

**EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SLUHCV 2015/0841

BETWEEN:

PEGGY CHARLES

Claimant

and

NICHOLAS FREDERICK

Defendant

Before:

Ms. Agnes Actie

Master

Appearances:

Mr. Horace Frazer for the claimant

Defendant in person

2016: April 28
December 30

JUDGMENT

- [1] **ACTIE M.:** Before the court is an application filed by the defendant seeking a declaration disputing the court's jurisdiction to hear the extant claim filed by the claimant.

Background

- [2] The claimant avers that she entered into an agreement with the defendant on the 5th May 2003, for the purchase of a parcel of land. At the time of the agreement the defendant agreed to the construction of a motorable road to provide access as well as proper infrastructure to the claimant's parcel of land not later than 31st March 2005. The claimant avers that she purchased the property on reliance of the representations made by the defendant.

- [3] The defendant did not complete the construction of the road on the agreed date but made further representation to complete the infrastructural works by the 15th December 2005. The claimant avers that the defendant has failed, neglected or refused to construct the road and to provide the basic infrastructure in accordance with the contract.
- [4] On 25th February 2011, the claimant filed a claim number 2011/ 0202 seeking various reliefs against the defendant for breach of contract. The court by order dated 14th December 2011, referred the matter to mediation. The parties settled at mediation whereby the defendant agreed to construct a motorable access road and to ensure completion of all infrastructural works, electricity and water supply on or before the 31st December 2012. The mediation agreement was made an order of the court.
- [5] The defendant failed to give effect to the agreement on the agreed date and thereafter filed a notice of application on 27th March 2015, seeking an extension of time to 30th August 2015 to comply with the mediation order.
- [6] On 9th November 2015, the claimant filed the extant claim form and statement of claim against the defendant for consequential loss and rescission of the agreement for sale, rescission of the mediation agreement or alternatively an order setting aside the mediation agreement, damages for loss of bargain together with costs and other reliefs. The claimant avers that to date, the defendant has failed, omitted or refused to comply with the terms of the mediation order.

APPLICATION NOT TO EXERCISE JURISDICTION

- [7] The defendant by notice of application dated 10th December 2015, applies to the court for a declaration that the court should not exercise its jurisdiction and dismiss the statement of claim. The grounds of the application can be summarized as follows:

(1) The court has no jurisdiction to try the extant claim

- (2) The extant claim is between the same parties as in claim number 2011/0202.
- (3) The extant claim seeks the same reliefs on the same facts as in claim 2011/0202 settled at mediation on 6th March 2012
- (4) The claimant rather than proceeding for the enforcement of the mediation order has proceeded to file a separate claim touching the same issues without out discontinuing the claim 2011/0202.
- (5) The mediation agreement entered into between the parties in claim 2011/0202 has the same standing as a court order and the claimant is to either apply to the court enforcement of the court order or apply to vary or set aside the court order.
- (6) There is no allegation that the mediation agreement was entered into account of fraud or misrepresentation.
- (7) The fling of the extant claim is an abuse of process

[8] Counsel for the claimant, in response, states that the defendant misrepresented his financial position in undertaking to finance the construction of the road which (the defendant) is not financially able to do so. The claimant avers that the defendant cannot legally enforce the mediation order because he does not have money required to finance the construction of the road. Counsel avers that the mediation agreement is a consent order which can be set aside by way of an appeal or by way of initiating a new claim. Counsel cites the following authorities in support:

(1) De Lasala v De Lasala {1979} UKPC 10

(2) Huddersfield Banking Co.Ltd. V Henry Lister and Son Ltd (1895) 2 ch 273 280- 385

(3) Attorney General v Tomline CH D 388

- [9] The applicant/defendant in response, states that the claimant's claim is rooted in breach of contract and the correct remedy is by way of enforcement of the order of the court. The defendant avers that the claimant accepts the mediation order to be a final order that can only be challenged on the grounds of fraud or misrepresentation at the time of the mediation agreement. The defendant further avers that the mediation order was not a contract but an order of the court.

Analysis

- [10] The use of Alternate Dispute Resolution (ADR) in the form of mediation has been a very popular and effective tool of case management under the CPR 2000. The minutes of settlement at a court-annexed mediation are intended to settle outstanding issues on a final basis. The parties are usually represented by experienced counsel. The court annexed mediation is not just a mediation outcome or a mere contract, but as an order of the court, breach of which is subject to conviction for contempt of court. .
- [11] Where a party refuses to comply with the terms of a court order then a motion for enforcement must be pursued. The mediation, now an order of the court, can be enforced by any of the enforcement proceedings as provided by the CPR 2000 and other relevant statutes. As indicated earlier, the breach of the order by the defendant is subject to a conviction for contempt of court, if pursued. The claimant now a judgment creditor is entitled to all enforcement reliefs available to give effect to the court order.
- [12] In **Greenbank Road Company Limited V David Clasen**¹ Ellis J. in relation to the enforcement of a mediation order states as follows:

“[10] Generally, at the end of a successful mediation session, the parties will draw up an agreement that embodies all the main points of what has

¹ BVIHCV 2015/0112

been agreed. Both parties will sign this agreement bringing the dispute to an end.

[11] Where the agreement results from an out-of-court mediation, it is a standard contract. It then becomes the responsibility of the parties to adhere to the terms of the mediation agreement because it is intended by its very nature to be a binding contract. If either side does not honor the terms of the contract, then the only course open to the other party is to pursue an action in court. When this happens, the innocent party will sue not only for the original disagreement, but also for breach of contract, seeking specific performance relief or damages or both.

[12] However, where the agreement results from a mediation process which is court connected, typically, the Parties would attend before a judge to have the agreement crystallized into an order of the court usually with some terms added in for enforcement purposes. The agreement is filed with the court as the court's judgment and is made part of the court's record. An appropriate order would normally dispose of the claim.

[13] In such cases, the agreement is still a legally binding and enforceable contract, but a party who breaches the terms of the agreement could be held in contempt of court, pay some heavy fines, and possibly serve a term of imprisonment. If the agreement is not added to the court record, it is nevertheless still binding like any other agreement made between the parties but in most cases the parties should properly first seek to get a ruling before it can be enforced.

[14] It is clear to this Court that the Parties to Cause 242 of 2013 intended to formalize the terms of the Mediation Agreement and to bring it under the imprimatur of the Court. It follows that the terms of the Agreement became an order of the Court on 27th November 2013 and the Parties were at liberty to apply for the purpose of carrying terms of the Agreement

into effect. Such an application would have to be made in the context of that Cause and would not necessitate the initiation of entirely new legal proceedings.

[15] In the Court's judgment that course would certainly be more consistent with the overriding objective which calls upon to the Court to deal with cases justly, economically and expeditiously, and which imposes upon parties, a duty assist the Court in furthering that objective. To the extent that this Claim seeks to deal with the terms of that Agreement, this Court is of the view that the appropriate course would have been to solicit a ruling and/or direction from the Court under the banner of that action"

- [13] The claimant in these proceedings have not filed for the enforcement of the court order but has filed a new claim seeking the exact same reliefs in the earlier claim which resulted in the mediation order. The claimant also claims for the rescission of the mediation agreement.
- [14] The court notes that the issues raised in the extant claim are identical to the issues claimed in the earlier claim number 2011/0202, filed on the 24th May 2011. This constitutes an abuse of process.
- [15] A judgment creditor may pursue the enforcement of a mediation order, which is made an order of the court or may file a claim to set aside the order. A court annexed-mediation agreement will only be set aside where there is clear evidence of fraud, coercion, bad faith, mistake or exceptional circumstances at the time of making the agreement.
- [16] The claimant in this extant claim also applied for the rescission of the mediation order. However, the entire claim contains the same reliefs claimed in the previous claim number 2011/0202.

- [17] The court when faced with an application that may have the effect of totally shutting a party out must always consider the overriding objective and may instead of striking out, make an “unless Order” to allow the defaulting party to put matters right.
- [18] The defendant’s application for a declaration that the court should not exercise its jurisdiction to determine the extant claim on the ground of abuse of process, if granted, will shut the claimant out of the proceedings.
- [19] The court notes that the claimant seeks the rescission of the mediation order but has not sufficiently particularized the facts to establish the permitted grounds for setting aside a mediation order. I am minded to allow the claimant an opportunity to put matters right and to amend the pleadings to particularize the facts, to bring the action for rescission of the mediation order under the recognised grounds, failing which the claim form and statement of claim shall stand dismissed.

ORDER

- [20] Accordingly, it is ordered and directed as follows:
- (1) Unless the claimant shall within twenty one (21) days of today’s date, file an amended statement of claim to particularize the grounds for the rescission of the mediation order, the claim shall stand dismissed with costs in the sum of \$750.00 to the defendant.
 - (2) If required, the defendant is granted an extension of time to file a defence within 28 days of service of the amended claim by the claimant.
 - (3) Thereafter, the matter shall be listed for further case management conference in accordance with the CPR 2000.
 - (4) Costs in the cause.

**AGNES ACTIE
MASTER.**