IN THE SUPREME COURT 0F JUDICATURE OF JAMAICA

CLAIM NO 2011 CD 00075

BETWEEN	**WILLIAM CLARKE**	**CLAIMANT**
AND	**THE BANK OF NOVA SCOTIA JAMAICA LIMITED**	**DEFENDANT**

Mrs Georgia Gibson-Henlin instructed by Henlin Gibson Henlin for the Claimant

Mr Michael Hylton QC and Miss Tamara Dickens instructed by Michael Hylton & Associates for the Defendant

Heard: January 9, 11, 12 and 27, 2012

JURISDICTION – WHETHER PARTIES SHOULD RETURN TO ARBITRATION – WHETHER ISSUE CONNECTED TO MATTERS SETTLED AT ARBITRATION OR WHETHER INDEPENDENT BANKER – CUSTOMER CONTRACT EXISTS

Sinclair-Haynes J

[1] This claim is for the sum of forty-one thousand one hundred and eighty-one pounds and six pence (£41,181.06), which represents monies deposited in an account at the Bank of Nova Scotia Jamaica Ltd. by William Clarke, the claimant, former president and chief executive of the defendant. This seemingly simple claim has its genesis in a long and acrimonious battle between hitherto 'wedded' parties. Needless to say, the claim is stridently resisted by the defendant.

The Claim

[2] The claimant claims that the monies were for the special purpose of purchasing a BMW which purpose was frustrated by his early retirement and therefore the defendant now holds the said monies on trust for the claimant. The trust has

failed; therefore the claimant is entitled to return of the said monies. The claimant claims:

> An order for payment of the sum of £41,181.06.
>
> Alternatively, damages for breach of contract.
>
> Interest on the said sum at 1% above the Commercial Bank's Prime lending rate at date of payment.

The claim is met with stout resistance from the defendant who is urging the court to find that it has no jurisdiction to hear the matter.

The Background

[3] Whilst the claimant was the president and chief executive officer of the defendant, the defendant purchased a 7 series BMW vehicle valued at two hundred and sixty thousand, eighty-eight hundred and six pence (£260,088.06) for the claimant. The claimant was entitled to a 5 series BMW and not a 7 series. An arrangement was entered into by the parties whereby the claimant was to deposit the difference in purchase price of the vehicles in an account with the defendant. This was in exchange for the option to purchase the 7 series at market value.

[4] At the expiration of four years, the claimant was entitled to exercise the option to purchase. Upon the exercise of the option to purchase, the sums deposited by the claimant would be deducted from the purchase price. It was an implied term of the contract that the defendant would pay the monies to the claimant or otherwise as directed if the option was not exercised as agreed.

[5] The claimant duly opened an account, made payments pursuant to the said arrangement. The arrangement came to a sudden and unforeseen end when the claimant's employment with the defendant was truncated by forced early retirement. The claimant ceased making payments towards the said vehicle in December 2007. Payments were due to end in 2010.

[6] On October 6, 2011, the claimant's attorney demanded, on behalf of the claimant, the return of the said £41,181.06. The defendant responded on October 10, 2011 and requested until October 12, 2011 to 'address the issue.'

The Defendant's Claim

[7] The defendant, in response to the claimant's claim has urged the court, *inter alia*:

to declare that it has no jurisdiction to try the claim;

to strike out the claim form.

[8] It is the evidence of Mrs Shaun Lawson-Laing, the defendant's legal Counsel, that at the request of the claimant, the matter was dealt with at arbitration. The claimant filed a Statement of Case which contained a claim in relation to the said car. A settlement was arrived at between the parties on June 7, 2011. The matter relating to the motor vehicle was among the matters which were settled. It was a term of the Settlement Agreement that disputes arising out of the Settlement Agreement were to be determined by Mr Graeme Mew who is the named Arbitrator of the London Court of International Arbitration (LCIA).

Claimant's Evidence

[9 The claimant avers that before LICA "the sole matter in dispute was agreed between the parties as being 'what is a fair and equitable retirement plan for the claimant having regard to all the circumstances.' The disputed question was certified by the defendant's board and confirmed by the Court of Appeal. The parties signed an agreement to go to Arbitration on those terms. He avers that the statement contained in paragraph (v) of his Statement of Case which was filed in support of his claim at Arbitration is irrelevant.

[10] He further avers that this claim does not arise either directly or indirectly out of the contract of March 26, 2010. This claim is entirely different. It arises out of a banker-customer contract which was made in this jurisdiction. Consequently, he

is entitled to terminate the relationship having made the demand on the bank. The defendant has breached the contract by failing to honour the demand.

Confidentiality

[11] Mr Marc Jones, an attorney-at-law with the firm of the claimant's attorney, by way of affidavit, objected to the inclusion in the affidavit of Shaun Lawson–Laing, of extracts of the claimant's statement of case filed in the Arbitration. He complained that it was in breach of the Arbitration agreement on confidentiality. He avers that by Rule 30, all materials and awards in the proceeding which were created for the purpose of the Arbitration were to be kept confidential. He also avers that the defendant is not entitled to rely on any document filed in the arbitration in this application as confidentiality is not limited to the Settlement Agreement.

[12] Clause 10 of the Settlement Agreement provides:

> *"All the provisions of this settlement shall be held in strict confidence by the respondent and the claimant. The respondent may advise its directors and senior management. No statement shall be made to the public other than as required by law."*

The claimant also signed the following Release and Discharge:

> *"The releaser undertakes and agrees that the terms of this settlement shall be kept confidential by the releaser and shall not be disclosed to any third party, other than to the releaser's legal advisors or as may be required by law without the express written permission of the bank".*

[13] Article 30 of the LCIA Arbitration Rules states*:*

> *"Unless the parties expressly agree in writing to the contrary, the parties undertake as a general principle to keep confidential all awards in their arbitration, together with all materials, in the proceedings created for the purpose of arbitration and all other documents produced by another party in the proceedings not otherwise in the public domain – save and to the extent that disclosure may be required of a party by legal duty, to protect or pursue a legal right or to enforce or challenge an award in bona*

fide legal proceedings before a state court or other judicial authority. "

[14] An attempt was made by the court to effect a rapprochement. In pursuance of this attempt, the parties spoke. However, their discussions failed to fructify. Although the court expressed the view that on the facts disclosed, this court was not the proper forum to hear the matter, it felt that if the Settlement Agreement stated unequivocally that the claimant was entitled to the car without any cost to him, then this court could properly hear the matter. That portion of the agreement was required by the court as it needed to have sight of the portions of the said agreement which dealt with the BMW motor car in order to determine whether indeed the agreement in relation to the said car was so worded. In the circumstances, the court felt that there would be no breach of the confidentiality clause as provision is made for disclosure to a court to protect a legal right. The court would then be informed as to the terms of the agreement and would be able to determine whether it needed to protect the claimant's legal right to the said sum.

[15] Consequently, and in an effort to obviate further cost to the parties if the matter could be resolved by this court, and in an effort to save the court's time, the court enquired whether the court could view the aforesaid clauses. Mr Hylton was charged with the responsibility of obtaining permission from the defendant to make the said clauses available to the court. His client refused. The court contemplated the issue of a subpoena. Mr Hylton indicated that it would be stoutly resisted by appeal. The court then asked Mrs Gibson-Henlin if she would provide the court with the relevant portion of the document. She trenchantly resisted and asserted that it was the responsibility of the defendant to do so. She too stated that any subpoena would be the subject of an appeal. According to her, it is the defendant's responsibility to disclose.

[16] In **Ford v Clarkson's Holidays Ltd** [1971] 1 [WLR] 1412, at para 1416 CD Davis, L.J. (as he then was) said:

> *"Once a party moving for a stay has shown that the dispute is within a valid and subsisting arbitration clause the burden of showing cause why effect should not be given to the agreement to submit is on the party opposing the application to stay."*

The onus is therefore clearly on Mrs Gibson-Henlin to disclose the relevant portions since she asserts that the Arbitration agreement is not applicable to the claim.

[17] In as much as the Settlement Agreement, the Release and Discharge and the LCIA authorize the court to scrutinize the said portions of the agreement, the court is of the view that in the circumstances it would be a colossal waste of the court's time to issue a subpoena. 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.

[18] The court must always be mindful of the overriding objective. In such ossified circumstances, allowing these parties to utilize valuable and limited court time bearing in mind the need of the Court to allot its resources to other cases, is the antithesis of the overriding objective. Therefore the court will determine the matter based on the material before it.

Should the Court decline to hear the Claim

[19] Mr Michael Hylton QC submits that the Settlement Agreement stipulates the appropriate forum for resolving any issue arising between the bank and Mr Clarke which concern matters dealt with under the Settlement Agreement. He relies on Clause 11 of the Settlement Agreement.

[20] Mrs Gibson-Henlin contends that there is no connection between the instant matter and the matters which were settled at Arbitration. The only issue to be determined is the banker-customer contract between the claimant and the defendant. It is her submission that only one disputed question concerned the Arbitration. Further, the matters referred to as the Facebook claim did not arise from the banker-client relationship.

Decision

[21] Paragraph 6.2.1(v) of the claimant's statement of claim dated March 15, 2011 which was filed supporting his claim at Arbitration stated:

> "*The claimant was provided with a 2007 BMW 750 motor car (088888894EX) by the respondent. This was 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."*
>
> *There is also the 2008 Audi Q7 motor car (9441FH). This is provided to the claimant as a part of the security arrangements to address the aforesaid concerns as to his personal safety.*
>
> *Both cars were maintained at the expense of the respondent and this would have continued but for the claimant's early retirement.*

[22] In the summary of his statement of case he stated:

> (ii) *Transfer ownership of the 2007 BMW 750 motor vehicle (0894EX) that was assigned to the claimant free of all encumbrance, without the claimant being required to make any payments in respects 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 $3,524,275.11 with respect to the purchase price of this 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 was 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."*

[23] From that statement it is apparent that an issue which was presented to LICA by the claimant for its determination was whether the said BMW should have been transferred to him at no cost to him. On the material before me, whether the claimant is entitled to the return of the £41,181.06 is a matter that relates to his request for Arbitration in his statement of case.

[24] By virtue of the Settlement Agreement, Mr Clarke agreed that any dispute which arose whether directly or indirectly relating to the request for Arbitration and Statement of Case filed, were settled. Further, the claimant executed a release and discharge. The preamble of the **Settlement Agreement** is revealing. It reads:

> "*It is hereby agreed between William Clarke (the claimant) and the Bank of Nova Scotia Jamaica Ltd., (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 Jamaica, Claim No. 2008 HCV 6042, and all matters relating directly or indirectly to the Jamaica 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 comments in the Supreme Court of Jamaica (Civil Division) Claim No. 2010 HCV 00336 collectively referred to herein as the Facebook claim are settled on the following basis."*
>
> *The claimant shall execute the release and discharge attached hereto in favour of the BNS and all its heirs, executives, predecessors, successors, affiliates, subsidiaries, officers, directors, employees, servants, agents, and assigns.*

[25] The wording of the preamble is clear. Indubitably, the issue whether the BMW should be transferred to him without cost was an issue raised in his statement of case and *prima facie* was settled. The claimant also was a signatory to a Release and Discharge by which he agreed to release the defendant from all matters which relate directly or indirectly to his request for arbitration and his said Statement of Case. The wording of the clause is clear and unambiguous. It reads:

> *"In consideration of the terms set out in the Minutes of Settlement dated June 7, 2011, the sufficiency of which is hereby acknowledged William Clarke (hereinafter referred to as the releaser) and his heirs, executors, predecessors, successors, assigns and agents do hereby remise, release and*

forever discharge BNS, its heirs, executors, predecessors, successors, affiliates (including but not limited to BNS Ja.), 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, conveyance, contracts, claims and demands whatsoever which against the bank the releaser 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 22, 2010 and statement of case filed on or about March 15, 2011 by the releaser 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 Jamaica 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 HCV00336.

And FOR THE SAID CONSIDERATION THE RELEASOR agrees not to make any claims or demands, or commence, maintain or prosecute any action, cause or proceedings 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 pleaded as such." 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 considerations offered for the purpose of making full and final compromise and settlement of all claims as noted above."

[26] Mrs Gibson-Henlin's reliance on the recital to the Agreement to arbitrate as support for her contention that there was only one disputed question in the arbitration lacks tenability. Article 1 of the recital to the Settlement Agreement states:

"*The matter in dispute which is hereby submitted to arbitration (herein referred to as the "Dispute") is as follows:*

What is a fair and equitable retirement plan for the Claimant having regard to all the circumstances?"

[27] In determining what was fair and equitable a number of matters were put before LICA. The matter of the BMW was but one. The recital merely encapsulated the essence of the case before it while the Summary of the Statement of Case enumerated the claim.

Whether this Court has Jurisdiction

[28] Pursuant to clause 11 of the **Settlement Agreement,** disputes which concerned the interpretation or implementation of the agreement were to be determined by Mr Graeme Mew of LICA. The interpretation ascribed to Clause 11 in the context of the matter by Mrs Gibson-Henlin is so disparate from what the Court views as the clear meaning of the provision that it is necessary to quote it. It provides:

"*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."*

In the matter of **Douglas Wright T/A Douglas Wright Associates v The Bank of Nova Scotia Jamaica Limited,** (1994) 31 JLR 351 Orr J examined the authorities in the matter.

At page 358 he said:

"The *authorities reveal that the basic stance of the court 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 271:"*

"… a bargain is a bargain, and the parties ought to abide by it, unless a clear reason appears for not doing so…"

[29] A dispute regarding the ownership of the monies which was deposited towards the purchase of the BMW has arisen. The question whether the said BMW was to be transferred to the claimant without cost to him was placed before the Arbitrator at 6.4 (ii) and (iii) of the Summary of his statement of case.

[30] Mrs Gibson-Henlin's submission that the issue is an independent one of a banker-customer contract which is unconnected to the matter resolved by the arbitration is wholly unsustainable.

[31] This court therefore declares that it has no jurisdiction to try this claim.

In the circumstances:

1. the claim form and particulars of claim are hereby struck out;

2. costs to the defendant to be taxed or agreed;

3. permission granted to the claimant to appeal.