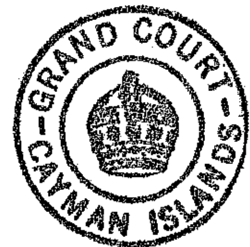
IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO. G250 OF 2014

IN THE MATTER OF section 132 of the Registered Land Law to register a Restriction against Registration Section Cayman Brac West, Block 97B Parcel 94.

BETWEEN	**GWENETH E. HENNING AS PERSONAL REPRESENTATIVE OF THE ESTATE OF JOHN ASHTON HENNING**	**PLAINTIFF**
AND	**MARGARET ANN HENNING**	**DEFENDANT**

Appearances:	**Ms. Stacy Thompson, Attorney-at-Law for the Plaintiff** **Mr. Philip Ebanks, Attorney-at-Law for the Defendant**
Before:	**Hon. Justice Mangatal**
Heard:	**January 9, 13 & February 27, 2015**



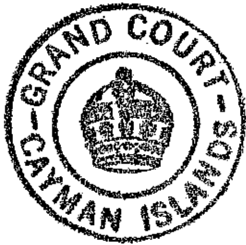
In Chambers

STRIKING OUT – G.C.R. O. 18, R.19 – SUMMARY JUDGMENT APPLICATION BY DEFENDANT – G.C.R. O. 14, R.12 – ORIGINATING SUMMONS – WHETHER SUPPORTING AFFIDAVIT CAN BE LOOKED AT IN DECIDING WHETHER NO REASONABLE CAUSE OF ACTION – WITHOUT PREJUDICE COMMUNICATIONS – WHETHER ADMISSIBLE TO CONSTRUE OR RECTIFY AGREEMENT/CONSENT ORDER – SEVERANCE OF JOINT PROPRIETORSHIP BY CONSENT ORDER, AND CREATION OF PROPRIETORSHIP IN COMMON. DECLARATION – O. 15, R.16 – WHETHER COURT HAS POWER TO GRANT ALTHOUGH NOT SPECIFICALLY CLAIMED – COURT'S OVERRIDING OBJECTIVE – DEALING WITH CASES JUSTLY.

JUDGMENT

1. There are two applications that were fixed for hearing before me on the 9 January 2015. The first in time was the Originating Summons filed on behalf of the Plaintiff on the 17th November 2014. That Originating Summons seeks the following relief:

> "1. The Order dated May 24, 2010 in the Cause No D 177 of 2009 be varied to include that the net proceeds of sale from the property registered at Cayman Brac West Block 97B Parcel 94 is to be divided equally between the Defendant and Plaintiff herein.
>
> 2. That a restriction be placed against the property until sale of the property is achieved.
>
> 3. That the Clerk of Court be empowered to sign the Real Estate Listing Agreement for the subject property in the place of the Defendant.
>
> 4. That the cost [sic] of this Application be met from the proceeds of sale of the property.
>
> 5. Any other relief this Honourable Court may deem fit."



2. The Originating Summons is supported by the Affidavit of Gweneth E. Henning, also filed on the 17th November 2014.

3. On the 30th December 2014 the Defendant filed a summons seeking the following relief:

> "1. The Plaintiff's claim be dismissed as having no prospect of success.
>
> 2. Judgment be entered for the Defendant.
>
> 3. The plaintiff do pay the Defendant's costs on an indemnity basis".

4. An affidavit was also filed by the Defendant on December 30 2014 and which she indicates was filed for a dual purpose. In paragraph one of her affidavit, the Defendant states that she has sworn the affidavit in response to the affidavit of the Plaintiff in support of the originating summons. At paragraph 2, the Defendant states that she has sworn this affidavit "in support of my own summons to strike out the said Application by Gweneth Henning."

5. I indicated to Counsel that it seemed that the nature of the Defendant's summons was such as to require that summons to be dealt with first. Both Counsel agreed to that course. It was also agreed that in the event that I was not minded to accede to the Defendant's application, I should go on to deal with the Plaintiff's Originating Summons, as both parties have filed all of the affidavit evidence in support or opposing the application that they would wish to have considered. The applications were considered on the 9th and 13th of January 2015. I wish to thank the attorneys-at-law on both sides for their interesting and well-written written submissions, and for providing a number of useful authorities.

The Defendant's Summons and Application

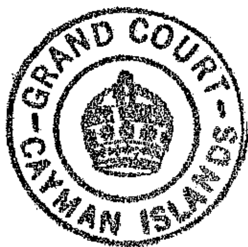
6. The main relief expressly sought in the summons filed on behalf of the Defendant is that the Plaintiff's claim be dismissed as having no prospect of success and that judgment be entered for the defendant. This would seem on its face to be an application for summary judgment pursuant to Order 14 Rule 12 of the *Grand Court Rules* ("the GCR"). However, in written submissions dated the 9th January 2015, Mr. Ebanks, who appeared for the

Defendant, sought to in addition refer to and pray in aid Order 18 Rule 19 of *the Grand Court Rules*, which reads as follows:

"Striking out pleadings and Endorsements (O. 18, R. 19)

19. (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement of any writ in the action, or anything in any pleading or in the endorsement, on the ground that-

(a) it discloses no reasonable cause of action or defence, as the case may be; or



(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court,

and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under subparagraph 19 (a).

(3) This rule shall, so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading."

7. Mr. Ebanks clarified that his application was under both Order 14 Rule 12 and Order 18 Rule 19. He submitted that the claim in the Originating Summons does not plead the

facts as required by O 18 Rule 7. Additionally, that the application is seeking a variation in respect of Cause No. D 177 of 2009, but yet is filed under a new cause in this Originating Summons. Further, that the application for variation would have to be brought by a party to the order and under the Cause No. D 177 of 2009.

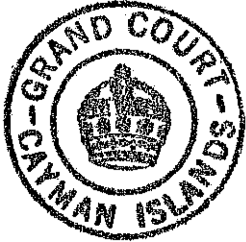
8. Defence Counsel further argued that the pleading defects in the Originating Summons cannot be cured by the Plaintiff's affidavit in support since the affidavit provides evidence and not facts.

9. Further, that the Plaintiff's affidavit cannot be relied upon because it wrongly exhibits without prejudice correspondence between the parties. It was submitted that this attempted use of without prejudice correspondence is itself an abuse of process. Counsel argued that it is trite law that without prejudice correspondence relating to negotiations for settlement in disputes between parties is privileged and generally protected from disclosure. Reference was made to the leading English case of ***Unilever v Proctor & Gamble*** [1999] EWCA Civ 3027, and to the decision of Henderson J in the local decision of ***Tom Jones International Limited v Attorney General*** [2010] (2) CILR Note 3, where ***Unilever*** was applied. It was submitted that for the privilege to be waived, both parties to the communications would have to do so, and that the Defendant had not so waived the privilege.

10. Mr. Ebanks also submitted that the originating summons was otherwise to be considered abusive for the following reasons:

"(i) Over three years have passed since the Order was made and therefore the application is well past the time for an appealing of the order;

(ii) The application for variation is sought by a non-party to the order, the party whose interest the plaintiff seeks to exercise interest over now being deceased. Further, that there was ample opportunity for Mr. Henning to have sought this variation before his death and, the submission continues, before the property changed hands by operation of law if it was not his intention that the property be held jointly until sold.



(iii) Critical to the application to strike out the Plaintiff's claim is that the property in respect of which the Plaintiff seeks to exercise interest, is now registered solely to the Defendant who has exercised her right in law pursuant to section 100 of the ***Registration of Land Law*** to be registered as sole proprietor following the death of the other joint proprietor.

(iv) The plaintiff's claim appears to hinge on the estate (which is not a party to the Order) getting a bad bargain as a result of the consent order. It was submitted by Mr. Ebanks that that was not a sound or proper basis upon which the Court could grant a Variation. Reference was made to the Court of Appeal of Cayman's decision in ***Range v Range*** [1988-89 CILR 437].

11. It was further submitted that in addition to the general privilege attaching because correspondence falls under the heading of without prejudice communications, there is a special and distinct privilege which attaches in relation to communications in matrimonial matters and it was argued that that special situation existed here. Reliance was placed upon paragraph 23 (8) of ***Unilever***.

12. Mr. Ebanks made an umbrella submission that the categories of conduct rendering a claim an abuse of process are not closed. It was posited that the courts can strike out cases where the litigation would amount to an abuse of process "in the exercise of its inherent jurisdiction to protect the general integrity of the process of the court and of its ability to deliver justice to all litigants" – per Smellie CJ in ***X v Y Ltd.*** [1999] CILR 73.

Argument that Plaintiff's case is unsustainable

13. Under this head of the Defendant's application, reference was made to ***Omni Securities Limited (No. 3)*** [1998 CILR 275] a decision of Smellie CJ, for the proposition that under Order 14 Rule 12, a Defendant is required to show that a Plaintiff's claim is unsustainable in order to obtain its dismissal, and that an application would fail where the Plaintiff could show "more than a faint possibility of succeeding".

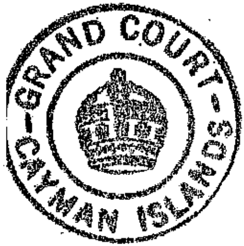
14. At paragraph 17 of the written submission handed up by Mr. Ebanks on the 13 January 2015, Mr. Ebanks made an additional submission that " the guidance in relation to the corresponding English jurisdiction to dismiss claims that have no reasonable prospect of success under CPR Part 24 identifies that a Plaintiff must have a "real" prospect of success, that is to say one that is more than false, fanciful or imaginary, and refers to the dictum of Lord Hobhouse in ***Three Rivers DC v Bank of England (No 3)*** that 'the criterion which the judge has to apply under CPR Part 24 is not one of probability; it is absence of reality' ".

15. Counsel submitted that on any interpretation, the Plaintiff's claim has no realistic (or even fanciful) prospect of success.

The Plaintiff's response to the application to dismiss/strike out claim and for judgment for the Defendant

16. Ms. Stacy Thompson, who appeared for the Plaintiff, decided to make certain concessions, in the face of the Defendant's strike out application. In her written Further Skeleton Submissions filed on January 12 2015, at paragraphs 9 - 11, Counsel summarized the position that she would be taking, as follows:

> "9. The Defendant claims that by issuing a separate claim/cause the Plaintiff has no basis for seeking a variation. The Plaintiff accepts this and resiles from pursuing an Order under paragraphs 1 and 3 of its Originating Summons with intention to satisfy procedural defects by issuing a Summons in the original cause between the late John Ashton Henning and Margaret Ann Henning.



> 10. The Orders sought in paragraphs 2 and 4 are actively pursued in light of the fact that a restriction application can survive independently given the acts of the Defendant, which are, at the lowest threshold favourable to the Defendant, questionable in light of the Order of May 24, 2010. Jurisdiction to make an application for a Restriction is also within the ambit of the Registrar of Lands in accordance with section 132 of the *Registered Land Law* (2004 Revision) as set out below:
>
> > 132(3) "The Registrar shall order a restriction to be entered in any case where it appears to him that the power of the proprietor to deal with the land, lease or charge is restricted."
>
> 11. This is proof that the plaintiff's case as pleaded is not fatal to her claim in seeking relief under separate cause."

17. In relation to the Defendant's submission that the Originating Summons does not plead sufficient facts, and that the Court cannot have regard to the supporting Affidavit, Ms. Thompson submitted that the supporting affidavit provides further details of the claim and the basis for seeking relief from the Court. In that regard, reference was made to the English decision of *Megarry V-C in* ***Re Caines*** [1978] 1 WLR 540 [1978] 2 All E R 1.

and the discussion in the oft- cited work of Barrister Stuart Sime, ***A Practical Approach To Civil Procedure***, 3rd edition, Chapter 30, pages 362-364.

18. Counsel also referred to a number of authorities for the well-known principle that the Court's power to strike out a statement of claim is a summary power which should be exercised only in plain and obvious cases.

19. It was also Ms. Thompson's position that the Court ought to admit the without prejudice communications. Further, that her client's claim is meritorious and is far-removed from being one which it was appropriate for the court to deal with in a summary manner.

The issues

20. It is useful to identify some of the main issues that arise in this matter. They appear to me to be as follows:

(1) Does the Originating Summons fail to disclose a reasonable cause of action? In that regard, should the Court have regard solely to the originating summons itself or may regard be had to the supporting affidavit evidence?

(2) If regard may be had to the affidavit evidence, is the without prejudice correspondence prior to the consent judgment being entered, admissible in evidence?

(3) Is this a plain and obvious case entitling the defendant's striking out application to succeed?

(4) Is the Defendant entitled to summary judgment, i.e. is this a claim with no prospect of success?

(5) If the Defendant's application for striking out and/or summary judgment is refused, what if any relief is the plaintiff entitled to under the originating summons?

Resolution of the Issues

(1) Does the originating summons fail to disclose a reasonable cause of action? Can the Court have regard to the supporting affidavit evidence?

21. Paragraph 30.1.2 of Sime's work, ***A Practical Approach to Civil Procedure***, usefully describes the relevant procedure as follows:

> " **30.1.2 Procedure**
>
> An application to strike out is made *inter partes* by summons or notice of application...It is normally supported by an affidavit. By way of exception, RSC O 18 R. 19(2), provides that no affidavit can be used in support of an application made on the ground that a pleading discloses no reasonable cause of action or defence. This is because such an application turns on a question of law, and the pleading should stand or fall on its own merits. This rule is often circumvented in practice by combining such an application with some or all of the other grounds stated in RSC Order 18, r. 19, or with an application under the inherent jurisdiction of the court."

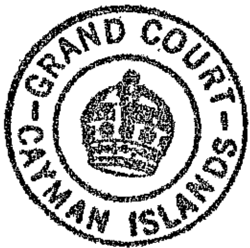
22. Paragraph 30.1.4 of the work of Sime, also provides useful assistance with regard to the Originating Summons procedure. It states as follows:

> " **30.1.4 Striking out in non-writ cases**

The same principles apply to....originating summonses and petitions....RSC Order 18, r. 19(3). As Megarry VC said in *Re Caines*, [1978] 1 WLR 540, some degree of flexibility is required in applying the rules on striking out to proceedings where there are no pleadings. As discussed in chapters 5 and 6, originating summonses, originating motions and petitions are often remarkably uninformative documents. Most of the factual material is contained in the affidavits in support. On an application to strike out a pleading on the ground that it discloses no reasonable cause of action, no affidavit evidence is admissible (30.1.2). This ban does not apply to the affidavits in support of an originating summons, because they are not evidence 'on' the application, but evidence which antedates the application...."

23. In an elucidating judgment, Megarry V-C in ***Re Caines*** stated as follows at pages 3 – 4 of the All England Report: -

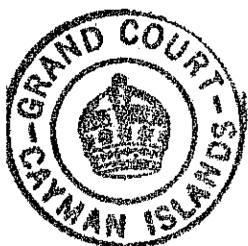
"That brings me to the first point, raised in a preliminary objection by counsel for the plaintiff. He says that in hearing the procedure summons I must look at the originating summons, and the originating summons alone, for the purpose of deciding whether it discloses any reasonable cause of action, and that I must not look at the affidavit sworn by the plaintiff in support of the originating summons. Of course, unlike a statement of claim in an action begun by writ, most originating summonses are remarkably uninformative documents. They usually ask a series of questions, or state the various forms of relief sought, but most of them, disclose little or nothing of what the case is about or what the plaintiff's contentions are. In this case, the originating summons simply asserts that the plaintiff is a beneficiary under the will of the testator, and claims an order for the administration of the testator's estate with ancillary relief, and nothing more. Most of the material that in an action by writ is provided by the statement of claim is, under an originating summons, normally provided by the affidavit in support of the originating summons. But that affidavit, said counsel for the plaintiff, constitutes evidence, and so is something that, in obedience to RSC Ord 18, r 19(2), I must not look at. Accordingly, it is impossible for the defendants to show that the originating summons discloses no cause of action.



Let me say at the outset that I think that the operation of RSC Ord 18, r 19, in the case of originating summonses is something that the rules committee might with advantage consider. If counsel for the plaintiff's submission is sound, then the application of the rule to originating summonses is likely in most cases to be nugatory. Of course, if under RSC Ord 28, r 8, an order had been made for the affidavits in the case to stand as pleadings, then the difficulty would disappear. But that is not the case here. The question is thus whether r 19(1)(*a*) is inapplicable to the

usual reticent form of originating summons, and applies only to those that are more forthcoming.

I can see no grounds on which it could be said that, in making r 19(1) apply to originating summonses, r 19(3) intended to leave most originating summonses outside the practical operation of the rule, and to include only the minority within it. There seem to me to be three considerations which point to r 19(1) being given its full scope in relation to an originating summons such as the one that is before me. First, there are the words 'so far as applicable' in r 19(3). If instead the words had been 'with any necessary modifications', then they would, of course, have given greater support to the contention that r 19(1) applies generally to originating summonses. But I think that even the phrase 'so far as applicable' can be read as permitting and requiring some degree of flexibility in applying to originating summonses a rule that was drafted for writs and pleadings.



Second, the prohibition in r 19(2) is expressed as being that evidence is to be inadmissible 'on' an application under r 19(1)(*a*). In other words, when an application is made under r 19(1)(*a*), the applicant cannot put in evidence to support his application, and the respondent cannot put in evidence to rebut that application. An application under the rule is not to be made into a preliminary hearing. But that ought not to enable a party to object to an affidavit that has already been put in for the purpose of supporting the originating summons; for such an affidavit is not truly evidence 'on' the application, but evidence which antedates the application and has been put in for a different purpose. In short, on an application under r 19(1)(*a*) you must take the proceedings as you find them, though evidence to support or repel the application cannot be added. Views of this kind were, I understand, initially held by counsel for the plaintiff, though on reflection after the hearing before the master he resiled from them. I regard it as being important that the purpose to be discerned in the Rules of the Supreme Court should not be stultified by an over-literal approach to their language."

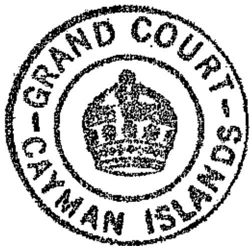
24. In paragraph [1] above, I set out the substantive contents of the Originating Summons. As in ***Re Caines***, this Originating Summons is decidedly uninformative. I share the view expressed in that decision that in the case of an application to strike out an Originating Summons under O. 18, r. 19, on the grounds that the summons does not disclose a reasonable cause of action, a certain amount of flexibility is required. Hence, it is permissible to look at the affidavit evidence filed in support of it. In addition, the affidavit evidence filed in support of an originating summons is not evidence "on" the application

and has been put in for a different purpose, i.e. in support of the substantive claim. In any event, the Defendant has also based her application upon the grounds that the claim is an abuse of the process of the court pursuant to O. 18 R. 19 (1) (d) and under the inherent jurisdiction of the Court, which allows for the use of affidavit evidence in resolving the issue whether to strike out – see, for example, paragraph 3 of the decision in ***Unilever***, cited by Mr. Ebanks.

(2) **If regard may be had to the affidavit evidence, is the without prejudice correspondence prior to the consent judgment being entered, admissible in evidence?**

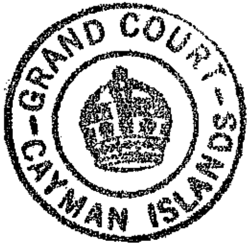
25. The decision in ***Unilever*** is instructive in relation to this issue. Having discussed a number of the leading cases on without prejudice communications, Robert Walker LJ, sitting in the Court of Appeal for England and Wales, at paragraphs 23 and 37, stated as follows:

> "23. .... There are numerous occasions on which, despite the existence of without prejudice negotiations, the without prejudice rule does not prevent the admission into evidence of what one or both of the parties said or wrote. The following are among the most important instances.
>
> (1) As Hoffman LJ noted in the first passage set out above, when the issue is whether without prejudice communications have resulted in a concluded compromise agreement, those communications are admissible. *Tomlin v Standard Telephones and Cables* [1969] 1 WLR 1378 is an example.
>
> (2) Evidence of the negotiations is also admissible to show that an agreement apparently concluded between the parties during the negotiations should be set aside on the ground of misrepresentation, fraud or undue influence. *Underwood v Cox* (1912) 4 DLR 66, a decision from Ontario is a striking illustration of this.
>
> (3) Even if there is no concluded compromise, a clear statement which is made by one party to negotiations, and on which the other party is intended to act and does in fact act, may be admissible as giving rise to an estoppel. That was the



view of Neuberger J in *Hodgkinson & Corby v Wards Mobility Services* [1997] FSR 178, 191, and his view on that point was not disapproved by this court on appeal.

(4) Apart from any concluded contract or estoppel, one party may be allowed to give evidence of what the other said or wrote in without prejudice negotiations if the exclusion of the evidence would act as a cloak for perjury, blackmail or other "unambiguous impropriety" (the expression used by Lord Hoffman LJ in *Foster v Friedland*, 10 November 1992, CAT 1052). Examples (helpfully collected in Fosket's Law & Practice of Compromise, 4th ed, para 9-32) are two first-instance decisions, *Finch v Wilson* (8 May 1987) and *Hawick Jersey International v Caplan* (The Times 11 March 1988). But this court has, in *Foster v Friedland* and *Fazil-Alizadeh v Nikbin*, 1993 CAT 205, warned that the exception should be applied only in the clearest cases of abuse of a privileged occasion.



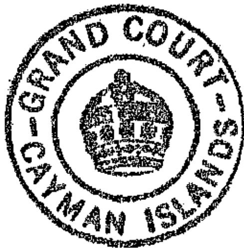
(5) Evidence of negotiations may be given (for instance, on an application to strike out proceedings for want of prosecution) in order to explain delay or apparent acquiescence. Lindley LJ in *Walker v Wilsher* (1889) 23 QBD 335, 338, noted this exception but regarded it as limited to "the fact that such letters have been written and the dates at which they were written". But occasionally fuller evidence is needed in order to give the court a fair picture of the rights and wrongs of the delay.

(6) In *Mueller* (which was a decision on discovery, not admissibility) one of the issues between the claimant and the defendants, his former solicitors, was whether the claimant had acted reasonably to mitigate his loss in his conduct and conclusion of negotiations for the compromise of proceedings brought by him against a software company and its other shareholders. Hoffman LJ treated that issue as one unconnected with the truth or falsity of anything stated in the negotiations, and as therefore falling outside the principle of public policy protecting without prejudice communications. The other members of the court agreed but would also have based their decision on waiver.

(7) The exception (or apparent exception) for an offer made 'without prejudice except as to costs' was clearly recognized by this court in *Cutts v Head*, and by the House of Lords in *Rush v Tomkins*, as based on an express or implied agreement between the parties. It stands apart from the principle of public policy (a point emphasized by the importance which the new Civil Procedure Rules, Part 44.3(4), attach to the conduct of the parties in deciding questions of costs). There seems to be no reason in

principle why parties to without prejudice negotiations should not expressly or impliedly agree to vary the application of the public policy rule or in other respects, either by extending or by limiting its reach. In *Cutts v Head* Fox LJ said (at p. 316) "what meaning is given to the words 'without prejudice' is a matter of interpretation which is capable of variation according to use in the profession. It seems to me that, no issue of public policy being involved, it would be wrong to say that the words were given a meaning in 1889 which is immutable ever after".

(8) In matrimonial cases there has developed what is now a distinct privilege extending to communications received in confidence with a view to matrimonial conciliation: see *Re D* [1993] 2 AER 693, 697, where Sir Thomas Bingham MR thought it not "fruitful to debate the relationship of this privilege with the more familiar head of 'without prejudice' privilege. That its underlying rationale is similar, and that it developed by way of analogy with 'without prejudice' privilege, seems clear. But both Lord Hailsham and Lord Simon in *D v National Society for the Prevention of Cruelty to Children* [1977] 1 All ER 589 at 602, 610 [1978] AC 171 at 226, 236 regarded it as having developed into a new category of privilege based on the public interest in the stability of marriage."



....

(37) Lord Griffiths in *Rush & Tompkins* noted (at p. 1300c), and more recent decisions illustrate, that even in situations to which the without prejudice rule undoubtedly applies, the veil imposed by public policy may have to be pulled aside, even so as to disclose admissions, in cases where the protection afforded by the rule has been unequivocally abused."

26. It is also instructive to note that in Cayman the ***Matrimonial Causes Law*** expressly contemplates the parties to a marriage who enter into a settlement agreement regarding matrimonial property having the right, indeed, a duty, to disclose to the Court the negotiations leading to the agreement. Section 14, which has as its marginal note, "Collusion", provides as follows:

"Collusion

14. It is lawful for the parties to a marriage, for the purpose of facilitating proceedings under this Law, to enter into an agreement for-

(a) providing that evidence of past matters and transactions be available to the Court;

(b) the custody and care and control of the children of the marriage;

(c) the settlement of matrimonial property;

(d) pecuniary provision; or

(e) periodical payments.

Provided that-

(i) a full and frank disclosure of such agreement and the negotiations leading thereto is made to the Court;

(ii) Neither party has himself committed or has procured or connived at the commission by the other of a matrimonial offence in order to obtain or accelerate decree; and

(iii) Neither party has exerted improper persuasion upon or offered improper advantage to an otherwise unwilling party for the purpose of obtaining such party's consent to a decree being obtained or accelerated."

(my emphasis)

27. It is perhaps useful at this juncture to look at the Consent Order that was entered into between John Henning and the Defendant, the Petitioner and Respondent respectively in Cause No. D 177 of 2009. It should be noted that in Cause No. D 177 of 2009, the parties' surname appears to have been wrongly typed as "Hennings" and not Henning". The Order, which was entered on the 24th May 2010, and which was signed by both the parties and their attorneys-at-law, was exhibited to the Plaintiff's affidavit. It reads as follows:

"........Consent Order

UPON reading the documents on file AND UPON the parties being legally advised by their respective attorneys AND UPON being satisfied that the parties have consented to the matters

herein, as evidenced by their respective signature and by the signature of their respective attorneys:

IT IS HEREBY ORDERED BY CONSENT:

1. That the court do sanction and permit the sale of all that land and property registered in the Cayman Islands Land Register as Registration Section Cayman Brac West, Block 97B Parcel 94 ("the Property") by the Petitioner and the Respondent as Joint Owners, with power of sale over the said property.

2. That the Petitioner and the Respondent and any other person occupying the Property do take all appropriate steps to give the purchaser vacant possession of the Property, once the property is sold.

3. That the Petitioner retains his 2004 Grand Chevrolet Jeep and his 25ft outboard fisherman boat.

4. That the respondent retains her 1995 Honda Civic motor car and the 1994 Jeep.

5. That the Respondent retains the home, inclusive of 2 attached rented units, located at 17 Avoca Lane, Mt. Pleasant, West bay, Grand Cayman.

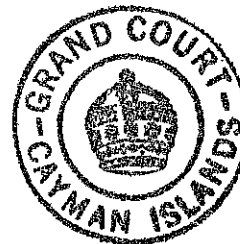
6. That the Respondent retains her Social Security (Pension) and CINICO (insurance) coverage as a result of her marriage to the Petitioner, but that the Respondent pays her own CINICO (insurance) premiums.

7. That each party bears their own costs in these proceedings.

8. That there shall be liberty to apply generally as to the workings of this Order.

9. The provisions of this Order conclude the settling of all outstanding ancillary matters and each party releases the same from all other existing and outstanding claims and liabilities that one may have against the other.

Dated this 24th day of May 2010

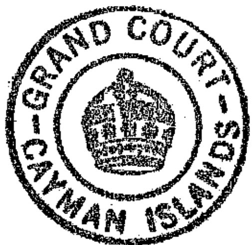


(my emphasis)

………"

28. I had queried of counsel whether the fact that the negotiations had culminated in an agreement allowed to Court to have regard to the without prejudice correspondence

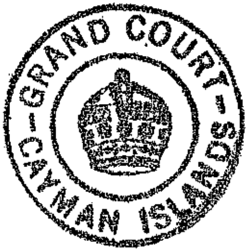
where the parties disagree as to what was actually agreed. Mr. Ebanks argued that the Court would not be able to admit the correspondence in those circumstances. However, fairly recent authority emanating from the Supreme Court of the United Kingdom does not support Mr. Ebanks in that argument. In ***Oceanbulk Shipping and Trading SA v TM Asia Ltd and others*** [2011] 1 A.C. 602, the ***Unilever*** decision was discussed in detail and applied. In ***Oceanbulk***, there were without prejudice negotiations that resulted in a settlement agreement. In an action claiming a breach of a clause of the settlement agreement, the plaintiff sought to strike out the defendant's pleading that relied upon without prejudice negotiations to support their interpretation of a clause of the agreement, absent mutual waiver. That application ultimately failed, and the defendants were allowed to amend their pleadings to allege that the claimant was estopped from denying that the clause bore the interpretation contended for by the defendants, and to rely in support of that plea on representations made by the claimant, inter alia, in the without prejudice negotiations Having discussed paragraph 24 of ***Unilever,*** referred to in paragraph 25 above, Lord Clarke of Stone-Cum-Ebony JSC stated, at paragraphs 33, 37-42,45,46 as follows:



> "33. Although it is not included in that list, it is not in dispute between the parties that another of the exceptions to the rule is rectification. A party to without prejudice negotiations can rely upon anything said in the course of them in order to show that a settlement agreement should be rectified. It was so held at first instance in Canada in *Pearlman v National Life Assurance Co of Canada* (1917) 39 OLR 141 and in New Zealand in *Butler v Countrywide Finance Ltd* (1992) 5 PRNZ 447. Neither case contains much reasoning but both courts treated the point as self-evident. In my opinion the parties correctly recognised such an exception because it is scarcely distinguishable from the first exception. No sensible line can be drawn between admitting without prejudice communications in order to resolve the issue of whether they have resulted in a concluded compromise agreement and admitting them in order to resolve the issue of what that agreement was. This can be seen most clearly where the alleged agreement is oral but, in my opinion, must equally apply where the agreement is partly oral and partly in writing and where the agreement is wholly in writing but the issue is whether it reflects the common understanding of the parties.

...

37. As Lord Hoffmann himself put it in para 14 of his speech in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101, in every case in which the interpretation of the language used in the contract is in issue, the question is what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean. In the *Chartbrook* case the House of Lords considered and rejected the submission that what at para 42 Lord Hoffmann called the exclusionary rule, which excludes evidence of what was said or done in the course of negotiating an agreement for the purpose of drawing inferences about what the contract means, should now be abolished. It accordingly remains part of English law. The exclusionary rule does not exclude such evidence for all purposes. Lord Hoffmann put it thus in para 42:



> "It does not exclude the use of such evidence for other purposes: for example, to establish that a fact which may be relevant was known to the parties, or to support a claim for rectification or estoppel. These are not exceptions to the rule. They operate outside it."

38. It is not in dispute that, where negotiations which culminate in an agreement are not without prejudice, the exclusionary rule applies to the correct approach to the construction of the agreement. Nor is it in dispute that in those circumstances evidence of the factual matrix is admissible as an aid to interpretation even where the evidence formed part of the negotiations. The distinction between objective facts and other statements made in the course of negotiations was clearly stated by Lord Hoffmann in para 38 of the *Chartbrook* case:

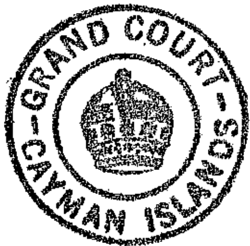
> 'Whereas the surrounding circumstances are, by definition, objective facts, which will usually be uncontroversial, statements in the course of pre-contractual negotiations will be drenched in subjectivity and may, if oral, be very much in dispute.'

39. Trial judges frequently have to distinguish between material which forms part of the pre-contractual negotiations which is part of the factual matrix and therefore admissible as an aid to interpretation and material which forms part of the pre-contractual negotiations but which is not part of the factual matrix and is not therefore admissible. This is often a straightforward task but sometimes it is not. <u>In my opinion this problem is not relevant to the question whether, where the pre-contractual negotiations that form part of the factual matrix are without prejudice, evidence of those negotiations is admissible as an aid to construction of</u>

the settlement agreement. The two questions are, as I see it, entirely distinct.

40. In these circumstances, I see no reason why the ordinary principles governing the interpretation of a settlement agreement should be any different regardless of whether the negotiations which led to it were without prejudice. The language should be construed in the same way and the question posed by Lord Hoffmann should be the same, namely what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean. That background knowledge may well include objective facts communicated by one party to the other in the course of the negotiations. As I see it, the process of interpretation should in principle be the same, whether the negotiations were without prejudice or not. In both cases the evidence is admitted in order to enable the court to make an objective assessment of the parties' intentions.

41. The parties entering into such negotiations would surely expect the agreement to mean the same in both cases. I would not accept the submission that to hold that the process of interpretation should be the same in both cases would be to offend against the principle underlying the without prejudice rule. The underlying principle, whether based in public policy or contract, is to encourage parties to speak frankly and thus to promote settlement. As I see it, the application in both cases of the same principle, namely to admit evidence of objective facts, albeit based on what was said in the course of negotiations, is likely to engender settlement and not the reverse. I would accept the submission made on behalf of TMT that, if a party to negotiations knows that, in the event of a dispute about what a settlement contract means, objective facts which emerge during negotiations will be admitted in order to assist the court to interpret the agreement in accordance with the parties' true intentions, settlement is likely to be encouraged not discouraged. Moreover this approach is the only way in which the modern principles of construction of contracts can properly be respected.



42. Any other approach would be to introduce an unprincipled distinction between this class of case and two others which have already been accepted as exceptions to the without prejudice rule. I have already expressed the view that the rectification exception is correctly accepted because no sensible line can be drawn between admitting without prejudice communications in order to resolve the issue whether they have resulted in a concluded compromise agreement, which was the first exception identified by Robert Walker LJ in *Unilever* [2000] 1 WLR 2436, 2444, and admitting them in order to resolve the issue what that agreement was. There is also no sensible basis on which a line can be drawn between the rectification case and this type of case.

…………………

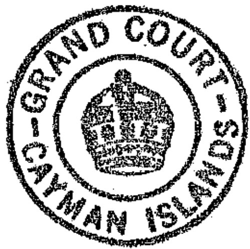
45. <u>........ the problems with which both the principles of rectification and the principles of construction (as explained in recent cases) grapple are closely related. This is an important factor in leading to the conclusion that evidence of what was said or written in the course of without prejudice negotiations should in principle be admissible, both when the court is considering a plea of rectification based on an alleged common understanding during the negotiations and when the court is considering a submission that the factual matrix relevant to the true construction of a settlement agreement includes evidence of an objective fact communicated in the course of such negotiations.</u>

46. <u>For these reasons I would hold that the interpretation exception should be recognised as an exception to the without prejudice rule. I would do so because I am persuaded that, in the words of Lord Walker in the *Ofulue* case [2009] AC 990, para 57, justice clearly demands it</u>. In doing so I would however stress that I am not seeking either to underplay the importance of the without prejudice rule or to extend the exception beyond evidence which is admissible in order to explain the factual matrix or surrounding circumstances to the court whose responsibility it is to construe the agreement in accordance with the principles identified in the *ICS* case 1 WLR 896 and the *Chartbrook* case [2009] AC 1101. In particular nothing in this judgment is intended otherwise to encourage the admission of evidence of pre-contractual negotiations."

(emphasis mine)

29. In my judgment, it is appropriate for me to admit the without prejudice correspondence in evidence. This is a case in which the parties are in dispute as to what was agreed by virtue of the consent order and where the plaintiff submits that the factual matrix relevant to a true construction of the consent order includes objective facts and matters included during the without prejudice correspondence. On the authority of the ***Oceanbulk Shipping*** case, the evidence should be admitted to enable the Court to make an objective assessment of the parties' intentions and to clarify the meaning of the Consent Order, if necessary. Further, it appears to me that this is a case where the Court ought to lift the veil imposed by public policy to prevent the real prospect of its protection being misused and/or abused. – See paragraph 37 of <u>Unilever</u>, referred to in paragraph 25 (above).

30. In addition to the above points, it should be noted that the special privilege to which Walker LJ referred in paragraph 23(8) of ***Unilever*** and upon which Mr. Ebanks sought to rely, is not at all applicable in any event in the instant case, since the agreement or consent order in question, and the relevant without prejudice communications are not concerned with communications received in confidence "with a view to matrimonial conciliation" . if anything the without prejudice correspondence relates to an agreement to settle matrimonial property consequent on matrimonial breakdown, in respect of which section 14 of the ***Matrimonial Causes Law*** clearly contemplates that there be full and frank disclosure before the Court of negotiations leading to such agreements.



(3) Is this a plain and obvious case entitling the defendant's striking out application to succeed?

The Plaintiff's evidence

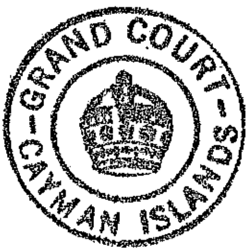
31. As indicated above, I have found that in order to resolve this issue, the Court must have regard not only to the Originating Summons, but also to the Affidavit filed in support. In that affidavit, Gweneth Henning states a number of matters. She indicates that she was the lawful wife of John Ashton Ludlow Henning who died intestate on the 21st April 2014. Letters of Administration were granted to the Plaintiff on the 23rd of September 2014. The Plaintiff indicated that she and Mr. Henning had in fact been married before so that when she married him on the 2nd of October 2010, this was a remarriage.

Mr. Henning and the Plaintiff have a daughter Judith Mae Cox (nee Henning) born during their first marriage.

32. Prior to the remarriage of Mr. Henning and the Plaintiff, Mr. Henning had been married to Margaret Ann Henning, the Defendant. That marriage ended in divorce and the marriage was dissolved on the 3rd June 2010. The Consent Order referred to at paragraph 27 above is the order made in respect of all claims for ancillary relief that were extant between Mr. Henning and the Defendant.

33. The Plaintiff contends that the property was intended to be shared equally between the parties and she exhibits a Listing Agreement with a Realty company signed by Mr. Henning and the Defendant and dated 13th September 2013, agreeing to list the property with that Realty company for sale on the open market.

34. In addition to the Listing Agreement, the Plaintiff also states in her affidavit that her belief as to the intentions of the parties, i.e. Mr. Henning and the Defendant at the relevant time, is supported by correspondence between the attorneys for her late husband and the attorneys for the Defendant during the time that the divorce proceedings were under way. It was this set of correspondence that was marked without prejudice and that I have ruled ought to be admitted in evidence. Reference was made in particular to a letter from the Defendant's attorneys dated March 11 2010 confirming the Defendant's intention that the property be sold and the net proceeds of sale be divided equally between the parties.

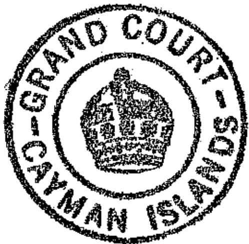


35. The Plaintiff also avers that since the death of her late husband, she has noticed that the "for sale" sign which advertised the property for sale, has been removed from the property.

36. Further, by a document dated 1st May 2014, the Defendant applied for transfer of the property into her sole name by completing and filing with the Registrar of Lands, Form 36, which is a form to effect "Deletion on Death of a Joint Proprietor". The Plaintiff indicates that she is concerned about this registration of the property in the Defendant's sole name, since there is no notation on the Land register that one half of the sale proceeds belong to the estate of her late husband.

37. In addition, the Plaintiff indicated that she has also been further concerned by the fact that by letter dated July 10 2014, the Defendant has written to her, requesting that she move her late husband's boat from what the Defendant termed " her property".

38. The Plaintiff closes her evidence (which was filed prior to the application to strike out and to her Counsel conceding the points referred to in paragraph 16 above) by asking that the Consent Order be varied to include an Order that the net proceeds of the property are to be split equally between her late husband's estate and the Defendant. In addition, she sought that a restriction be applied to the property, until the sale is achieved, so as to minimize the prejudice to the estate.



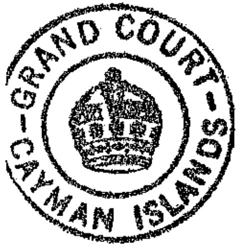
The Defendant's evidence

39. The Defendant's affidavit states a number of matters, some of which amount to legal arguments, but a number of the main relevant matters raised are as follows. She states that this application by the Plaintiff is not only way out of time, but to consider a variation at this time without her "being able to call upon the recollections of the other party, Mr.

Henning (now deceased) as to discussions between us on this matter would result in considerable prejudice to me."

40. The Defendant states that based on advice which she received from her attorney, and which she exhibits, no interest in the property can fall to the estate of Mr. Henning.

41. According to the Defendant she has had conversations with Mr. Henning, most recently about two years ago, pointing out at the time that as she was the most unhealthy of the two, the property could be placed in 2 individual shares, so that she could pass on an undivided share to her children. Mr. Henning, she stated, did not agree with her. Further, that he told her outright that Gwyneth Henning, was not interested in the property and that it was strictly between both of them (Mr. Henning and the Defendant) and that when it was sold they would discuss the matter.



42. It was the Defendant's evidence that the property has at all times been her private residence. She lived there alone and claimed that she was the one to find the initial money to purchase it and has been solely responsible for the maintenance and upkeep over the years. The Defendant claimed that Mr. Henning was well aware of this and knew that when the property was sold the Defendant's additional expenditure and efforts would have to be taken into consideration in any division of proceeds.

43. The Defendant agreed that the property was for sale with a sign in place on the property before Mr. Henning died. She stated at paragraph 14 of her Affidavit, that that

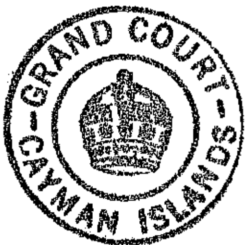
"was the agreement we had and [I] abided by it." However, she continued, that after Mr. Henning's death she applied as she claimed to be entitled to, for deletion of Mr. Henning's name from the property register and following approval of her application, removed the "for-sale" sign from the property. According to the Defendant, it is no secret that property prices, particularly in the Brac, are depressed and that now is not a good time to sell unless one has to. She did not want to sell, hence her removal of the sign.

44. The Defendant asserts that the Deletion on the death of a joint proprietor form shows that as from 1st May, 2014, she was entitled to sole proprietorship of their property. She indicated that she has been advised that she is entitled to rely on the rule as to survivorship following death of the other joint property owner, Mr. Henning.

45. The Defendant stated that she objects to the Plaintiff's application or any part of it or to the registration of any restriction against the property or any sale of it.

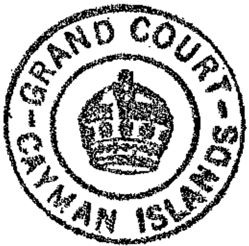
Whether Striking Out appropriate?

46. When the Originating Summons and affidavit are considered together, as I have held that they should, it is very plain that this is not at all a clear and obvious case that discloses no reasonable cause of action. Further, taking the Defendant's affidavit evidence into account, this action is also not frivolous or vexatious, and does not amount to an abuse of the process of the Court.



(4) Is the Defendant entitled to summary judgment, i.e. is this a claim with no prospect of success?

47. Additionally, it is in my view plain that this is not a case that discloses no real prospect or no prospect of success. The combined effect of the originating summons and affidavit evidence is that it calls for the Court to go through the very serious exercise of trying to decipher what was agreed between Mr. Henning and the Defendant, as represented in the Consent Order dated 24 May 2010. The Court would be required to satisfy itself as to the factual matrix of the agreement in order to ascertain the objective facts and to construe the relevant facts and circumstances in order to ascertain the intentions of the relevant parties, Mr. Henning and the Defendant. The claim also seeks injunctive relief to protect the Plaintiff as a result of the actions taken by the Defendant to make herself become registered as the sole proprietor of the property. The Defendant is not entitled to summary judgment and that application falls to be dismissed.



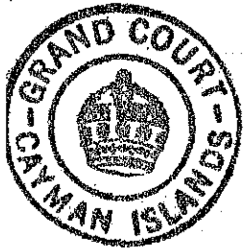
(5) If the Defendant's application for striking out and/or summary judgment is refused, what if any relief is the plaintiff entitled to under the originating summons?

48. It is the case that an application to vary the Consent Order could have been made, (indeed, if an application to vary, is truly what was required), in the original cause. Indeed, personal representatives expressly have the right to pursue such remedies. Section 23 of the ***Matrimonial Causes Law*** provides as follows:

> "23. Either spouse or the personal representatives of either spouse may make application for variation of any order made under section 21, and the Court, after hearing the parties, may make such variation."
>
> (emphasis mine)

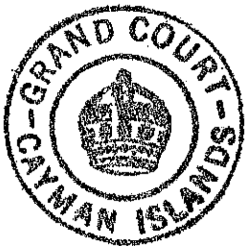
49. However, in my judgment, this case, the substantive issues joined and real relief required, although having as their genesis the matrimonial proceedings between Mr. Henning and the Defendant and the Consent Order therein entered, are not really about a variation of that order, wholly or at all. The Plaintiff's Attorney has now indicated that the claim at this time is essentially, for the matters requested at paragraphs 2 and 4 of the Originating Summons, i.e. that a restriction be placed against the property until sale of the property is achieved, and that the costs of this application be met from the proceeds of the sale of the property. She has also retained the claim for any other relief that the Court deems fit.

50. In my judgment, what this case really involves, and needs, is the resolution of the question as to the proper construction to be put upon the agreement between the parties as embodied in the Consent Order. It seems to me that what the Plaintiff requires are certain declarations as to the matters agreed between the parties and the construction of the true intentions of the parties as manifested in the agreement. This demands that the badly worded Consent Order be clarified. Further, what the Plaintiff really requires is not so much a restriction under section 132 (3) of the *Registered Land Law* (2004 Revision) as her attorney has argued, but rather an inhibition, pursuant to section 124. In other words, injunctive relief is required. This arises because of the extraordinary step taken by the Defendant in these proceedings, whether on legal advice or not, to go and have herself registered as the sole proprietor of this joint property, acting as if the Consent Order had never existed. At the very least, the Defendant's duty before taking any such action would have been to herself ask the Court for directions as to what



should take place in light of the death of Mr. Henning, her co-owner of the property. Section 124 gives the Court power to inhibit registered dealings, whereas Section 132 deals with the powers of the Registrar of Lands. However, in order to deal with the issue of inhibiting relief, it appears to me that the Court would have to first make findings and ascertain what was the true agreement between Mr. Henning and the Defendant as represented in the Consent Order. In addition, as a result of the death of Mr. Henning there are certain steps that must now be taken with the Register in order to reflect the true interests of the parties in accordance with the Consent Order entered from as far back as 2010. In that regard, section 116 of the *Land Registration Law* which deals with the question of registration on transmission of the administrator of the estate of an intestate deceased proprietor in common, comes into play.

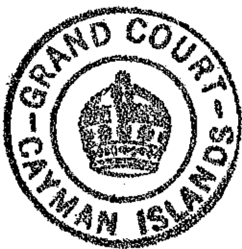
51. In Range v. Range cited by Mr. Ebanks, the Court of Appeal of the Cayman Islands indicated that pursuant to section 23 of the *Matrimonial Causes Law* the Grand Court has jurisdiction to vary all ancillary orders. However, that jurisdiction will be sparingly exercised where the order itself appears to contemplate finality and is made by consent of the parties. Like the order in Range v. Range, the Consent Order in this case does appear to have been "unhappily drafted" and clearly, was not worded with the greatest care by the parties and their representatives. In that case, at pages 441-442, Zacca P, cited a number of authoritative English cases and discussed the fact that with consent orders, as stated by Brandon LJ in ***Brown v Kirrage*** (1980), 11 Fam. Law 141:



> "One has, as it seems to me, simply to look at the order and any admissible material available for its construction, and determine what the court intended-or, in the case of the consent order, what the parties intended to effect by the order." (my emphasis)

52 The email from Mr. Hennings' then Attorney-at-Law Clyte Linwood to the Defendant's then Attorney Sheridan Brooks-Hurst dated March 4, 2010, is instructive. Ms. Linwood writes, amongst other matters: -

> "... Hennings v. Hennings proposed settlement – Cause No. D 177 of 2009 ... As my client is anxious to conclude the divorce proceedings, he has instructed me to inform you of the following, with regards to settlement of ancillaries. He is proposing that by consent: -
>
> (i) <u>The home in Cayman Brac is sold and the proceeds split 50/50 between the parties</u>; In this regard we understand that your client has just obtained a valuation on the property so that we would appreciate if you could provide us with a copy of same.
>
> (ii) The Cross-Respondent retains his motor vehicle and his 25 foot boat;
>
> (iii) That the Cross-Petitioner retains her motor vehicle, the Home/apartments in West Bay and the proceeds from sale of land..."
>
> (my emphasis)



53. Of great importance is the fact that in her letter of response dated 11th March 2010, Ms. Sheridan Brooks on behalf of the Defendant amongst other matters wrote the following to Mr. Henning's Attorney:

> Re: Hennings v. Hennings et al, Cause No. F 177 of 2009
>
> "Further to your client's proposals for settlement of the ancillary matters in this cause, we have now taken our client's instructions on the content and can advise as follows: -
>
> (a) Subject to what is said below, <u>our client agrees to the sale of the former matrimonial home in Cayman Brac and to the net proceeds being divided 50/50 between the parties. In this regard we understand that your client has just obtained a valuation on the property so that we would appreciate if you could provide us with a copy of same.</u>

...

(h) In the circumstances, and to summarise, our client is prepared to settle the ancillary matters in this cause as follows:

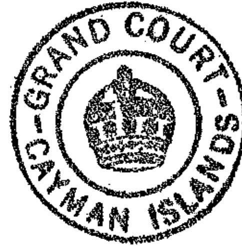
(i) Former matrimonial Home in Cayman Brac to be sold and net proceeds to be divided equally between the parties;

(ii) The Respondent to retain possession of the boat and one of the motor vehicles, with the Petitioner being compensated for her rental of alternative transportation since December 2009;

(iii) The Petitioner to continue to receive her small pension as a result of her marriage to the Respondent and the Respondent to contribute to her legal fees in an amount to be notified to you.

...".

(my emphasis)



54. In my view, the wording of the Consent Order itself, the without prejudice correspondence between the parties, as well as the Agreement to List the property for sale, signed by the parties, subsequent to the order, appear to make it clear, and evidence that there was an intention to sever the joint proprietorship of the parties so that they would hold their interests as proprietors in common in equal shares. Sub-section 100(3) of the *Land Registration Law* is the formal statutory way in which a severance comes about, but it is not the only way or time at which severance takes place. Whilst the Order to my mind makes it clear that a sale is agreed, it did not expressly state what would be the shares of the respective parties. However, the correspondence indicates a plain intention that there would be equal interests and it is plain that equity would, until such time as the legal interests were altered to reflect the true interests and shares, treat the interests as being equal shares as proprietors in common and would regard the joint proprietorship as having been severed.

55. This claim has not been made with the particularity and level of detail that is required. What, therefore, is the Court to do in these circumstances? The overriding objective is to deal with cases justly. In my view, in reflecting on the matter, Counsel for the Plaintiff ought not to have made the concessions which she did. This is because my view now is, (although I had a different provisional view initially), that in the somewhat peculiar circumstances of this case, there was no need for an application to be made in the original Cause No. F 177 of 2009 after all. One course that seems open is for counsel for the Plaintiff to be asked to amend and clarify precisely what is being asked for. In *Sime*, at paragraph 30.1.3.1, under the heading "No reasonable cause of action or defence:", the learned author states "the court may allow a party to amend its plea other than striking it out, even if a proposed amendment had not been placed before it at that stage" (*CBS Songs Ltd. v Amstrand Ltd* [1987] RPC 417. Amendment will only be allowed as an alternative to striking out if there is a real prospect of establishing the amended case (*Charles Church Developments Ltd. v. Cronin*) [1970] FSR1)."

56. However, another course is for the Court to make the appropriate declarations arising from the facts and circumstances as they have been found in this case. Order 15, rule 16 of the *Grand Court Rules*, codifies the Court's inherent power to grant declaratory relief. It states:

"**Declaratory Judgment** (o.15, r.16)

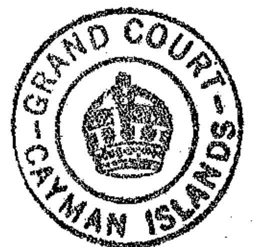
16. No action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought

thereby, and the Court my make binding declarations of right whether or not any consequential relief is or could be claimed."

57. Note 15/16/7 to the identical rule in the English *Supreme Court Practice 1999* states: "A declaration may be made although not specifically claimed in the statement of claim" and the case cited for that proposition is the English Court of Appeal's decision in ***Harrison-Broadley v. Smith*** [1964] 1 All E.R. 867.

58. In ***Harrison-Broadley v Smith***, the Court had before it a case in which no claim for a declaration had been made in the relevant Statement of Claim. Injunctive relief was the sole relief claimed, but that was refused. It was held that it was appropriate to grant relief in the form of a declaration even though that relief had not been claimed and a declaration was so granted. The rule applicable at the time and which was considered was O. 18, rule 17. At page 873 B Harman LJ stated:

> "It is very awkward that no declaration is asked for on the claim; no further relief is asked for. Nothing is asked for except these two injunctions, which I do not think it is proper to give. The Rules of the Supreme Court, however, do, I think, entitle us to grant a declaration if that be the right thing to do; and in *Hulton v Hulton*, cited to us this morning, it does appear from the judgment of Lush J., that it is, if necessary, within the power of the court, although a declaration be not asked for, to grant one. ...."



(my emphasis)

59. In the *Preamble* to the *Grand Court Rules*, which deals with the GCR's overriding objective, at section 2, it is stated:

" **2. Application by the Court of the overriding objective**

2.1The Court must seek to give effect to the overriding objective when it -

(a) applies, or exercises any discretion given to it by these Rules; or

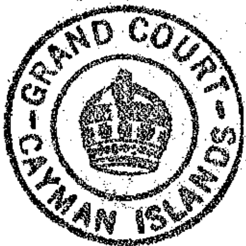
(b) interprets the meaning of any Rule.

2.2 These Rules shall be liberally construed to give effect to the overriding objective and, in particular, to secure the just, most expeditious and least expensive determination of every cause or matter on its merits."

60. In my judgment, it is appropriate and necessary for this Court to make the declarations required (by way of further or other relief) and give the orders needed to sort out and unravel this very unfortunate situation and somewhat less-than thoroughly drafted claim. This is what the justice of this case seems to require in the circumstances.

61. I therefore grant the following declarations and make the following Orders: -

1) The Defendant's Summons dated 30th December 2014 is dismissed.



2) (a) a declaration is granted that by Consent Order dated May 24, 2010 in Cause No. D 177 of 2009 the parties to that cause, John Ashton Ludlow Henning (now deceased) and Margaret Ann Henning intended and agreed that the property, registered in their names as joint proprietors in the Cayman Islands Land Register as Registration Section Cayman Brac West, Block 97B, Parcel 94, be sold and the net proceeds of sale be divided equally between the parties.

(b) A declaration is granted that by virtue of the agreement between the parties to cause no. D 177 of 2009 as embodied in the Consent Order dated May 24, 2010, the parties agreed to sever the joint proprietorship and thereby become entitled to the property as proprietors in common in equal shares.

(c) Further or alternatively to paragraph (a) above, the Consent Order dated May 24 2010, is hereby rectified by substituting for paragraph 1 thereof, the following: -

> "1. The property registered in the Cayman Islands Land Register as Registration Section Cayman Brac West, Block 97B, parcel 94 ("the Property") in the joint names of the Petitioner and the Respondent is to be sold, and the proceeds of sale be divided equally between Gweneth E. Henning, in her capacity as the Administrator of the estate of John Ashton Ludlow Henning, also known as John Ashton Henning, deceased, and, Margaret Ann Henning.

(d) The Registrar of Lands is, upon service of the formal order, to forthwith cause the registration in the Register of the names of Gweneth E. Henning as Administrator of the estate of John Ashton Ludlow Henning, also known as John Ashton Henning, deceased, on transmission, and Margaret Ann Henning, as proprietors in common in equal shares.

(e) The Defendant is to deliver up to the Plaintiff's attorneys-at-law by March 6, 2015, any Land Certificate that has been issued to her in her sole name, in respect of the said property for cancellation by the Registrar of Lands.

(f) Save for delivery up of the said Land Certificate, as referred to in paragraph (e) (above), the Defendant, whether by herself, her servants and/or agents is inhibited and/or restrained from dealing with, selling or otherwise disposing of the said property for so long as same remains registered in her sole name.

(g) The said property is to be sold by public auction or by private treaty.

(h) The Clerk of Court of the Grand Court is hereby empowered to sign all relevant instruments or documents required to perfect these orders, including the registration of the interests of the estate of John Ashton Henning, deceased, on the Land Register and for sale of the said property.

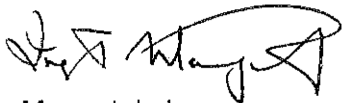
(i) The Plaintiff is to prepare, file and serve this Order and forthwith serve a copy of the Formal Order on the Registrar of Lands.

(j) There shall be liberty to either party to apply generally as to the workings of this Order.

62. Both parties after I had delivered this judgment in unapproved format on the 27th February 2015, have subsequently requested to be heard further on the

question of costs. That issue will be the subject of a separate hearing to be fixed in consultation with the Listing Officer. The question of costs is therefore reserved to a date to be fixed.

Dated this 27th day of February, 2015



Mangatal, J.
Judge of the Grand Court