COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law and Equity Side
2019/CLE/gen/FP/00224

BETWEEN
(1) MARVIN DAMES
(2) LATALIA DAMES
Plaintiff

AND
FIRST CARIBBEAN INTERNATIONAL BANK (Bahamas) Ltd

AND
INSURANCE MANAGEMENT (BAHAMAS) LTD
Defendants

BEFORE: The Honourable Justice Petra M. Hanna-Adderley

APPEARANCES: Mr. Beryn Duncanson for the Plaintiffs

Ms. Viola Major and Ms. Camille Cleare for the Second Defendants

HEARING DATES: November 17, 2020

RULING

Hanna-Adderley, J

Introduction

1. This is an application by way of a Summons filed by the Plaintiffs on August 24, 2020 whereby they seek a Declaration that the accord and settlement between themselves and the Second Defendant agreed by way of an exchange of correspondence, and notice given by Counsel for both parties to the Court on August 14, 2020, is an accord for the withdrawal by the Second Defendant from this action, and in the usual course of any lawsuit before the Court, any payments thereunder ought to be directed to the Plaintiffs' Counsel. Alternatively, the Plaintiffs seek a Declaration that the respective parties were not 'ad idem' on the question of settlement and as such no settlement was concluded; an order directing costs be payable by the Second Defendant to the Plaintiffs on a full indemnity basis in any event; and further relief and/or directions by the Court. The

Plaintiffs rely on the Second Affidavit of Beryn Duncanson filed August 24, 2020 in support of their application.

2. The Second Defendant opposes the Plaintiffs' application. Both parties made oral submissions.

Statement of Facts

3. The Plaintiffs filed a Specially Indorsed Writ of Summons on November 26, 2019 whereby they seek damages resulting from the Defendants alleged negligence and breach of contract following damages to their home during the passage of Hurricane Dorian in or around September, 2019. They claim that the First Defendant's failure to pay the premiums of the insurance policy over the subject property to the Second Defendant resulted in the Second Defendant cancelling their coverage and being unable to claim against the said policy, thus being unable to repair the subject property.
4. The parties appeared before this Court on August 14, 2020 for a series of applications filed on behalf of the First Defendant and the Plaintiffs. Prior to the hearing of these applications, Counsel for the Plaintiffs and the Second Defendant indicated to the Court that a settlement agreement had been reached between those parties. The said exchange given to the Court is below:-

"Mr. Duncanson: With that opportunity in hand,
the Plaintiffs and the Second Defendants have reached a
cord, we have reached terms. And I hope that my learned
friend I expect, Mrs. Major can confirm that to
your Ladyship.
Now—

The Court: Yes, so if that is the case and
Mrs. Major has just confirmed that, so the matter is
settled and she need not continue to appear in this
hearing, correct?

(Transcript dated August 14, 2020, page 1, lines 23-32)

Mr. Duncanson: Exactly so, my Lady. It's
settled in the sense that we expect that the formalities
of a closing should take place from hence. So the Court
will be getting a formal notice of withdrawal at that

time. But really for all intent and purposes, yes, it's resolved between the Plaintiffs and the Second Defendants.

Ms. Major: Thank you, my Lady.
As indicated by Mr. Duncanson, we will send something to the Court formally so the Court has it in writing, the discontinuance against the Second Defendant."

(Transcript dated August 14, 2020, page 2, lines 1-7; 22-26)

5. The Plaintiffs' evidence, in part, as found in the Second Affidavit of Beryn Duncanson is that Mr. Duncanson believed that the Plaintiffs and the Second Defendant had a settlement based on various telephone communications and written correspondence with Counsel for the Second Defendant. That Mrs. Viola Major, Counsel for the Second Defendant informed the Court on August 14, 2020 that the Plaintiffs and the Second Defendant had reached an accord. That the Plaintiffs' conditional acceptance as found in the email exhibited and dated August 12, 2020 was based on the Plaintiffs understanding that the settlement payment was to be made to Counsel for the Plaintiffs and not the bank as loss payee under a non-existing insurance policy as claimed by Mr. Duncanson.
6. An exchange of e-mails between the parties indicate the various terms and conditions relative to the settlement negotiations. In an e-mail dated July 14, 2020 from Mrs. Major to Mr. Duncanson, Mrs. Major states that the Second Defendant was not willing to increase the previous offer made by the adjuster, Sam Hooper to "se le" the claim for damage under the policy for the sum of $50,755.86. She further states that the terms of the offer are amended and that the current offer was as follows: "Making no admission as to liability, our client is willing to se le both the claim for damage under the policy, as well as the claims under the captioned Supreme Court Action for the previously offered sum of $50,755.86, with each party bearing their own legal costs." Mr. Duncanson responds to Mrs. Major's e-mail on July 22, 2020 and states that his clients were minded to accept the Second Defendant's offer of July 14, 2020 save that "In all the circumstances therefore we counter-offer a basic amount of a little less than your own, a flat **$50,000** **($755.86**

less than your own offer, and entirely without prejudice to my clients' claim their hurricane damages alone are virtually double the total) for your client's contribution to our clients' loss, in total release of your client alone (Insurance Management), **<u>SAVE Legal Costs to be Taxed if not agreed at a flat $25,000 (a discounted third portion of current legal costs)</u>**. These legal costs of $25,000 as a contribution from your client are offered to be accepted 'as is' to be included in the Release, or by substitution the term/words "costs to be taxed if not agreed", and therefore subject to a future taxation (which might be considerably higher)....For the avoidance of doubt the settlement contemplated hereby is meant to release your client Insurance Management the 2nd Defendant alone, and not FCIB the 1st Defendant."

7. In an e-mail response on July 27, 2020 Mrs. Major advises Mr. Duncanson that after a review of his counter-offer (e-mail of July 22, 2020) they do not agree the sum of $25,000 requested as costs as his representation that the sum of $25,000 is a "discounted third portion of current legal costs" suggests his total costs to date was $75,000. She states that the Plaintiffs should have sought to withdraw the action against the Second Defendant as early as November 27, 2019 when the adjuster, Sam Hooper reached out with a view to honour their claim under the policy. Mrs. Major further advises that the Second Defendant has considered the steps taken in the action to date which included the filing of the summary judgement and strike out applications and offered the sum of $8,000.00 towards the Plaintiffs costs to resolve the matter amicably. Additionally, in an e-mail dated July 28, 2020 to Mr. Duncanson, Mrs. Major states that the without prejudice offer made by the Second Defendant relates to the claim to insurers made under the policy as well as the Supreme Court action against the insurers and indicates that should the Plaintiffs agree to the proposed terms they require that the action be withdrawn against the Second Defendant.
8. In an e-mail dated August 12, 2020 from Mr. Duncanson to Mrs. Major, Mr. Duncanson advises that his e-mail serves as open acceptance of the terms of their last exchanges of offers and counter-offer and in particular he states:-

   "For the avoidance of doubt:-

    1. the sum of $50,000 payable by your client Insurance Management, is without admission of any kind by either them or the Plaintiffs as to the true value of the Plaintiffs' claim, either as to extent of hurricane damages side or the

separate common law damages consequent to a negligence claim (vs limitation under a breach of an extant insurance contract);

2. the sum of $8,000 costs contribution payable by your client IM is accepted as a nominal contribution to the overall actual true legal costs, no inference as to pro-rata or other percentage of contribution thereby being made.

In all the circumstances kindly confirm you will now prepare forthwith draft Release documentation for my review and will also confirm to the judge that we have an accord."

9. In response to Mr. Duncanson's acceptance, Mrs. Major by e-mail dated August 14, 2020 advises that the Plaintiffs' position "is noted" and the Second Defendant will draft the Deed and advise the Judge that the parties have reached an accord at the subsequent hearing.

10. However, in an e-mail dated August 21, 2020 from Mr. Duncanson to Mrs. Major he advises, in part, that the total sum of $58,000.00 paid by the Second Defendant should be payable to the Plaintiffs in care of their attorney and not to the bank as loss payee and that the settlement is not to be implicit evidence by either party of any payment being made under any policy. He requests confirmation of this arrangement by Mrs. Major and if not, they were not 'ad idem' on the accord. In response to his e-mail, Mrs. Major states on August 21, 2020, in part, that the Plaintiffs and the Second Defendant agreed to settle both the claim made under the policy and the Supreme Court Action for the global sum of $58,000.00. She further states that as the First Defendant is named on the policy, it is the responsibility of the Second Defendant to include the First Defendant in the settlement payment unless the First Defendant releases their interest and such a payment by cheque being made payable to both the Plaintiffs and the First Defendant is the norm by Insurers. Mrs. Major ends her e-mail advising that if they are not on one accord, they will be constrained to resume their Defence in the action.

Submissions

11. Mr. Duncanson submits, in part, that the e-mail correspondence between himself and Mrs. Major prior to the hearing on August 14, 2020 shows offer and acceptance of an accord, i.e. a settlement. However, he submits that the stage at which the settlement agreement was agreed upon was in the context of a lawsuit which would remove the Second Defendant from the litigation and not a settlement agreement in the context of an insurance settlement. It is his submission that the payment of the monies under the

settlement agreement pursuant to the litigation should be paid directly to him and not paid to the First Defendant as the Second Defendant proposes and submits that there is a difference between an insurance settlement and a litigation settlement. Mr. Duncanson also submits that there was never any acceptance in his e-mails that the $50,000.00 representing the insurance claim and the $8,000.00 representing legal costs was a payment under the insurance policy. It is his submission that the position of the Plaintiffs is that they have a binding settlement and the issue is the way in which the payment is to be made.

12. Mr. Duncanson submits, in part, in the alternative that if the Court does not accept that the intention of the parties as at August 14, 2020 was to agree to a binding settlement whereby payment would be made directly to the Plaintiffs from the Second Defendant in the Supreme Court action, thereby withdrawing the lawsuit against the Second Defendant, then the parties were not 'ad idem' and there is no settlement.
13. Mrs. Major in response submits in part that the correspondence between the Plaintiffs and the Second Defendant shows that the parties are not of one accord, in particular they were not 'ad idem' as it relates to the terms of the payout. She submits that while the parties had agreed a number, i.e. $50,000.00 representing the claim for damage under the policy and $8,000.00 representing the Plaintiffs legal costs, the details of how it was to be paid out was not agreed. It is her submission that the correspondence between the parties also do not show where these terms relating to payout were agreed. Mrs. Major submits that the correspondence shows that the Second Defendant's offer of the sum of $50,000.00 and $8,000.00 was to settle the claim under the policy (i.e. the damage) and the Supreme Court action. She submits that it was only after the hearing on August 14, 2020 that a dispute as to the terms of the agreement was made known to her by Mr. Duncanson in his e-mail dated August 21, 2020. Therefore, it is her submission for these reasons that the parties were not 'ad idem' as it relates to the settlement agreement previously indicated to the Court.

Issues

14. The issue to be determined before the Court on this application is whether the parties are of one accord or have reached a settlement agreement.

Analysis and Conclusions

15. The submissions advanced by both Counsel in this matter, as I understand them, ultimately ask the Court to declare that the parties as at August 14, 2020 were not "ad idem" and that the action was not settled as against the Second Defendant. The Court's decision can only be made upon a close examination of the exchange of correspondence between the parties and the Court's findings of fact thereon.
16. As I understand the Plaintiffs' submissions and the crux of the instant action, Mr. Duncanson has maintained that the insurance policy which the Second Defendant sought to settle the claim under is a fake policy and as such, he submits that the Second Defendant cannot settle something that does not exist. More so, as I understand Mr. Duncanson, his contention is that such settlement arises from the Supreme Court action only and he submits that the usual course of such settlement would require the monies to be paid directly to him and not paid to the First Defendant and the Plaintiffs as loss payees to the insurance policy. Alternatively, if the Court does not accept that the payments under the settlement were to be paid directly to him then the parties were not 'ad idem' on the question of settlement and therefore no settlement was concluded. Mrs. Major has submitted that the Second Defendant has always maintained that the offer for settlement between the parties was an offer under the policy of insurance and to settle the Supreme Court action as against the Second Defendant.
17. Considering the totality of the e-mail correspondence exhibited to Mr. Duncanson's Second Affidavit I find that the Second Defendant offered to pay $50,000.00 for damages to settle the claim and $8,000.00 for costs. I accept and find that Mr. Duncanson's acceptance of this offer was predicated on a number of terms and conditions, chief of which was that the payments under the settlement were to be made directly to him (see emails of August 12 and August 21, 2020). It is evident from the correspondence and I so find that the Second Defendant had predicated its offer on the basis that the settlement was under the policy of insurance and the Supreme Court action and that the payment of a global sum of $58,000.00 would be made to the First Defendant in the joint names of the Plaintiffs and the First Defendant (see emails of July 14 and August 21, 2020).
18. Therefore, having reviewed the totality of the exchange of correspondence, particularly on July 14, August 12 and August 21, 2020, I find that the parties were not 'ad idem' when they appeared before the Court on August 14, 2020 nor were they subsequently and as such no settlement or accord has been reached.

Costs

19. The parties addressed the Court on the issue of costs as the Plaintiffs seek an Order directing that costs be payable by the Second Defendant to the Plaintiffs on a full indemnity basis.
20. Mrs. Major submits that the Plaintiffs seeking an order for the costs of this application on an indemnity basis should not be granted if the Court finds that the parties were not 'ad idem' and had no settlement the Plaintiffs' Summons fails. She further submits that the Plaintiffs could not succeed on their alternative declaration as the Court making such a finding (i.e. that the parties were not 'ad idem') is the natural and logical conclusion of the Court not granting the first declaration sought by the Plaintiffs. It is her submission that costs should be awarded to the Second Defendant as it has had to defend the Plaintiffs Summons. Additionally, Mrs. Major submits that even if an order for costs is made it should not be on an indemnity basis as this type of order is for situations where there has been contempt of court or there has been some egregious behaviour on the part of one of the parties. She submits that has not been the case during the course of this litigation and that both parties have attempted to negotiate in good faith.
21. In response to Mrs. Major, Mr. Duncanson submits that the Plaintiffs seeking an order for costs on an indemnity basis is grounded in the Second Defendant's failure to request of the Court any directions regarding the mode of payment of the settlement proceeds. He submits that the Second Defendant's failure to do so caused the additional costs, frustration and aggravation to the Plaintiffs and that their actions were borne out of malice. It is his submission that the need for this application could have been avoided.
22. Mrs. Major, in response submits that the Plaintiffs Summons for declaratory relief was filed on August 24, 2020, therefore there was no need to come to the Court seeking directions as the issue of whether the parties were 'ad idem' would be dealt with by that Summons. Moreover, she submits that if the Court made a determination that the parties were not 'ad idem' and there was no settlement, there would be no need for directions and the matter would proceed in the usual course of litigation.
23. It is accepted that costs are in the discretion of the court. However, the general rule is that costs follows the event and when considering whether to order costs on an indemnity basis the Court has to take into consideration all the circumstances of the case. **Bartlett v Barclays Bank Trust Co. Ltd. (No. 2)** 1980 Ch 515 at 547.

24. Upon considering an application for costs to be awarded on a full indemnity basis Mr. Justice Rattee in **Atlantic Bar & Grill Limited v Posthouse Hotels Ltd** [2000] C.P. Rep. 32 adopted the following observations of Knox J in **Bowen-Jones v Bowen-Jones** [1986] 3 All ER 163:

> **"The circumstances in which an order for indemnity costs can be made, while an open ended discretion so far as the rules are concerned, is obviously one which must be exercised on judicial discretion."**

Having then cited various authorities, His Lordship went on to say:

> **'In summary, the position appears to be that, where there are circumstances of a party behaving in litigation in a way which can be properly categorized as disgraceful, or deserving of moral condemnation, in such cases an order for indemnity costs may be appropriate.'**

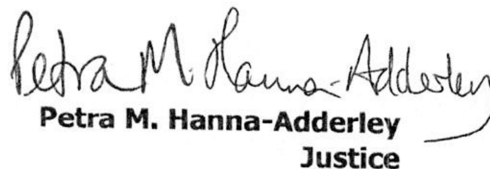
Newman J went on to say:

> **"There may be cases otherwise, falling short of such behavior in which the Court considers it appropriate to order indemnity costs. The threshold of qualification which a party would appear to have to establish is that there has been, on the party to be impugned by such an order, some conduct which can be properly categorized as unreasonable, and I would add to that in a way which the Court is satisfied constitutes unreasonable of such a high degree that it can be categorized as exceptional. There are varying ways in which the course of litigation, parties to it could be categorized as having behaved unreasonable, but one would not, simply as a result of that, decide that they should pay costs on an indemnity basis."**

25. I do not accept that the Second Defendant acted unreasonably or out of malice in defending its position. Nor has its behaviour, its conduct, been contemptuous or egregious in any way. The Second Defendant has defended its position in the normal course of a ligation. If I was minded to make a costs order in favour of the Plaintiffs such an order on

an indemnity basis would not be warranted. However, having accepted that there was no accord or settlement agreement between the parties for their respective reasons ultimately advanced before the Court by the Parties, costs are ordered to be in the case.

Dated: the 14th day of April, A. D. 2021



Petra M. Hanna-Adderley
Justice