[2014] JMSC CIV 94

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2009 HCV 03982

BETWEEN	**HALF MOON BAY LIMITED**	**FIRST CLAIMANT**
AND	**HALF MOON ROSE HALL GOLF CLUB LIMITED**	**SECOND CLAIMANT**
AND	**ROSE HALL (DEVELOPMENTS) LIMITED**	**FIRST DEFENDANT**
AND	**ROSE HALL LIMITED**	**SECOND DEFENDANT**

Gordon Robinson and Sherry Ann McGregor instructed by Nunes Scholefield DeLeon for the claimants

Dr Lloyd Barnett and Weiden Daley instructed by Hart Muirhead and Fatta for the defendants

May 5, 6 and June 3, 2014

CIVIL PROCEDURE – COMPROMISE OF ACTION – NO COURT ORDER – APPLICATIONS SEEKING TO ENFORCE COMPROMISE – RULE 35 OF THE CIVIL PROCEDURE RULES

SYKES J

[1] Water is an important input into the management of a golf course. No water, no greens, no holes, no course and no golf. Both claimants say that by virtue of an indenture and lease both of which were executed in 1975, the defendants were to supply 350,000 gallons per day to the second claimant for irrigating the golf course.

[2] The claimants allege that the defendants were in breach of their obligations under the indenture and the lease. This claim was brought. It ended in an agreement but the agreement was not made a court order.

[3] Part of the agreement (a) involved both parties signing a joint notice of discontinuance; (b) that neither party was to any other proceedings in the claim; (c) each party bearing their own costs.

[4] On October 25, 2013, the claimants filed an application asking for a declaration that the claim was settled and a further declaration that the settlement has not been performed and that this claim be stayed on terms that the settlement agreement pursuant to rule 35.1 of the Civil Procedure Rules ('CPR').

[5] The defendants responded with their application of October 29, 2013 asking that the claimants serve on the defendants' attorneys a signed notice of discontinuance.

[6] On May 6, 2014, this court refused applications – one by the claimants and the other by the defendants – brought on a compromise that was not made a court order.

The claimants' submissions

[7] The essential point made by Mr Gordon Robinson was that since part 35 of the CPR came into force it replaced all other means of compromising or settling claims. Claims can now only be settled in terms of part 35. The parties are no longer free to settle claims in any way they wish. They must utilise part 35 or at least they are bound by part 35 whether they realise it or not.

[8] According to Mr Robinson rule 35.11 provides that where 'the offeree accepts which is not limited in accordance with rule 35.8 (3), the claim is stayed upon terms of the offer.'

[9] This meant, submitted learned counsel, that once the action was stayed (as is the case here) and if there is allegation of a breach of the agreement, the party alleging breach may apply to lift the stay and seek to enforce the agreement within the four corners of the litigation already filed. However, counsel submitted that under rule 35.11 (7) and (8) the application for lifting the stay is not necessary.

[10] The underlying rationale for rule 35 said Mr Robinson was that it eliminated the problems associated with enforcing a Tomlin order. A Tomlin order was a court order in which an action was compromised on terms embodied in a schedule to the order. The Tomlin order provided for the claimant and the agreement having agreed to the terms set out in the schedule further proceedings were stayed except for the purpose of carrying the terms into effect. The case of **Dashwood v Dashwood** [1927] WN 276 stated that in order to carry the terms into effect the party seeking to enforce the agreement had to obtain an order requiring the party in breach to perform his obligation under the agreement. Rule 35.11 (7) has, in

effect, outflanked **Dashwood** by providing that where an offer is accepted but its terms are not complied with then any stay arising on acceptance ceases to have effect and the proceedings or the part stayed was stayed may continue and either party may apply to the court to enforce the terms.

The defendants' submissions

[11] The defendants' position is quite simple. There is an agreement it is to be enforced according to its terms.

The court's response

[12] The critical and most important fact in these applications is that the agreement was not made part of a court order. The consequence of this was made clear by Slade J in **Green v Rozen** [1955] 2 All ER 797. In that case the claimant sued to recover money he lent to the defendants. When the matter came for hearing the parties told the judge that the matter was settled. The briefs were endorsed, 'by consent proceedings stayed on terms indorsed on briefs. Liberty to either side to apply.' Unfortunately, no court order was made. The defendants failed to pay the final instalment and costs as agreed. The claimant made an application in the original action and asked for judgment for the sum of the last instalment and a costs order. Slade J refused the application on the basis that where no order made the compromise superseded the original cause of action and the court had no further jurisdiction in respect of the original claim. His Lordship also held that the claimant's only remedy was to bring an action on the agreement.

[13] Slade J's position was endorsed and applied by the Court of Appeal of England and Wales in **McCallum v Country Residences Ltd** [1965] 2 All ER 264. In that case Mr McCallum sued the defendant for labour and money in respect of work done by him. The dispute was referred to an official referee. Negotiations ensued. The claimant's solicitors wrote to the official referee asking for an order in the following terms:

> *"All further proceedings in this action be stayed save for the purpose of carrying the following terms into effect: That the defendants do pay to the plaintiff the sum of £900 within seven days from the date hereof. That the defendants pay the plaintiff's costs as between party and party, such costs to be taxed. That the plaintiff's costs be taxed on a common fund basis pursuant to Sch. 3 to the Legal Aid and Advice Act, 1949."*

[14] As can be seen this is the usual form of a Tomlin order. The defendant's solicitors did agree a sum for labour and work but did not agree costs. The official referee granted an order in the terms asked for. Lord Denning MR indicated that this order was not Tomlin order despite its form because a Tomlin order is a consent order and in the instant case there was no consent. The Master of the Roll's argument is crucial. His Lordship indicated at page 265:

> *When an action is compromised by an agreement to pay a sum in satisfaction, it gives rise to a new cause of action. This arises since the writ in the first action and must be the subject of a new action. The plaintiff, in order to get judgment, has to sue on the compromise. That is the only course which the plaintiff can take in order to enforce the settlement; unless of course he can go further and get the defendant to consent to an order of the court. In the absence of a consent to the order, as distinct from a consent to the agreement, I do not think the court has jurisdiction to make an order.*

[15] Winn LJ agreed with the Master of the Rolls. Danckwerts LJ disagreed. His Lordship was prepared to hold the defendant to the agreement. Thus consent to

an agreement is not a consent order unless the parties agree to the order and the order is in fact made. This position has not changed.

[16] The question is whether Part 35 has changed this. This court concludes that it has not. Part 35 is the equivalent of Part 36 of the English CPR. An examination of the cases of **Gibbon v Manchester City Council** [2011] 2 All ER 258 and **C v D (No 2)** [2011] EWCA Civ 646; 136 Con LR 109. These cases state that Part 36 is a self contained code designed to encourage settlements and the primary benefit is in terms of costs saved. Moore - Bick LJ at **[4]** held:

> ***[4]*** *It can be seen from Pt 36 as a whole, as well as from the extracts cited above, that it contains a carefully structured and highly prescriptive set of rules dealing with formal offers to settle proceedings which have specific consequences in relation to costs in those cases where the offer is not accepted and the offeree fails to do better after a trial. In cases where there has been no Pt 36 offer or a Pt 36 offer has been bettered the judge has a broad discretion in dealing with costs within the framework provided by CPR Pt 44. Rule 44.3(4) provides that when exercising its discretion as to costs the court will have regard to the general rule that the unsuccessful party should pay the costs of the successful party, but will also have regard to the conduct of the parties and any payment into court or admissible offer to settle made by one or other party which falls outside the terms of Pt 36.* ***In seeking to settle the proceedings, therefore, parties are not bound to make use of the mechanism provided by Pt 36, but if they wish to take advantage of the particular consequences for costs and other matters that flow from making a Pt 36 offer, in relation to which the court's discretion is much more***

confined, they must follow its requirements. (emphasis added).

[17] This court agreed with the Lord Justice and adopts his reasoning as applicable to Part 35 of the Jamaican CPR. The result then is that Part 35 is an additional mechanism to those stated in **Rozen** by which parties can settle proceedings. No litigant is compelled to use Part 35 but if he wishes to do so he must comply with its provisions.

Conclusion and disposition

[18] Both applications are dismissed. The agreement has taken the place of the original cause of action. The agreement not being a court order, this court has no jurisdiction to entertain any application in the original claim. Enforcement can only take place on the agreement which means filing a claim and the attendant pleadings. Part 35 has not changed this position. No party is compelled to follow Part 35 but if he does he must follow the rules closely.

[19] Applications dismissed. Leave to appeal granted. Each party to bear own costs.