[2013] JMCA Civ 4

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 145/2012

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MRS JUSTICE McINTOSH JA
THE HON MR JUSTICE BROOKS JA

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

Vincent Chen instructed by Chen Green & Co for the appellants

Mrs Symone Mayhew instructed by Wilmot Hogarth & Co for the respondents

15 January and 22 February 2013

PANTON P

[1] This appeal is in respect of an order made by Mangatal J pursuant to the report of mediation involving the parties. The question for determination is whether the learned judge placed a correct interpretation on what the parties agreed.

[2] The order reads as follows:

"(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."

[3] The judge's order stemmed from the mediation report which stated the following:

1) the mediation was held on 7 February 2012;

2) the parties have reached full agreement;

3) the claim and defence are settled; and

4) the parties will keep the agreement confidential as evidenced by their signatures.

[4] In view of the fact that the parties have arrived at full agreement and have bound themselves to confidentiality in respect of the agreement, it is unnecessary to set out the details of the claim and the defence that form the basis of the suit. It is sufficient, it seems, to say only that the suit was a claim for monies loaned, with the borrowers admitting the debt but denying that the time for repayment had arrived. However, it ought to be noted that it is agreed by the parties "that some of the matters the subject of the Agreement, encompass matters not dealt with in the action and statements of case".

[5] As far as the order of Mangatal J is concerned, the complaint of the appellants is in respect of the declaration that the parties had agreed to a Tomlin Order and the staying of all further proceedings upon the terms set out in the settlement agreement. Further, they take issue with her order that either party may enforce the terms without bringing a new claim. To that end, the grounds of appeal were framed thus:

"(A) The learned judge has misconstrued the real meaning and effect of Rules 74.12 and 42.7 of the Civil Procedure Code [sic] 2002. Rule 74.12 requires that all mediation settlement agreements must be entered and is applicable to every type of agreement which is then dealt with in accordance with Rule 42.7 in different ways depending upon the nature, circumstances and effect of the settlement.

(B) The reference in The Settlement Agreement to the Supreme Court is not the same as a reference to the

action and the judge has confused them, using the terms interchangeably.

(C) The learned judge has misconstrued The Settlement Agreement. Paragraph 2 (b) requires that the parties take certain steps in the event of breach. It is a procedural provision and conforms to Rule 74.12. It cannot impact upon the agreement to settle so as to change its meaning to one for a stay.

(D) The printed standard form portion of the agreement is applicable to all mediation settlement agreements and cannot be construed to reverse the substantive agreements reached by the parties in a specific mediation.

(E) A Tomlin order requires consensus between the parties that the action in which it is made will be stayed with permission to apply within those same proceedings to enforce its terms. It cannot be imposed by the court and is intended to negative the rule that once a matter is settled a new action must be brought.

(F) The true meaning of The Mediation Settlement Agreement is that it has created a new contract in consideration of the settlement of the matters arising in the action and, in the event of its breach, must be the subject of a new and different action.

(G) The ruling at paragraph 1 of the order to the effect that the matter is settled is inconsistent with the ruling at paragraph 2 to the effect that a Tomlin order is entered."

[6] The appellants seek the following order, with costs:

> "(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 final settlement has been agreed to by the parties and a new contract entered into by them.
>
> (3) No further steps or proceedings may be taken in this action and any breach of the terms of the aforesaid agreement shall be the subject of a new action by any party aggrieved by the breach of that contract."

[7] Mangatal J, in arriving at her decision, considered submissions from Mr Vincent Chen and Mrs Symone Mayhew. She noted that Mrs Mayhew submitted that the obvious order to be made was a Tomlin type order as provided for in rule 42.7(b)(2) of the Civil Procedure Rules (CPR), whereas Mr Chen submitted that there is in existence a valid and binding agreement amounting to a settlement of the matter, and which puts an end to the dispute. A Tomlin Order, he said, keeps the action alive by providing for a stay of the action pending the doing of acts agreed on in the settlement. In the instant case, he said, 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.

[8] Paragraphs 37 and 38 of the judgment give the reasoning of the learned judge. They are reproduced hereunder – paragraph 37 in full, and 38 in part:

> "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 …"

The learned judge then went on to quote from Foskett's "The Law of Compromise" in which the author opined that the Tomlin Order would become institutionalized under the then proposed new English civil procedure rules (which have since provided a pattern for the Jamaican CPR).

[9] Rule 74.11 of the CPR requires the mediator to file a report at the registry within a specified time after the completion of the mediation. Where an agreement has been arrived at, the signed written agreement is to accompany the report unless it is a term of the agreement that it remains confidential. Where an agreement has been reached, the court must make an order in the terms of the report.

[10] Rule 42.7 provides for the making of the order. The rule applies particularly where "all relevant parties agree the terms in which judgment should be given or an order made" – see rule 42.7 (1)(b). It also applies to the following kinds of judgment or order:

1) Judgment for the payment of a debt or damages, or for the delivery up of goods, and costs.

2) Order for:

i. the dismissal of a claim;

ii. the stay of proceedings on terms (a 'Tomlin Order');

iii. the stay of enforcement of a judgment;

iv. setting aside or varying a default judgment;

v. the payment out of money paid into court;

vi. the discharge from liability of any party; and

vii. the payment, assessment or waiver of costs.

Where this rule applies, the order must be drawn in the terms agreed, expressed as being "By Consent", signed by the attorneys-at-law representing the parties and filed at the registry for sealing – see rule 42.7 (5).

[11] In determining whether the order made by learned judge was correct, one has to look at the nature of a Tomlin Order and then see whether it is truly applicable to the agreement that was arrived at by the parties. It is also necessary to look at some of the authorities that were referred to by the learned judge in her very clear reasoning.

[12] Osborn's Concise Law Dictionary defines a Tomlin Order thus:

> "An order, named after Mr. Justice Tomlin who laid down the practice principles, which records that an action is stayed by the agreement of the parties under the terms set out in a schedule to the order."

This formulation is captured in rule 42.7 (2) (b) (ii) of the CPR, which has been listed in the summary at paragraph [10] above.

[13] In Stuart Sime's work, "A practical approach to Civil Procedure" (12th ed., at para. 41.19), it is stated that Tomlin Orders are so named after Tomlin J who, in a Practice Note 1927 WN 290, said that:

> "… where terms of compromise are agreed and it is intended to stay the action with the terms scheduled to the order, the order should be worded:
>
> > 'And, the claimant and the defendant having agreed to the terms set forth in the schedule hereto, it is ordered that all further proceedings in this claim be stayed, except for the purpose of carrying such terms into effect.
> >
> > Liberty to apply as to carrying such terms into effect'."

It continues by stating that if the scheduled terms are breached, enforcement is a two-stage process: (1) the action must be restored under the "liberty to apply" clause and an order obtained to compel compliance; (2) if that order is itself breached, enforcement can follow in the usual way.

[14] ***Horizon Technologies International Ltd v Lucky Wealth Consultants Ltd*** [1992] 1 HKLR 106; [1992] 1 All ER 469 is relevant so far as it explains the working of a Tomlin Order. In that case, a commercial action, the parties specifically sought a Tomlin Order and made elaborate provisions as regards the compromising of the dispute. Upon the giving of certain undertakings, it was agreed to be ordered, and indeed was so ordered:

> "… that all further proceedings in this Action be stayed upon the terms of settlement agreed between the parties set out in the Schedule hereto except for the

purpose of having the said terms carried into effect and that there be liberty to apply for the said purpose."

[15] In delivering the judgment of the Privy Council, Sir Maurice Casey quoted as follows from Volume 23 of Atkin's Court Forms (2nd ed.) p.197, in respect of the nature and scope of the Tomlin Order:

> "A form of consent order commonly found in the Chancery Division where the parties are *sui juris* is the Tomlin order, in which the terms agreed between the parties are set out in a schedule and all further proceedings in the action are stayed except for the purpose of giving effect to the terms, for which purpose liberty to apply is given. The terms are not part of the order, and if a term is not observed by a party, application under the liberty to apply will usually be necessary to give effect to it. If by a term a party is to pay a sum of money to another party and does not carry it out, application must be made for an order for payment to enable judgment to be entered and execution to issue. It should be particularly noted that if by one of the terms a party gives an undertaking to do, or to refrain from doing, something, the undertaking is not an undertaking given to the court: it is merely an agreement between the parties. Terms scheduled to a Tomlin order represent an arrangement between the parties, and the court is not concerned with approving them although it may properly offer suggestions upon them if it appears to the court that they may cause some difficulty.
>
> The terms need not be within the ambit of the original dispute but the Court will refuse to enforce terms which are too vague or insufficiently precise."

[16] In ***McCallum v Country Residences Ltd*** [1965] 2 All ER 264, a legally aided plaintiff brought an action in respect of work done. After correspondence between the solicitors, a settlement was arrived at whereby the defendants were to pay a certain sum of money plus costs to date. The plaintiff's solicitors proposed taking out a summons "that terms of settlement had been reached" in order to obtain the necessary order as to costs required for a legally aided client. A summons was duly taken out for a Tomlin Order, that the action be stayed except for carrying out the terms of the settlement. The solicitor's clerk for the defendants indicated uncertainty of the position as to costs, and did not consent to the order. The official referee read the correspondence, and made the order. On appeal, it was held, by majority, that in the absence of consent to the order, as distinct from consent to the agreement, the court had no jurisdiction to make the order. The case ***Green v Rozen*** [1955] 2 All ER 797 was considered by the court.

[17] Lord Denning, MR said:

> "Now the defendants appeal to this court, saying that the official referee had no jurisdiction to make such an order. When an action is compromised by an agreement to pay a sum in satisfaction, it gives rise to a new cause of action. This arises since the writ in the first action, and must be the subject of a new action. The plaintiff, in order to get judgment, has to sue on the compromise. That is the only course which the plaintiff can take in order to enforce the settlement, unless of course he can go further and get the defendant to consent to an order of the court. In the absence of a consent to the *order,* as distinct from a consent to the *agreement*, I do not think the court has jurisdiction to make an order. I think that is borne out

> by the decision to which Winn L.J referred – Green v. Rozen. Of course, if there could have been found a consent to the order being made, it would have been a different matter."

Winn LJ, in agreeing that the appeal should be allowed, supported the reasons expressed by the Master of the Rolls. Danckwerts LJ dissented.

[18] In ***Green v Rozen,*** referred to above, the plaintiff brought an action to recover money lent to the defendants. When the matter came before Slade J for trial, counsel announced that the matter had been settled in terms endorsed on counsel's briefs and signed by counsel. The defendants were to pay the sum by installments on stated dates. If any installment was in arrear, the entire debt and costs became due and payable immediately. Slade J was not requested to make an order. Hence, no order was made staying all further proceedings. The defendants having failed to pay the last installment and the costs, the plaintiff made an application in the original action asking for judgment for the amount. The learned judge held that "the application must be refused because, the court not having made an order in the action, the agreement compromising the action between the parties completely superseded the original cause of action and the court had no further jurisdiction in respect of that cause of action. Per curiam: the plaintiff's only remedy was to bring an action on the agreement of compromise." (page 797F)

[19] In ***E. F. Phillips & Sons Ltd. v Clarke*** [1969] 3 All ER 710, there was a motion to enforce the terms of a compromise which were agreed between the parties and embodied in an order made by Cross J in the form of a Tomlin Order. The question was

whether the agreement could be enforced by a motion in the original action. It was held by Goff J that where a Tomlin Order is in the normally appropriate form with a qualified stay and liberty to apply, an application may be made in the original action strictly to enforce the terms of compromise embodied in the order and the schedule provided it does not depart from the agreed terms; and an order giving effect to the terms may be obtained notwithstanding that they go beyond the ambit of the original dispute and the particular term sought to be enforced is something which could not have been enforced in the original action and contains an obligation which did not then exist but arose for the first time under the compromise.

[20] David Foskett, QC in the lecture, entitled "The Tomlin Order: three score years and ten", examined the origin and use of the Order. Mangatal J seems to have found some comfort in Mr Foskett's treatment of the Order in that he sees it as becoming institutionalized when consideration is given to the intended operation of the new English civil procedure rules, with the accent being on saving time and costs.

[21] There is a common thread running through the cases. Apart from the fact that the parties are usually in agreement with the making of a Tomlin Order, the agreement specifies that there is a stay of the proceedings and there is a stated provision for liberty to apply for directions in the action. It is clear therefore that such proceedings are not dead. Mangatal J said that there is no magic in the words "stay" or "liberty to apply". It is difficult to agree with that observation, given the actual wording of the practice direction issued by Tomlin J, and also bearing in mind that the CPR made no modification in respect of its reference to a Tomlin Order. The common law

interpretation has not been affected in any way by the CPR. Mr Foskett was anticipating that the phraseology of the Order would "doubtless change from its traditional form" by the introduction of the new English procedure rules. He is probably disappointed as that has not happened.

[22] In the circumstances, the parties having agreed that the claim and defence are settled, and they having eschewed the terminology of a Tomlin Order, the learned judge was in error in making the order she made. The appeal succeeds and the appellants are entitled to the orders sought.

McINTOSH JA

[23] I have read in draft the judgment of Panton P and agree with his reasoning and conclusion. I have nothing further to add.

BROOKS JA

[24] I too have read the draft judgment of Panton P and agree with his reasoning and conclusion.

PANTON P

ORDER

1. The appeal is allowed and the order of Mangatal J set aside.

2. Order in terms of the mediation report filed 9 February 2012, that is, the claim and defence are herein settled and the parties will keep the agreement confidential.

3. Pursuant to the Dispute Resolution Foundation Mediation Settlement Agreement, the court hereby declares that a final settlement has been agreed to by the parties and a new contract entered into by them.

4. No further steps or proceedings may be taken in this action and any breach of the terms of the aforesaid agreement shall be the subject of a new action by any party aggrieved by the breach of that contract.

5. Costs to the appellants to be agreed or taxed.