[2022] JMSC Civ 128

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2011HCV07709

BETWEEN	**WINSTON CHARLES**	**CLAIMANT**
AND	**VICTORIA MUTUAL BUILDING SOCIETY (VMBS)**	**DEFENDANT**

IN CHAMBERS

Mr. Leroy Equiano Attorney at law for the Claimant

Mr. Jonathan Morgan instructed by Dunn Cox for the Defendant.

Heard: June 2, 2020 and July 22, 2022

Civil Procedure – Mediation – Withdrawal of Mediation Agreement – application for order in terms of a confidential agreement.

O. SMITH, J (AG)

[1] The Claimant, Winston Charles filed a Notice of Application for Court Orders on November 30, 2020 whereby he has sought to reject the settlement sum that was agreed to by the parties at a mediation meeting held on October 14, 2020. The Defendants, Victoria Mutual Building Society (hereinafter VMBS) subsequently filed a Notice of Application for Court Orders on April 13, 2021 seeking an Order in terms of the mediation agreement made between Winston Charles and VMBS on October 14, 2020. They seek this order pursuant to Rule 74.12 (1) of the Civil Procedure Rules 2002 as amended, (CPR).

[2] This matter has a long history in these courts. The history is not necessary for the determination of this application but it certainly adds context to the fraught relationship between the parties. In 2011 Winston Charles was the owner of 385 Long Mountain Country Club in the parish of St. Andrew, registered at Volume 1372, Folio 623 of the Register Book of Titles. VMBS had a mortgage on the property which was registered on the title on August 27, 2004 to secure the sum of $9,689,000.00 which was borrowed from them towards the purchase of the property. In about September 2009. Mr. Charles fell into arrears. It appears that this continued into 2010 at which time VMBS informed him in writing of its intention to exercise their Power of Sale under the mortgage agreement by Public Auction on July 20, 2010. This did not take place and said auction was postponed to August 2010. However, the second auction did not materialize. Instead, by October 2010 he was notified, in writing, that the property would be sold by private treaty. By May of 2011 Mr. Charles was informed by VMBS that it had accepted an offer in February 2011.

[3] The property was sold for $24,500,000.00. This displeased Mr. Charles a great deal as he said the property was prime real estate and in July 2011, based on a valuation he had done, was worth a market value of $40,000,000.00 with a forced sale value of $33,000,000.00. The property in his estimation was undersold by about $15,000,000.00. As a consequence, Mr. Charles filed a claim on December 6, 2011 against VMBS and Wescar Development Ltd as first and second defendants respectively.

[4] This case suffered several setbacks. It was Dismissed for Want of Prosecution on January 9, 2018. Mr. Charles then applied for the matter to be restored to the list, however, same was refused on January 14, 2018. He then appealed and on December 20, 2019 the Court of Appeal set aside the orders of the judge of the Supreme Court which had been made on the 11th and 14th of January 2018.

[5] After all of that and after several hearing dates the parties were referred again to mediation. I say again because this matter was commenced by Claim Form and

as such is subject to mandatory mediation. In 2012 there was an automatic referral but there is no indication that the parties attended. March 18, 2020 was therefore the second attempt. No agreement was reached. Then on July 15, 2020, the parties were again referred to mediation. It is the result of this mediation that has brought us here today.

[6] It is agreed by the parties that mediation was held on October 14, 2020. As a result of the outbreak of the Novel Coronavirus the session was held via Zoom. Present on the Platform, based on the Mediation Report, was Counsel Mr. John Givans representing Mr. Charles, Mr. Charles, Jonathan Morgan and Chantelle Bennett as counsel for the first defendant and a representative from VMBS. The 2nd defendant had long seized to be a part of this matter, the principal having died in 2015 and their attorneys having received no instructions in the matter.

[7] This Mediation bore some fruit as per Report of Mediation Form which was filed in this Court on October 23, 2020 and December 3, 2020. It seems that the report was filed twice. The reports indicate at paragraph3;

> *"3 (e) the parties have reached a full agreement…" and at*
>
> *"3 (e) (iii) the claim and defence are herein settled, and the parties will keep the agreement confidential."*

The report bears only the signature of the mediator.

The Application of Mr. Charles

[8] The application filed by or on behalf of Mr. Charles is lengthy. Much of the orders sought are not orders that can be entertained by way of a Notice of Application for Court Orders. The salient order sought for the purposes of this application is as follows;

> *"The claimant has rejected the suggested settlement amount of $3,500,000 that was put forward by the first defendant at the mediation held on the 14th of October 2020, this amount of money being grossly unacceptable, and is an insult to the damages done to the Claimant's whole life and that of his family caused by the 1st Defendant, when they fraudulently sold his house*

by way of Private Treaty and as such the Claimant expects this Honourable Court to do Justice in this matter."

The Application by VMBS

[9] The application is quite simple. It seeks to ask the court for an order or judgment to be entered in the terms of the Mediation Agreement made between the Claimant and the 1st Defendant on October 14, 2020, as reflected in the Report of Mediation filed by the mediator thereafter"

[10] The grounds on which the application is made is

"pursuant to Rule 74.12(1) of the Civil Procedure Rules, the court must make an order in the terms of the report where an agreement has been reached at the mediation of the claim;"

Submissions on behalf of the Mr. Charles.

[11] On the day of the hearing Mr. Equiano, who was by then on record as counsel for Mr. Charles, indicated that he could no longer represent Mr. Charles as Mr. Charles had expressed his displeasure with Mr. Equiano's written submissions and had forbidden him from filing them in the court. As such Mr. Equiano sat in on the video conference while Mr. Charles made his submissions. I should indicate that Mr. Charles in the end concluded his submissions by reading those filed on his behalf by Mr. Equiano.

[12] He relied on Rule 74.11 which directs that a mediator's report and agreement should be filed at the registry. The focus being on Rule 74.11(2) and (3) which specifically speak to a signed written agreement. It was submitted that the Civil Procedure Rules (hereinafter CPR) do not recognize verbal agreements as being agreements made for the purpose of the rules and gives no recognition or consideration to any such agreement. In the consequence, he argued that an agreement is valid only after it is reduced in writing and signed by the parties.

[13] Mr. Charles sought to rely on Rule 74.10(5) by submitting that the rule was designed to remove any ambiguity as to whether the parties truly arrived at an

agreement of their own free will, in that vulnerable persons are given the "chance to see and understand what is written for them to agree to, the process is not complete until the opportunity is given to the parties."

[14] Remote mediation, he continued does not alter the CPR and is not an exemption to the requirement that there be a written agreement signed by the parties.

[15] Under Rule 74.2(1), where an agreement is reached, the court must make an order in terms of the agreement. However, before this can take place there must be a written agreement.

[16] There was no enforceable contract between the parties as it lacked two essential ingredients, consideration and performance. In support of his submissions Mr. Charles relied on the case of ***Cordell Green v Kingsley Stewart*** **[2014] JMSC Civ 26**. He argued that in the ***Cordell Green*** case there was no issue that there was a mediation agreement what was in issue was the enforceability of the agreement. In ***Cordell Green*** the parties signed a confidential agreement.

Submissions on behalf of VMBS

[17] No written submissions were filed on behalf of the VMBS. In the circumstances this court will attempt to reproduce the essence of counsels' oral submissions and apologises beforehand if I misrepresent in any way what counsel was attempting to impart to the court.

[18] representing the defendant, Mr. Jonathan Morgan, began by pointing out that there were certain aspects of Mr. Charles's application that could not be made by way of Notice of Application for Court Orders. Those being from paragraphs 2-6. I agree with counsel as they are a repetition of the Particulars of Claim filed on December 6, 2011.

[19] Mr. Morgan submitted that the nature of the application filed is seeking to have the courts determine the effect of the Mediation Report. He highlighted what he called inconsistencies between the evidence filed and the submissions, in that Mr.

Charles is claiming that he did not accept the mediation agreement however his submissions state that he accepted the settlement sum tentatively but it is not binding because he did not sign.

[20] Secondly, the evidence of the defence far outweighs that of the plaintiff in light of the list of persons who say an agreement was reached. Yet a week and a day later the claimant seeks to back pedal.

[20] The Claimant is relying on Rule 74 which states that in order for there to be an agreement a certain procedure has to be followed. Specifically, Rule 74.11(2) which states that where an agreement is reached it must be signed by the parties. Counsel submitted that he was not in agreement.

[21] He ended by indicating that the claimant is not a vulnerable party because he was able to repeat the agreement in his letter. He cannot now rely on his failure to sign the mediation report to escape the agreement.

ISSUES

[22] I have identified one issue which I believe will address any secondary issues that may arise.

Whether the Court can make an order on the Mediation Report alone as filed.

The Law

[23] The relevant Part of the Civil Procedure Rules 2002, as Amended is Part 74.

> For these purposes the relevant rule is 74.11 and 74.12.
>
> 74.11 (1) Subject to any extension pursuant to rule 74.8 (2), within 8 days of the completion of the mediation and in any event, within 98 days of the referral, the mediator shall file a report in form M5 at the registry, indicating:

a) the date(s) of the mediation;

b) the persons receiving notice and the date of notification of the last mediation session;

c) the persons who attended the mediation;

d) whether agreement was reached; and

e) where no agreement or a partial agreement was reached whether the parties are prepared to continue with mediation and the mediator considers that there are reasonable prospects of an agreement being reached if an extension of time is granted.

(2) Where an agreement is reached between the parties, the signed written agreement shall accompany the report or be filed at the registry not later than 30 days after the completion of the mediation, unless it is a term of the agreement that it remains confidential.

(3) Where the written agreement does not accompany the report but it is to be filed, the mediator shall indicate in the report who will be responsible for filing the written agreement.

74.12 (1) Where an agreement has been reached, the court must make an order in the terms of the report [pursuant to rule 42.7].

(2) Where the report states that no mediation has taken place or that no agreement was reached, the Registrar must immediately fix a case management conference, pursuant to rule 27.3 and give notice to the parties as required by that rule.

[24] This matter was commenced by Claim Form as such the parties were referred to mandatory mediation as per Rule 74.1. That process as earlier discussed failed but the parties were ordered back to mediation pursuant to Rule 74.3(5). Therefore, all the relevant rules pertaining to mediation are applicable in this case. VMBS is of the view that a binding agreement was arrived at and is asking the court to make an order or judgment in the terms of the agreement, while the Mr.

Charles is saying there is no binding agreement and he wishes to withdraw from the settlement.

[25] Mr. Charles, by way of the letter exhibited in the affidavit of Chantal Bennett filed in support of VMBs's' application, says he considered accepting the defendants offer but decided against it as he is not in agreement with the settlement amount. I will address the application filed by the 1st defendant first.

[26] In ***Frank Gayle v Maria Miletic*** **JM 2011 SC 37, 2009 HCV03497**, Beswick, J had to consider a situation where the mediation report submitted to the court specified that;

> *"1a. This agreement … is binding upon the parties,*
>
> *b. All promises… made in the course of reaching the settlement…are confidential…*
>
> *f. This agreement is binding upon the signatories upon their signature. Both parties understand and agree that, as a provision of this settlement the agreement will become fully binding upon the parties only upon execution by all relevant parties."*

However, the agreement was not reduced into writing as contemplated by Rule 42.7(5) of the CPR nor had the court made an order under Rule 74.12(1). Beswick J was of the view that in the circumstances, the mediation settlement was not to be regarded as an order of the court and as such could not be enforced by the court as an order of the court. I should indicate that the agreement was drawn up between the parties. It detailed what each party was to do in order to satisfy the agreement and the signatures of the parties were affixed. However, before the parties completed their obligations under the agreement the claimants' attorney filed a Notice of Discontinuance. Beswick, J was to determine if the agreement could be considered as an order of the court.

[27] The principle I have distilled from this case is that a mediation agreement that follows all the steps laid out in the CPR is a contract that only becomes enforceable as a court order after the court makes an order under Rule 42.7.

[28] The case at bar is dissimilar to many of the cases I have read on the topic, in that; it was conducted via Zoom. The parties were therefore not together in one room for the mediation and as such neither the parties nor the attorneys signed the Mediation Report. The parties agree that there was a mediation session and that a Mediation Report was filed in accordance with rule 74.11(1). However, no mediation agreement was attached. This is understandable in light of the confidential designation of the agreement. However, what this means is that the agreement, said to have been arrived at between the parties, falls within the unless section of Rule 74.11(2) which says that once an agreement is arrived at, "the signed written agreement shall accompany the report…unless it is a term of the agreement that it remains confidential." The rules however, provide no guidance on the procedure to be adopted where the parties arrive at an agreement in accordance with 3(c)(iii) on the Mediation Report. That is, a confidential agreement.

[29] Part 74 is evidently more supportive of a situation where the parties have signed a written agreement that can be attached to the mediation report. I am strengthened in this view by Rule 74.11(3) which states that where a written agreement does not accompany the report, but is to be filed, the mediator should indicate who is responsible for this. Rule 42.7 (5) is also instructive in terms of what is expected by the court when an order is being made capturing an agreement between parties.

> *"...the order must be –*
>
> *(a) Drawn up in the terms agreed;*
>
> *(b) Expressed as being "By Consent";*
>
> *(c) Signed by the attorney-at-law acting for each party…and*
>
> *(d) Filed at the registry for sealing."*

[30] Perhaps guidance can be had from Edwards, J in **Cordell Green** who at paragraph 31 said,

> *"Conversely, where the mediation agreement is confidential (made on counsel's brief) it is not filed in court and therefore no order is made by the court. The parties therefore have no order or judgment to enforce in the proceedings.*

[31] The parties in this case never filed the agreement in the court. In fact, as between themselves, they do not have a written or signed agreement. This may be because just about a week after the mediation session Mr. Charles indicated that he was not in agreement with the settlement sum. The cases discussed are therefore distinguishable from the present case. With no signed Mediation Report and no signed or written agreement in existence as contemplated by the CPR the agreement between the parties and cannot be made into an order of the court.

[32] In the case Trinidadian High Court case of ***Kisundaya Soogrim v Indar Singh*** **Claim No. CV2015-03713,** the Honourable Mr. Justice V. Kokaram in deciding whether a consent order entered into had brought the proceedings to an end examined the cases of **C*ordell Green*, *Western Broadcasting Services v Edward PC* 43 of 2005** and ***Green v Rozen*** **[1955] 1 W.L.R. 74**. Having done so he indicated that the cases confirmed the following:

> *"a. There are various forms by which a claim can be compromised and the parties must carefully decide which of the options are suitable for their case as each method has its own legal consequences. See **Green v Rozen**.*
>
> *b. Where there is a dispute as to whether an agreement was arrived at between the parties which give rise to a consent order, the Court will first determine whether there was agreement as to the essential terms of compromise. If important or essential terms are unsettled the agreement can be held to be incomplete.*
>
> *c. The consent order is to be interpreted like a contract and to place the relevant language in meaningful context.*
>
> *d. Public policy dictates that persons of full age and capacity advised by counsel should be free to contract on such terms as they desire and that such contract be held sacred by the Court.*
>
> *e. If an agreement is uncertain it would be void for uncertainty."*

[33] The present case fits squarely into (a) I say this because as in ***Green v Rozen*****,** which is a case for monies loaned, the parties arrived at an agreement settled "on

counsels brief". However, unlike the case at bar, the parties in ***Green v Rozen*** disclosed the agreement to the Court but did not seek to have the order entered. Their agreement also indicated that all proceedings were stayed on terms endorsed on Counsel's Brief. In addition, the terms of the agreement were recorded on the back of the brief. The parties in ***Green v Rozen*** also took steps in pursuance of the agreement until the defendant breached the agreement and the claimant sought the assistance of the court to enforce the agreement for payment of the outstanding balance. The court found that it had no jurisdiction as the settlement had superseded the original claim.

[34] In ***Cordell Green*** at paragraph 21, Edwards J said,

> *"Where settlement has been agreed, the parties must decide how to record it and how it will be enforced if either party does not abide by its terms. Where a case is settled in advance of a hearing each party has a responsibility to inform the court. The settlement itself can be viewed as a contract, so is binding even if it is not made into a formal order of the court. The agreements should deal with future status of the claim; whether there should be final judgment in favour of one party, whether the claim should be dismissed or a stay granted or whether the claim should be withdrawn and notice of discontinuance filed. Settlements are enforceable contracts between the parties, the consideration for which is forbearance to sue."*

[35] The cases discussed all had something more than the case at bar. They had a written agreement, a written and signed agreement or a report signed by all the relevant parties. They all had progressed beyond the agreement whereas in this case the parties have not even taken the first step. The defendants Notice of Application for Court Orders pursuant to 74.12(1) is deficient in that the agreement failed to comply with Rule 74.11 and although the defendant applied for an order or judgment in terms of the agreement there was no order filed in the registry as per Rule 42.7 and there could not have been one in light of the stance taken by the Claimant.

[36] On the other hand, by virtue of his Application to Withdraw from the terms of the Mediation Agreement Mr. Charles has acknowledged that an agreement is in existence, albeit an unwritten one. There is however, room for one to conclude

that an oral contract exists between the parties. At the mediation session an offer was made by VMBS which it appears was accepted by Mr. Charles. The consideration was the payment of the agreed sum in return for settling the claim. The fact that in retrospect, Mr. Charles finds the sum to be an insult is not a basis upon which one can withdraw from a contract. I take into consideration that at the mediation session he was represented by counsel. There is nothing suggested or directly stated in the NOA, the affidavit filed in support or the submissions on which this court can conclude that there has been some mistake, undue influence or misrepresentation that would lead this court to find that the contract can be rescinded. See **Cole v Pope (1898**) 29 SCR 291.

Disposition

[37] Having examined in detail the case of ***Cordell Green*** I am fully guided by Edwards J. The agreement in this case was similar in nature in that the parties attended mediation and arrived at an agreement which was not disclosed and said to be made confidential. In the case at bar only the Mediation Report was filed and only the Mediator's signature was affixed. No agreement was filed and as in ***Cordell Green***. That fact however, does not negate the existence of an agreement. The application by the defendant was their attempt to return to court for an order on the agreement. Unfortunately, this court is not in a position to grant the orders sought in the application of VMBS.

[38] I am also constrained to say that neither can the court grant the orders sought by Mr. Charles. As per Edwards, J in **Cordell Green**,

> "Settlements are enforceable contracts between the parties, the consideration for which is forbearance to sue."

[39] The Notice of Application for Court Orders filed on November 30, 2020 by Mr. Charles is denied.

[40] The Notice of Application for Court Orders filed on behalf of VMBS on April 13, 2021 is denied.

[41] Each party is to bear their own cost on the applications.

[42] Leave to appeal is granted.