[2016]JMSC Civ 87

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL COURT CIVIL DIVISION

CLAIM NO. 2015 HCV 03798

BETWEEN	**EXECUTIVE INVESTMENTS CORPORATION LIMITED**	**CLAIMANT**
AND	**BATH PLUS LIMITED**	**1ST DEFENDANT**
AND	**GLADSTONE MALLITT**	**2ND DEFENDANT**
AND	**RETINELLA MALLITT**	**3RD DEFENDANT**

IN CHAMBERS

Mrs. Karene Stanley-Jones instructed by Karene N. Stanley & Co. for the Claimant

Mr. Nigel Jones and Ms. Kashina Moore instructed by Nigel Jones & Co. for the Defendants

Heard on April 19, 2016

Mediation settlement agreement - Application to have mediation agreement declared not binding for uncertainty and have Claim heard - Counter application to have agreement enforced - Was the requirement to use 'best endeavours' to realise a lease with a 3rd party a sufficiently certain term to make the contract binding - Was there adequate consideration for the agreement

PALMER, J (AG.)

Introduction

[1] On April 19, 2016 there were two opposing applications before the Court; one by the Defendants for a determination by the Court that a mediation agreement was

not binding and the other by the Claimant that the said agreement should be enforced. On April 28, 2016 I ruled as follows on the respective applications:

(1) Application of the Defendant/Applicant filed 26.2.16, is denied;

(2) On the application for Court Orders filed by the Claimant on 21.4.16 it is ordered as follows:

Pursuant to Rules 74.12 (1) and 42.7 (5) of the CPR:

(a) *That a consent order be drafted in the same terms as agreed in the mediation agreement appended and referred to in the report of the mediator filed on December 11, 2015;*

(b) *The Order is to be expressed as being 'By Consent';*

(c) *The Order is to be signed by the Attorneys-at-law acting for each party to whom the Order relates;*

(d) *Should either party fail to sign the Order by Friday, April 29, 2016 by 10 am, the Registrar of the Supreme Court is so empowered to sign;*

(e) *The order shall be filed at the Supreme Court Registry by 12 MD for it to be perfected;*

(3) Costs of the Application to the Claimant/ Applicant to be agreed or taxed;

(4) Leave to appeal granted to the Defendant;

(5) A Stay of Execution is granted against the enforcement of the Consent Order, referred at paragraph 2 herein, for 42 days pending appeal.

(6) Claimant's Attorneys at law to prepare, file and serve the order herein as well as the consent order.

[2] As promised, the following are my reasons.

Background to applications

[3] The 1st Defendant Company (BPL), owned and operated by the 2nd and 3rd Defendants, are the tenants of the Claimant Company (EICL), with whom they had a 3-year lease. EICL says the lease was due to expire in December 2015, while BPL's position was that it should end about a year later. EICL by way of Fixed Date Claim Form sought orders to determine when the lease expired in

order to recover possession of the shop located in the Village Plaza in St. Andrew.

[4] The parties were referred to mediation and on December 3, 2015 the process resulted in the signed mediation settlement agreement that is the subject of the applications. The mediator's report was filed, to which was appended the said agreement, which was not made confidential. It included a time line for BPL to vacate the leased premises and for EICL to make 'best endeavours' to realise a short term lease in favour of the BPL with Rock Investments Limited.

[5] BPL changed Counsel after the agreement was signed and almost 3 months later, filed Notice of Application for Court Orders seeking the following orders:

> *i* *Order that Mediation Agreement entered into in relation to this matter is not binding;*
>
> *ii* *The matter be referred to case Management Conference;*
>
> *iii* *Costs to the Applicant;*
>
> *iv* *Such further and other relief as this Honourable Court may deem fit.*

[6] EICL filed its own application on April 12, 2016, seeking:

> *i* *That the court make an Order in terms of the Mediation Report and Mediation Settlement Agreement deriving from mediation exercise conducted on December 3, 2015 between Executive Investments Corporation Limited v. Bath Plus Limited, Gladstone Mallitt and Retinella Mallitt;*
>
> *ii* *That the time for serving the Notice of Application be abridged and;*
>
> *iii* *No order as to Costs.*

[7] The main issue surrounded whether the mediation settlement agreement was binding and all other considerations centred on that determination.

The Mediation Settlement Agreement

[8] The agreement begins:

> *The reason for the mediation was to completely resolve the issues in dispute between the parties.*

It continues at paragraph 1:

> *a. This agreement constitutes the complete understanding of and between the Claimant and the Defendant and is binding upon the parties, their successors, and their representatives. No other terms, promises,or agreements will have any force or effect unless reduced to writing and signed by all parties to this Agreement.*
>
> *...*
>
> *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 their execution by the relevant parties.*

[9] Paragraphs 2 and 3 of the agreement contain the consideration each party gave to constitute the agreement.

> *2. In exchange for the promises made by ALL THE PARTIES to this Agreement, they both freely and voluntarily agree:*
>
> *a. That execution of the agreement operates as a withdrawal of complaints identified by the mediation...*
>
> *b. That in the event any party hereto believes that the other has violated a term or condition of the Agreement, to notify in writing the Mediation Manager at the [DRF] within 30 calendar days of the alleged violation and request the terms of the Agreement be specifically implemented. In addition, the parties agree to utilize the Supreme Court to enforce the terms and conditions of the Settlement Agreement.*

[10] Paragraph 3 contains the specific terms crafted from the mediation discussions and is the source of the contention. It reads:

> *3. In exchange for the promises made by the Claimant [EICL] in paragraph 2 of this agreement, the Defendant [BPL] agrees:*
>
> *(i) The Defendants agree to vacate the leased premises being Shop number 24 Village Plaza on or before the 30th April, 2016;*
>
> *(ii) The Claimant agrees to use its best endeavours to realise a short term lease of Shop 9A Mall Plaza to the to the 1st Defendant, as is, for the period 1st May 2016 to 31st August 2016 on terms to be agreed between the 1st Defendant and Rock Investments Limited.*

[11] It was submitted for BPL that paragraph 3 (ii) of the agreement is uncertain and renders the mediation agreement non-binding. Accordingly, the Court was invited to exercise its case management powers under the Civil Procedure Rules, 2002, as amended ('CPR') to "take any step, give any direction or make any other order for the purposes of managing the case and furthering the overriding objective" (see **Rule 26.1 (2) (v)**).

[12] The application is vigorously opposed by EICL who argues that the agreement required that EICL use its 'best endeavours' to carry out its obligations under the agreement, which it did, and that the Court should make orders in terms of the agreement.

BPL's submissions

[13] Counsel for BPL submitted that there is no contract arising out of the mediation because the terms of the agreement were not fully set out and agreed upon. In support for this position the 2nd Defendant, Retinella Mallitt, states in her Affidavit:

> *That no terms have been agreed in relation to the occupation of 9A Mall Plaza notwithstanding my attempts to discuss same with the Claimant's representative; I have not even been told the proposed rent to be paid for the unit. In the absence of any agreed terms, I will be without a unit to conduct my business*
>
> *That the uncertainty of the term which was supposed to be for my benefit is creating severe hardship as our business is about to be*

> *interrupted. In fact I fear that if this Court does not hear and determine this application shortly the Claimant may seek to remove me from the unit without more.*

[14] It is argued for BPL that there must be certainty of all terms of the agreement for it to be binding, and the absence of such certainty renders it not binding. I believe that the need for certainty in such agreements is hardly something that could be refuted. The uncertainty referred to by BPL they say is evidenced by the fact that the Defendants are without a unit to operate their business and that the terms of this short-term lease were being left to be determined at a future date between BPL and a 3rd party. Whatever the best endeavours of EICL up to the time of the hearing, no terms had been either communicated or settled upon up to the time of the hearing. Based on the state of affairs it was argued that the only recourse was for the matter to be fixed for hearing of the Fixed Date Claim Form.

[15] Reliance was placed by Counsel for BPL, on several authorities but **Cordell Green v. Kingsley Stewart** [2014] JMSC Civ. 26 ("**Green**") a decision of C. Edwards, J. (as she then was) requires particular mention as it considered similar issues to those of the instant case. In **Green** the Court reluctantly undertook that task of looking into the terms of a confidential mediation agreement that had been endorsed in terms on Counsel's brief. No order was made in terms of the agreement and none was sought. The precise terms of the agreement included a future agreement on the wording of an apology in a manner to be determined by the parties themselves

[16] In **Green** the argument for the applicant was that the agreement reached was not binding because it required the respondent to do certain acts at a future time. The parties had agreed that there be an apology but they were to meet to agree the content and frequency of its publication. The parties never met to settle the terms and it was argued that as this was an essential term of the agreement. The failure of the parties to resolve it made the agreement uncertain and therefore invalid. The Court was being asked to exercise its powers under Rule 26 of the

CPR to order that the matter be fixed for a further mediation or for a Case Management Conference.

[17] Reliance was placed by the applicants in **Green** on the Privy Council decision in **Western Broadcasting v. Seaga** Privy Council Appeal No. 43 of 2005 in which it was noted that the in some cases it may be said that parties have reached an enforceable agreement on part of the matters in issue, leaving the rest to be determined by further agreement or the process of litigation, the process of law or the standard of reasonableness. It found that the facts of that case were such that the failure to settle those essential terms of the apology, such as its content and frequency, resulted in a lacunae that was impossible to fill, rendering the agreement incomplete for uncertainty.

[18] The respondent in **Green** argued that the matter had proceeded to mediation and a settlement was arrived at on terms on Counsel's brief. This, it was argued was the end of the matter and the agreement could only be enforced in new proceedings brought to enforce that contract. In support of the proposition, reliance was placed on the authority of **Green v. Rozen** [1995] 1 WLR 741 and **John Atkinson and Jean Phyllis Maud Atkinson v. Rosario Castan and Carmen Segura** [1991] WL 83945, CA that where parties arrive at a settlement agreement in terms so endorsed, that the enforcement of that agreement ought to be through the instituting of fresh proceedings. It was argued that the facts of **Green** were distinguishable from the **Western Broadcasting v. Seaga** (supra) as the terms of the agreement in **Green** were certain. Though the wording of the apology was left to be determined, the time to settle on the wording was certain, as was the time and manner of the publication.

[19] Counsel for the respondent in **Green** also relied on the **Gayle v. Miletic** JM 2011 SC 37, a decision of Beswick, J, where there had been a mediation agreement which included a term that a notice of discontinuance be filed by the Claimant after the Defendant had carried out obligations regarding the signing of a sale agreement. Before the Defendant had carried out the terms of the agreement the

Claimant filed a Notice of Discontinuance. No order had been made in terms of the agreement and the Claimant having acted prematurely to discontinue the claim, the Court found that the only recourse was to have the agreement enforced through instituting fresh proceedings.

[20] The argument for BPL in the instant case, is not dissimilar to that of the Applicants in **Green**, in which Edwards, J. found that looking at the words of the agreement, no full and final settlement was arrived at, for if the parties never met, no binding contract would ever be concluded. The agreement was found to be unenforceable on the basis of uncertainty. In view if the fact that no order had been sought or made pursuant to Part 74 of the CPR to have the agreement enforced, the Court also went on to rule that there being no notice of discontinuance filed, no stay of proceedings granted and none effected by operation of law, that the Court could determine the matter in those proceedings without the need for the Claimant to commence fresh proceedings.

[21] BPL further argued that were the Court to accept that the offending term was uncertain, the uncertain terms of the agreement could not be severed from the certain terms so as to allow the contract to be binding. The agreement was that for BPL to vacate the shop they now occupied, EICL were to secure the other shop for them to move to.

[22] Finally, it is argued, that if the offending term of the mediation settlement agreement was deemed unenforceable, presumably where the Court found that the terms of the contract could be severed so as to preserve the agreement, that the agreement would in any event be unenforceable for lack of consideration. The submission is that there was nothing new or of any value put forward by EICL for BPL giving up the lease, as EICL was already under a duty by virtue of the lease agreement to grant to BPL exclusive possession of the unit to operate the shop.

EICL's submissions

[23] EICL argued that it had carried out its obligation under the mediation agreement; that there was no uncertainty in it; and there was clear and adequate consideration by EICL for the agreement. When the parties left the mediation, it was argued, there was certainty that the Defendants were to leave the property by April 30, 2016. It was the decision of the parties to frame the agreement as they did because the agreement would involve discussions with Rock Investments Limited, an entirely different entity, who owns the plaza in which shop 9A was located.

[24] At paragraphs 5 – 12 and 14 of the affidavit of Cherane Hamilton, EICL's General Manager, (one of two affidavits filed by her on April 15, 2016), it is stated:

> *5. ... no terms have been agreed in relation to the rental of Shop 9A because that shop is comprised in the mall Plaza owned by Rock Investments Limited and which has different directors.*
>
> *6. That this fact is known to the Defendants as for many years the Defendants occupied shop 9A Mall Plaza.*
>
> *7. That for this reason at a mediation exercise the agreement was framed "the Claimant agrees to use its best endeavours" because the rental of 9A to the Defendants could not be guaranteed by the Claimant.*
>
> *8. That upon leaving the mediation the Defendants would have been aware that they are to vacate the premises they currently occupy by April 30, 2016 and that the only way its business would be relocated to Shop 9A Mall Plaza is if the Claimant succeeded in getting the directors of Mall Plaza to rent the premises to the Defendants.*
>
> *9. That when it was apparent from my inquiries of the directors of the Mall Plaza that shop 9A would not be available and the reason for same I advised our Attorneys-at-Law and by letter dated March 3, 2016 Counsel for the Defendants was advised of the outcome of the efforts of the Claimant to secure the premises of the Defendant.*

> *10. That at all material times shop 9A Mall Plaza not being premises owned and controlled by the Claimant when advised of the unavailability of the unit because of planned renovation works which will obstruct access to the unit the Claimant had no choice but to advise the Defendants of this as soon as possible so that the Defendants could make suitable arrangements.*
>
> *11. Additionally the Claimant did not stop there but also sought to identify an alternate location elsewhere within the Village Mall however in light of the specifications of the Defendants for the downstairs unit etc. No alternate suitable space was available.*
>
> *12. That at all material times the matter was fully ventilated at mediation and at no time did the Claimant hold itself out as being able to guarantee the Defendants occupation of Unit 9A Mall Plaza.*
>
> *...*
>
> *14. That... the Claimant used its best endeavours to secure a short term rental for the Defendants however was unsuccessful and being owned by a different company with different directors cannot do more.*

[25] BPL's suggestion that the contract is not binding due to a lack of consideration was challenged on two grounds. Firstly, that the mediation agreement would allow BPL to remain at the premises for 4 months more than they were, in the view of EICL, entitled to remain. Though a binding mediation agreement supersedes the Claim, EICL's original claim was that it was entitled to recovery possession by December 2015. With the 'fast tracked' process of the Fixed Date Claim Form, the Claimant may well have had a result that had the Defendants vacating the premises earlier than April 2016. BPL's position had been that they were entitled to remain there under the lease at least to the end of 2016. It was submitted that the second consideration was that EICL would use their best endeavours to realise the short term lease in favour of the Defendants. This, the Claimant argued, was discharged as best as was within its power.

[26] It was argued that in the presence of BPL's Counsel at that time and a trained mediator BPL agreed to vacate the shop by April 30, 2016. In turn EICL would not be entitled to pursue possession until the period provided for in the mediation agreement had elapsed. The argument was that BPL knew after the mediation agreement was signed that the only way that they would get shop 9A was if EICL was successful in the execution of their 'best endeavours' to realise the short term lease. BPL's position would have been decidedly different had the agreement been for EICL to supply them with the alternate location. It is of note that the Claimant did make attempts to secure other premises within their plaza to accommodate the Defendants.

[27] It was argued further for EICL that the facts of the instant case are different than those in **Green** because there are no important points left unsettled in the agreement. Mediation is an exercise which allows parties, with the assistance of the mediator, to arrive at their own agreement which is binding on them both. The dictum in **Green**, it was argued, is not of general application and was clearly decided on its particular facts.

[28] Counsel submitted that the agreement was as certain as it was clear in relation to when the Defendants ought to vacate the premises. There could be no greater certainty in the agreement as it regards the unit in Mall Plaza as the parties all knew that it was not owned by EICL. The Defendants left with the understanding that the only way that they would be successful in getting that unit was if Rock Investment facilitated the relocation. The necessary implication was that if best endeavours did not realise the short term lease then the Defendants would have to seek another location.

[29] Counsel for EICL argued that the obligation to use its best endeavours was discharged by determining; (a) whether the space was available and (b) whether it could be accessed by the Defendant. When it was discovered that the unit was unavailable, the Defendants were promptly informed of this fact and as to why.

The Claimant having used its best endeavours, the Defendant ought to vacate the premises as agreed.

[30] It was submitted that it is inaccurate on the part of the Defendants to argue that some critical part of the agreement was left undetermined and therefore there was no contract. To the contrary there was a concluded bargain as the agreement made it clear that access to the unit was something that the Claimant could facilitate but not guarantee.

[31] **Roger James Weston v Sara Elizabeth Dayman** [2006] EWCA Civ 1165, cited in **Green** was relied upon by EICL for the proposition that consent orders should be interpreted like a contract to determine what the reasonable person would have understood the parties to mean. Likewise the Court should assess reasonably what the parties meant by the terms of the mediation agreement, and certainly what the reasonable person would understand the agreement to mean. It was submitted that a reasonable person would have understood the parties to be saying that the Defendant would vacate the premises by April 30, 2016 and the Claimant would make its best endeavours to secure the short term lease for Shop 9A; not that the move was contingent on the Claimant securing the unit or that EICL could guarantee acquisition of the unit. It was submitted that the fact that EICL's best endeavours did not result in a short term lease does not impugn the agreement.

[32] The Defendants would have known from the time of the mediation settlement agreement that shop 9A was not guaranteed and as such they should have begun the process of finding alternate accommodation to which they could relocate from the beginning, just in case best endeavours did not bear fruit. It was submitted that the only reason that the consent order was not filed in accordance with Rule 42.7 of the CPR was because of the change of position on the part of the Defendants after they retained new Counsel.

Analysis

[33] The primary issue that the Court had to determine was whether, the contract was unenforceable; whether because the terms were uncertain or for lack of consideration. At paragraph 2 of the agreement the parties agreed that the mediation settlement agreement would act as a withdrawal of all other complaints in the Claim; the Claimant's claim that the lease ended December 2015 and the Defendants' that it ended December 2016. The viability or not of either argument as a matter of law is not so relevant to consider now, but each party would relinquish their respective position in favour of the mediated position. The terms of the mediation settlement agreement represented all the terms of the agreement between the parties.

[34] The facts in this case are distinguishable from those of **Green** because what was left uncertain was as between the parties themselves regarding the circumstances and terms of the apology, for which there was no certainty either as to what the terms would be or if those terms would ever be settled. Here, what is argued for BPL is that terms that were clearly to be agreed between BPL and a 3rd party were not settled. The agreement regarding EICL's obligations did not have as a requirement that the terms with Rock Investments Limited had to be settled for the obligation to be discharged. Instead they had to do their best endeavours towards this end.

[35] I agree with the submission of the Claimant that no party could reasonably have left the mediation with the belief that the Claimant was guaranteeing or could guarantee acquisition of shop 9A. If that was so or intended to be, it is not stated anywhere in the terms of the mediation settlement agreement. Though the Court would not have had the benefit of the discussions at mediation, some reasons for there being no such guarantee are evident. Firstly, the unit was owned by a 3rd party who was not party to the proceedings and not controlled by EICL. Secondly, that EICL was not responsible for agreeing terms between Rock Investments Limited and BPL.

Best endeavours

[36] What then was meant by the term 'best endeavours' in what was essentially a commercial arrangement regarding Claimant's obligation under the agreement? The term 'best endeavours' in commercial agreements has been the subject of some judicial consideration and is of some assistance here in determining what was meant the term was used. The authors of **Hill & Redman's Law of Landlord and Tenant** at paragraph 469.3 (as cited on Lexis Nexis) discuss its use:

> *"Where an agreement is conditional upon the occurrence of an event or the obtaining of some permission or consent, it is common for a party to be placed under an obligation to make reasonable efforts to bring about the event or to obtain the permission or consent, as the case may be. Such obligations may be expressed, in a variety of forms, or they may be implied. An obligation to use reasonable endeavours (or best or all reasonable endeavours) is generally enforceable, provided that the object of the endeavours is sufficiently definite. The reason is that, granted a definite objective, it is possible for a court to determine whether the endeavours, if any, made by a party to achieve that objective were reasonable in the circumstances (or, in an 'all reasonable endeavours' case, whether the party made all the endeavours to achieve the objective which were reasonable in the circumstances). It has been said that an obligation to use best endeavours should usually be held to be an enforceable obligation unless*
>
> *(i) the object intended to be procured by the endeavours is too vague or elusive to be itself a matter of legal obligation; or*
>
> *(ii) the parties have no criteria on the basis of which it is possible to assess whether best endeavours have been, or can be used*

[37] In **Jet2.com Limited v Blackpool Airport Limited** [2012] EWCA Civ 417, in agreeing with the decision of the judge at first instance who found the Defendant airport to be in breach of contract, Moore-Bick, LJ. found that a term of an agreement that required Blackpool Airport Limited to use its 'best endeavours' to

promote Jet2.com's business, was not too uncertain as to be capable of being a legally binding obligation. It required that the airport would do all that was reasonable to enable the business of the airline to succeed and to grow. In fact even where the Defendant airport had incurred a loss each time that the Claimant airline brought in its aircraft after opening hours, the Court held that whether and if so, to what extent a party could consider financial interests in determining how to exercise its best endeavours, was dependent on the terms of the contract.

[38] The term has been held not to have been sufficiently certain, such as in **Bower v Bantam Investments Ltd** [1972] 3 All ER 349 at 350, where an application by the Claimant for injunctive relief was refused where a party had an obligation to use best endeavours 'to procure if practicable the development of the property for the purposes of a marina with associated recreational facilities'. The Court found that it was not clear from the wording of the obligation what it is that the Defendant might not do. In refusing the application the court held:

> *The relief claimed by the plaintiff had to be commensurate with the duties, express or implied, of the defendants under the contract; at most the only duties which would be implied were that the defendants should use their best endeavours to procure, if practicable, the development of the property for the purposes of a marina with associated facilities. Nothing could be less specific or uncertain for there was no criterion by which best endeavours and practicality could be judged.*

[39] AGJ Berg in **Drafting Commercial Agreements** put the obligation to use best endeavours this way:

> *Not all obligations can be undertaken in absolute and unqualified terms, particularly if the subject matter of the obligation is outside the control of the person undertaking it – for example, that a third party gives a necessary authorisation or consent.*

[40] The author puts the standard to use best endeavours as being beyond the acts of someone merely seeking to discharge a contractual obligation, but closer to

someone who is acting as if in their own interests. In other words, what would be reasonable in the situation, would be what the party would have done to carry out the obligation had it been for their own interest. Reference is made at page 100 to the authority of **IBM United Kingdom Limited v. Rockware Glass Limited** [1980] FSR 335 in which Rockware Glass had agreed to sell land to IBM UK Ltd. A term of the agreement was that the purchaser would use reasonable endeavours to obtain planning permission. Planning permission was sought but refused but the process provided for an appeal to the Secretary of State, which IBM UK Limited failed to do.

[41] The Court found that the prospect of a successful appeal to the Secretary of State offered a reasonable chance of success and the Plaintiff was obliged to have appealed to the Secretary of State. It declared that the Plaintiff was:

> *... bound to take all those steps in their power which are capable of producing the desired result, namely, the obtaining of planning permission, being steps which a prudent, determined and reasonable owner, acting in his own interests and desiring to achieve the result, would take*

[42] Applying the principles of law to the facts of this case the following can be concluded:

i A term in an mediation agreement that requires a party to use best endeavours is sufficiently certain to bind parties to the agreement;

ii That to meet that obligation the Claimant was required to take those steps within its power that were capable of producing the desired result;

iii The actions of Claimant ought not to be merely the actions of a party seeking to meet a contractual obligation, but that of a prudent, determined and reasonable party acting in its own interests and desiring to achieve the result. In this case the interest would be to realise a lease agreement of shop 9A from Rock Investments to continue its operating its business

iv To ensure that the agreement is binding and enforceable, there must be certainty as to the object of the legal obligation. It cannot be vague or elusive

v There must be criteria that form the basis to assess whether best endeavours have been, or can be used.

[43] There was in my view, certainty of the object of the legal obligation, which was that EICL would make best efforts, or best endeavours, to secure shop 9A for BPL. On the evidence of the Claimant's General Manager, even if the shop had been available, the best endeavours of EICL could only have been to make enquiries of Rock Investments Limited as to the availability of the unit, indicate the interest of the Defendants and the period for which the short term lease was required, schedule meeting of the parties and facilitate negotiations. Most of those steps were negated by the fact of the refusal or inability of Rock Investments to rent the shop.

[44] Could a prudent, determined and reasonable business owner acting in its own interests and desiring to secure a lease in those circumstances have arrived at a better result? I find that the answer to that question is no. There is no indication of any appeal process from the decision of Rock Investments not to rent the shop; or of a similar unit being available to be leased to BPL in the same Mall Plaza; or further efforts that could have been made to compel or persuade Rock Investment Limited to lease the premises for the period suggested or at all to BPL. In my view the best endeavours of EICL were all that could have been done to meet their obligation under the agreement.

[45] Ms. Hamilton says that by letter dated March 3, 2016 to the BPL's Counsel they were advised of the efforts made and that the unit would not be available due to renovation works that would obstruct access to the unit. The letter was not exhibited but she states that despite having done what EICL was obligated to do under the agreement that she went further to make efforts to identify alternate locations for the Defendants to occupy. The agreement did not place this obligation on EICL, but their efforts were indeed akin to those that a prudent,

determined and reasonable business owner would have undertaken had the acquisition been for their benefit. Unfortunately, based on the specifications of the Defendants, this too was unsuccessful.

[46] The Defendant in the affidavit of Retinella Mallitt indicated that no terms had been agreed regarding the renting of shop 9A notwithstanding attempts to discuss it with the Claimant's representative. She states that she had not been told of the proposed rent to be paid for the unit or any of the agreed terms. Nowhere does the agreement say EICL had an obligation to settle or even communicate the terms of the lease to BPL. The agreement made it clear that the terms of the lease were to be settled between the BPL and Rock Investments Limited. EICL is notably excluded from the process of settling the terms.

[47] In **IBM United v. Rockware Glass** (supra) the refusal of the planning permission was not a factor within the control of the Plaintiff, but the appeal to the Secretary was. In **Green** the uncertainty was as between the obligations between the parties themselves. I accept that the terms between EICL and BPL were certain in regards to what each was to do. After EICL's best endeavours were performed, BPL was to settle terms with Rock Investments Limited. If BPL's being able to settle the terms with the 3rd party was the criterion for successful performance of the agreement, would EICL be in breach if the Defendants refused to accept the terms of the lease offered by Rock Investments Limited or if they opted to seek other premises but needed more time to acquire them? I do not accept this as so and this could not have been the intention of the parties.

Conclusion

[48] 'Public policy dictates that men of full age and capacity, advised by learned counsel should be left to contract freely and on such terms as they devise and that such contracts should be held sacred and be enforced by the Courts' (see Edwards, J. in **Green** at paragraph 26). Mediation is a dispute resolution tool that is embarked upon on the principles of good faith and confidentiality. These tenets

must be safeguarded if the integrity of the process is to be preserved, and the precious resource of the Court's time, not wasted. Where binding agreements are arrived at arising out of mediation discussions, and especially were parties have the advice of Counsel in arriving at such agreements, parties should not be at liberty to resile from their obligation, especially having already benefited under such agreements.

[49] EICL was bound to await the expiration of the period under the mediation settlement agreement before taking further steps. BPL knew at the time of signing that EICL could not offer a guarantee regarding the acquisition of it. At that point it should have been evident that if the best endeavours did not bear the desired fruit, the only option was to seek an alternate location.

[50] The CPR provides at 74.11 that the Mediator shall within 8 days of the completion of the mediation file a report indicating whether an agreement was reached. Where an agreement has been reached and its terms are not made confidential between the parties, the signed agreement shall accompany the report or be filed at the registry within a 30 days. On the facts of this case it is not disputed that a signed agreement was prepared, that it was filed within the requisite time with the report and that the terms of the agreement were not made confidential.

[51] It is also clear from Rule 74.12 that it is the intention of the CPR to solemnise the mediation settlement agreement in the form of a consent judgment or order. The Court must make orders in terms of the agreement under Rule 42.7 and must ensure the order is:

> *(a) Drawn in terms agreed;*
>
> *(b) Expressed as being "By consent";*
>
> *(c) Signed by the attorney-at-law acting for each party to whom the order relates; and*
>
> *(d) Filed at the registry for sealing.*

[52] The CPR's mechanism for the Courts endorsement of mediation agreements that result in settlement is the making of a consent order in terms as already outlined. It is for that reason and those already outlined, the Court ruled as it did and the order was framed as it was.