VINET v. ROCK CITY SERVICES LIMITED, ROBLES, USQUIERI and GRACIA

SUPREME COURT (Pizzarello, A.J.): July 31st, 1998

Civil Procedure—settlement of proceedings—"without prejudice" communications—valid agreement may be reached by solicitor's acceptance of "without prejudice" offer—"Tomlin order" records agreement but not itself agreement—"without prejudice" correspondence and amendments to draft order indicate no final agreement reached

Civil Procedure—settlement of proceedings—solicitor's ostensible authority—solicitor making offer of settlement without client's instructions nevertheless binds client unless made subject to confirmation

The defendants applied for an order to enforce a settlement of litigation out of court.

The solicitor representing the plaintiff, on his instructions, rejected a "without prejudice" offer to settle from the defendants and, without consulting his client further, made an alternative "without prejudice" proposal for settlement. The solicitor for the first, third and fourth defendants took instructions from his clients, who agreed to accept the offer. He then consulted the second defendant's solicitor, whose client agreed to accept the offer and the two solicitors signed a draft *Tomlin* order setting out the agreed terms which was then sent to the plaintiff's solicitor with a "without prejudice" letter.

On the same day the defendants' solicitor spoke to a colleague of the plaintiff's solicitor, confirming that his clients had accepted the new offer and that he was sending the *Tomlin* order. That solicitor said that he would "look at" the draft order. The conduct of the first, third and fourth defendants' case was then taken over by another solicitor from the same firm on the understanding that agreement had been reached. He agreed to minor changes to the draft order suggested by the plaintiff's solicitor, which he believed did not affect the substance of the order. Later, having taken instructions, the plaintiff's solicitor resiled from the agreement.

The defendants submitted that (a) agreement had been reached when the plaintiff's counter-offer was accepted by the solicitor for the first, third and fourth defendants; (b) the letter to the plaintiff's solicitor, although marked "without prejudice," did not indicate that the terms of the agreement were to be further discussed; (c) the draft *Tomlin* order incorporated the terms already agreed and the minor changes made later did not impinge on the basic agreement; and (d) they had at no stage been informed by the plaintiff's solicitor that he had not yet taken his client's

instructions, and accordingly they were entitled to rely on his ostensible authority to settle the claim.

The plaintiff submitted in reply that (a) his solicitor had told the defendants' solicitor at the outset that he would shortly be meeting with his client and that his proposal was subject to instructions; (b) the "without prejudice" nature of the letter had indicated that discussions were ongoing and the draft order had been regarded as a negotiating tool only; (c) the fact that his solicitor's suggestions for changes to the draft order were accepted showed that the order had not been intended to represent a final agreement; and (d) accordingly, there had been no agreement and the issue of ostensible authority did not arise.

Held, dismissing the application:

(1) An agreement reached by the acceptance of a "without prejudice" offer of settlement was a valid agreement. Such an agreement could be recorded in a *Tomlin* order for approval by the court, but the order would not constitute the agreement, which must come first. When a solicitor negotiated to settle an action without taking instructions from his client and without informing the other party that his proposals were subject to instructions, the other party was entitled to rely on the solicitor's ostensible authority and could enforce a settlement reached in this way (page 344, line 42 – page 345, line 9).

(2) In this case, however, the "without prejudice" nature of the letter written to confirm the alleged agreement and the subsequent amendments made to the draft *Tomlin* order were evidence that no final agreement had been reached at the time the solicitors for the defendants "accepted" the plaintiff's solicitor's offer. The draft order was treated as a basis for negotiation. Whether the plaintiff's solicitor informed any or all of the defendants' representatives that his proposal was subject to taking instructions was unclear. However, in the absence of a firm agreement, his authority to settle the claim was immaterial (page 345, lines 37–45; page 346, line 37 – page 347, line 11).

Case cited:

(1) *Tomlin* v. *Standard Telephones & Cables Ltd.*, [1969] 1 W.L.R. 1378; [1969] 3 All E.R. 201, applied.

Ms. C.J. Glasby for the plaintiff;
D. Whitmore and *A. Christodoulides* for the first, third, and fourth defendants;
D. Bossino for the second defendant.

PIZZARELLO, A.J.: I am persuaded that a party to an action can rely on a solicitor's ostensible authority to settle an action in respect of which the solicitor may or may not have instructions from his client. It is a solicitor's duty to take proper instructions from his client and the other 45

side can rely on this. It is also clear that a solicitor may make it clear that proposals may be limited by making them subject to express confirmation by a client.

When proposals are put forward "without prejudice," my understanding is that if the proposals are accepted then any agreement reached thereby stands and the "without prejudice" nature of the negotiations falls by the wayside. When an agreement to compromise is reached then the terms may be embodied in a *Tomlin* order. The *Tomlin* order is not the agreement; it follows the agreement.

In this case the defendants said that an agreement was reached some time in April 1997 at a time when all the defendants were formally represented by Marrache & Co. and when Marrache & Co. were still on the record but a conflict had arisen between the second, third and fourth defendants which did not concern the action and by reason of which, from April 22nd, 1997, the second defendant was actually represented by L.W. Triay & Co.

Mr. Fleming said he was in communication with several of the firm of Finch & Co. with a view to a settlement and said in evidence that he made a "without prejudice" offer to Mr. Gorski of Finch & Co. of £30,000 inclusive of costs on a "drop-hands" basis, and he said that Gorski said he would take instructions and revert. When they spoke again Mr. Gorski told him the £30,000 was not acceptable and made an offer of settlement on another basis. He agreed that Mr. Gorski spoke "without prejudice" but said that he did not tell him that it was made without his client's instructions. Mr. Fleming said he told Gorski he would take instructions and revert.

Thus far the defendant's story marries with the letter of April 23rd, 1997 marked "without prejudice" and addressed to Messrs. Finch & Co., written at a time when Mr. Fleming considered the offer was accepted. The understanding was confirmed in this letter, the other defendant, now represented by L.W. Triay & Co., was contacted for his consent and the draft *Tomlin* order was sent on the basis that "if those terms are not acceptable" counsel's brief will have to be delivered no later than April 24th (because the case had been set down for trial). As far as Mr. Fleming was concerned the *Tomlin* order he drafted was not the agreement. The agreement had been made when Gorski made his counter-offer and when it was accepted by him.

However, it seems to me that there is no final agreement. The first, third and fourth defendants submit that the draft *Tomlin* order incorporated the agreement and all that was intended in that letter was that the terms of the *Tomlin* order should be agreed, not that the terms of the agreement already made were to be made the subject of further discussion. The letter is not clear in my view. I would read it, because it is marked "without prejudice," as negotiating a deal on the terms of the draft of a *Tomlin* order and not as confirming a deal in respect of which the draft *Tomlin* order was giving expression to the agreement.

Mr. Fleming said that after he wrote the letter he spoke to Mr. Finch that day and told Mr. Finch his clients had accepted and he was sending the *Tomlin* order and that Finch had said "I'll look at it" with no reservations attached. Mr. Finch agreed that he said that intending to convey his intention to consider the draft *Tomlin* order as the basis for an agreement. He said he had already informed the defendant's solicitors and in particular Mr. Neish of L.W. Triay & Co. that he was meeting with his client on April 25th in the afternoon and it was obvious that he would agree nothing on his client's behalf before he saw his client.

Mr. Christodoulides then took over the conduct of the matter from Mr. Fleming. His brief was that Mr. Fleming had consulted with L.W. Triay & Co. and drafted a *Tomlin* order which represented the offer made by Gorski and had sent it to Finch & Co. on April 23rd. Mr. Christodoulides said he spoke to Mr. Finch on April 25th. His concern was the drawing of the *Tomlin* order as there had been an agreement already. He had attended the meeting of April 22nd, 1997 when it was agreed that L.W. Triay & Co. would act as solicitors for the second defendant. When he spoke to Mr. Finch on April 25th to settle the *Tomlin* order, Finch agreed to settle on the basis of the *Tomlin* order subject to minor suggestions which were accepted at once. As far as Mr. Christodoulides was concerned, these details did not impinge on the agreement that had already been made and Mr. Finch did not say he was speaking without instructions and had to seek approval from his client. On April 25th, he said, in a second conversation, Mr. Finch then attempted to resile from the agreement but he submitted that it was then too late to change the terms agreed.

When Mr. Finch spoke to Mr. Christodoulides on April 25th he was in receipt of the letter of April 23rd and had spoken to Mr. Fleming and would, in my view, have spoken to Mr. Christodoulides on the basis—as he says he understood it, and as I understand it—that the draft *Tomlin* order was a negotiating instrument. When Mr. Christodoulides spoke to Mr. Finch his position was that an agreement had been reached and any amendments to the *Tomlin* order were not matters of substance, so his perception was different to Finch's and this was understandable. The result, of course, is people talking in the same language but meaning different things.

The position now is that the applicants have to persuade me that an agreement was reached on April 23rd, for everything else seems to follow on that. If there was no agreement on April 23rd there is nothing. If there was an agreement on that day then Mr. Finch is wrong. And while it is pertinent to observe that Mr. Neish has not been called by the plaintiff, on whom, I think, the burden of calling him lies, it does not necessarily follow that I must favour the defendant's application.

Equally, the draft *Tomlin* order signed by both solicitors to the defendants was not produced until the eleventh hour. I accept the

explanation given and it is signed by L.W. Triay & Co. That draft order throws doubt on Mr. Finch's assertion that Mr. Neish of L.W. Triay & Co. knew that he was to see his client on April 25th, for if Mr. Finch is correct then Mr. Neish would have known that all the negotiations were subject to his seeing his client and would be unlikely to have signed the draft *Tomlin* order, except perhaps in "escrow," in which case I would have expected Mr. Bossino to have told me so from the Bar.

Notwithstanding this, I am not persuaded that a final and binding agreement was entered into on April 23rd and so I dismiss this application and the action will proceed to trial unless, in the meantime, the parties resolve their differences. They seemed to be close to an understanding at one stage and I would urge them to close that gap and settle their differences out of court.

Application dismissed.
