

THE EASTERN CARIBBEAN SUPREME COURT

BRITISH VIRGIN ISLANDS

**IN THE HIGH COURT OF JUSTICE
Civil Division**

CLAIM NO. BVIHCV2021/0068

BETWEEN:

[1] WILFORD TODMAN

Claimant

and

**[1] CARL TODMAN
[2] LENA FRANCIS
[3] EDWIN TODMAN
[4] REGISTRAR OF LANDS**

Defendants

Appearances:

Ms. Marie-Lou Creque for the Claimant
Nellien Bute for the First, Second and Third Named Defendants
Renard Penn, Attorney-General's chambers for the Fourth Named
Defendant, absent.

2023: May 2;
30.

JUDGMENT

[1] **CENAC-DANTES, M.:** An Application with affidavit in support and exhibit was filed by the claimant on the 30th March, 2023 to record the mediation agreement of the 6th February, 2023 between the claimant and the first, second and third defendants as an order of the court. The Application is opposed by the first, second and third defendants. The Attorney-General's office was not a party to the mediation and understandably did not participate in the hearing.

[2] The grounds of the Application are that:

- (1) The parties voluntarily entered into mediation pursuant to order of the Master of 26 September 2022.
- (2) Mediation was held on 6 February 2022 and after three hours the mediation agreement was entered into and executed by the parties.
- (3) By e-mail dated 13th February 2023 the first second and third defendants indicated their intention to renege on the mediation agreement.
- (4) The mediation agreement was voluntarily entered into by all parties with no threat, coercion, bad faith, or mistake. There were no exceptional circumstances at the time of the parties entering into the agreement.
- (5) No party, whether to the claim or without are adversely affected by the mediation agreement.
- (6) The claimant has already taken steps pursuant to and in compliance with the mediation agreement.
- (7) In all the circumstances of the case it would be wrong and highly prejudicial not to formalise the terms of the mediation agreement into an order of court.

[3] A copy of the handwritten mediation agreement signed by the parties was exhibited to the Affidavit of the claimant.

[4] The defendants' submission, is that the court has jurisdiction to set aside a court-connected mediation settlement agreement and should not reduce it to a recorded order of the court on the basis that the defendants were coerced, that there were exceptional circumstances at the time of making the agreement and that the said agreement is contrary to public policy.

[5] The issues to be resolved are:

- (1) (a) Is a mediation agreement binding and can the court set it aside.
(b) Were the defendants coerced into the agreement and/or were there exceptional circumstances that warrant setting the agreement aside.

- (2) Can the court make a mediation agreement an order of the court if one of the parties, reneges.
- (3) Did the defendants have capacity to contract the agreement.

Issues 1(a) and (b):

(a) Is a mediation agreement binding and can the court set it aside.

(b) Were the defendants coerced into the agreement and/or were there exceptional circumstances that warrant setting the agreement aside.

- [6] The case law is clear that the court is prevented from setting aside a mediation agreement except where a party can prove that the agreement was obtained through “fraud, coercion, bad faith, mistake or exceptional circumstances at the time of making the agreement.”¹ Both the claimant and the defendants are agreed on this point.
- [7] Practice Direction No. 6 of 2020, clause 16 states that once signed, the mediation settlement agreement becomes a legal contract unless contrary to public policy.
- [8] If, as the authorities provide, a mediation outcome, even without it being recorded as an order of the court is a contract,² then “the parties are bound by the terms of the written agreement which they have signed because by signing the document, each party has represented to the other that they have made themselves acquainted with its contents and assented to them.”³
- [9] Whichever way the matter is approached, it is evident that it is extremely difficult, to near impossible to set aside a mediation agreement in the absence of fraud, coercion, bad faith or mistake.

¹ Nicholas Lansiquot v Ignatius Leon [2021] ECSCJ No. 739

² Peggy Charles v Nicholas Frederick [2016] para. 10, Greenbank et al v David Clasen et al, [2016], para. 13

³ Greenbank et al v David Clasen et al, [2016], para. 19

[10] In the present case, the defendants allege coercion on the part of the mediator, exceptional circumstances, and grounds of public policy. In neither of the instances have the defendants satisfactorily established those grounds. The defendants merely assert that they felt forced to enter the agreement based on what the mediator said. They each went on to say in their affidavit and submissions, that because the mediation is confidential, they could not disclose the details without the leave of the court, yet failed to make any application for the consideration of the court to permit said disclosure. Exceptional circumstances were broadly coached in an obscure reference to a lack of legal capacity on the part of the first defendant to contract the agreement as well as an assertion that the agreement is contrary to public policy without providing more.

[11] In the case at bar, without any, or more compelling evidence, I cannot accept that there was any coercion on the part of the mediator to cause the defendants to enter into the said agreement. Further, the defendants offered no evidence or other information as to how the agreement violates the good of the public and public interest at large.

Issue 2:

Can the court make a mediation agreement an order of the court if one of the parties reneges.

[12] I need go no further than clause 16.2(b) and 16.3 of Practice Direction No. 6 of 2020 which states, that within 7 days after signing of the settlement agreement the parties shall apply to the court for an order in terms of the said agreement and the Master shall make an order in Form M9.

[13] In parties choosing to participate in court connected mediation, it is evident that they intend to bring any settled agreement under the imprimatur of the court, hence the practice direction directing that the agreement shall be made an order of the court.

- [14] The said clause goes on to state, that if the parties fail to apply to the court for the order within 7 days after the settlement agreement, then the Master shall make an order under Part 26.2 of the CPR which allows the court to make an order of its own initiative.
- [15] By engaging in the court's mediation process the parties clearly showed an intention to be bound by any agreement entered into once it did not offend against public policy, good faith and their conscious choice. The defendants have made out no proper case for such offences having been committed by the mediator or the claimant.

Issue 3:

Did the defendants have the capacity to contract the agreement.

- [16] At all material times the defendants held themselves out as the lawful proprietors of parcel 49 and parcels 434 and 437. Parcel 49 is currently held jointly by the second and third defendants and parcels 434 and 437 by the first defendant. Not only did they represent themselves as such throughout the proceedings prior to mediation, but there is no suggestion that they ever indicated a lack of capacity to contract to the mediator.
- [17] The first defendant took issue with his role as administrator now being functus which rendered him impotent to contract at all in relation to any part of the estate of Julia Todman. This was of no moment, as at all times he held himself and the second and third defendant out as the lawful and rightful owners of the stated parcels to which his administration had no further relevance.
- [18] Having first disagreed with mediation, then discussing it with their legal practitioner and opting for mediation, the defendants had more than sufficient time within which to notify any other parties they deemed relevant and necessary to the proceedings.

Not only did they not seek to include any supposed beneficiaries as parties to the action, but their pleadings clearly stated that parcel 49 is properly held by the second and third defendants, and the remaining two parcels by the first defendant in his personal capacity. Now that they seek to avoid the agreement, they choose to invoke a ground of lack of capacity.

- [19] The first defendant made heavy weather of his incapacity to contract on behalf of the second and third defendants at the mediation. The unchallenged evidence of the claimant, which I accept, is that the second and third defendants were present via zoom, and although they did not have the agreement in hand to read, it was read out to them in the presence of the first defendant and the claimant by the mediator. The second and third defendant, and the first defendant made no objection to any part of the said agreement and thereafter authorized the first defendant to sign on their behalf.
- [20] Further, counsel for the defendants was present and would have advised and been able to advise the defendants regarding other interested persons and the implication of entering into the said agreement. Having so entered, it is taken that they were advised and acted upon that advice which led to the present outcome. Had they felt forced, or indicated their concern as to a lack of capacity, they would have no doubt mentioned this to their lawyer who would have taken necessary steps. It seems highly improbable that any lawyer present during the process would have permitted the matter to proceed so far without relevant advice to their clients.
- [21] In spite of the pleadings of the first defendant, that the claimant essentially had no real cause of action as parcels 434 and 437 belonged to him outright and did not form part of the estate of Julia Todman, and that parcel 49 was lawfully transferred to the defendants, the first defendant's responses to this application seem to suggest, in his attempt to avoid the order, that the properties were erroneously transferred to himself and the other defendants and that the proceeds of sale to be realized following the agreement would be distributed among the beneficiaries.

- [22] It seems to me that the defendants are asking the court to go behind the agreement and make a determination on the primary issue, that is, the lawful ownership of the property, which would require an examination of the evidence.
- [23] In *Elston v King*, the court was of the view that in arriving at a compromised settlement parties approach the compromise from a divergent perspective, and it is this divergence which the compromise resolves, not by determining it but by reaching an accommodation which both sides find acceptable.⁴
- [24] The court in *Elston* was clear that, “where parties arrive at a compromise position by way of mediation, the court does not determine the issues between the parties, but the issues are resolved by way of an agreement between the parties. Therefore, it is possible for parties to attend mediation and reach an agreement which may have nothing to do with the issues to be determined.”⁵
- [25] For the court to delve into the alleged incapacity of the defendants as regards their proprietorship will require more than a *prima facie* examination on the evidence, which is beyond what, in my view, the court needs to do here. If there is an allegation of incapacity it should be so glaring as to not be missed.

Conclusion

- [26] On the evidence, submissions, and authorities, I find that while the court can set aside a mediation agreement, I am unable to do so in the present case as it does not come close to satisfying me as to coercion, exceptional circumstances, or being contrary to public policy.
- [27] By application, the claimant has clearly sought to invoke the court’s power under rule 26.2 of the CPR in seeking to have the court make an order of its own initiative

⁴ *Elston v King* (2000) EWHC 55 (Ch.), para. 35

⁵ *Supra* note 1, para. 36

after hearing the parties. I do not accept that the defendants lacked the capacity to contract with the claimant, or that the first defendant lacked the capacity to contract on behalf of the first and second defendant and I therefore choose to exercise my discretion in favour of the claimant, that the mediation settlement agreement be made an order of the court.

[28] My order is as follows:

- (1) The application of the Claimant to record the mediation agreement of the 6th February 2023 between the claimant and the first, second and third defendants is to be made an order of the court.
- (2) Costs to the claimant in the amount of \$1000.
- (3) The claimant is to take carriage of the order.

Cybelle L. Cenac-Dantes
Master of the High Court

By the Court

Registrar