

JAMAICA

IN THE COURT OF APPEAL

**BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MISS JUSTICE P WILLIAMS JA
THE HON MRS JUSTICE DUNBAR-GREEN JA**

APPLICATION NO COA2023APP00043

BETWEEN ANDREW WILLIS APPLICANT

AND VICTORIA MUTUAL BUILDING SOCIETY RESPONDENT

Lemar Neale and Ms Chris-Ann Campbell instructed by NEA | LEX for the applicant

Mrs Daniella Gentles-Silvera KC instructed by Livingston, Alexander & Levy for the respondent

19 June 2023

Civil Procedure – Mediation Agreement – Validity of – Whether agreement breached – Whether terms may be implied into agreement

Civil Procedure – Claim struck out in the court below - Permission to appeal – Whether claim has a real prospect of success

ORAL JUDGMENT

BROOKS P

[1] This case concerns the validity and effect of an agreement made during a court-ordered mediation, conducted pursuant to part 74 of the Civil Procedure Rules ('the CPR'). The applicant, Mr Andrew Willis, contends that the respondent, Victoria Mutual Building Society ('VMBS'), has failed to comply with terms that must be implied as part

of a mediation agreement, to which they had arrived, in a claim that he had brought against VMBS.

[2] A judge of the Supreme Court (‘the learned judge’) struck out Mr Willis’ fresh claim against VMBS in which he sought damages for breach of contract. Mr Willis now seeks permission to appeal the learned judge’s decision. Before analysing his application, some of the salient facts of the case must be outlined for context.

The background

[3] Mr Willis was the registered proprietor of registered land (‘the property’). He mortgaged the property to VMBS but defaulted in repaying the mortgage loan. VMBS foreclosed on the property and had it registered in its name. In August 2013, Mr Willis sued VMBS asserting that it had not followed the proper procedure.

[4] The parties attended mediation and agreed, on 23 April 2020, to the following terms:

- “1. [Mr Willis] shall pay [VMBS] the sum of TWENTY MILLION (\$20,000,000.00) being the purchase price for [the property].
2. [VMBS] shall give [Mr Willis] until the 21st August 2020 to secure financing for the purchase price referred to at paragraph 1 above.
3. Should [Mr Willis] not provide proof of financing acceptable to [VMBS] on or before the 21st August, 2020 [VMBS] shall be free to proceed to exercise its rights over the said property as it is legally entitled to do including selling the property to a third party.
4. [Mr Willis] shall file a Notice of Discontinuance of this suit on or before the 30th April 2020.”

[5] Mr Willis filed the notice of discontinuance within the stipulated time, but thereafter, the matter went awry. He wrote letters to VMBS concerning meeting the

date for providing proof of financing but got no positive response from VMBS. He wrote to VMBS in:

- a. May 2020 offering to purchase the property;
- b. July 2020 requesting an agreement for sale; and
- c. August 2020 asking for an extension of time in which to provide proof that he had secured financing for the purchase.

[6] VMBS, by letters dated 1 July 2020, 9 July 2020 and 13 August 2020, instead requested proof of his ability to purchase the property. All the letters asked Mr Willis to provide a "pre-qualification letter". Mr Willis failed to provide that proof before 21 August 2020, and on 19 July 2021, VMBS sold the property to third parties.

[7] On 23 March 2021, Mr Willis filed a claim against VMBS, serving only the claim form, seeking damages, an injunction and specific performance on the basis that VMBS had breached the mediation agreement. He contended that VMBS's breach was its failure to provide him with an agreement for sale prior to 21 August 2020 to enable him to secure financing for the purchase of the property. VMBS had prior knowledge of the claim even before Mr Willis served the claim form, and on 16 July 2021 VMBS filed an application to strike out the claim. Mr Willis later filed an amended claim form and particulars of claim. He served them on VMBS on 15 September 2021. On 28 September 2022, he also filed an application for permission to further amend his claim.

[8] VMBS' application to strike out Mr Willis' claim and his application to further amend the claim were the two applications that went before the learned judge in October 2022, and upon which he ruled in January 2023, granting VMBS's application and refusing Mr Willis'. The learned judge also refused Mr Willis' application for permission to appeal, hence his present application to this court.

The application for permission to appeal

[9] Before this court, Mr Neale sought to show the court that VMBS acted in bad faith in failing to provide an agreement for sale. He said it was an implied term of the mediation agreement that VMBS would provide the agreement for sale. He submitted that VMBS' bad faith was demonstrated in their letter of May 2020 to Mr Willis indicating that they had to send his offer for purchase to a credit committee for consideration.

[10] Learned counsel also submitted that the learned judge in the court below erred in not considering that the pleadings demonstrated that the cause of action had a reasonable prospect of success.

[11] We are not in agreement with Mr Neale on this point. The learned judge was correct in his assessment that Mr Willis had no cause of action with any reasonable prospect of success being demonstrated in his statement of case. We agree with the learned judge that it was appropriate to strike out the claim. Accordingly, Mr Willis' proposed appeal has no real chance of success (see rule 1.8(7) of the Court of Appeal Rules) and, in the circumstances, the orders are as follows:

1. The application for permission to appeal the judgment and orders of K Anderson J handed down on 27 January 2023 is refused.
2. Costs of the application to the respondent to be agreed or taxed.