

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2009/HCV03497

BETWEEN FRANK DELANO GAYLE CLAIMANT/RESPONDENT
AND MARIA MILETIC DEFENDANT/APPLICANT

Mr. Joseph Jarrett for Claimant/Respondent

Mr. Kipcho West for Defendant/Applicant

Heard: February 22 and March 29, 2011

*Setting aside of Notice of Discontinuance -
Rule 37 Civil Procedure Rules 2002 –Filing
of Mediation Report – Absence of Court
Order in terms of the Report-Rescission of
Mediation Settlement - Rule 74 Civil
Procedure Rules 2002*

Lawrence-Beswick J

1. Mr. Gayle and Ms. Miletic are neighbours. Mr. Gayle alleges that Ms. Miletic has encroached on his land. On July 2, 2009, he filed suit against her seeking *inter alia* a declaration that he is the owner of the land on which he alleges she encroached and orders for possession of the land, damages for trespass and the demolition of a fence.

2. The matter was automatically referred by the Court to mediation, where the parties, Mr. Gayle and Ms. Miletic, on March 25, 2010 came to an agreement as to the resolution of the issues between them which had been before the Court.

3. The agreement was, *inter alia*, that both parties would sign a sale agreement and transfer in order to transfer land, including the disputed portion of land, from Mr. Gayle to Ms. Miletic. The agreement continued that after these documents were signed a notice of discontinuance was to be filed.

4. On June 4, 2010 before all the terms of the agreement had been met by the parties, Mr. Gayle's attorney-at-law, Mr. Jarrett, filed a notice of discontinuance of the action. The result of this was that the land was not transferred to Ms. Miletic. On November 24, 2010, Ms. Miletic's attorney-at-law, Mr. West, filed this Notice of Application for Court Orders seeking the Court to order that Mr. Gayle be made to comply with the Settlement Agreement and that he be restrained from disposing of the land.

Mediation Agreement

5. The mediator had forwarded a report of the settlement agreement to the Court. There is, however, no Order of the Court formalizing the settlement.

6. Is the settlement agreement resulting from that mediation to be regarded as an Order of the Court such that the Court can order Mr. Gayle's compliance with it? That is the first question to be determined.

7. **Rule 74.12(1)** of the Civil Procedure Rules 2002 (the Rules) provides:

“Where an agreement has been reached, the court must make an order in the terms of the report [pursuant to rule 42.7]”

8. The Rules appear to be silent as to:

- (a) *the time within which the Court must make the Order;*
- (b) *who bears the responsibility to request the Court to make the Order;*
- (c) *the consequence of a failure of the Court to so order*

9. **Rule 42.7**, to which **Rule 74.12(1)** refers, concerns Consent Judgments and Orders and applies where, *inter alia*,

“(1) (b) all relevant parties agree the terms in which judgment should be given or an order made.”

Rule 42.7(5) specifies that 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.*

10. The mediation settlement agreement was not reduced into writing in the manner specified in **Rule 42.7(5)** (supra), nor did the Court make the Order which it is mandated to do by **Rule 74.12(1)** (supra).

In my view therefore, this mediation settlement is not to be regarded as an Order of the Court, and therefore cannot be enforced as an Order of the Court.

11. Is it nonetheless enforceable? The mediation settlement specified that:

- “1 a. This agreement ... is binding upon the parties ...*
- b. All promises ... made in the course of reaching this Settlement Agreement... 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.”*

12. Paragraph 2 of the Settlement Agreement states that the parties freely and voluntarily agree to withdraw specified complaints in exchange for the promises made by all parties.

Paragraph 3 of the Agreement detailed the agreement of the parties for Ms. Miletic to purchase all of Mr. Gayle's land for \$900,000.00. Mr. Gayle's attorney-at-law was to prepare the Sale Agreement and/or Transfer Agreement. Within 14 days of the signing of the sales agreement/transfer that attorney-at-law was to file and serve a notice of discontinuance. However, the Notice was filed before the sales agreement and/or Transfer were signed.

13. The Agreement culminates with the signatures of Mr. Gayle and Ms. Miletic, dated March 25, 2010 which are below the statement that the parties have read and understood the agreement and freely enter into it.

This Mediation Settlement Agreement may be interpreted to mean that each party freely agreed to do certain things in return for defined benefits in which event it may be considered to be a contract between the parties and enforceable as such.

14. The next question must be as to whether the Court in this application, would have the power to enforce such a contract, when the suit has purportedly been discontinued.

Discontinuance

15. The mediation settlement agreement provided that a Notice of Discontinuance should be filed within 14 days of the parties having signed the sale agreement transfer (sic). Such signing did not occur and therefore the Notice of Discontinuance would not have been filed pursuant to that agreement.

16. However, the Civil Procedure Rules 2002 provide for discontinuance under those rules. **Rule 37.2(1)** provides:

“The general rule is that a claimant may discontinue ... a claim without the permission of the court.”

Rule 37.2 (2) specifies the Court’s permission as being required to discontinue a claim where the Court had granted an interim injunction or a party had given an undertaking to the Court and it states the circumstances where a party’s consent is required for discontinuance.

17. It may well be argued that this particular mediation settlement to which the parties agreed is in effect a combination of an interim injunction and an undertaking as the parties agreed to withdraw their complaints, end their dispute by agreeing to the sale of the disputed land and thereafter to discontinue the claim.

18. However, **Rule 37** is specific as to the circumstances in which permission or consent is required to discontinue a claim, and the specified categories do not include a mediation settlement agreement. This means therefore that Mr. Gayle was at liberty to file a Notice of Discontinuance without the Court’s permission, or without the consent of Ms. Miletic.

19. **Rule 37.3(1)** makes further provision for the procedure for discontinuing a claim which includes service and filing of the Notice of Discontinuance. There is no dispute as to this Rule having been complied with. Discontinuance would take effect, according to **Rule 37.5(1)** on the date when the Notice is served. That date is agreed as being June 7, 2010. “The claim ... is brought to an end ... on that date.” **Rule 37.5 (2)**

20. The effect of the discontinuance in this action would be that Mr. Gayle would no longer be seeking a declaration of his ownership of the land which he had alleged was being encroached on by Ms. Miletic, nor damages for trespass nor the other remedies he had sought, including the demolition of a fence which had been between both properties.

21. However, Ms. Miletic does not wish the suit to be discontinued until the issues joined in the suit have been resolved in accordance with the mediation settlement agreement.

Setting Aside of Notice of Discontinuance

22. **Rule 37.4** provides for the setting aside of a Notice of Discontinuance under the Civil Procedure Rules 2002. It refers to such setting aside in circumstances where the defendant whose consent is required, has not consented to discontinuance, or the court has not given permission where required. Neither permission nor consent to discontinue is required in this claim.

23. The Notice of Discontinuance therefore cannot be set aside under **Rule 37.4** of the Rules. In any event, the Application to set aside the Notice of Discontinuance was filed on February 15, 2011, some eight months after the Notice of Discontinuance had been served on Ms. Miletic's then attorneys-at-law. The reason for what I regard as such an inordinate delay was that Ms. Miletic had been abroad for one month between July and August 2010 and had not been aware of the Discontinuance before she left in July. She had also changed her attorney-at-law.

That in my view is not an acceptable reason for excusing such a delay and therefore the application to set aside the Notice of Discontinuance would have been

refused, even if the discontinuance had fallen into one of the categories of discontinuance which could have been set aside.

Contract

24. However, in my view, the contract entered into by way of the mediation settlement may well be regarded as being enforceable. Ms. Miletic may choose now to pursue her own claim to enforce the contract, if so advised.

25. The evidence is that, pursuant to the mediation settlement, a surveyor was employed by Ms. Miletic. The surveyor identified and outlined the boundaries of the respective properties after which Mr. Gayle demolished the offending wall replacing it with a wall in accordance with the new boundaries. Mr. Gayle then purportedly entered into a Sale Agreement with another party, thereby excluding Ms. Miletic from purchasing the land, contrary to the agreement made at the Mediation Conference.

26. In so doing he derived the benefit of the mediation settlement agreement and met none of his obligations. It may be said that Mr. Gayle achieved the major objectives of his claim primarily as a result of the work of Ms. Miletic's surveyor which was at Ms. Miletic's expense.

It is of interest that on April 27, 2010, Mr. Jarrett had agreed on behalf of Mr. Gayle that Ms. Miletic's promissory note for payment of some of the purchase price would be payable on June 30, 2010. Nonetheless, he purported to rescind the agreement on June 7, 2010 which was some three weeks before the agreed date for payment of some of the monies.

27. Ms. Miletic's evidence is that no transfer to a third party has been registered though the evidence of Mr. Gayle is that in November 2010, the property was sold to a

third party. In any event there is in force an injunction to prevent the disposal of the land until judgment in this matter.

Orders

28. Court proceedings must be certain. Having filed and served a Notice of Discontinuance, Mr. Gayle should not discover eight months later, that the discontinuance is being challenged without evidence of an acceptable reason.

The claim in this suit was brought to an end by the Discontinuance proceeding and the application to set aside the Notice of Discontinuance is refused.

29. Also refused is the Order sought in this Notice of Application for Court Orders that “the claimant be made to comply with the Settlement Agreement arrived at in mediation on the 25th March 2010.” No specific remedy is sought. However, in view of my finding that this claim is at an end, no remedy is available to Ms. Miletic pursuant to this discontinued claim. If so advised, her remedy may lie in fresh proceedings brought by her to determine whether the mediation settlement agreement is a contract and whether it can/should be enforced.

30. In the circumstances of this case, where sale of the land to a third party is most imminent, the Court will delay execution of this judgment for six weeks from today, to allow Ms. Miletic the opportunity to file suit seeking to enforce the mediation settlement agreement, if so advised.

31. The Orders are:

- (1) Application to set aside Notice of Discontinuance filed June 4, 2010 is refused.
- (2) Application for claimant to be made to comply with the Settlement Agreement arrived at in mediation on the 25th March 2010 is refused.

- (3) Execution of this Judgment stayed until May 10, 2011.
- (4) Costs to the applicant/defendant, Ms. Miletic, to be agreed or taxed.
- (5) Leave to appeal granted to all parties.