Privy Council Appeal No 43 of 2005

Western Broadcasting Services		*Appellant*
	v.	
Edward Seaga		*Respondent*

FROM

THE COURT OF APPEAL OF JAMAICA

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

Delivered the 29th March 2007

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Present at the hearing:-

Lord Bingham of Cornhill
Lord Rodger of Earlsferry
Baroness Hale of Richmond
Lord Carswell
Lord Brown of Eaton-under-Heywood

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*[Delivered by **Lord Carswell**]*

1. The respondent Edward Seaga, a former Prime Minister of Jamaica and then Leader of the Opposition, commenced proceedings on 26 November 1999 against five defendants in respect of the content of a radio programme known as the Breakfast Club broadcast on 3, 6 and 14 September 1999. The first named defendant is the present appellant Western Broadcasting Services Ltd, a broadcasting company which transmitted the programme from its radio station Hot 102 FM. The second defendant is The Breakfast Club Ltd, which was sued as the

[2007] UKPC 19

company making the programme. The third named defendant Anthony Abrahams is sued as the host of the programme broadcast on the dates mentioned. The fourth defendant, an American journalist Laurie Gunst, is sued for publishing statements alleged to have been defamatory on the programme on 3 September 1999 and the fifth defendant Jeff Stein, also an American journalist, is sued for publishing defamatory statements on the programme on 6 September. It is also claimed in the statement of claim that the third defendant Mr Abrahams made further defamatory remarks of and concerning the respondent in a Breakfast Club programme on 14 September 1999. The writ of summons and statement of claim, both filed on 26 November 1999, claim damages against all five defendants.

2. The first, second and third defendants filed a defence on 10 January 2000 and the respondent filed a reply on 7 March 2000. The fourth and fifth defendants, who were not resident or present in Jamaica, were not served with the proceedings. On 18 June 2003 the Jamaican Supreme Court ordered that substituted service of a concurrent writ of summons could be effected upon those defendants by advertisement in the United States in the newspapers specified.

3. The respondent subsequently brought an application to the court to vary the terms of the order for substituted service by permitting service on named publishers, because of the considerable expense of advertising. The application was to be heard at a case management conference to be held on 22 September 2003, with an estimated length of hearing of 15 minutes.

4. At the hearing on 22 September, held before McIntosh J, the requested variation of the order for substituted service was made. The attorney acting for the respondent, Mr Emil George QC, then informed the judge that a settlement had been reached between the respondent and the present appellant Western Broadcasting Services Ltd. He invited the judge to permit Mr Abraham Dabdoub, the attorney who had earlier represented the respondent, to give the court information about the settlement, although counsel for the appellant objected on the ground that she was instructed that negotiations were not complete. Mr Dabdoub addressed the judge about the negotiations which had taken place at a meeting held on 11 July 2003 at the respondent's office. After hearing him for some time the judge adjourned the matter to a further hearing on 26 September 2003 at 2 pm, indicating that affidavits verifying or disputing the representations made were required and should be filed by 26 September.

5. When the matter came back before McIntosh J on 26 September affidavits had been filed on each side, sworn by Mr Dabdoub and Mr Raymond Clough on behalf of the respondent, and Mr Neville Blythe and Ms Andrea Messam on behalf

of the appellant. The judge decided that she would determine the matter on the content of the affidavits without receiving oral evidence, although counsel for the appellant had submitted that it was required. She proceeded to hear argument on the ambit of her case management powers and the suitability of the procedure and on the issue of the finality of the settlement negotiations. Her note of the hearing does not contain any reference to any application to cross-examine the deponents on the content of the affidavits and it is not entirely clear whether such an application was made or considered by the judge or whether she would have permitted cross-examination. It was claimed, however, in the appellant's printed case (para 18) that no opportunity was afforded for cross-examination. At the conclusion of the hearing she reserved her decision and gave it in a written judgment on 30 September 2003.

6. In the course of her judgment the judge held that she could decide the matter in a case management conference under the terms of the Civil Procedure Rules. She went on to express her opinion that there was ample material before her on which to make a determination; that the court was entitled to act on the material provided and need not have any oral evidence. She considered the terms of the affidavits and held that a binding agreement had been reached between the appellant and the respondent at the meeting of 11 July 2003. She made a declaration to that effect, but without ordering any stay or dismissal of the proceedings as between the respondent and the appellant.

7. The Court of Appeal (Forte P, Smith JA and Harrison JA (Ag)) on 20 December 2004 dismissed the appellant's appeal, upholding the judge's decision on all grounds, holding that the settlement between the appellant and the respondent was valid and binding.

8. In order to consider the correctness of these decisions, their Lordships must examine the negotiations between the parties, as deposed to in the affidavits considered by the judge and the Court of Appeal. At the respondent's request a meeting was arranged on 11 July 2003 at the respondent's offices for the purpose of attempting to negotiate a settlement of the action. Those present were the respondent, his attorneys Messrs Dabdoub and Clough, Mr Blythe, chairman of the appellant company, Ms Messam, then its general manager, and Mr Walter Scott, attorney on record for the first three named defendants. Mr Dabdoub deposed that the meeting was to be concerned solely with the liability of the appellant to the respondent, whereas Mr Blythe and Ms Messam averred that it was their intention all along that any settlement would include the second and third defendants, since the appellant was contractually bound to indemnify them.

9. At the meeting a discussion took place between the lawyers, then further negotiation directly between the respondent and Mr Blythe. According to Mr Dabdoub and Mr Clough, certain terms were agreed between them, as follows:

> "(a) That the 1st 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 decide on the number of times the apology would be published on each medium.
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> (b) The 1st Defendant agreed that it would pay an amount of Twenty Million Dollars ($ 20,000,000.00) plus Attorneys-at-Law Costs to Dunn Cox to be agreed between the Attorneys-at law.
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> (c) An amount of Three Million Dollars (S 3,000,000.00) would be payable cash and the balance of Seventeen Million Dollars ($17,000,000.00) would be paid by way of the 1st Defendant and CVM Television Limited providing the Claimant with Volume Discount Advertising credit on both Hot 102 Radio Station and CVM-TV which advertising credit the Claimant could sell for cash to any third party.
>
> (d) Mr. Neville Blythe at that meeting stated that United General Insurance Company Limited would purchase Five Million ($5,000,000.00) of this advertising credit from the Claimant.
>
> (e) That the settlement related solely in respect to the liability of the 1st Defendant and it was expressly understood and agreed between the Claimant *(sic)* that the offer of apology and amends was not made in respect of any of the other Defendants, namely Breakfast Club Limited, Anthony Abrahams, Laurie Gunst and Jeff Stein."

It was not disputed by Mr Blythe or Ms Messam that agreement was reached on terms (a), (b) and (c), but Mr Blythe denied that he gave the undertaking contained in paragraph (d). Moreover, they both dispute that any settlement was or could be reached which determined the liability of the appellant without including the second and third defendants. It is apparent from the terms of the affidavits sworn by Messrs Dabdoub and Clough that they considered the negotiations to be complete at the end of the meeting, though it may have been envisaged that the

terms would be incorporated in a formal written agreement. Ms Messam averred, on the other hand, that it was her understanding that the parties were to meet again "to work out the details with respect to the payment of $3,000,000 to the Claimant, the terms of the letter of apology and the details regarding the placing of the advertisements."

10. Under cover of a letter of 18 July 2003 on Western Broadcasting Services Ltd paper, Ms Messam sent to the respondent a cheque for $2,000,000, which the letter stated represented "an on account payment of the Three Million dollars ($3,000,000) cash settlement as per our negotiated agreement on Friday July 11, 2003." The letter was headed "WITHOUT PREJUDICE", which she said in her affidavit was because it was her understanding that the negotiations were to continue. Mr Blythe deposed that he made this payment on the request of the respondent's representatives as a "good faith advance", as the respondent was experiencing financial difficulties at the time. He stated that he understood that the respondent's representatives urged that the payment should be made "as there was an imminent settlement which was likely to be finalised." Mr Blythe said that he instructed Ms Messam to arrange for the payment, having regard to the amicable spirit in which the discussions had been conducted and relying on the trust which he had in the respondent. He further stated that the respondent himself later telephoned him and for "personal reasons" requested payment of the balance of $1,000,000. Mr Blythe said that he gave him a cheque for this amount at a meeting on 29 August 2003.

11. On 5 August 2003 Mr Dabdoub forwarded to Mr Scott by e-mail a draft deed of settlement for approval. He stated in the e-mail:

> "I have asked Raymond [Clough] to draft the Notice of Discontinuance, the Deed of Release and Discharge and the apology which our client would find acceptable. We can then agree the number of publications of the apology."

The same day Mr Clough sent an e-mail to Mr Scott, attaching a draft of the deed of settlement and asking Mr Scott to let him have a draft apology and deed of discharge and release, while he would do a notice of discontinuance.

12. The third and fourth recitals of the draft deed read as follows:

> "AND WHEREAS Hot 102 and CVM-TV are desirous of Hot 102 making an offer of apology and amends in respect to the liability of Hot 102 on the basis that such apology and offer of amends on the

basis that such apology and amends *(sic)* is solely in respect to the liability of Hot 102 and arrived at on the basis of one-fifth the sum, exclusive of costs, the Claimant is prepared to accept from the Defendants jointly in settlement of the claim for damages for libel.

AND WHEREAS the Claimant is prepared to accept from Hot 102 an apology and amends in the terms set out herein and to discharge Hot 102 from all further liability on the understanding and agreement as follows:

(i) the said offer of apology and amends is not made in respect to any of the other Defendants, namely Breakfast Club Limited, Anthony Abrahams, Laurie Gunst and Jeff Stein but is made solely on behalf of Hot 102 in discharge of Hot 102's share and contribution to the damages for libel and is accepted by the Claimant on that basis and that basis only.

(ii) in consideration of the acceptance of Hot 102's offer of apology and amends and in consideration of the discharge of Hot 102 from all further liability in respect of the action and in further consideration of the mutual agreements and understandings contained herein CVM-TV guarantees the performance and due completion of this Deed of Settlement."

The draft provided for the payment of the sum of $3,000,000 and the advertising to the value of $17,000,000, as agreed on 11 July. It also contained a provision for the payment of legal fees in the sum of $600,000. An apology was to be broadcast on Hot 102 and on CVM-TV on the occasions and in the manner set out in the First Schedule. As is made clear by the e-mails, no draft of the apology was extant at the time when the draft deed was sent to Mr Scott. Completion of the agreement by performance of the various obligations was to be effected on or before 15 August 2003.

13. Mr Scott replied by e-mail on 7 August:

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

Later on the same day, however, he sent a further e-mail, stating that it seemed that he had misunderstood his client's instructions. The settlement had to include The Breakfast Club Ltd, since Western Broadcasting Services Ltd was contractually bound to indemnify it and in those circumstances wished to have one complete settlement. He passed on Mr Blythe's request for a meeting along with the Breakfast Club "to arrive at a full settlement."

14. At this point the versions given by Messrs Dabdoub and Clough and Mr Blythe in their respective affidavits diverge. Mr Dabdoub stated that when contacted by Mr Scott for a meeting to discuss a settlement with respect to The Breakfast Club Ltd, he said he was prepared to do so "on the very clear understanding that there already was a firm and binding agreement with respect to the 1st Defendant". A meeting took place on 28 August, at which Mr Clough states that "it was made clear that any settlement related solely in respect to the liability of the First Defendant not in respect to any of the other Defendants." Negotiations broke down when the attorney for The Breakfast Club Ltd stated that neither it nor Mr Anthony Abrahams would apologise. Mr Dabdoub further stated in paragraph 12 of his affidavit (though this averment is not contained in Mr Clough's affidavit):

> "At that meeting both Mr Scott and Mr Blythe gave an assurance that the agreement already arrived at with the 1st Defendant would be honoured."

Mr Blythe in his affidavit denied having given any such assurance.

15. Messrs Dabdoub and Clough went on to describe a meeting on 29 August 2003 at which progress was made in reaching agreement encompassing The Breakfast Club Ltd and Mr Abrahams, though a figure for their liability to the respondent remained to be agreed. Mr Blythe did not deal with this meeting in his affidavit. Attempts were made to hold further meetings to finalise these discussions, but none had taken place by the time the case management conference was held on 22 September 2003.

16. It was argued on behalf of the appellant in the Court of Appeal that it was outside the judge's powers under the case management provisions in CPR rule 26.1 to make the order of 26 September 2003, a submission which the court rejected. Mr Guthrie did not, however, rely upon that point either in his written case or in his oral argument before the Board. Their Lordships are content to proceed upon the assumption that the case management powers conferred upon the judge by CPR

rule 26.1(2)(v) are broad enough to justify her decision to determine the issue summarily when it came before her as a matter of case management.

17. The first matter on which Mr Guthrie joined issue was the way in which the judge purported to exercise her powers of case management. He submitted that in determining the point before her on affidavit evidence alone, where there were significant factual conflicts, and declining to hear oral evidence, she went outside the ambit of her authorised powers and was guilty of an abuse of those powers. He relied on the statement of Danckwerts LJ in a case of striking out a claim, *Wenlock v Moloney* [1965] 1 WLR 1238, 1244, approved by Lord Hope of Craighead in *Three Rivers District Council v Bank of England (No 3)* [2001] 2 All ER 513, 534:

> "... this summary jurisdiction of the court was never intended to be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the plaintiff really has a cause of action. To do that, is to usurp the position of the trial judge, and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power."

Counsel submitted that, given the divergence between the affidavit evidence filed on each side, it was unfair and prejudicial to the appellant for the judge to proceed to decide the matter on affidavit, while declining to receive oral evidence. That refusal does not appear to their Lordships to betoken a proper willingness to permit cross-examination of the deponents, and they are unable to agree with the view expressed by the Court of Appeal that there was "ample opportunity" for the attorneys to cross-examine. They accordingly accept the correctness of the appellant's submission that the procedure adopted was unfair and went outside the ambit of the judge's power of case management. Similarly, the Court of Appeal was wrong to uphold the judge's factual conclusion, given the unresolved conflicts of evidence. As the Board held in *Chin v Chin* [2001] UKPC 7, para 14, in the absence of cross-examination it was in no better position than the judge to assess the credibility of the respective deponents.

18. This conclusion would ordinarily lead the Board to remit the matter to the Supreme Court for it to determine the issue of the completeness of the settlement after sufficient ascertainment of the facts by oral evidence, cross-examination or any other step required to achieve a fair hearing of the issue. Counsel went further,

however, in his second submission, that if the judge had approached the case correctly, receiving any necessary oral evidence, it would not have been possible for her to conclude that a complete settlement had been reached. There are difficult issues which could only be resolved, if at all, by the reception of oral evidence, such as whether the settlement was to cover only the liability of the appellant and not that of the second and third defendants, and whether Mr Blythe had actual or apparent authority to agree a settlement on behalf of the appellant. Even if one assumes that these could be resolved in the respondent's favour after receipt of further evidence, there were still matters which remained to be decided. If this proposition is correct, it would lead to the conclusion that the declaration made by the judge should be set aside.

19. It is trite law that although parties may reach agreement on essential matters of principle, if important points are left unsettled their agreement will be incomplete: *Chitty on Contracts,* 29th ed (2004) para 2-110. In some cases it can properly be said that the parties have reached an enforceable agreement on part of the matters in issue, leaving the rest to be determined by further agreement or the process of litigation: see such cases as *Tomlin v Standard Telephones & Cables Ltd* [1969] 1 WLR 1378. The present case does not come into that category. In others the remaining details can be supplied by the operation of law or by invoking the standard of reasonableness.

20. Whether or not it might be possible to argue that some of the matters left outstanding in the agreement made on 11 July 2003 could be resolved in this way or by oral evidence, their Lordships consider that the content and publication of the apology remain incapable of resolution. Paragraph (a) of the agreed terms provided that the apology would be drafted by the respondent's lawyers and that "the Attorneys-at-Law" were to decide on the number of times the apology would be published on radio and television. This contains two lacunae which appear to their Lordships to be impossible to fill. It cannot possibly have been intended that the respondent's attorneys could propound any draft they might choose, however sweeping or abject, and require it to be accepted by the appellant. Secondly, it is unclear whether the number of times of publication was to be decided by the respondent's attorneys or by agreement between the attorneys for the respective parties. If the former, it could not have been intended to give the respondent's attorneys carte blanche over the number of publications; if the latter, it is an important matter remaining still to be agreed.

21. There may be cases in which the matter remaining to be negotiated is of such subsidiary importance as not to negative the intention of the parties to be bound by the more significant terms to which they have agreed: *Chitty, op cit,* para

2-127. Their Lordships do not consider that the present case could be so regarded. They are altogether unable to accept the view expressed by the Court of Appeal that the terms of the apology were "merely peripheral" and could not be considered an essential part of the agreement. In their opinion the content and publication of the apology in a case such as the present are crucial and failure to settle this essential term leaves the agreement incomplete for uncertainty.

22. Their Lordships will humbly advise Her Majesty that the appeal should be allowed, that the declaration made by McIntosh J in paragraph 1 of the order of 30 September 2003 be set aside and that the appellants should have their costs of the hearing before McIntosh J on 26 September 2003 and of the appeals to the Court of Appeal and the Privy Council.