Neutral Citation Number: [2025] CIGC (Civ) 24

IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

G 0010 of 2021

BETWEEN:

KENTON NEMBHARD

Plaintiff

AND:

THE ATTORNEY GENERAL OF THE CAYMAN ISLANDS

Defendant

AND:

DEPARTMENT OF ENVIRONMENTAL HEALTH

Interested Party

Appearances:	**Mr. Clayton Phuran of CP Attorneys for the Plaintiff** **Mr. James Austin-Smith of Campbells for the Defendant**
Before:	**Hon Justice Marlene Carter**
Date of Hearing:	**9 September 2024**
Draft Judgment circulated:	**14 August 2025**
Judgment delivered:	**20 August 2025**

Civil Law – Payment into court- offer to settle – when contract made- whether settlement of claim by words and conduct

JUDGMENT

Introduction

1. The plaintiff filed a claim for damages for negligence. The plaintiff was employed by the Interested Party between 27 April 2008 and 31 January 2020. The claim revolved around an injury to the plaintiff's shoulder which he alleges was caused by the negligence of the employer.

2. On 16 November 2023 the defendant made a payment into court ("the payment into court"). The payment into court, if accepted, was to be in full and final satisfaction of all the plaintiff's claims. The defendant has filed the instant application by summons seeking, at paragraph 1, a declaration that the payment into court was accepted by the plaintiff on 26 April 2024.

3. Apart from that declaration the summons also seeks the following:

> *"2. The Defendant shall pay the Plaintiff's costs of the action until 23 November 2023, to be taxed on the standard basis if not agreed, excluding the period in paragraph 3 below;*
>
> *3. The Plaintiff shall pay the Defendant's costs pursuant to paragraph 2 of the Order dated 14 February 2023, to be taxed if not agreed.*
>
> *4. The Plaintiff shall pay the Defendant's costs from 24 November 2023 to the date of this order, to be taxed on the standard basis if not agreed.*
>
> *5. On determination of the sums due in paragraphs 2 to 4 above, the parties shall agree a further order confirming the amount to be paid out of court to each party and dismissing the action.*"

4. The parties have each set out a detailed chronology ["the Chronology"] to assist the court.[1] Some of the more salient dates and correspondence from the Chronology are those noted in the following paragraphs.

5. On 03 April 2024, the defendant wrote to the plaintiff stating:

> *"If the funds [the payment into court] are not accepted by [05 April 2024] then our client's rights are fully reserved, including making an application pursuant to GCR 0.22, r.1(3) to have the payment into court withdrawn based on the new evidence…"*

[1] Further aspects of the Chronology are detailed later in this judgment.

6. On 26 April 2024, counsel for the plaintiff wrote to the defendant stating:

> *"We are creatures of instruction, and, at our client's request, we advise that we have been asked to accept the payment into court of CI$[redacted] if that option is still open. We await your response."*

7. On 29 April 2024, the defendant responded:

> *"Thank you for your letter dated 26 April 2024. We agree to your client's proposal that he accepts our client's payment into Court. Prior to the funds being paid out of Court, we suggest that agreement is reached as to the extent to which either party is liable to the other for costs...."*

8. On 1 May 2024, the listing officer and Judge's secretary were informed that the matter had been settled.

9. There were then attempts by the parties to agree the extent to which each was liable to the other in respect of costs. Those attempts were unsuccessful.

10. On 15 May 2024, the plaintiff wrote:

> *"In our view, your acceptance of our client's proposal was conditional on an agreement regarding costs. There having been no agreement regarding costs, there is no settlement."*

The Defendant's submissions

11. Counsel for the defendant submitted that there was an offer made by the defendant which was accepted by the plaintiff. As such, the plaintiff cannot resile from his acceptance of the offer.

12. Counsel submitted that the Court should reject the plaintiff's assertion that the acceptance was made conditional on agreement being reached as to costs. Counsel argued that when one views the correspondence between the parties as detailed in the Chronology, the email of 26 April 2024 from the plaintiff contains no such stipulation. While counsel agrees that the email from the defendant in reply of 29 April 2024 contained a suggestion that the parties attempt to agree costs prior to the agreement being actioned and funds paid over to the plaintiff, this suggestion is irrelevant to the existence of the clear agreement to accept the payment into court.

13. Counsel further submitted that if the plaintiff sought to make the acceptance conditional on an agreement as to costs the plaintiff would have made that clear indication. The plaintiff did not. It

was further argued that the existence of the agreement is further evidenced in the parties' subsequent conduct:

> *"(1) The Court was written to three times and explicitly told that "the case has settled". (Not that it had settled subject to an agreement on costs.)*
>
> *(2) The parties requested that all outstanding applications be vacated from the court list because of the settlement. (Not that they be adjourned pending settlement negotiations.)*
>
> *(3) The parties sought the Court's ruling on a costs application to finalise the "ensuing" financial aspects of the matter. (Not that this was a prerequisite to reaching an agreement to settle the matter.)*
>
> *(4) The Plaintiff wrote to the Defendant suggesting arrangements be made "between ourselves for the payment into court to be paid out." (The Plaintiff was not suggesting the parties proceed to finalise the settlement agreement without court input - it was suggesting they try to resolve the ensuing issue of costs without court input.)"*[2]

14. The defendant submits that the parties' *"words and conduct"* are clear. The parties intended to settle the case and did so in the clearest possible terms.

The Plaintiff's submissions in response

15. The plaintiff submits that he did not accept the payment into court. Instead, the plaintiff contends, he rejected the defendant's numerous offers of settlement. In the alternative, the plaintiff submits that the Court may view the letter from the plaintiff on 26 April 2024 as an offer, which the defendant accepted by the terms of its letter of 29 April 2024. However, the defendant attached an act and or condition to its acceptance and the act or condition was never completed. Therefore, there is no contract between the parties.

16. Regarding the plaintiff's letter of the 26 April 2024, it was submitted that the plaintiff was simply inquiring if the payment was available as it stood without costs. The plaintiff argues that once the defendant responded to that letter to "*suggest that agreement is reached as to the extent to which*

[2] From the Defendant's skeleton argument at paragraph 11.

either party is liable to the other for costs", the defendant thereby requested an act and or a condition to be completed, and this was never completed.

17. The plaintiff further submits that the Court should find, when it reviews the Chronology, that what is evident is that the plaintiff was willing to enter negotiations with the defendant, but there was no offer by the plaintiff nor an acceptance so as to form a binding contract. The plaintiff argues that what transpired between the parties was in the vein of *"mere enquiries"*.

18. Specifically, counsel for the plaintiff submitted that "*the letter written by CP Attorneys on the 26th of April 2024, was simply an attempt to enquire if the offer which had been made by the payment into Court was still available as it stood or if there were different terms to the offer. Therefore, by no means did the plaintiff accept the payment into Court."*

19. Counsel argues that there was never an acceptance of the payment into court as per the Grand Court Rules. It is submitted that since the plaintiff did not submit a notice of acceptance per the Rules, by submitting Form No.15, there could be no acceptance of the payment into court. Counsel argues further that the chronology of counter offers made by the plaintiff is evidence of the non-acceptance of the defendant's offer.

20. The plaintiff contends that the other matters referred to by the defendant as evidence of agreement from subsequent conduct do not amount to confirmation of a settlement. Counsel submitted further that the argument that the plaintiff's writing to the defendant to state, *"In the absence of a response from the Court, it is our view that we should proceed to make arrangements between ourselves for the payment into Court to be paid out, subject to any agreement we may make to address the issue of the January 11 costs."* was simply another indication of an offer from the plaintiff for the payment of the amount paid into court for full and final settlement including costs save for the costs awarded by the Court of 11 January 2024.

21. The plaintiff stated that the Chronology shows that there has never been any contract between the parties but simply mere enquiries and invitations to treat.

Court's considerations

22. The Chronology referred to earlier in this judgment is set out below. Within the Chronology, the figures regarding settlement have been redacted as they do not impact the Court's decision on the issues for determination.

DATE	INCIDENT
16/11/23	D Makes payment into court of CI$ [redacted]
23/11/23	P served with notice of payment in.
3/4/24	D letter to P: Points out impact of newly discovered evidence. Indicates: "*If the funds are not accepted by [5 April 2024] then our client's rights are fully reserved, including making an application pursuant to GCR O.22, r.1(3) to have the payment into court withdrawn based on the new evidence…*"
12/4/24	P letter to D: Makes counter proposal
22/4/24	D letter to P: Rejects P counter proposal of 12.4.24. "*As set out in our letter of today's date, in light of new evidence we are instructed to file a strike-out application. Needless to say, if our strike-out application is successful your client will no longer be entitled to accept the offer of CI$[redated] paid into Court.*"
26/4/24	P writes to D: "*We are creatures of instruction, and, at our client's request, we advise that we have been asked to accept the payment into court of $CI [redacted] if that option is still open. We await your response*."
29/4/24	D email to P: "*Thank you for your letter dated 26 April 2024. We agree to your client's proposal that he accept our client's payment into Court.* *Prior to the funds being paid out of Court, we suggest that agreement is reached as to the extent to which either party is liable to the other for costs…*"
1/5/24 11.51 am	D writes to List Officer copying P. "*The hearing date in this matter can be vacated (for both applications) as the case has settled.*"
1/5/24 12.38 pm	List Office responds re: vacating date. P copied.
1/5/24 12.04 pm	D writes to Judge's secretary copying P. "*This case has now settled. Can you advise when the ruling on costs in respect of the hearing on 11 January 2024 will be available so that the parties can finalise the ensuing financial aspects of the matter?*"

2/5/24 11.40 am	D writes to J's secretary, P copied: "*As indicated in my email yesterday, this matter has now settled. Therefore the parties will not be obtaining or filing any further evidence.*"
10/5/24	P writes to D: "*We note your email to the court on May 1, 2024 for the ruling on costs for the January 11, 2024 hearing. In the absence of a response from the court, it is our view that we should proceed to make arrangements between ourselves for the payment into court to be paid out, subject to any agreement we may make to address the issue of the January 11 costs.*"
13/5/24	P letter to D: "*In our view, the matter is taking too long to be resolved. We propose that payment of the CI$[redated] be made, excluding costs, and we then seek to agree costs between us or proceed to taxation. A proposed draft order to this effect is enclosed. Kindly let us have your response by close of business on May 14, 2024, failing which we will take it that the matter is not in fact settled and we will seek to have the interim payment application re-listed.*"
15/5/24	P letter to D: "*In our view, your acceptance of our client's proposal was conditional on an agreement regarding costs. There having been no agreement regarding costs, there is no settlement.*" Further argument as to costs. "*In any event we await your further word by May 17, 2024.*"

Issue 1 – The status of the Payment into court

23. GCR Order 22 Rule 3(1):

> *"Where money is paid into Court under Rule 1, then, subject to paragraph (2), within 21 days after receipt of the notice of payment, or, where more than one payment has been made or the notice has been amended, within 21 days after receipt of the notice of the last payment or the amended notice but, in any case, before the trial or hearing of the actions begins, the plaintiff may –*
>
> *(a) Where the money was paid in respect of the cause of action or all the causes of action in respect of which the plaintiff claims, accept the money in satisfaction of that cause of action or those causes of action, as the case may be; or*
>
> *(b) Where the money was paid in respect of some only of the causes of action in respect of which the plaintiff claims, accept in satisfaction of any such cause or causes of action the sum specified in respect of that cause or those causes of action in the notice of payment, by giving notice in Form No.15 of the Grand*

Court Rules- Volume II – Form (as amended and revised) to every defendant to the action."

24. The payment into court was notified to the plaintiff. Notice was served on the plaintiff on 23 November 2023. The plaintiff moved to make a counter proposal to what was set out in the payment into court. This counter proposal was not accepted. The defendant instead relates that it has instructions to file a strike-out application. On 26 April 2024, within four (4) days of this indication, the plaintiff advised the defendant of his client's request to accept the payment into court.

25. It is apparent from the correspondence between the parties that there had been a movement away from the payment into court regime. The defendant's reply of 29 April 2024 supports this view. There is no entreaty on the part of the defendant for the plaintiff to indicate its acceptance of the payment into court by giving notice in the form prescribed by Rule 22. Instead, the defendant's note in response was to the effect that *"we agree to your client's proposal that he accepts our client's payment into court."*

26. The parties' conduct subsequent to these statements being exchanged further confirms this position. The plaintiff sought to *"make arrangements between ourselves for the payment into court to be paid out…*". Therefore, the fact that the plaintiff did not signify acceptance of the payment into court through the medium prescribed by the Rules is not sufficient here to conclude that there was no contract between the parties towards the resolution of the claim.

27. I do not accept that the plaintiff's letter of 26 April was simply an attempt to enquire if the offer which has been made by payment into court was still available as it stood or if there were different terms of the offer. The fact of a payment into court carries its own terms as set out in Order 22. There was no need for such an inquiry of the defendant.

28. The main issue here remains one of offer and then acceptance. The amount of the payment into court was to this Court's mind, an indication of the amount at which the defendant was prepared to settle this matter. It was ultimately the figure at which the negotiation ended between the parties.

Issue 2: Did the Plaintiff accept the Defendant's offer so that there is a binding contract between the parties

29. Counsel for the plaintiff referred to principles of offer and acceptance in contract as set out in **Halsbury's Laws of England**. There is no dispute as to their relevance to this application.

i. *"An invitation to treat is a mere declaration of willingness to enter into negotiations, it is not an offer and cannot be accepted so as to form a binding contract".*[3]

ii. *"An acceptance of an offer is an indication, express or implied, by the offeree made whilst the offer remains open and in the manner requested in that offer of the offeree's willingness to be bound unconditionally to a contract with the offeror on the terms stated in the offer."*[4]

iii. *"An acceptance is a final and unqualified expression of assent, whether by words or conduct, to the terms of an offer. The objective test of agreement applies to an acceptance no less than to an offer. On this test. a mere acknowledgement of the receipt of an offer does not amount to an acceptance: nor is there acceptance if a person. to whom an offer to sell goods has been made. merely replies that it is his intention to place an order or asks for an invoice."*[5]

30. In the context of exchanges between parties involved in litigation, the following relevant authorities were referred to by counsel in the course of their arguments. In ***The Society of Lloyds v Twinn and Twinn***[6], the respondents were served with separate statutory demands which called for payment of sums said to be owing by them to Lloyd's under a so-called Reconstruction and Renewal Agreement entered into between Lloyd's and each of the Names who accepted the terms on offer. The Registrar made bankruptcy orders on petitions against each appellant. The respondents appealed these orders. Their appeals were allowed, and the bankruptcy orders were set aside. The appellant sought the re-instatement of the bankruptcy orders.

31. At issue before the court was whether the respondents had accepted the Re-construction and Renewal Settlement offer that had been extended by Lloyd's to Names in July 1996. The court below held that they had not accepted the offer, that their purported acceptance had been so hedged around with conditions as not to constitute an effective acceptance at all.

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[3] Halsbury's Laws of England Contract Volume 22 [2019], formation of Contract, offer and acceptance, offer and invitation to treat, para 35 invitation to treat.

[4] Halsbury's Laws of England Contract Volume 22 [2019], formation of Contract, offer and acceptance, acceptance, para 51 meaning of acceptance.

[5] *OTM Ltd v Hydranautics* [1981] 2 Lloyds Rep 211

[6] [2010] UKSC 14

32. Each respondent had signed and executed a settlement offer in the following terms:

> *"I have carefully read the Settlement Offer Document, including the Settlement Agreement set out and described therein. In consideration for the mutual covenants and agreements and other good consideration, I hereby irrevocably accept the settlement offer, agree to be bound by the terms and conditions set out in the Settlement Agreement, make all releases, waivers, assignments and other depositions and grant all powers of attorney, authorities and appointments there under".*

33. The Respondents submitted the above signed and executed settlement offer to the Appellant with a covering letter. While the Respondents accepted the amounts found to be due, they further stated: *"I have no money with which to make payment;"*

34. As stated by the court in the ensuing appeal, *"The point that has been taken is based on Mr. Twinn's assertion in the letter that neither he nor his wife would be able to pay the net sums due from them under their respective finality statements. This assertion, it is submitted, rendered the apparently unequivocal acceptances, constituted by the execution of the acceptance forms, equivocal and ineffective.*

35. This contention is what was accepted by the court below. On appeal, the Court of Appeal noted that the question that should have been considered was not whether this letter was an unequivocal acceptance of the appellant's offer, but whether it rendered the *"apparently unequivocal acceptances"* equivocal.

36. The court found that:

> *"34. It seems to me plain that Mr. Twinn was following up unconditional acceptances with an attempt to obtain concessions as to the means by which he and his wife's payment obligations under the Settlement Agreement might be discharged."*

37. The court accepted that subsequent correspondence could not be used to assist in the construction of a written contract. However, it did so only as *"a general proposition"*. The court went on to state that:

> *"... subsequent correspondence, or subsequent statements by the parties, can be used to cast light on the question whether a binding contract has been entered into. The point is made in Chitty, Vol. 1, 28th edition, at paragraph 12-124*

> *Subsequent actions are therefore inadmissible to interpret a written agreement, although they are admissible to show there was a contract and what the terms of the contract were, either originally or by variation or as the basis of an estoppel".*

38. At paragraph 49 – 51 of the report, the court stated:

> *"Two situations must be distinguished from one another. An offeree who purports to accept an offer must accept unconditionally. An acceptance which adds a new term to the contract is not an unconditional acceptance. But there is, conceptually at least, no reason why an offeree should not accept an offer unconditionally and, at the same time, make a collateral offer to the original offeror. The original offeror may or may not accept the collateral offer but, whether he does or does not do so, the unconditional acceptance will stand as having concluded the contract on the terms of the original offer."*
>
> ....
>
> *51. Whether an acceptance is truly unconditional, with the counter-offer being collateral to the concluded contract, or whether the counter-offer is a condition of the acceptance is an issue which will depend on the facts of the particular case. The intended effect of a purported acceptance must be judged objectively from the language used and the surrounding circumstances."*

39. In the case of ***Storer v Manchester City Council***[7] the defendant, City Council, refused to proceed with the sale of council property to the claimant under an arrangement which had been agreed with its predecessor. To assist the tenants to purchase properties without the need for full legal formalities, the defendant created a standard application form for tenants to use. The claimant applied using the form.

40. All the terms of the contract had been agreed but for the date on which the lease was to end and the mortgage payments were to begin. These had been left blank on the form returned to the defendant by the claimant. The claimant alleged that the contract was completely concluded and sought specific performance of the agreement.

41. The issue for the court was whether the contract had been concluded, even though the date on which the claimant became a purchaser rather than a tenant was still to be determined.

42. The Court of Appeal held that the contract was complete despite the absence of this term. The court noted that in distinguishing between an offer and an invitation to treat, it is necessary to look not to

[7] [1974] 1 WLR 1403

the subjective intentions or beliefs of the parties, but rather on what their words and conduct might reasonably and objectively be understood to mean. In this case, the arrangement was objectively designed to dispense with the usual formalities associated with land sale. The defendant, therefore, accepted the claimant's offer to buy the house when it responded with a form of agreement. This was not a case in which the parties had implicitly or explicitly agreed that their arrangement would be *'subject to contract'*. The court found that there was, therefore, no need for an exchange of contracts and that the date clause was merely of administrative concern, so its absence did not affect the contract's validity.

43. In ***AB and Another v CD Ltd.***[8]**,** at issue was whether an oral agreement reached after an unsuccessful mediation hearing was legally enforceable notwithstanding a standard clause in the mediation agreement providing that no agreement was to be legally enforceable unless incorporated into a written agreement and signed by the parties.

44. This was a claim for professional negligence in relation to work carried out by the defendant as an architect at a property owned by the claimants. Before the trial of the action, the parties entered into a mediation agreement. At the mediation hearing, the claimants made an offer to settle the claim, representing a sum in respect of damages and a sum in respect of costs. The defendant said it was unable to respond to this offer without making further enquiries. The offer was left open for a few more days. There were then various email exchanges between the parties' solicitors on the issue of costs. The defendant subsequently made a counter offer regarding both the figure for damages and the figure for costs which the claimant accepted.

45. The defendant subsequently adopted a position that whilst the parties had agreed their figure in respect of damages, the written terms of settlement had not been agreed. They asserted that the defendant's offer had been subject to contract and, in any event, under the terms of the mediation agreement, an agreement should not be enforceable unless incorporated into a written agreement by the parties.

46. The defendant also submitted that the claimant's purported acceptance of the defendant's offer on 12 March 2013 introduced two new terms. The new terms were said to be that the disposal of the action was to be by way of a Tomlin order and that the time for payment was to be fourteen (14) days.

[8] [2013] EWHC 1376 (TCC)

47. The court did not find favour with these submissions. The court held that the new terms were not a counter offer on the part of the Plaintiff. The court stated:

> *"This conclusion is also reinforced by a passage in Chitty on Contracts 31st Edition at para.2-032. In that paragraph the authors say this:*
>
> > *'The test in each case is whether the offeror reasonably regarded the purported acceptance 'as introducing a new term into the bargain and not as a clear acceptance of the offer.' It is also possible for a communication which contains new terms to amount at the same time: (1) to a firm acceptance of the offer; and (2) to a new offer to enter into a further contract. In such a case, there will be a contract on the terms of the original offer, but none on the terms of the new offer, unless that, in turn, is accepted.'*
> >
> > *It seems to me that the opinion in the last sentence of that paragraph is supported by the authorities cited. In my view, it applies to this case. Accordingly, for this reason also, I consider that the claimants' stated willingness to accept £Y in respect of their costs does not invalidate an otherwise valid acceptance of the defendant's offer."*

48. Counsel also referred the court to the following from the judgment of Lord Clarke delivering the judgment of the Supreme Court in ***RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG***[9]

> *"[45] The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded j or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a pre-condition to a concluded and legally binding agreement.*
>
> ...

[9] [2010] UKSC 14

[49] In his judgment in the Court of Appeal in the Pagnan case Lloyd LJ (with whom O'Connor and Stocker LJJ agreed) summarised the relevant principles in this way (at 619):

> *'(1) In order to determine whether a contract has been concluded in the course of correspondence, one must first look to the correspondence as a whole ...*
>
> *(2) Even if the parties have reached agreement on all the terms of the proposed contract, nevertheless they may intend that the contract shall not become binding until some further condition has been fulfilled. That is the ordinary "subject to contract" case.*
>
> *(3) Alternatively, they may intend that the contract shall not become binding until some further term or terms have been agreed ...*
>
> *(4) Conversely, the parties may intend to be bound forthwith even though there are further terms still to be agreed or some further formality to be fulfilled ...*
>
> *(5) If the parties fail to reach agreement on such further terms, the existing contract is not invalidated unless the failure to reach agreement on such further terms renders the contract as a whole unworkable or void for uncertainty.*
>
> *(6) It is sometimes said that the parties must agree on the essential terms and that it is only matters of detail which can be left over. This may be misleading, since the word "essential" in that context is ambiguous. If by "essential" one means a term without which the contract cannot be enforced then the statement is true: the law cannot enforce an incomplete contract. If by "essential" one means a term which the parties have agreed to be essential for the formation of a binding contract, then the statement is tautologous. If by "essential" one means only a term which the Court regards as important as opposed to a term which the Court regards as less important or a matter of detail, the statement is untrue. It is for the parties to decide whether they wish to be bound and, if so, by what terms,*

> *whether important or unimportant. It is the parties who are, in the memorable phrase coined by the Judge [at 611], "the masters of their contractual fate". Of course, the more important the term is the less likely it is that the parties will have left it for future decision. But there is no legal obstacle which stands in the way of the parties agreeing to be bound now while deferring important matters to be agreed later. It happens every day when parties enter into so-called "heads of agreement".'*

49. These authorities emphasise that in determining whether there is a binding contract between the parties there must be a scrupulous examination of all that passed between them and the circumstances surrounding their interactions in relation to the subject of the contract.

50. There are various factors which lead this Court to a conclusion in favour of the defendant on this application. The first of these is the context in which the parties exchanged the relevant correspondence especially between April and May 2024. These were attorneys attempting to explore whether there could be a resolution to the issues between their clients. The email from the defendant of 22 April 2022 is almost in the nature of an ultimatum. That counsel for the plaintiff noted this forceful expression of the defendant's position can be seen from his response. He was resigned to the fact that he had instructions to proceed along a certain course. This is the entire tone of his response of the 26 April 2024 we he stated: "*We are creatures of instruction, and, at our client's request, we advise that we have been asked to accept the payment in to court, …if that option is still open."*

51. The actions of counsel for the plaintiff thereafter are also instructive and another factor towards acceptance of the defendant's submissions on this aspect of the application. The defendant proceeded to inform the listing officer and the Court that the matter was settled. The plaintiff's attorney was copied in on this correspondence. At no stage did counsel for the plaintiff object or give any indication, when the defendant sought to have the matter taken out of the Court's list for the stated reason that the parties had reached settlement, to say that matters were not yet settled as negotiations were continuing. At no stage did counsel for the plaintiff inquire as to the actions of counsel for the defendant in making these representations or to resile from what counsel for the defendant had taken to be the position and now acted upon, which was a position of acceptance of the defendant's offer.

52. While the matter of costs was still to be settled, I do not accept that this prevented the parties from having come to an agreement. The correspondence between the parties shows the plaintiff's attorneys making attempts to have the monies paid out on 10 and 13 May 2024. At this stage it appeared that, to the plaintiff, costs did not go to the heart of the matter which was the settlement of the claim. Counsel for the plaintiff's words are clear in their intent and meaning. In an event, when counsel for the plaintiff now asserts that the question of costs should be considered an essential component of the agreement to settle, the fact remains that a contract can be concluded where even such an important matter between the parties was not yet agreed.

53. I have looked at the correspondence between the parties as a whole. There was no indication that the settlement of the claim was bound to the issue of costs being agreed beforehand. I find that the correspondence shows that the parties intended to be bound even as the issue surrounding costs was still to be agreed or resolved. In any event, even in a case where there may be an unresolved further issue, an *existing contract is not invalidated unless the failure to reach agreement on such further terms renders the contract as a whole unworkable or void for uncertainty*[10]. In the circumstances of this case, neither of these factors are present.

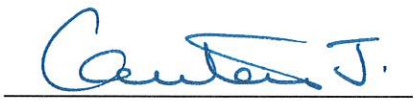
54. The plaintiff's alternative submission that the letter from the plaintiff on 26 April 2024 was an offer, which the defendant accepted by the terms of its letter of 29 April 2024 and to which the defendant attached an act and or condition which was never completed leading to the conclusion that there was no contract between the parties is rejected. The offer flowed from the defendant. The plaintiff accepted the offer and attached no conditions or none that invalidated the contract. Even if the Court were to contemplate that the offer flowed from the plaintiff and the defendant accepted this offer by its letter on 29 April 2024, the actions of both the defendant and the plaintiff thereafter do not support the contention that the defendant contemplated that the issue of costs needed to be resolved before agreement. The defendant wrote to the Court and to the listing officer indicating that the matter was settled with the plaintiff being copied in on this correspondence. There is no doubt that it was never contemplated that this was a condition which could prevent the agreement to settle the claim being concluded and a binding contract being formed.

55. The determination of whether or not there is a contract does not depend upon a party's subjective state of mind[11]. In this case the actions of the parties, a review of their correspondence and the

[10] See paragraph *45, RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG*
[11] Ibid at paragraph 49.

plain meaning and sentiment recorded therein, leads to the firm conclusion that there was between the parties a firm intention to settle, an intention for a binding contract to that effect. This is this Court's objective appraisal of the relevant facts.

56. The application for a declaration succeeds. The defendant is granted an order in terms of the summons filed herein.



Hon. Justice Marlene I. Carter
Judge of the Grand Court