[2021] **JMSC Civ.136**

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO SU2020CV00150

IN CHAMBERS (VIA ZOOM)

BETWEEN	**RICHARD LAKE**	**CLAIMANT**
AND	**PAUL BURKE**	**DEFENDANT**

Ms Deniesha Buchanan Attorney-at-law for the Claimant

Mr Franz Jobson instructed by Jobson, Wadsworth, Thompson, Fontaine, Attorneys-at-law for the Defendant

Heard: JULY 13, 2021, JULY 16, 2021 AND JULY 19, 2021

Application to enter Consent Order pursuant to CPR 74.12 and CPR 42.7

CORAM: T. MOTT TULLOCH-REID, J (AG.)

Background

[1] On January 17, 2020, the Claimant filed a claim against the Defendant for damages for malicious prosecution when the Defendant without reasonable or probable cause caused the Claimant to be charged under Section 27(1) of the Rent Restriction Act. The Defendant filed a Defence on May 7, 2020 and the matter was automatically referred to mediation by the Registrar. The mediation was embarked on and was successful. I am without the physical file but the Court's soft file, JEMS, does not have a mediator's report filed on it and neither the Claimant nor the Defendant provided me with a copy.

[2] On February 15, 2021, the Claimant filed an application for judgment to be entered against the Defendant in the terms of the undated Mediation Settlement Agreement which arose out of the mediation. The Mediation Settlement Agreement is exhibited to the Affidavit of Ms Buchanan which was filed in support of the Notice of Application. Mr Jobson objected to the use of the words "*judgment be entered into against the Defendant*". He argues that that goes against the terms of the agreement as one of the bases on which the agreement was made was that neither party admitted liability, fault or error (see paragraph 3 of the Mediation Settlement Agreement). Ms Buchanan agreed that this was so and stated that the Claimant had no difficulty if the order was reworded to satisfy that term in the agreement.

[3] The gist then of the application is for the Mediation Settlement Agreement to be put into the form of an order in keeping with the requirement of CPR 74.12(1). CPR 74.12(1) reads as follows:

> *"Where an agreement has been reached, the court must make an order in the terms of the report [pursuant to rule 42.7]".*

CPR 42.7(5) provides

> "*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."*

[4] Both parties agree that there was an agreement arrived at, at the mediation. This brought into play CPR 74.12(1) and CPR 74.12(1) makes CPR 42.7 relevant to this matter. The court must make an order in the terms of the agreement. CPR 42.7(5) also uses the word "must" and "must" is mandatory. In **Magwall Jamaica**

Limited and ors v Glenn Clydesdale and anor [2013] JMCA Civ 4 Panton P at paragraph 9 of the judgment in referring to both rules, said that

> *"Where an agreement has been reached, the court must make an order in terms of the report."*

In the case of **Patrick Allen v Theresa Allen [2018] JMCA Civ 16** Phillips JA in examining the same parts of the CPR had this to say at paragraph 62 of the judgment:

> *"…once the court is satisfied that there is an agreement, which it can do by examining the mediator's report and the executed mediation agreement submitted with the report, the rules mandate that the court make an order in terms of the report (which by extension would incorporate the agreement), which is a consent order."*

[5] Phillips JA in referring to the case of **Neville Atkinson v Olamae Hunt [2015] JMSC Civ 14** said that she agreed with King J who said that a consent order made pursuant to CPR 74.12(1) and 42.7 is "*a mere administrative act*" and that "*the court would, therefore, only be giving its imprimatur to the agreement*."

[6] The issue I am faced with did not present itself to the judges in the cases in which the parties are relying on. The issue is not whether the mediation agreement should be varied as was the case in **Tiffany Barrett (a minor who sues by her mother and next friend Shirley Hinds-Smith) v Suzette Ann Marie Desouza and anor [2014] JMSC Civ 25** or where the terms of the mediation agreement were to be kept confidential as was the case in **Magwall Jamaica Limited and ors v Glenn Clydesdale and anor [2013] JMCA Civ 4.** The issue I am asked to consider is whether the Court should make an order pursuant to CPR 74.12(1) and 42.7 in circumstances where Clause 8 of the Mediation Settlement Agreement provides as follows:

"Upon payment to the Claimant of the full amount due hereunder and receipt of the agreed Statement signed by the Defendant the Claimant shall withdraw his Claim herein with no order as to costs".

[7] Both the Claimant's and the Defendant's attorneys-at-law agree that clauses 6 and 7 of the Mediation Settlement Agreement, which required payment of money and delivering of a Statement have been complied with. What they disagree on is the next step forward. Ms Buchanan is of the view that the Court must now make a Consent Order pursuant to CPR 74.12(1). Mr Jobson is of the view that the Claimant, having now been satisfied, should withdraw the claim as was agreed.

[8] Ms Buchanan argues that Clause 8 of the Mediation Settlement Agreement is not a bar for Consent Judgment to be entered. She relied on the case of **Gayle v Miletic 2009 HCV 03497** the decision of Beswick J made on March 29, 2011. In that case the Court held that the mediation agreement was merely a contract and could not be enforced until there was a Court Order. In the case before me, the terms agreed have already been satisfied. Monies were paid and a statement given. There would therefore be nothing left to enforce. I wonder therefore at the Claimant's insistence to have the Order. It is not likely that he will need the Court's assistance to enforce the judgment if the Defendant defaults because for all intents and purposes, the issue which was the subject of the claim has been settled.

[9] I understood the spirit of Clause 8 of the Mediation 'Settlement Agreement to say that after the money was paid and the statement given, the Claimant would withdraw the claim against the Defendant. I would have expected that a Joint Notice of Discontinuance or a Notice of Discontinuance would be filed. Ms Buchanan argues against this. She says what is required is the Consent Order, and then the claim would be withdrawn. I imagine that the terms of the Mediation Settlement Agreement were so drafted so that the terms would remain confidential. Ms Buchanan however submits that that language was missing from the Mediation Settlement Agreement and so the terms need not be private.

[10] Mr Jobson says if the Consent Order is filed the claim cannot be withdrawn because there must be a claim associated with the order. The basis for the consent order is for the purpose of enforcing a judgment so that there is no need to start a claim for breach of contract on the mediation agreement where the terms are not obeyed. Since the Defendant has fulfilled his obligations, what would the purpose of the Consent Order be? I am sympathetic to the Defendant's position.

[11] The cases referred to in the submissions of Mr Jobson spoke more to the varying of an order rather than to the procedure to be followed in the instance that there was a mediation agreement. At paragraph 21 of the decision of **Cordell Green v Kingsley Stewart [2014] JMSC Civ 26** 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…*** (my emphasis)".

[12] The parties in the case before me agreed to the withdrawal of the claim but went no further and that is why the Defendant has found himself in the position he has found himself in today. Had he paid attention to the mandatory nature of parts 74.12(1) and 42.7 of the CPR, he would have been more careful in crafting the agreement so that not only would he have agreed to the withdrawal of the claim but he would have insisted on:

a. a notice of discontinuance being filed; and
b. the terms of the mediation agreement being confidential, if that was what he had hoped to achieve.

Neither term being agreed to, I am bound by the requirement of CPR 74.12 and 42.7 and this is so notwithstanding the fact that the main terms agreed, which would have brought an end to the substantive claim, have been satisfied. I am also bound by the Court of Appeal decision in the **Patrick Allen case** which endorsed the position that once an agreement is reached, then the court should make an order in terms of the mediator's report (see paragraph 59 of the judgment). In order to properly discharge its functions pursuant to the CPR, the court must have regard to not only the mediator's report but to the mediation agreement signed by the parties (see paragraph 60 of the judgment). Once the court is satisfied that there is an agreement, the rules mandate the court to make an order in terms of the mediator's report which would incorporate the agreement. The order the court makes is the Consent Order (see paragraph 62 of the judgment).

[13] Perhaps there should be some consideration to CPR 74.12 being amended so that it takes into account situations where there is a settlement agreement and the settlement terms have been complied with in full. In those situations, I am of the view that a Consent Order would not strictly be needed as there would be no need to seek enforcement orders against a defaulting party in the future. Perhaps the wording could be:

> "*CPR 74.12(3) Where an agreement has been reached and the terms of the settlement agreement have been complied with, then the parties must file a Joint Notice of Discontinuance."*

Such wording would have prevented an outcome wherein what could be construed as an unnecessary order, is made.

[14] Mr Jobson submits that if the Consent Order is granted then it ought to read:

> *"No admission of liability, fault or error has been acknowledged by either Party hereto, by consent, the Claimant shall withdraw his claim".*

Ms Buchanan's suggested wording is:

> *"It is hereby ordered that judgment by consent [is] granted in terms of the undated Mediation Settlement Agreement of January 2021, with no order as to costs."*

In my view, neither option satisfies the requirement as set out in CPR 42.7(5)(a) and in the common law for the order to incorporate the mediation agreement. While the Claimant's application succeeds, I cannot accept the wording suggested and the Defendant's suggested wording does not consider the agreement in its entirety. I therefore order as follows:

BY CONSENT and in keeping with the undated Mediation Settlement Agreement entered into between the Claimant and the Defendant at the mediation held on December 7 and 15, 2020

(a) Neither the Claimant nor the Defendant accepts liability, fault or error in the claim.

(b) The Defendant shall pay to the Claimant the sum of $750,000.00 on or before February 15, 2021.

(c) The Defendant shall forthwith execute and deliver to the Claimant the Statement attached to the Mediation Settlement Agreement as Appendix A under cover of a letter the terms of which were agreed between the parties at Mediation on January 12, 2021, setting out the Defendant's view of the context of these proceedings and agrees that the said Statement may be used by the Claimant as the Claimant sees fit.

(d) Upon payment to the Claimant of the full amount due hereunder and receipt of the agreed Statement signed by the Defendant, the Claimant shall withdraw his claim.

(e) There shall be no order as to costs.

(f) The Claimant's attorney-at-law is to file and serve the Formal Order.