[2012] JMCC Comm. 15

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. 2011 CD 00067

BETWEEN	**GLENN CLYDESDALE**	**1ST CLAIMANT**
AND	**VICTORIA CLYDESDALE**	**2ND CLAIMANT**
AND	**MAGWALL JAMAICA LIMITED**	**1ST DEFENDANT**
AND	**RICHARD CATLING**	**2ND DEFENDANT**
AND	**SAMUEL CATLING**	**3RD DEFENDANT**

IN CHAMBERS

Mrs. Symone Mayhew and Ms. Debbie Wilmot, instructed by Wilmot Hogarth & Co. for the Claimants.

Mr. Vincent Chen instructed by Chen Green & Co. for the Defendants.

HEARD: 27 September, and 8 November 2012.

CIVIL PROCEDURE AND PROCEDURE-MEDIATION-RULE 74.12(1) OF THE CPR-MEANING OF ORDER IN TERMS OF MEDIATION REPORT-RULE 42.7 OF THE CPR-APPROPRIATE FORM OF CONSENT ORDER-WHETHER AFTER ENTRY INTO CONFIDENTIAL AGREEMENT IN FORM PROVIDED BY RULES TOMLIN ORDER TO BE ENTERED OR WHETHER PARTY SEEKING TO ENFORCE TO FILE NEW ACTION-OVERRIDING OBJECTIVE OF DEALING WITH CASE EXPEDITIOUSLY AND SAVING TIME AND EXPENSE.

Mangatal J:

1. This case raises interesting questions, as to the proper interpretation of Rule 74.12 of the Civil Procedure Rules 2002 ("the CPR"), and its interplay with Rule 42.7. Rule 74.12 is concerned with action by the court after the filing of a mediation report. Rule 42.7 deals with Consent Judgments and Orders. I would like at the outset to express my gratitude to Counsel on both sides for their industry and well-thought out submissions. This is, I believe, a fairly novel point in our jurisdiction, and there is a dearth of local authority on the question of what an order made in terms of a mediation report really means.

2. The 1st Claimant Glenn Clydesdale ("Mr. Clydesdale") is a shareholder and former Director of the 1st Defendant Magwall Jamaica Limited ("Magwall").

3. The 2nd Claimant Victoria Clydesdale ("Mrs. Clydesdale") is the wife of Mr. Clydesdale.

4. Magwall is a limited liability company, duly incorporated under the laws of Jamaica, and is a wholly owned subsidiary of Magwall Caribbean Limited ("Magwall Caribbean").

5. The 2nd and 3rd Defendants Richard Catling and Samuel Catling are both directors of Magwall Caribbean and Magwall and are also Chief Financial Officer and Chief Executive Officer respectively of Magwall.

6. The Particulars of Claim make a number of allegations against the Defendants. Amongst other matters, it is alleged that:

    a. Mr. Clydesdale agreed to extend a short-term loan in the amount of US$100,000 to Magwall at an interest rate of 2% per month for each month or part thereof that the loan remained outstanding, commencing March 1, 2011, such loan being repayable on demand "Loan 1"; and

    b. Mrs. Clydesdale agreed to extend an interest free loan of US$200,000.00 to Magwall, such loan being repayable on demand "Loan 2".

7. The Clydsdales also allege that the 2nd and 3rd Defendants have exercised their powers as the directors of Magwall Caribbean and of Magwall in a manner that is oppressive and unfairly prejudicial to them.

8. Amongst other claims, the Particulars of Claim seek the following:

A. In respect of the 1st Claimant:

1. The sum of US$104,000.00 equivalent to JA$8,957.520.00 at the rate of US $1: JA$86.13 as at the date of these Particulars.

2. Interest on the aforesaid sum at the rate of 2% per month until payment as agreed by the parties or at a commercial rate of interest as this Court deems just pursuant to the Law Reform (Miscellaneous Provisions) Act.

B. In respect of the 2nd Claimant:

3. The sum of US$200,000 equivalent to JA$17,226,000.00 at the rate of US $1:JA 86.13 as at the date of this particulars, together with interest at a commercial rate pursuant to the Law Reform (Miscellaneous Provisions) Act.

C. Pursuant to Section 213A of the Companies Act, the 1st and 2nd Claimants seek:

4. An order for any or all of the following:

(a) Requiring the Defendants to produce to the Claimants:

(i) All the financial records of the 1st Defendant; and

(ii) Audited financial statements for the 1st Defendant;

(b) An order appointing a receiver for the 1st Defendant.

(c) In the alternative an order to liquidate or dissolve the 1st Defendant.

(d) An order to prevent the Defendants, whether acting alone or in concert, from dissipating or encumbering the assets of the 1st Defendant in any manner whatsoever.

9. In the Defence, the Defendants admit receiving the sums alleged from the Clydesdales. However, as regards Mr. Clydesdale's claim, the Defendants say that it was agreed that no demand would be made under the loan until Magwall had made sufficient sales to become viable. It was also pleaded that, in any event, the interest charged on the loan is excessive, the transaction is harsh and unconscionable, and in breach of the Money Lending Act. Mr. Clydesdale sought an order that it should be reopened by the court and

an account taken between the parties as to the proper amount to be calculated for interest.

10. As regards Mrs. Clydesdale's claim, the Defendants aver that the funds provided by her were for an equity holding in the parent company Magwall Caribbean.

11. The 2nd and 3rd Defendants deny that they have been guilty of any oppressive and/or unfairly prejudicial conduct and deny that the Clydesdales are entitled to any of the relief claimed under Section 213A of the Companies Act.

12. By virtue of the nature of this claim and of the date it was filed, it was subject to the automatic mediation procedures and mandatory rules in Part 74 of the CPR. The parties attended mediation on February 7, 2012, at which time a Mediation Settlement Agreement ("the Agreement") was reached and executed by the parties. The Agreement, amongst other matters, embodied terms that were among the relief sought in the Claim Form and Particulars of Claim. There were also matters dealt with in the Agreement that were wholly outside the subject of the claim as pleaded.

13. In accordance with the Rules, the mediator filed the Report on February 9, 2012 indicating that "the parties have reached full agreement…., the claim and defence are herein settled, and the parties will keep the agreement confidential…."

14. There are allegations of breach of the Agreement by the Clydesdales and the Defendants in respect of each other.

THE APPLICATION

15. As originally filed in June 2012, the Clydesdales sought certain orders in respect of the Agreement. It is instructive that by an amended application filed September 24 2012, the application now seeks in the alternative an order in terms of the Mediation Report.

Thus the application now is:

> …*That an Order be entered in terms of the "Mediation Settlement Agreement" made between the parties on February 7, 2012 and or the Mediation Report filed on February 9, 2012.*

16. The Grounds set out in the application are as follows:

> …..
> …..

3) Pursuant to Part 74.12(1) and 42.7 of the Civil Procedure Rules the court is to make an order in terms of the mediation report.

4) The Claimants have honoured their obligations under the Mediation Settlement Agreement but the Defendants have failed and or refused to honour their obligations under the Agreement.

5) In the circumstances it is just and equitable that an order be made in terms of the …Agreement and/or the Mediation Report.

17. Prior to the commencement of the hearing, both parties indicated to me that they were agreed that the Court must make an order in terms of the mediation report. Both Counsel Mrs. Mayhew for the Clydesdales, and Counsel Mr. Chen for the Defendants, agreed upon the mandatory nature of the provision in Rule 74.12(1) and the meaning and import of the word "must". I found that the position taken by Counsel as to the mandatory nature of the Rules was quite appropriate. Reference was made by Mrs. Mayhew to a decision of the Ontario Supreme Court of Justice in **Tim Hagel v. Andrew Giles and Ors.** 2006 CANLII3964 (ONSC). As pointed out by Mrs. Mayhew in her submissions, our Mediation Rules were modeled on the Canadian Rules. However, it is useful to compare and contrast the corresponding provisions of the Canadian Rules. It will be readily seen that whereas the corresponding Canadian section is permissive, our Rule 74.12(1) has plainly taken a different path. The Jamaican Rules Committee has taken the mandatory approach to entry of orders once agreement is reached.

18. Rule 74.11 (1) provides for the time frame within which the mediator is to file a report in relation to the completion of the mediation and date of referral .Rule 74.11(2) provides that:

74.11 (2) W*here an agreement is reached between the parties, the signed 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.*

19. Rule 74.12(1) provides that:

74.12.1

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

20. Rule 42.7 provides as follows:

Consent judgments and orders

42.7 (1) This rule applies where-

a. none of these Rules prevents the parties agreeing to vary the terms of any court order; and

b. all relevant parties agree the terms in which judgment should be given or an order made.

(1) Except as provided by paragraphs (3) and (4), this rule applies to the following kinds of judgment or order-

(a) A judgment for-

(i) The payment of a debt or damages (including a judgment or order for damages or the value of goods to be assessed);

(ii) The delivery up of goods with or without the option of paying the value of the goods to be assessed or the agreed value; and

(iii) Costs.

(b) An order for-

(i) The dismissal of any claim, wholly or in part;

(ii) The stay of proceedings on terms which are attached as a schedule to the order but which are not otherwise part of it (a "Tomlin Order");

(iii) The stay of enforcement of a judgment, either unconditionally or on condition that the money due under the judgment is payable on a stated date or by installments specified in the order;

(iv) Setting aside or varying a default judgment under part 13;

(v) The payment out of money which has been paid into court;

(vi) The discharge from liability of any party;

(vii) The payment, assessment or waiver of costs, or such other provision for costs as may be agreed; and

(viii) Any procedural order other than one falling within Rules 26.7(3) or 27.8(1) and (2).

(2) This rule does not apply-

(a) Where any party is a litigant in person;

(b) Where any party is a minor or patient;

(c) In Admiralty proceedings; or

(d) Where the court's approval is required by these Rules or any enactment before an agreed order can be made.

(2) This rule does not allow the making of a consent order by which any hearing date fixed by the court is to be adjourned.

(4) Where this rule applies the order must be-

(a) Drawn in the 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.

THE SUBMISSIONS ON BEHALF OF THE CLYDESDALES

21. It was Mrs. Mayhew's submission that having determined that the court is required to enter an order in terms of the Report, whether the settlement agreement is attached to the report or not, the question arises as to what type of order should be made. Rule 74.12 dictates that the order should be in accordance with Rule 42.7 and this rule deals with various types of consent orders. It was Counsel's submission that when one considers the result of the mediation and the fact that the parties agreed to keep the terms confidential, but to use the Supreme Court to enforce the order in the event of breach, the obvious order is a Tomlin type order as provided for in Rule 42.7(b)(2) of the CPR.

THE SUBMISSIONS ON BEHALF OF THE DEFENDANT

22. Mr. Chen quite helpfully set out the categories into which the orders provided for in Rule 42.7 can be "loosely categorized", as follows:

(a). Settlement of the matter; (b) entry of a judgment for payment or dismissal of the action or the doing of some act in the action itself; and (c) stay of the action on terms (Tomlin Order). Mr. Chen submits, correctly, that these categories have different implications.

23. Those in (a), it was argued, bring the proceedings to an end and no further steps can be taken within that action; a new action would have to be brought to enforce them. Those in (b) will be enforced by the issue of process within the action and the proceedings remain alive until the orders are enforced. Those within (c) keep the proceedings alive as it is only stayed upon the terms agreed. It is Mr. Chen's submission that in the case of

the classic Tomlin Order the proceedings are stayed on the terms set out in the schedule to the order and there is usually, he argues, a provision in the schedule for permission to apply to enforce the terms in case of breach.

24. It was argued that the rules require that there should be consensus. That there is no doubt that at the time of the making of the Agreement there was consensus that the matter was settled on the terms set out in the Agreement. Mr. Chen pointed out that, and indeed, this matter is not in dispute, that some of the matters the subject of the Agreement, encompass matters not dealt with in the action and statements of case. He also argues that some of the new matters arose subsequent to the date of filing of the Claim Form. It was submitted that there is in existence a valid and binding agreement which falls into category (a) above and puts an end to the dispute or disputes from which it arose.

25. It was contended that the device used by the court to enforce an order other than a simple order for payment of money or the delivery of possession is a Tomlin order. Further, that that method was devised by the English Courts to keep the action alive by providing for a stay of the action pending the doing of the acts agreed on in the settlement which are usually set out in a schedule to the settlement agreement. Reference was made by Mr. Chen to a lecture by David Foskett Q.C.to the London Common Law and Commercial Bar Association of November, 19th 1997 entitled "The Tomlin Order : three score and ten". I must say that I found this lecture very useful, not to mention, entertaining, as the learning is punctuated by humour and anecdotes in the learned author's own inimitable style. Indeed, I have found the work of Queen's Counsel Mr. Foskett **The Law and Practice of Compromise**, 6th Edition, in which this Lecture in fact appears, to be an excellent and comprehensive work in relation to settlement and compromise agreements.

26. The Agreement, according to Counsel, does the very opposite to staying the action: it provides that the claim is withdrawn and the action is settled on the terms set out in it. Mr. Chen submits that those terms go beyond the simple direction for payment of money. It requires the doing of acts which could not properly be ordered to be done based upon the ambit of the action itself.

27. Mr. Chen therefore submits that the Agreement is not a Tomlin order as no provision was made within it to stay the action and make further applications to the court for enforcement.

28. Mr. Chen also invited the court's attention to Rule 35.11 dealing with offers to settle and the effect of acceptance of such offers. Rule 35.11(8) provides as follows:

> *(8) Where a party claims damages for breach of contract arising from an alleged failure of another party to carry out the terms of an agreed offer, that party may do so by applying to the court without the need to commence new proceedings unless the court orders otherwise*

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29. Counsel submits that this method set out in Rule 35.11(8) is a special and limited method of enforcement relating to offers under the Rules and is restricted to a claim for damages for breach of contract. It was argued that this confirms the law that whenever a matter is settled by an agreement which creates a new contract the new contract can only be enforced by new proceedings and that this Rule creates an exception to it.

30. Mr. Chen also made submissions in relation to enforcement. He submitted that the order cannot be enforced in the present action as it has to be the subject of a new action and further, that the Claimants are in any event in breach of the terms of the Agreement. However, in my judgment, on neither party's case does the issue of enforcement arise for consideration within this application. Whilst, therefore, the submissions and cases cited in relation to the concept of "best endeavours" are very interesting and may yet arise for consideration at some other stage, they do not arise for consideration at this juncture. If Mr. Chen is correct and there has to be a new claim filed in a separate law suit, then the question of enforcement would not arise now. Further, in the event that Mrs. Mayhew is correct and that the court should enter an order in the nature of a Tomlin order, pursuant to Rule 42.7(b)(ii), then a separate application would still have to be made to the Court in this same law suit for enforcement of the terms of the Agreement. In that event, and upon that separate and distinct application, it would be open to the Defendants to raise allegations of breach and default under the Agreement as a possible defence to the Clydesdale's claim to enforce the order- see **Horizon Technologies International Ltd.** [1992] 1 HKLR 106, at 113, cited by Mrs. Mayhew. That decision is a decision of the Judicial Committee of the Privy Council, emanating from the courts of Hong Kong, in which the whole of the agreement between the parties settling the

particular piece of litigation had not been transposed into the schedule to a Tomlin Order. When one of the corporate parties applied for an Order enforcing the terms of the schedule, it was argued by the other party that the corporate party was itself in breach of a term of the larger agreement and accordingly, was not entitled to the Order sought. The Privy Council decided, as a preliminary point, that the argument could indeed be mounted by the party resisting enforcement. See also paragraph A7-19 of Mr. Foskett's Lecture.

RESOLUTION OF THE ISSUES

31. In my judgment, the court has to consider the nature of the compromise embodied in the Agreement. It also has to look at the contents of the Mediation Report, and consider the proper construction of the relevant rules.

32. I agree with Mr. Chen that the agreement reached at mediation can be as wide as the parties may devise and, so long as it is correctly worded, such an agreement will fall within one of the categories contemplated by Rule 42. Mediation proceedings are indeed fully accommodated by the Rules.

33. I also think that it is important to put aside any considerations to do with breach in relation to a consideration of this application. Questions of breach and enforcement are in my judgment not relevant to a consideration of the court's compulsory task of entering an order in terms of the mediation report. They can only confuse the issue if they are examined at this point. The question at this stage is simply what format should the order take in order to properly reflect and represent the agreement between the parties. In addition, what is the correct construction to attach to the wording of the rules, bearing in mind the overriding objective of dealing with cases justly when considering the just and proper way to interpret Rules 74.12(1), and Rule 42.7.

34. In this case, the Mediation Report announces that the claim and the defence are settled. However, it is important to examine the Agreement itself. This Agreement is in a form which requires certain sections to be filled out by the parties, depending on the particular facts and circumstances of their compromise. Part 74 of the CPR. establishes automatic referral to mediation of certain matters, and applies to matters already filed within the civil jurisdiction of the Supreme Court. Mr. Chen has submitted that the settlement agreed has brought the original proceedings to an end, and that the parties have made no provision in the Agreement for the making of further applications to the court for

enforcement. However, I disagree with that submission entirely. To my mind, Mr. Chen's argument ignores the significance of Clause 2b. Whilst Clause 2a of the standard form agreement states that in exchange for the promises made by the parties they agree that execution of the Agreement operates as a withdrawal of complaints identified by the "mediation case number found in the Preamble above", Clause 2 b very significantly for present purposes, states:

2. In exchange for the promises made by ALL PARTIES to this Agreement, they both freely and voluntarily agree:

> b. *That in the event any party hereto believes that the other has violated a term or condition of this Agreement to notify in writing the Mediation Manager at the Dispute Resolution Foundation within 30 calendar days of the date of the alleged violation and request that 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****.* (My emphasis)

35. The parties also agreed to keep the terms of the Agreement confidential –see the Mediation Report filed by the Mediator in the Supreme Court on February 9, 2012. As stated by David Foskett Q.C. at paragraph A7-04, there are relatively simple compromises, for example, involving the mere payment of a sum of money, or the giving up of possession of premises. In such cases, a straight-forward consent judgment or order can be entered. For example, with regard to payment of a sum of money, Rule 42.7(2)(a)(i) could come into play. If this agreement were arrived at by way of mediation, then in such a case, one would expect that the Agreement could be exhibited (although it does not necessarily have to be the case), and in that event , a straight-forward consent order could be entered up pursuant to Rule 74.12(1) and Rule 42.7. However, there are relatively more complicated cases, involving for example a number of inter-related obligations, some of them being of a nature that, even had the parties wished otherwise, they could not be made orders of the court. It is pointed out that there is no jurisdiction to make a judgment or order by consent which the court would not otherwise have jurisdiction to make. This is one of the situations where a Tomlin order can prove very useful. See also **Phillips v. Clarke** [1969] 3 All E.R. 710, cited by Mrs. Mayhew. At paragraph A7-05, Mr. Foskett has this to say about the Tomlin order:

> *What had emerged, certainly by the early part of this century, was a practice whereby parties agreed to the stay of the proceedings upon the*

> *terms of the agreement between them. Those terms were recorded in a Schedule to the Order and the intention was that the Court should be able to make orders in aid of the enforcement of those terms as the result of an application by summons within the stayed action. In other words, no fresh action was required, although, of course, a further step in the proceedings was necessary in order to obtain a suitable form of Order.*

36. At paragraphs A7-19, A7-20, (upon which passages Mrs. Mayhew relies in support of her Submissions), the learned author states:

> *Before drawing all this to some form of conclusion, let me draw attention to one feature of the standard Tomlin Order procedure which parties do from time to time adapt. Since the Schedule to the Order is part of the Court record, it is open to public inspection. Parties may wish, for an assortment of reasons, to keep their settlement confidential. This can, at least in part, be achieved by recording the terms of the settlement on a separate document rather than in the schedule. Provided that that document is clearly identified on the face of the Tomlin Order, there can be no objection to dealing with things that way.*

37. Whilst, therefore, Mr. Chen is right that the Agreement does not expressly speak to a stay, it seems to me that in effect that is what is being agreed. The action is being settled, yet it is agreed that if there is allegation of breach, the parties will utilize the Supreme Court for the enforcement of the terms and conditions of the Settlement Agreement. In other words, the bargain is that the action would not be resorted to thereafter except for the purpose of enforcing the terms. Since it is the Supreme Court from whence the matter came to the Mediator, then for the parties to agree to utilize the Supreme Court for enforcement of the Agreement, must mean going back to the Supreme Court, or in other words, resorting to the action filed for the limited purpose of enforcing the terms of the Agreement. There is no magic in the word “stay”, or indeed, in the words “liberty to apply”, if words such as those utilized in the instant case are extant. I therefore agree with Mrs. Mayhew that the result of the mediation, coupled with the parties agreeing to keep the Agreement confidential, and agreeing to use the Supreme Court to enforce the terms in the event of breach, do point heavily to the appropriateness of a Tomlin order. This conclusion is strengthened because a number of the terms were to do with matters outside of those claimed, could not have been ordered by the Court in any event as a consent judgment, and some arose subsequently to the filing of the Claim Form. These characteristics of the contents of the Agreement, do not, as Mr. Chen argued, support the view that a new claim would have to be made on the Agreement, because such subject matter are exactly the kind that are aptly suited to be

the subject of a Tomlin Order. I agree that there must be consensus. There is consensus here to a Tomlin Order because that is the effect of the bargain struck and as signified in the Agreement. The case of **McCallum v. Country Residences Ltd** [1965] 1 W.L.R. 657, cited by Mr. Chen is distinguishable because nowhere in the terms agreed in that case could it be found that the parties had agreed to go back to court to enforce the agreement in the event of breach.

38. I agree with Mrs. Mayhew's submission that it would be consistent with the overriding objective for the parties to be at liberty to seek to enforce the terms of the Agreement without the need to commence a new action. This would be consistent with the objective of saving time and expense and dealing with cases expeditiously. – see also **Bargain Pages Ltd. v. Midland Independent Newspapers** [2003] EWHC 1887, referred to at paragraph 9-26, 9-27 of Foskett's work **The Law of Compromise**. At paragraph A7-21,22 at first discussing the rules on Offers, Mr. Foskett Q.C. emphasized that there was a role for Tomlin orders to play under the new English Rules. The learned Queen's Counsel was delivering his Lecture on the eve of the new English Rules. He stated:

> *All I feel able to say, therefore, is that there must be a fighting chance that the Tomlin order will become "institutionalized" under the new Rules.* ***Since the philosophy that underpins the new rules will be the saving of costs and increased speed in securing justice, it surely would have found a natural home.***
>
> ***The phraseology of any such Order, whether under the new Rules as such or simply made by the parties after the Rules have become effective, will doubtless change from its traditional form. The Committee is enjoined by the enabling Act to draft the Rules in uncomplicated language…Whilst I think that the expression "stay" is likely to be retained, the days of the expression "liberty to apply" are probably numbered.*** (My emphasis)

39. If Mr. Chen's submission is correct that the parties would have to file a new action, that would give rise to a number of undesirable consequences which it is clear to me the CPR does not espouse and never intended. As Mr. Foskett points out at paragraph A7-04, a new action would mean the issue of a new Claim Form, Particulars of Claim, "followed by all the panoply of further pleadings, discovery and so on. Even if the matter could have been dealt with under… (Summary Judgment procedures), or in some other reasonably summary fashion, there would be delay and expense. For the litigant seeking

enforcement of the obviously enforceable, there would be much frustration." In Jamaica, a new action of this sort would itself be subject to automatic referral to mediation! The parties in this case have already undergone mediation and have arrived at the desirable outcome of a compromise. For them to be subject to automatic referral in another round of mediation (which is arguably a consequence) would, to my mind be ludicrous. This demonstrates that it could not have been the intention of our Rulemakers that parties who have arrived at a settlement, but which settlement cannot be embodied in the terms of the Consent Order, would have to file a fresh action. This is precisely the situation calling for a Tomlin Order. It would certainly be a backward step, and not one taking the administration of justice to a new and higher level of justice and efficiency. Neither the ordinary and natural meaning of the Rules nor a reasonable or purposive construction gives rise to such an interpretation.

40. It is my view that the fact that Rule 35.11(8) expressly deals with the issue of Offers and their acceptance does not take away from the fact that the new Rules encourage settlement and compromise and the speedy resolution of matters in every area. The use of a Tomlin type order is quite clearly not limited to Offers to Settle. Indeed, as has been discussed above, Tomlin orders are expressly discussed in Rule 42.7(2)(b) (ii). At paragraph A7-21, Foskett discussed the fact that in relation to the English Rules, Lord Woolf's proposals placed emphasis on "offers to settle". He pointed out that "Unless the Rules say something about the consequences of acceptance of such an offer, the parties will either have to have specified what is to happen or be left to enforce the settlement in a fresh action. I cannot believe that anyone would welcome that last possibility." Our Jamaican Rules were modeled on the English Rules, including the provisions to do with Offers to Settle.

41. Mrs. Mayhew has not specified what exactly the wording of this order should be. However, in so far as she is asking me to reflect the compromise of the parties and the contents of the Mediation Report by making a Tomlin Order, it seems to me appropriate to use Form A1-14 set out in David Foskett Q.C.'s Work. The format that is appropriate is that set out in the Form which would simply refer to the Agreement, and its terms would not be embraced in a Schedule, since the parties have agreed to keep it confidential.

42. I am minded to make an order in terms of the Mediation Report filed February 9, 2012 as sought in the Amended Notice of Application for Court Orders filed September 24 2012, and this requires me to make a Tomlin Order to reflect the compromise arrived at.

43. Therefore I make the following orders:-

(1) Order in terms of the Mediation Report filed February 9, 2012, that is, the claim and defence are herein settled and the parties will keep the agreement confidential.

(2) Pursuant to the Dispute Resolution Foundation Mediation Settlement Agreement, the Court hereby declares that a Tomlin Order has been agreed to by the Parties.

(3) Therefore, by consent, all further proceedings in this matter be stayed upon the terms set out in the document entitled “Dispute Resolution Foundation Mediation Settlement Agreement” dated February 7, 2012, signed by all of the parties, duplicate copies of which have been retained by the Attorneys-at-law for both the Claimants and the Defendants, except for the purpose of enforcing those terms. It is further ordered that either party may be permitted to apply to the court to enforce the terms upon which this matter has been stayed without the need to bring a new claim.

(4) No order as to Costs.

(5) Permission to appeal granted to the Defendants.