's reminder is as to the overriding objective of the Rules which is set out in Part 1 and the charge of the court thereunder to seek to give effect to the over-riding objective to deal with cases justly.

Part 26. 1(v) empowers the Court, after outlining its general powers, to "take any steps, give any other direction or make any other order for the purpose of managing the case and furthering the over-riding objective." This in my view is what the court is seeking to do here.

The Court is not "actively encouraging and assisting parties to settle the whole or part of their case on terms that are fair to each party" (Part 25.1(f), the parties here being the Claimant and the First Defendant. They entered into settlement negotiations independently of the court and arrived at their own terms. The affidavit and documentary evidence clearly point to that.

Mr. Piper accepts that the Court may look at 'Without Prejudice' communication for the purpose of determination whether or not a binding agreement has been reached but he says the question is whether in the circumstances of this case it is appropriate to embark upon such a determination of this given the evidence before the Court and Mr. Wong Ken adopts his submissions, on behalf of the Second and Third Defendants.

Mr. Piper further submitted that in circumstances where all of the evidence is in the form of documents then it may be possible on a perusal of such documents to conclude one way or the other as to whether or not there has been a binding agreement. He says that in this case there must be what amounts to oral evidence from the parties some of whom has not filed affidavits.

In my view, the Court is entitled to act on the material provided and need not any oral evidence. Other evidence may well be available and quite often the court is aware that this is so in proceedings before it. The parties usually decide what material is to be placed before the court in support of their claim. The question is whether what is

available to the court is sufficient for a determination of the matter and in this case I hold that it is. There is ample material before me to enable me to make a determination.

It is not at all unusual for there to arise circumstances that were not in the contemplation of Legislators and Framers of Procedural Rules and in situations where those uncontemplated circumstances arise the Courts must nevertheless consider them and deal with them fairly and justly.

At the conclusion of submissions on September 26, I expressed certain concerns about this matter as it relates to the Second and Third Defendants. I was motivated by considerations of the circumstances as revealed in the affidavits which indicated that there was every possibility of a settlement between the Claimant and the Second and Third Defendants. I had in mind the provisions of Part 25 1 (f) but, in effect, this is a separate consideration from those pertaining to the First Defendant. A consideration as to whether there is indeed a binding agreement between the Claimant and the First Defendant is independent of any consideration of the possibility of settlement involving the Second and Third Defendants.

It is in pursuance of that settlement agreement reached on July 11, 2003 that the cheque for $2,000,000.00 was paid to the Claimant with no reference to any good faith payment and no mention of the Second and the Third Defendants. It was in further pursuance of the said agreement that the second cheque was given to the Claimant under cover of a letter referring only to the First Defendant. The agreement reached was only as between the First Defendant and the Claimant. I accept that it was as a result of the agreed settlement with the First Defendant that Mr. Scott sought to change his status as

appearing for the three Defendants, anticipating a possible conflict of interest and indeed that explains Mr. Wong Ken's subsequent appearance in the matter.

I do not accept that the negotiations of July 11, 2003 included any discussions involving the Second and Third Defendants and the view expressed by Mr. George that it was after the agreement was reached and acted upon that the First Defendant sought to include them, is a reasonable inference to be drawn in al the circumstances. The fact that the Deed of Settlement was never executed does not in any way detract from the fact that a binding agreement was reached on July 11, 2003 with precise terms as referred to in the affidavits on both sides. Neither is it material that there are two draft agreements exhibited which have minor differences.

The overriding objective of the Civil Procedure Rules of 2002 demands that this settlement agreement be acknowledge by the Court. It would be unjust and unfair to the Claimant to do otherwise. He was entitled to act upon and agreement which was already partially performed by the First Defendant and indeed the Court has heard that in pursuance of the Seventeen Million Dollars ($17,000,000.00) advertising credit component of the agreement, he has already sold some Ten Million Dollars of the advertising time.

As indicated above, the First Defendants speak of the agreement in their affidavits and only seek to aver that it was not complete because they wish to have the Second and Third Defendants included. What in effect they were seeking to do was to reopen the settlement agreement but that did not take place.

Accordingly, I rule that there is a binding agreement between the Claimant and the First Defendant in settlement of the Claim against the First Defendant only, in the

terms already outlined in this judgment. The matter will therefore proceed against the Second and Third Defendants and, in the event that the Claimant is able to effect substituted service in accordance with the Order of the Court made on September 22, 2003, against the Fourth and Firth Defendants. The Case Management Conference is adjourned for a date to be set by the Registrar, making allowance for the time limited to the Fourth and Firth Defendants to enter an Appearance.

The Formal Order herein is to be filed by the Claimant's Attorneys-at-Law and costs are in the claim.