[2018] JMCA Civ 16

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 111/2016

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MISS JUSTICE EDWARDS JA (AG)

BETWEEN	**PATRICK ALLEN**	**APPELLANT**
AND	**THERESA ALLEN**	**RESPONDENT**

Written submissions filed by Lemar Neale for the appellant

Written submissions filed by Joseph Jarrett & Company for the respondent

8 June 2018

PROCEDURAL APPEAL

(Considered on paper pursuant to rule 2.4(3) of the Court of Appeal Rules 2002)

PHILLIPS JA

[1] This is an appeal from the decision of Wint-Blair J (Ag), as she then was, made on 23 November 2016, dismissing an application, filed by the appellant, to set aside an order made by F Williams J (as he then was) on 8 May 2015, pursuant to a mediation agreement.

Background

[2] A dispute exists as to whether the parties are indeed married (which is not for determination on this appeal), but shortly after their alleged marriage, they purchased land situated at Brown's Town, Ewarton in the parish of Saint Catherine, recorded at LNS 4530 Folio 143 and registered under the Facilities for Title Act (the property). A loan was later obtained from the National Housing Trust (NHT) to build a house on the land (although a dispute also exists as to who obtained this loan). Sometime thereafter, the relationship between the parties broke down irretrievably, but no formal steps were ever instituted to commence divorce proceedings, or to obtain a declaration as to the validity of the marriage.

[3] On 15 June 2012, the respondent filed a fixed date claim form under the Property (Rights of Spouses) Act (PROSA) seeking declarations and consequential orders regarding the ownership of and/or her interest in relation to the said land. This application was supported by affidavits sworn to on 29 April 2013 and 20 April 2014, by the respondent, in which she asserted that she was entitled to an interest in the property. The basis of her claim was that she had solely financed the purchase of the land. In fact, she stated that she had given the appellant US$1300.00, the full purchase price of the land. She further deponed that she and the appellant jointly obtained a loan from the NHT to build a house on the land; and she had documentation from the NHT showing that the loan was in both their names; and that she had sent a cheque to the NHT from the United States to clear mortgage arrears which had occurred on the loan.

[4] The appellant, in his affidavit in response filed 4 February 2014, denied the respondent's claim that she had contributed to the acquisition of the land or the construction of the house on it. He instead asserted that it was he who had paid the purchase price for the land in full, and that a payment which had been made by the respondent directly to the vendor had been a gift to him. He averred that while the respondent's name does appear on the certificate of title for the said land, the mortgage obtained from the NHT was in his sole name, and he exhibited a copy of the NHT loan approval to his affidavit. He also denied that the respondent had paid funds directly to the NHT. He further deponed that the price of the land offered for sale had been a reasonable price, which he had deemed to be a good investment, but he had never intended it to be their matrimonial home.

[5] When the matter came before the court, the parties were referred to mediation. They participated in mediation on 24 February 2015 and arrived at an agreement. Present at mediation were the appellant and his attorney-at-law, Mr Demar Kemar Hewitt, Miss Jacinth Baker (who had been given a power of attorney by the respondent to, *inter alia*, appear on her behalf in the matter before the court as well as at mediation), and the respondent's attorney-at-law, Mr Joseph Jarrett. The terms of the mediation agreement signed by both parties and submitted to the court were as follows:

> "(i)
> Agreement that All that parcel of land part of Ewarton called Brown's Town recorded at L.N.S 4530 Folio 143 / registered under The Facilities For Title Act is jointly owned by the [respondent] and [appellant].

(ii)
Agreement that the [respondent] is entitled to 35% per cent [sic] share of All that parcel of land part of Ewarton called Brown's Town recorded at L.N.S 4530 Folio 143 / registered under The Facilities For Title Act.

(iii)
That in the alternative agreement that the [respondent] has an equitable interest under common law in All that parcel of land part of Ewarton called Brown's Town recorded at L.N.S 4530 Folio 143 / registered under The Facilities For Title Act of 35% percent [sic].

(iv)
Agreement that the aforesaid [property], shall be valued by a reputable valuator to be agreed upon by the parties.

(v)
Agreement that the [appellant] be given the first option if he so desires, to purchase the [respondent's] shares or interest in the abovementioned property.

(vi)
If the [appellant] fails to exercise his option within the twenty one (21) days of the agreement the [respondent] is to be given the option to purchase the [appellant's] share within a further period of twenty-one days.

(vii)
If either party fails to exercise their option to purchase the [property] within the stipulated period the property is to be sold by public auction or private treaty and the net proceeds distributed to the parties in accordance to their respective shares.

(viii)
That the cost of the valuation report [be] shared equally.

(ix)
That the Registrar of the Supreme Court be empowered to execute all documents, necessary to effect a sale and transfer of the properties, in the event that either party fail or neglect to do so. [sic]

> (x)
> That all costs incidental to the sale of the property including but not limited to the preparation of a valuation report for the property, the payment of transfer tax, stamp duty, registration and attorney's fees to be borne by the [respondent] and [appellant] equally."

[6] The registrar sent a "Notice of Appointment to Approve Mediation Settlement" to the attorneys-at-law for both parties notifying them that the date on which the mediation settlement was to be approved was 8 May 2015. The matter went before F Williams J on the said date but neither the appellant nor his counsel was present. The learned judge made an order in the exact terms of the mediation agreement. The order, however, was not expressed as having been made 'by consent'.

[7] The time within which the appellant was expected to exercise the option to purchase the respondent's share in the land lapsed. Accordingly, the respondent's attorney-at-law wrote to the appellant's attorney-at-law indicating that 155 days had passed since the mediation agreement was signed, and they had not yet received the sums representing the respondent's 35% share of the property, nor the appellant's contribution towards the valuation report. The respondent's attorney-at-law indicated that by virtue of this default, the appellant was deemed to have forfeited his option to purchase the property, and that they were instructed to place the property on the open market. A series of correspondence was exchanged thereafter.

[8] On 14 December 2015, the appellant filed a notice of application for court orders in which he sought the following:

"1. The Order made by the Honourable Mr. Justice F. Williams on the 8th day of May 2015 be set aside.

2. The Court gives directions on the outstanding issues in relation to the Mediation Agreement and the claim and that:

    a) the claim be referred back to mediation for the parties to re-enter into settlement discussions.

    b) in the alternative, the claim proceeds to case management and trial.

3. All proceedings to enforce the Mediation Agreement and/or the said Order of Mr. Justice F. Williams be stayed until the determination of the claim.

4. Costs of this Application to be to the [appellant], to be taxed if not agreed.

5. Such further or other relief as this Honourable Court deems fit."

[9] The application was made on the grounds that *inter alia*: (i) neither the appellant nor his attorney-at-law had consented to the order; (ii) if the appellant had been present, it was likely that the court would have made some other order on the basis that there were unresolved issues between the parties; and (iii) the order gives effect to a mediation agreement that was not intended to represent a complete settlement of the issues in dispute between the parties.

[10] The application was supported by an affidavit sworn to by the appellant in which he deponed that the respondent had taken steps to dispose of the property. He further deponed that the respondent ought to be prohibited from disposing of the property, as the order made by F Williams J was "not properly" made, since it was done in his

absence and without his consent, which was required. The appellant stated that he was absent when the order was formalised because he was unaware of the date set for the "mediation confirmation", and further indicated that if he had been aware of the date, he would have attended in order to have discussions with the respondent about various outstanding issues.

[11] The appellant accepted that an agreement had been reached in relation to some of the issues raised by his attorney-at-law and based on his instructions, such as the fact that the respondent was entitled to a 35% share in the property, and that he would be given the first option to purchase the value of the respondent's interest. However, he deponed that despite the signed mediation agreement, there was no final agreement between the parties, as there were various unresolved issues which he outlined at paragraph 8 of his affidavit to include but were not limited to:

> "...being reimbursed for solely repaying the mortgage to date; an account to be given to the [respondent] for my sole use and occupation of the property over the period; the [respondent] contributing to the mortgage payments until the claim was settled; the Costs of the proceedings and the status of the claim."

[12] As a consequence, he indicated that it was his understanding that his acquisition of the respondent's interest would be affected by the final value to be attached to the property, after those outstanding issues were addressed, especially those relating to the mortgage payments. He further averred that he had been informed by his attorney-at-law that the respondent had been unwilling to compromise on the issues concerning the mortgage, on the basis that his sole use and occupation should be set-off against the

payments he had made towards the mortgage. He also stated that his attorney had advised him that there would be a hearing for the approval of the mediation terms, and "at that hearing the parties could make an attempt to reach a final agreement or otherwise proceed to trial".

[13] In response to the appellant's application, an affidavit sworn to by Miss Jacinth Baker, on behalf of the respondent, was filed on 13 January 2016. Miss Baker deponed that she had been told by the mediator that the mediation agreement would be the subject of a formal order. In addition, she refuted the appellant's account of the effect of the mediation agreement and indicated that the mediation agreement signed by the parties was intended to be, and represented, the final settlement of the matters and all issues arising. At paragraph 8 of her affidavit, Miss Baker asserted:

> "That the mediation on the 24th day of February 2015 lasted for some three hours during which the respective position of the parties was thoroughly ventilated. In the end it was agreed that the [appellant's] interest in the property would be 65% and the [respondent's] at 35%. This took into account the [appellant's] responsibility for discharging the mortgage due to the National Housing Trust. It is very wrong of him to having [sic] got the [respondent] to agree to 35% on the basis that he would be solely responsible for discharging the NHT mortgage to now seek to [have] that responsibility shared with the [respondent] and still come away with 65% of the net proceeds in the event of a sale knowing full well that the [respondent] did not insist on a 50/50 split of the property because it was agreed that his larger share would reflect his responsibility for discharging the NHT mortgage which he had allowed to fall into arrears."

As a consequence, she averred that there were no outstanding issues between the parties that required resolution, and all that remained was for the agreement to be implemented.

The decision in the court below

[14] The application was heard by Wint-Blair J (Ag) who opined that the issue that was central to the disposal of the matter was whether F Williams J had the jurisdiction to make the order that he did. The learned judge refused to grant the orders the appellant had sought, and held that the order made by F Williams J, approving the mediation agreement, was properly made, as it, in essence, encompassed the matters agreed between the parties.

[15] The learned judge decided that in making the order, F Williams J would have considered and taken into account the signed mediation report and agreement dated 24 February 2015, and he would also have considered the absence of the appellant and his counsel. She rejected the submission that the order made by F Williams J was void *ab initio* due to the absence of the appellant and/or his attorney-at-law, since the appellant's counsel had been present at the mediation session, and had signed the agreement on behalf of the appellant.

[16] In relation to counsel for the appellant's submission that the appellant had not consented to the making of the order as required by rule 42.7(5) of the Civil Procedure Rules 2002 (CPR), in that, the order did not contain the words 'by consent', and that since counsel was absent there was no consent, the learned judge found that counsel had "overlooked rule 42.7(1)(a) which provides for the varying of the terms of any court order and the powers of the court to amend or vary an order previously made". Wint-Blair J (Ag) stated that since the matter before F Williams J was procedural in nature, and given that there are many cases which have interpreted 'must' (as stated in

rule 42.7(5) to mean 'may', in respect of procedural matters, particularly where prejudice or injustice would be the result, she therefore interpreted the word 'must' to mean 'may'. She further noted that the court can remedy the order by varying it to add the words 'by consent'.

[17] The learned judge, having considered the cases of **Magwall Jamaica Limited and Others v Glenn Clydesdale and Another** [2013] JMCA Civ 4, **McCallum v Country Residences Ltd** [1965] 2 All ER 264 and **Green v Rozen and Others** [1955] 2 All ER 797, which had been relied upon by the appellant, concluded that they are all distinguishable on their facts from the instant case. She found that based on the mediation agreement, there was no need for further litigation to settle the vexed issue of mortgage arrears on the property, as the mediation agreement showed that this issue had been ventilated.

[18] In the light of her findings and conclusion, Wint-Blair J (Ag) made the following orders:

> "i. Application refused
>
> ii. Costs to the [respondent] to be agreed or taxed
>
> iii. Leave to appeal allowed.
>
> iv. Stay of execution of order [sic] of Williams, J made on May 8, 2015 until the hearing of the appeal.
>
> v. [Respondent's] attorney to prepare, file and serve the orders made herein."

Grounds of Appeal

[19] On 30 November 2016, the appellant lodged an appeal against Wint-Blair J (Ag)'s decision on the following grounds:

> "a. The learned judge erred in law in failing to accept the submissions that the order made by the Honourable Mr Justice F. Williams approving the mediation settlement was without jurisdiction as there was no consent to the making of the order by the [appellant] and his counsel.
>
> b. The learned judge erred in law in failing to appreciate that consent to the mediation agreement by the litigants and their counsel is distinct from consent to the making of the order which said consent is mandatory to confer jurisdiction on the court.
>
> c. The learned judge erred in law in failing to appreciate that Rule 42.7(1), which provides for the varying of orders, applies only to those orders which have been validly made by the court and not to those which the court did not have jurisdiction to make in the first place.
>
> d. The learned judge misdirected herself on the law when she interpreted the word 'must' in Rule 42.7(5) to mean 'may' thereby holding that the requirements in the said Rule are not mandatory.
>
> e. The learned judge misconstrued the decision in Magwall Jamaica Limited et al v Glenn Clydesdale & Anor [2013] JMCA Civ 4 and the cases of McCallum Country Residences Ltd [1965] 2 All ER 264, [and] Green v Rozen [1955] 2 All ER 797 mentioned therein when she found that all three cases were distinguishable on their facts from the instant case. In so finding, the learned judge failed to appreciate that the cases are relevant to show the general principles relating to all consent orders and particularly those in Rule 42.7 which with the amendment of the Civil Procedure Rules 2002 in 2006, also include mediation settlements."

Appellant's submissions

[20] Counsel for the appellant submitted that rule 74.12 provides that where an agreement has been reached at mediation, the court must make an order in the terms of the report pursuant to rule 42.7. It was argued that the amendment to the rules in 2006, now allows for mediation reports to be among the orders that fall under rule 42.7 and that the order made must be in the terms of the report. This, counsel also argued, meant that the order that the court is empowered to make under rule 74.12 where an agreement has been reached, is a consent order. However, surprisingly, counsel asserted that the order made in those circumstances, was merely an administrative order, and required no judicial intervention.

[21] Counsel, in reliance on **Neville Atkinson v Olamae Hunt** [2015] JMSC Civ 14, contended that rule 42.7(3) outlines the circumstances in which rule 42.7(2) would be inapplicable. However, as none of the circumstances in rule 42.7(3) applied to this case, the order made by F Williams J ought to have been a mere administrative one.

[22] Counsel submitted further that Wint-Blair J (Ag) also fell into error when she refused to accept the appellant's submission that the court had no jurisdiction to make the order, as based on the requirements of rule 42.7(5), the order made by F Williams J was not a consent order as contemplated by the rules. Counsel asserted that instead of refusing the order, Wint-Blair J (Ag) had held that the parties having consented to the mediation agreement, F Williams J had not erred in making the order that he did.

[23] Counsel posited that the order made by the learned judge was neither expressed to be 'by consent' nor signed by the attorneys-at-law for each party. Counsel relied on this court's decision in **Magwall Jamaica Limited** where a distinction was made between consent to a compromise and consent to an order. Counsel also relied on the decision in **Green v Rozen**, and argued that F Williams J lacked jurisdiction because despite the consent to the mediation agreement, there was no such consent or evidence of consent to the order made by him. Counsel therefore contended that Wint-Blair J (Ag) had misapplied the principle in **Green v Rozen** when she found that that case was distinguishable on the facts. He also submitted that the cases cited were relevant since the principles enunciated therein were applicable to all consent orders, including those made under rule 42.7 among which were agreements reached at mediation.

[24] Counsel submitted that Wint-Blair J (Ag) also erred when she found that the order could be varied to add the words 'by consent' as she failed to appreciate that rule 42.7(1) applies only to those orders which have been validly made. However, in the instant case, the order was not one that the court had jurisdiction to make, and so rule 42.7(1) would not apply. In addition, it was argued that the respondent's recourse, in the absence of the consent order, would be to sue on the 'compromise'.

[25] Counsel concluded that based on the relevant principles, the orders made by both F Williams J and Wint-Blair J (Ag) should be set aside, with costs in this court and the court below to the appellant.

Respondent's Submissions

[26] Counsel for the respondent argued that the parties had participated in mediation on 24 February 2015, where they had arrived at a comprehensive settlement of all the issues. No issues remained outstanding, and the mediator had reported to the Supreme Court that the parties had arrived at a settlement. Each party had received a copy of the agreement which both parties had signed. In addition, counsel argued that there was no reference, nor had there been any agreement, and certainly, nothing stated in the agreement itself, that any aspect of the matter was to be referred to further mediation to resolve any outstanding issues.

[27] Counsel posited that the parties were served on 10 March 2015 with a "Notice of Appointment to Approve Mediation Settlement", which was set for hearing on 8 May 2015, pursuant to rule 74.12(1) of the CPR. A copy of the notice was sent to the respondent, and in respect of the appellant, to Williams Thomas & Co, attorneys-at-law for and on behalf of the appellant.

[28] Counsel asked this court to note that the appellant had changed his attorney twice since the mediation settlement agreement.

[29] On 8 May 2015, when the mediation agreement came before F Williams J for approval, counsel for the respondent submitted that neither the appellant nor his attorney-at-law answered when their names were called by the clerk. The learned judge, in accordance with his inherent jurisdiction, counsel submitted, proceeded in their absence, and made an order in the terms of the mediation agreement.

[30] Counsel posited that the mediation agreement was freely entered into by the parties and represented the final agreement between them. Further, counsel maintained that upon completion of mediation, all that remained was for the mediation agreement to be formalised, and as a consequence, the order made by F Williams J merely approved the agreement between the parties. Counsel also pointed out that the appellant was not asserting that the order made by F Williams J did not represent the terms of the mediation agreement, which the parties had agreed and signed.

[31] Counsel urged the court to note the fact that the appellant's notice of application for court orders was filed on 14 December 2015, some six months after F Williams J had made his order, and some nine months after the letter dated 17 March 2015 from the appellant's attorney-at-law to the respondent's attorney-at-law, indicating the appellant's interest in exercising his option to purchase the respondent's interest, pursuant to the mediation agreement.

[32] Counsel submitted that even though the order had been drawn up in accordance with rule 42.7(5), the appellant had, nonetheless, contended that it was invalid. Counsel urged the court to note that the order made by F Williams J merely approved the mediation agreement which remained valid and enforceable between the parties. Further, counsel argued, that the omission of the reference 'by consent' could not be a ground for setting aside the order, as the order itself was a correct reflection of what the parties had agreed; and reiterated that the appellant had never argued that the mediation agreement should be set aside on the basis that it did not reflect the terms agreed by the parties.

[33] It was also argued that the order by F Williams J had not been obtained by irregular means to warrant it being set aside. Counsel, in reliance on **Magwall Jamaica Limited**, contended that the mediation agreement, once signed, was binding on the parties, and could be enforced by way of a separate action in the event of a breach, as it represents a settlement of the matter, and an end to the dispute between the parties. Counsel therefore submitted that the application to set aside F Williams J's order was illogical, and a waste of the court's time and resources.

[34] It was submitted further that counsel for the appellant had relied on authorities without taking into consideration the facts and circumstances of this case. In fact, it was argued that counsel had completely ignored the existence and details of the mediation agreement, which represented the irrevocable final agreement between the parties, and the mediator's report stating that the parties had arrived at a final agreement.

[35] More importantly, counsel argued, previous counsel in the matter had commenced implementation of the agreement, when he wrote to the respondent's attorneys exercising the appellant's option to purchase the respondent's interest in the said property. It was argued that the circumstances outlined did not support challenging the correctness of Wint-Blair J (Ag)'s decision.

[36] Counsel submitted that, F Williams J had acted correctly in making the order in accordance with the terms of the mediation agreement, and that Wint-Blair J (Ag) was correct in refusing to set it aside. Counsel also posited that in all the circumstances, a

wasted costs order should be made, as it appears that the appellant had filed an appeal which was clearly without merit.

Analysis

[37] The appellant sought to challenge the procedure by which the terms of the mediation agreement between the parties were encapsulated in an order of the court. This case has highlighted the fact that the CPR does not specifically set out the process by which a matter that has been resolved at mediation and in which a mediation agreement has been made, would be placed before the court, for the order to be made pursuant to rule 74.12.

[38] In this case, the appellant was not present in court when F Williams J made the order about which he complains, and so, he made the application to set aside that order, which was heard and refused by Wint-Blair J (Ag), and which is the subject of this appeal. The application was presumably based on rule 11.18 of the CPR, although this rule was not specifically referred to in the submissions. This rule states that:

> "(1) A party who was not present when an order was made may apply to set aside that order.
>
> (2) The application must be made not more than 14 days after the date on which the order was served on the applicant.
>
> (3) The application to set aside the order must be supported by evidence on affidavit showing –
>
> (a) a good reason for failing to attend the hearing; and
>
> (b) that it is likely that had the applicant attended some other order might have been made."

[39] Wint-Blair J (Ag) was being asked to set aside the order of a judge of co-ordinate jurisdiction. She had the jurisdiction to consider the application, as the appellant was absent when the order was made. It was imperative that the requirements set out under the above rule were satisfied.

[40] Based on the circumstances of this case, in my view, the appellant would have been able to satisfy rules 11.18(1) and (2) of the CPR. It was not in dispute that the appellant was a party to the claim and was not present when F Williams J made the order on 8 May 2015. Accordingly, the appellant may therefore apply to set aside the order. Filing the application would therefore have satisfied rule 11.18(1) and Wint-Blair J (Ag) would therefore have had jurisdiction, under this rule, to deal with the application by the appellant to set aside the order. The application to set aside the order ought to have been made within 14 days of service of the order. In the instant case, the appellant indicated that the order had not been served, which was not challenged. From the evidence it appears that the order was not perfected until the filing of the application. Rule 11.18(2) would therefore have been satisfied.

[41] Rule 11.18(3) has two limbs and both must be satisfied. Rule 11.18(3)(a) requires that the appellant show a good reason for failing to attend. The appellant's explanation for his absence is that although the notice was served on the offices of his attorney at the time, he had not been notified. In fact, the information received from Mr Demar Kemar Hewitt, the appellant's former attorney, was that his former office had not been served. However, according to the court's record, the notice issued by the registrar had been served on Mr Hewitt's office. The appellant was not present on the

date when F Williams J made the order as he was not aware of the date. He asserted that his absence was not intentional and had he been aware of the date, he would have attended. It is clear that if he was unaware of the date then he could not have attended. However, the fact that the notice was served on the firm of attorneys on record for the appellant at the material time, the appellant should have been notified by someone at the firm. This does not detract however from the fact that he was not aware of the date due to no fault of his own, and so in my view, rule 11.18(3)(a) of the CPR would have been satisfied.

[42] In circumstances where the conduct of counsel has placed litigants or their interests in jeopardy, Lord Denning in **Salter Rex & Co v Ghosh** [1971] 2 All ER 865 has cautioned that "[w]e never like a litigant to suffer by the mistake of his lawyers". The Judicial Committee of the Privy Council in **The Attorney General v Universal Projects Limited** [2011] UKPC 37, however, has also made it clear at paragraph 23 that:

> "...Oversight may be excusable in certain circumstances. But it is difficult to see how inexcusable oversight can ever amount to a good explanation. **Similarly if the explanation for the breach is administrative inefficiency**." (Emphasis supplied)

[43] So, although the failure of the appellant's attorneys-at-law to inform him of the date for the hearing may have been due to administrative inefficiency, which may not amount to a good explanation, nonetheless, it may amount to a good reason for the appellant not being in attendance as he did not know of the date. Additionally, as Lord

Denning has stated, the court must always be mindful that it does not want the litigant to suffer due to the fault entirely of his attorney, particularly, when no prejudice may have occurred. As a consequence, although Wint-Blair J (Ag) did not specifically address this issue, it would not have been wrong for her, in my view, in considering the application, to have accepted that the first of these two limbs, namely rule 11.18(3)(a), would have been satisfied, as the appellant would have been blameless in the situation.

[44] In considering the application further, and, in particular, whether rule 11.18(3)(b) had been satisfied, the issue which Wint-Blair J (Ag) would have been required to determine was whether it was likely that F Williams J would have made a different order if he had heard the appellant's submissions in relation to:

(i) the jurisdiction of the court to make a consent order pursuant to a mediation agreement; and

(ii) the appellant's assertion that the mediation agreement was incomplete, and that there were unresolved issues, and so the matter should be adjourned to another date to resolve those issues.

[45] In reviewing the decision of Wint-Blair J (Ag) refusing the application made by the appellant to set aside the order made by F Williams J, this court must apply the principles laid down in **Hadmor Productions Ltd and Others v Hamilton and Another** [1983] 1 AC 191. In that case, Lord Diplock gave the following guidance:

> "Upon an appeal from the judge's grant or refusal of an interlocutory injunction the function of an appellate court...

> is not to exercise an independent discretion of its own. **It must defer to the judge's exercise of his discretion and must not interfere with it merely upon the ground that the members of the appellate court would have exercised the discretion differently. The function of the appellate court is initially one of review only. It may set aside the judge's exercise of his discretion on the ground that it was based upon a misunderstanding of the law or of the evidence before him or upon an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn upon the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal; or upon the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it.** Since reasons given by judges for granting or refusing interlocutory injunctions may sometimes be sketchy, there may also be occasional cases where even though no erroneous assumption of law or fact can be identified the judge's decision to grant or refuse the injunction is so aberrant that it must be set aside upon the ground that no reasonable judge regardful of his duty to act judicially could have reached it. It is only if and after the appellate court has reached the conclusion that the judge's exercise of his discretion must be set aside for one or other of these reasons, that it becomes entitled to exercise an original discretion of its own." (Emphasis supplied)

[46] Although this appeal does not relate to the exercise of the discretion of a judge in relation to the grant of an interlocutory injunction, the principles are the same in relation to other interlocutory orders. This principle has been consistently applied by this court, and was restated in **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1 by Morrison JA (as he then was), in his usual erudite and eloquent manner, at paragraph [20] of that judgment as follows:

> "This court will therefore only set aside the exercise of a discretion by a judge on an interlocutory application on the ground that it was based on a misunderstanding by the judge of the law or of the evidence before him, or on an inference - that particular facts existed or did not exist - which can be shown to be demonstrably wrong, or where the judge's decision 'is so aberrant that it must be set aside on the ground that no judge regardful of his duty to act judicially could have reached it'."

[47] With those considerations in mind, it would be necessary to review and assess Wint-Blair J (Ag)'s findings and conclusion, in the light of the above and rule 11.18, in order to determine whether she was 'demonstrably' wrong in the exercise of her discretion.

[48] The grounds filed will be discussed within the context of the issues arising.

Ground (a) - The learned judge erred in failing to accept that F Williams J's order was made without jurisdiction and that there was no consent to that order; and

Ground (d) - The learned judge erred in interpreting 'must' to mean 'may' in rule 42.7(5) of the CPR and therefore also erred in concluding that the requirements of the rule were not mandatory.

[49] In order to determine whether the order made by F Williams J was properly made and the type of the order he had jurisdiction to make, it is necessary to examine the process by which it was made. The referral of parties to mediation is one of the ways by which the court seeks to carry out certain aspects of the overriding objective. The process is court-driven and, in keeping with the thrust in recent times to promote alternative dispute resolution, is geared towards easing the pressure on an overburdened court system, and allowing the parties to arrive at their own resolution of

matters, inclusive of issues not canvassed in their pleadings filed in the courts. It is important to examine the applicable rules in the CPR dealing with mediation, and the orders that can be made by the court when an agreement has been reached at mediation.

[50] Part 74 of the CPR makes provision for all aspects of the mediation process which includes for instance: the purpose and objective of mediation; the manner in which it is to be conducted; the role of the mediator and the court in the mediation process; and the relevant period within which particular matters, including the mediation session, should be completed. In the instant appeal, it will be necessary to discuss rules 74.3, 74.9, 74.10, 74.11 and 74.12.

[51] Rule 74.3 sets out the matters that are amenable to mandatory mediation and the court's power to order parties to go to mediation if the rules directing that parties be automatically referred do not apply. It was not an automatic referral to mediation in the instant case, but no issue had been taken that the matter had not been properly referred. Although matters brought by fixed date claim form, under rule 8.1, are generally exempted from the mediation process pursuant to rule 74.3(1)(a), rule 74.3(2) states that a judge or master can direct a mediation in any proceedings, and a matter can be referred to mediation at any time by order of a judge or master (rule 74.3(5)) or by consent before pre-trial review (rule 74.3(4)). So, it is clear that in the instant case, although the matter was commenced by way of fixed date claim form, it nonetheless could have been subject to the mediation process. In the instant case, no

party has posited that the mediation process was inappropriate. Nothing therefore turns on that, and nothing more need be said on it.

[52] Rule 74.9(1) states that the parties along with their attorneys-at-law (where represented) must attend all mediation sessions. Rule 74.10 outlines the procedure to be followed when conducting mediation, highlights the confidential nature of the mediation process, and prescribes that any agreement reached should be in writing, signed by the parties and recorded. Rule 74.10(5) specifically provides that:

> "Any agreement reached by the parties at the mediation shall be recorded in writing and signed by the parties and their attorneys-at-law (if any)."

[53] Rule 74.11 of the CPR requires the mediator to file a report and states that:

> "(1) Subject to any extension pursuant to rule 74.8(2), within 8 days of the completion of the mediation and in any event, within 98 days of the referral, the mediator shall file a report in form M5 at the registry, indicating:
>
> a) the date(s) of the mediation;
>
> b) the persons receiving notice and the date of notification of the last mediation session;
>
> c) the persons who attended the mediation;
>
> d) whether agreement was reached; and
>
> e) where no agreement or partial agreement was reached, whether the parties are prepared to continue with mediation and the mediator considers that there are reasonable prospects of an agreement being reached if an extension of time is granted.

(2) Where an agreement is reached between the parties, the signed written agreement shall accompany the report or be filed at the registry not later than 30 days after the completion of the mediation, unless it is a term of the agreement that it remains confidential.

(3) Where the written agreement does not accompany the report but it is to be filed, the mediator shall indicate in the report who will be responsible for the filing of the written agreement."

[54] In this case, there is no dispute that both parties, accompanied by their attorneys, attended the mediation session. There is an agreement signed by both parties, which was also signed by their respective attorneys as witnesses to their respective signatures. The appellant is however contending that there were unresolved issues that had not been dealt with, and that discussions were to continue between the parties to settle those issues. The respondent disputes this, and states that the mediation agreement signed by the parties had taken into consideration all the issues in dispute, including those that the appellant had asserted remained unresolved, such as the mortgage payments and the appellant's sole use and occupation of the premises.

[55] As previously indicated, Ms Baker deponed that the issue in relation to the mortgage payments was considered by the parties. In addition, she stated that this had been reflected in the 35% that the respondent had agreed to accept as her interest in the property. In the fixed date claim form, the respondent had requested a declaration that the property at Brown's Town, Ewarton was owned jointly by the appellant and the respondent, and that she was entitled to a 50% share in the same. The fact that she

agreed to a 35% interest in the said property indicates that, in my view, the issues that the appellant had claimed to be unresolved, would have been at the heart of the dispute between the parties. It is difficult to accept that those issues had not been resolved before the parties had signed the mediation agreement. In addition, on the face of the mediation agreement, there is no indication that discussions would be continuing between the parties in relation to any issue, as it is a completed agreement and makes no mention of any unresolved issues. Both the appellant and his attorney-at-law were present at the mediation session, and as indicated, both of them signed the agreement.

[56] The mediator's report was not in the papers submitted by the parties, but was obtained from the court file. The mediator's report contains boxes to be ticked as appropriate. The box ticked, *viz* (e) stated that "the parties have reached full agreement and a copy of the mediation agreement was attached". The box at (c), referring to the parties having arrived at a partial settlement was not ticked. The report was signed by the mediator and both attorneys representing the appellant and the respondent. It was dated 24 February 2015. The agreement, signed by the parties and witnessed by their respective attorneys, and also signed by the mediator, was dated the same day.

[57] Of importance to this appeal is rule 74.12, which stipulates the action that should be taken once an agreement has been reached, after the mediator files the mediation report, and the type of order that the court is empowered to make. It provides as follows:

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

(2) Where the report states that no mediation has taken place or that no agreement was reached, the Registrar must immediately fix a case management conference, pursuant to rule 27.3 and give notice to the parties as required by that rule." (Emphasis supplied)

[58] Rule 42.7 deals with consent orders and judgments. It states that:

"(1) This rule applies where –

(a) none of these Rules prevents the parties agreeing to vary the terms of any court order; and

(b) all relevant parties agree the terms in which judgment should be given or an order made.

(2) Except as provided by paragraphs (3) and (4), this rule applies to the following kinds of judgment or order –

(a) a judgment for –

(i) the payment of a debt or damages (including a judgment or order for damages or the value of goods to be assessed);

(ii) The delivery up of goods with or without the option of paying the value of the goods to be assessed or the agreed value; and

(iii) costs.

(b) an order for -

(i) the dismissal of any claim, wholly or in part;

(ii) the stay of proceedings on terms which are attached as a schedule to the order but which are not otherwise part of it (a 'Tomlin Order');

(iii) the stay of enforcement of a judgment, either unconditionally or on condition that the money due under the judgment is payable on a stated date or by instalments specified in the order;

(iv) setting aside or varying a default judgment under Part 13;

(v) the payment out of money which has been paid into court;

(vi) the discharge from liability of any party;

(vii) the payment, assessment or waiver of costs, or such other provision for costs as may be agreed; and

(viii) any procedural order other than one falling within rules 26.7(3) or 27.8(1) and (2).

(3) This rule does not apply –

(a) where any party is a litigant in person;

(b) where any party is a minor or patient;

(c) in Admiralty proceedings; or

(d) where the court's approval is required by these Rules or any enactment before an agreed order can be made.

(4) This rule does not allow the making of a consent order by which any hearing date fixed by the court is to be adjourned.

(5) 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."

[59] It is clear that the role and function of the court after a mediation agreement has been reached is important to the determination of this appeal. As indicated, the mediator's report stated that there was an agreement. The mediator's report and the mediation agreement would dictate what the court's action would be. Once an agreement had been reached, then the applicable rule would be rule 74.12(1) which directs that the court should make an order in terms of the mediator's report pursuant to rule 42.7. Rule 42.7 speaks to consent orders and judgments. Rule 42.1 states that Part 42 of the CPR contains rules relating to judgments and orders made by the court, but indicates that the rules do not apply to the extent that any other rule makes a different provision in relation to the judgment or order in question. Rule 74.12 makes provisions for orders to be made where a mediation agreement has been reached. It is this section that makes rule 42.7 applicable to the instant matter.

[60] In the instant case, the court, in order to properly discharge its functions pursuant to the rules, must pay due regard to the content of the mediator's report and the agreement signed by the parties, in order to be satisfied that there was an agreement. From all accounts, it would appear in the instant case, that the mediation

agreement was before F Williams J for his consideration, as the order that he made, as indicated, was in its exact terms.

[61] In **Magwall Jamaica Limited**, Panton P described the procedure based on the rules at paragraph [9] of his judgment thus:

> "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."

[62] As a consequence, 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. F Williams J, having therefore been satisfied that the parties had reached an agreement, would have then been obliged to make a consent order in the terms agreed in the mediation agreement, attached to, and/or accompanying the mediator's report. It is important to note that to the contrary, rule 74.12(2) indicates that if the mediator's report states that no mediation has taken place and no agreement has been reached, then the registrar must immediately fix a case management conference pursuant to rule 27.3 of the CPR, and give notice to the parties as required by that rule. If an agreement has been arrived at, there clearly would be no need to fix a case management conference to arrange the dates and other matters attendant to the trial process.

[63] Counsel for the appellant submitted that since the order had not stated that it had been made 'by consent', it could not therefore be treated as a consent order, as rule 42.7(5) required that the order state that it had been made 'by consent'. In dealing with this issue, Wint-Blair J (Ag) found that the requirements stated in this rule were not mandatory as 'must' has been held to mean 'may' in respect of procedural matters. Whereas the principle cited by Wint-Blair J (Ag) that 'must' has been interpreted to mean 'may' in many instances under the rules is correct, I find that that principle does not arise in the instant case, as pursuant to rule 74.12, the court is obliged to enter the order in terms of the report, and so the rule has mandatory application in this instance.

[64] It is necessary to point out that rule 42.7(5) of the CPR relates to the manner in which the formal order should be drawn up. In my view, while the provisions of rule 42.7(5) address the form of the order, they do not relate to the substance of the order made. As a result, on a perusal of the rule, a consideration of the face of the order made cannot be determinative of whether the order was in fact a consent order. I, however, accept that the order made by the court, when drawn up, should be expressed as being made 'by consent' (rule 42.7(5)(b)), and ought to have been signed by the parties' attorneys-at-law (rule 42.7(5)(c)).

[65] In **Chandless-Chandless v Nicholson** [1942] 2 All ER 315, that court was also faced with an order that was not expressed to be made 'by consent'. Lord Greene MR in that case in addressing this issue at page 317, said:

> "... I would like to say quite distinctly that, if an order is made by consent, the practice should invariably be that it should, on the face of it, be expressed so to have been

> made. **When the court finds an order which is not expressed to be made by consent, it certainly is not going to treat it as a consent order, unless it is satisfied that it was in fact a consent order**." (Emphasis supplied)

[66] The rules are clear that any order made pursuant to a mediation agreement should be drawn in the terms agreed and expressed to be 'by consent'. The rules guide how such orders made by the court must be enforced. There are several cases however which are helpful in respect of the principles relating to the definition and effect of a consent order and the manner in which courts have treated with those orders, depending on the nature and meaning ascribed to each of them.

[67] As indicated, in this matter, at the end of the mediation process, there was an agreement signed by the parties and witnessed by their respective attorneys. F Williams J's jurisdiction to make the consent order is derived not from rule 42.7(5) but from rule 74.12(1), and that rule requires that a judge be satisfied that there was an agreement between the parties in relation to the matter. In this case, the fact that there was a signed agreement by all parties, following a mediation session with the parties and their counsel, is not in dispute.

[68] In the light of the foregoing, pursuant to the CPR and in the circumstances of this case, the only order F Williams J could have made was an order pursuant to rule 42.7, that is, a consent order. So, even though the order made by F Williams J was not expressed to be 'by consent', the fact that it was made pursuant to the rules, based on a mediation agreement, it would have nonetheless have been a consent order.

[69] It is also interesting that counsel for the appellant had argued, in reliance on the dictum of King J in **Atkinson v Hunt**, that the order made by F Williams J ought to have been a purely administrative one with no judicial intervention. The court in **Atkinson v Hunt** was invited to consider "[w]hat action is the Court required to take in accordance with the interpretation of CPR 74.12?". This issue arose because the claimant in that case wanted to withdraw from the mediation agreement. King J referred to rules 42.4 and 42.5, and concluded that if none of the circumstances listed in 42.7(3) was applicable, then:

> "[19] ...No judicial intervention is therefore necessary. The judgment must be entered by a mere administrative act.
>
> [20] The court is neither empowered nor obliged to intervene in the conversion of the mediation agreement in these circumstances into an order of the court."

[70] In **Atkinson v Hunt**, King J clearly accepted and recognised that the action taken by the court in the course of such proceedings, though exercising a judicial function, would be an administrative act. King J referred to rule 42.7 to explain the nature of the court's role when making the consent order, pursuant to 74.12. He indicated that by virtue of these rules, a consent order in respect of a mediation agreement is a mere administrative act. The learned judge stated, and as indicated I agree, that based on rule 74.12, only rule 42.7 would be relevant, and the court would, therefore, only be giving its imprimatur to the agreement. In fact, King J stated at paragraph [14] that "[s]uch orders are therefore completed by a mere administrative act without the need for judicial intervention". If by that King J meant that the judge

would make the order, but by way of an administrative act, and not by way of a judicial hearing or process, I would agree with him, but the order must be made by a judicial officer, and once that is the case, it is a judicial act.

[71] In addressing the issue of the need for the parties to sign the formal order based on rule 42.7(5), King J indicated at paragraph [21] that:

> "In the event that neither [sic] party refuses to cooperate in having the agreement converted to an order of the court, the court can then be asked to order the unwilling party to sign [or] alternatively the agreement can be can be [sic] enforced by an action as indicated by Clause 2b of the agreement."

The learned judge was thereby recognising that implicit in the parties having signed the mediation agreement, was their consent to the order being made by the court, pursuant to rule 42.7(5), and the formal order should be drawn up in the terms of the agreement. It may be prudent, however, that if the attorneys were unwilling to sign the order as drawn up, for an application to be made to the court to dispense with their signatures, bearing in mind that there is no requirement, pursuant to rule 42.7(5), for the parties themselves to sign the order as drawn up. The court has the power to dispense with compliance with any of the rules in special circumstances (rule 26.1(8)), or to make any other order or give any other direction, to give effect to its orders (rule 26.1(2)(v)), in furthering the overriding objective.

[72] In my view, the decision in **Atkinson v Hunt** does not support the appellant's contention that there was a need for the appellant to consent to the order made by F Williams J. This authority cannot assist the appellant, and in fact its effect is to the

contrary. The parties in fact do not need to be present when the order is made, and no notice need be given to them to attend court when it is being made. The order of the court can be made in their absence. There is no need for the court to obtain any consent from them. Their consent is demonstrated by their respective signatures in the mediation agreement, witnessed by their respective attorneys, and also in the mediator's report, with the signature of the mediator, and the signatures of their attorneys.

[73] In my view, Part 42 of the CPR is of limited application in relation to the order to be made pursuant to a mediation agreement or rule 74.12. As has already been stated, Part 74 deals specifically with the mediation process, and an order made by the court pursuant to a mediation agreement must be a consent order, in keeping with rule 42.7, as stipulated by Part 74. However, based on rule 74.12, only rule 42.7 is relevant to the mediation process, once a mediation agreement has been arrived at.

[74] In **Magwall Jamaica Limited**, Panton P made the following observation at paragraph [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) ..."

I do not think it is necessary to discuss the nature of the agreement arrived at by the parties, as, based on rules 74.12 and 42.7(1)(b), the order made would in effect be a consent order, since all the relevant parties had agreed the terms in which the order should be made.

[75] In **Siebe Gorman & Co Ltd v Pneupac Ltd** [1982] 1 All ER 377, Lord Denning MR, in explaining or describing a consent order, stated at page 380 that:

> "It should be clearly understood by the profession that, when an order is expressed to be made 'by consent', it is ambiguous. There are two meanings to the words 'by consent'. That was observed by Lord Greene MR in *Chandless-Chandless v Nicholson* [1942] 2 All ER 315 at 317 ... One meaning is this: the words 'by consent' may evidence a real contract between the parties. In such a case the court will only interfere with such an order on the same grounds as it would with any other contract. The other meaning is this: the words 'by consent' may mean 'the parties hereto not objecting'. In such a case there is no real contract between the parties. The order can be altered or varied by the court in the same circumstances as any other order that is made by the court without the consent of the parties. In every case it is necessary to discover which meaning is used. Does the order evidence a real contract between the parties? Or does it only evidence an order made without obligation?"

[76] The question which posed a controversy for the appellant, it would appear, was which of these two orders was made by F Williams J. The authorities make it clear that the content of the agreement or the order will determine whether there was in fact a contract that is "embodied in the order". In **Siebe Gorman v Pneupac**, Lord Denning MR, in discussing the means by which it should be determined whether the order was evidence of a real contract or an order made without obligation, after examining the authorities, opined at page 380 that:

> "... It seems to me that all those cases can be, and should be, explained on the basis that there was a real contract between the parties evidenced by the order which was drawn up."

[77] It is clear that the order made by F Williams J would have evidenced a real contract between the parties, as embodied in the mediation agreement. There is no doubt that the order made was a consent order, in substance, based on the description given in **Chandless-Chandless v Nicholson**. Further, F Williams J was bound to make a consent order pursuant to the rules, since there was a binding mediation agreement between the parties. Wint-Blair J (Ag) was clearly correct in concluding that F Williams J had jurisdiction to make the order and so ground (a) therefore must fail. The fact that the order was not expressed to be 'by consent' and was not signed by the parties' attorneys-at-law is not detrimental, as it was, in substance, a consent order, and the CPR contains provisions permitting the court to put matters right (rule 26.9). Accordingly, that irregularity would not be fatal to the efficacy of the order, and it would certainly not be a nullity. However, while ground (d) has merit, since the irregularity in the order is one that can be corrected by the court pursuant to the rules, the success of that ground is not sufficient to disturb the outcome of this appeal.

Ground (b) - The learned judge failed to appreciate that consent to the mediation agreement was different from consent to the order made by F Williams J; and

Ground (e) - The learned judge misconstrued the authorities in finding that the facts of the cases cited were distinguishable from the facts of the instant case, and failed to appreciate that the cases were relevant to show the principles relating to consent orders.

[78] It is clear that a consent order has to be made by agreement, and the court must be satisfied that the parties have agreed to the terms in which the order is to be made.

[79] The appellant has sought to challenge the order on the ground that there was no consent to the order made by the court approving the agreement. Counsel for the appellant relied on the decisions in **Magwall Jamaica Limited**, **McCallum v Country Residences** and **Green v Rozen** to argue that the parties to a settlement must not only consent to the agreement, but are required to consent to the order made by the court when the agreement is being approved by the court. Otherwise, it was submitted, the court would have no jurisdiction to make a consent order. Counsel for the appellant also relied on those cases to argue that since neither the appellant nor his attorney was present when the respondent attended before F Williams J, there was no consent to the order made by F Williams J, and it was therefore invalid and void *ab initio*. Also, as the order made by F Williams J had not been drawn up expressed to have been made 'by consent' as required by the rules, the respondent would be forced to sue on the agreement. As a result, the order made by F Williams J, it was argued, could not be enforced by the methods applicable to consent orders made by the courts.

[80] In the light of those submissions, it is necessary to examine, in summary, the *ratio decidendi* of these authorities.

[81] In **Magwall Jamaica Limited**, the parties went to mediation and had arrived at a settlement. When the matter went before Mangatal J, the learned judge concluded that based on the agreement, the nature of the order to be made was a Tomlin Order. Her interpretation of the settlement reached was the subject of the appeal to this court.

[82] The complaint was made on the basis that the agreement reached did not have all the features of a Tomlin Order as there was no term for a stay of the action pending the carrying out of the agreed terms, and no provision for the enforcement of the terms by applying to the court. These provisions would have made their agreement distinct from an ordinary consent order or a mere agreement between the parties. At paragraph [11] of that judgment, Panton P observed that:

> "In determining whether the order made by the 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."

[83] The learned President also stated at paragraph [21] that:

> "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."

[84] Panton P succinctly stated the conclusion of the court at paragraph [22] in this way:

> "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 court therefore found that the parties had agreed that a final settlement had been arrived at. No Tomlin Order had been made, and in keeping with the agreement, any breach of the terms would be subject to a new action by the party aggrieved by the breach of contract.

[85] The issue in **Magwall Jamaica Limited** was not whether the parties had agreed to the order, but a challenge to the type of consent order that had been made based on the agreement; and whether a Tomlin Order was a type of consent order under rule 42.7. The court found, as indicated, that the agreement did not have all the features of a Tomlin Order, and as Panton P observed, the parties had not characterised it as such. As indicated previously, that was not the issue in the instant case. The appellant was not challenging the nature of the order, but whether a consent order had been made *ab initio.* Wint-Blair J (Ag) found that the order had been properly made. As indicated, pursuant to rule 74.12, once the mediation agreement had been reached, the court must make the order in its terms and in terms of the mediation report. F Williams J made the order. No more input was therefore required from the parties.

[86] In **Green v Rozen**, the issue to be determined was the mode of enforcement to be utilized for breach of an agreement between the parties endorsed on counsel's brief. In that case, the plaintiff brought a claim against the defendants for the return of monies lent. The parties had agreed to settle the matter and the terms were noted on counsel's brief. The matter was mentioned before Slade J, and the court was informed of the terms of the settlement. The court had not been asked to make an order and

had not made any order whatsoever. It certainly had not made an order staying all further proceedings, or an order relating to costs, despite the fact that these items had been included in the terms endorsed on counsel's brief. Subsequently, there was a breach of the settlement and funds to be paid under the agreement remained outstanding. As a result, the plaintiff filed an application for relief in respect of the breach. He sought to enforce the settlement between the parties for payment of the last instalment and the costs in the matter, which had been taxed by the Master. These items were based on the agreement and not connected to the original claim that had been filed. The terms of the settlement were outlined in full by Slade J, and he indicated at page 798:

> "Those terms are signed by counsel on both sides. Although, no doubt, it was the intention of the parties that all further proceedings should be stayed in the light of that compromise, I am informed by the learned associate, who was present on that day, and counsel for the plaintiff on his instructions agrees..., that, in fact, I made no actual order staying all further proceedings although, no doubt I should have contemplated, as the parties did, that all further proceedings would be stayed on the basis of what I shall call 'the new agreement'. Nor did I make any order for taxation of costs, which was a term of the agreed terms in default of the costs being agreed ..."

[87] Slade J discussed the various ways of disposing of an action when the parties had agreed to settle the same, and the consequences, effect and efficacy of each approach. He identified five such methods which he accepted were not exhaustive, *viz*: judgment by consent; consent order; Tomlin Order; an order by consent staying all further proceedings in the action on the terms agreed on counsel's brief; and when the

court makes no order at all, having been told that the case had been settled on terms endorsed on counsel's brief.

[88] Slade J stated in that case, that the court had not made any order, and so the fifth method which had been identified by him was the one that the parties had adopted. He then concluded at page 801 that:

> "The fifth method, which is the only one I propose to adjudicate on, is the one which was adopted in the present case. The court made no order of any kind whatsoever, and, having considered such authorities as I have been able to find, I arrive at the conclusion that in those circumstances the new agreement between the parties to the action supersedes the original cause of action altogether, that the court has no further jurisdiction in respect of the original cause of action which has been superseded by the new agreement, and that, if the terms of the new agreement are not complied with, then the injured party must seek his remedy on the new agreement. I mentioned to counsel for the plaintiff what I thought were one or two of the difficulties in his way. He is asking me to give him judgment for £83 6s 8d, as well as the costs. The sum of £83 6s 8d, which is one-third of £250, arises only under the terms of the new agreement. Counsel cannot ask me to remove the stay because I have made no order for the stay: there is nothing to be removed. In my judgment, therefore, the plaintiff's remedy in this case to enforce the sum of £83 6s 8d, plus the taxed costs which the defendants agreed to be paid, must be by action on the new agreement."

The conclusion arrived at by Slade J was due to the fact that there was no order made by the court and so it could not be enforced by reviving the claim.

[89] For present purposes, it would be useful to examine how Slade J described a consent order and the consequences of such an order. He described it in the following terms at page 799:

> "The second way, which is, no doubt, more appropriate when the terms of settlement are not so straightforward as the mere payment of an agreed sum of money by specified instalments, is to secure an order of the court, made by consent, that the defendant, and, it may be, also the plaintiff, shall do the things which they have respectively engaged themselves to do by the terms of settlement."

[90] At page 800, he prefaced his description of the means of enforcing the orders with the following statement:

> "It will perhaps emphasise which is the easiest method of disposing of an action if consideration is given to the steps which can be taken in each of those cases to enforce the terms, if default is made in compliance with them."

[91] He then described the means by which a consent order would be enforced as follows:

> "In the second case, the court has made an order in the terms which I have indicated, that the plaintiff do certain things, the defendant do certain things, and, if the plaintiff or the defendant, as the case may be, fails to carry out the court's order, it is only necessary for application to be made to the court and the court will enforce the order, the court having clearly ordered, in the order itself, what each party is to do or to refrain from doing."

[92] Counsel for the appellant contended that the respondent ought not to be able to enforce the order made by F Williams J in the manner described above by Slade J. Counsel for the appellant had submitted that the respondent was obliged to institute a fresh claim. I do not agree with those submissions. The order endorsing the mediation

agreement must be enforced as a court order in the usual way. This demonstrates the connection between the court and the mediation process established under the CPR.

[93] The facts on which the decision in **Green v Rozen** is based are obviously distinguishable from the instant appeal, as the court in the instant case, has made an order in the terms of the agreement, and that order would clearly be a consent order, and would be valid and enforceable as an order of the court.

[94] In **McCallum v Country Residences**, an action was brought against the defendant, Country Residences Limited, by Mr McCallum for monies due for labour and work done. The parties were negotiating a settlement and it appeared that the parties had arrived at a settlement. However, when the matter went before the court, the defendant's attorney did not consent to the order. The official referee examined the correspondence between the parties and concluded that an agreement to settle the matter had been reached, and made the order sought which was a Tomlin Order.

[95] The defendant appealed and Lord Denning MR, having found that there had been no agreement consented to between the parties, stated at page 265 that:

> "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 LJ referred, of *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. But there was none. Counsel for the plaintiff had to agree that the plaintiff could not have signed judgment in the action for £900: nor, it seems to me, can he in effect sign judgment by means of the form of order which has been made here. It should not cause much delay. The plaintiff has only to sue on the agreement and he should be able to get judgment at once."

[96] There is no doubt that whenever there is an agreement between the parties to resolve the dispute or the matter, the court will always have a duty to ensure that both parties are assenting to the agreement and the order being made. In **McCallum v Country Residences** it was not clear that the parties had arrived at an agreement so that a consent order could be made. Lord Denning MR indicated that the plaintiff was not in a position to sign judgment in the action for the amount claimed. Whether the agreement reached between the parties has been sufficiently communicated to the court, will be based on the circumstances of the case. This is not an issue in dispute in the instant case, in the light of the executed mediation agreement. Furthermore, the report of the mediator, which is required by the court, would have satisfied the court that an agreement had been arrived at between the parties.

[97] The three cases discussed above set out the common law position in relation to the court's approach in ascertaining whether there was an agreement, and if the parties were consenting to the order. At common law, the approach adopted by the courts is understandable, as the parties have made a private agreement, and it is only natural that they would need to attend court to indicate their respective positions as it relates to both the agreement and the order being made in respect of it.

[98] In the instant case, any question relating to the enforcement of orders made relating to mediation agreements are governed by the CPR, as orders made by the court generally. Based on the procedure set out in the CPR, with regard to orders made in respect of mediation agreements (Parts 74 and 42), there is no requirement under the rules for the parties to attend court when the consent order is made reflecting the mediation agreement. This is so despite the fact that in this case, the registrar of the court had issued notices of appointment to approve mediation settlement to the parties, informing them of the date set for the order to be made reflecting the terms of the mediation agreement. What is clear is that there are no provisions requiring either or any party to make application to the court, and to give notice to the other party for approval of the mediation agreement.

[99] In my view, the rules make it clear that the agreement signed by the parties at mediation would dictate the terms of the order ultimately to be made by the court. The agreement between the parties would trigger rule 74.12(1). This rule directs that the court make an order in terms of the mediation report/agreement, pursuant to rule 42.7 of the CPR, which deals with consent orders and judgments.

[100] The procedure set out under the CPR, and the process by which parties engage in mediation is different from the private agreements between parties settling their disputes. The process under the CPR indicates that the parties, with their attorneys-at-law, where represented, must attend all mediation sessions. It also stipulates that the agreement reached ought to be reduced in writing, that it must be signed by the parties (who would appreciate the import of the rules governing the process), and the

agreement must set out how the matter before the court has been resolved, which is also indicative of their agreement or consent to the order to be made by the court, which must be made in the same terms as the agreement and the mediation report. The procedure set out under Part 74, for settling matters before the court, is clear, and the common law principles derived from the cases cited, bring clarity to the matters not addressed in the rules. Any order made pursuant to a mediation agreement must be included as one of the orders listed under rule 42.7, albeit that rule 42.7 does not expressly list mediation orders. In addition, the agreement signed by the parties, is a binding contract between the parties setting out the terms agreed between them with regard to how the dispute between them has been resolved.

[101] In my view, based on the rules governing mediation agreements, once the parties have reached an agreement, there is no requirement for the parties to consent to the actual order made in court, as this would naturally follow from the mediation process. This is all part and parcel of the court's approved alternate resolution mechanism.

[102] The order made by F Williams J therefore, was in essence, a consent order made pursuant to rules 74.12 and 42.7 of the CPR. The learned judge had the power and jurisdiction to make a consent order in the terms of the agreement made between the parties on 24 February 2015, and there was no requirement for the parties to attend before him. Additionally, if either party was unwilling to sign the order as drawn up, the court could dispense with the necessity for their signatures, or make any other order to ensure compliance. The appellant’s and/or his attorney-at-law’s absence therefore

would not have affected the learned judge's jurisdiction to make the consent order, reflecting the terms of the mediation agreement. The second limb of rule 11.18(3)(b) of the CPR would therefore have been satisfied, and Wint-Blair J (Ag) therefore acted in keeping with that position. Grounds (b) and (e) could therefore not succeed.

Ground c - The learned judge erred in failing to appreciate that the variation of orders can only apply to orders validly made, and would not apply to orders made where the court had no jurisdiction.

[103] This ground appears to stem from Wint-Blair J (Ag)'s statement in reference to counsel's submission where she said:

> "...He overlooked Rule 42.7(1)(a) which provides for the varying of the terms of any court order and the powers of the court to amend or vary an order previously made."

[104] The appellant has however only taken issue with the learned judge's reference to rule 42.7(1)(a), and not to the court's general powers to correct any error arising in a judgment or order from any accidental slip or omission (see rule 42.10(1) and also **Weir v Tree** [2016] JMCA App 6 and **American Jewellery Company Limited and Others v Commercial Corporation Jamaica Limited and Others** [2014] JMCA App 16). Additionally, as mentioned previously, the court has the power to put things right (rule 26.9). Based on that power, F Williams J could therefore, in the light of these principles, affix the words 'by consent' to the order made by him, and it would have accurately reflected the intent of the parties and the order of the court.

[105] The appellant also argued that the order must be valid for rule 42.7(1)(a) to apply. I have already indicated that, in my view, the order made by F Williams J was

valid. In any event, Wint-Blair J (Ag) did not interfere or amend the order made by F Williams J.

[106] This ground raises the issue as to whether it is necessary for this court to amend the order made by F Williams J to make it completely compliant with rules 42.7(1)(a), 42.7(5)(b) and (c) by adding the words 'by consent' (although this was not posited by the appellant) and by directing that the order is to be signed by the attorneys-at-law for both parties. These amendments would ensure that it is clear on the face of the record, the type of order that had been made, and underpin the reason why Wint-Blair J (Ag) refused to set it aside. I am of the view, that the order made by F Williams J was in every material respect a consent order, and in any event, this court is empowered by section 10 of the Judicature (Appellate Jurisdiction) Act (JAJA) to amend the order made by the learned judge, so that it is in compliance with the rules, and reflects accurately the agreement made by the parties and the order made by the court.

[107] Also, it must be remembered that pursuant to rule 1.16 of the Court of Appeal Rules (CAR), an appeal is by way of a re-hearing, and by rule 2.15 of CAR in relation to a civil appeal, the court has all the powers set out in rule 1.7 and in addition thereto, all the powers and duties of the Supreme Court, including in particular the powers set out in Part 26 of the CPR. This includes, as previously indicated, rule 26.9 (to put matters right), and rule 26.2(v) which permits the court to take any other step, give any other direction, or make any other order for the purpose of managing the case and furthering the overriding objective.

[108] This court is also empowered by rule 2.15 of CAR to give any judgment or make any order which in its opinion, ought to have been made by the court below. Wint-Blair J (Ag) was therefore correct to say that the words 'by consent' could have been affixed to the order, as it could have been done pursuant to rules 42.10, 26.2(v) and 26.9 of the CPR, or by the court's inherent authority. Ground (c) could not therefore succeed based on the principles I have outlined, as the order would have been validly made, within the learned judge's jurisdiction, and which could be varied accordingly. The variation would not affect the outcome of the appeal as it does not affect the substance of the order made by F Williams J.

Conclusion

[109] In the light of my reasoning set out herein, it is clear that it was not likely that a different order would have been made, if the appellant had attended on the date fixed before F Williams J and submitted that the court needed the appellant's consent to make the consent order. It is also unlikely that a different order would have been made had the appellant submitted that the negotiations were incomplete despite the mediation report signed by the mediator, and both counsel, and the mediation agreement signed by both parties and their counsel. This is because: (i) the consent order made by F Williams was properly made pursuant to the applicable rules; (ii) the court did not need the appellant's consent to make the order pursuant to rules 74.12 or 42.7(5); (iii) the appellant's contention that the agreement was incomplete was not reflected in any way in the mediator's report and/or the mediation agreement; and (iv) Miss Baker's explanation in her affidavit of the reduced percentage share in the

property, accepted by the respondent in full and final settlement, was entirely reasonable and acceptable. The fact, as stated, that there was no term in the mediation agreement indicating that the mediation process was incomplete, supports Miss Baker's explanation. Additionally, the mediator's report quite clearly indicated that an agreement had been reached. It was not a partial settlement. Accordingly, Wint-Blair J (Ag)'s interpretation of the effect of the terms of the agreement cannot therefore be faulted.

[110] In all the circumstances of this case, the appellant having failed to establish that it was likely that a different order would have been made had he been present, and applying the principles outlined above, in my view, Wint-Blair J (Ag) exercised her judicial discretion correctly. It therefore cannot be said that she was "demonstrably wrong" in refusing the appellant's application to set aside the order made by F Williams J. This court therefore has no basis to interfere with the learned judge's decision.

[111] In the light of my conclusion in relation to ground (c), I would recommend that this court amend the order by F Williams J to add the words 'by consent', so that the nature of the order made can be clear on the face of the record, in keeping with rule 42.7 of the CPR. The attorneys-at-law representing the parties should be invited to sign the order, which must be filed and sealed in the registry, also in keeping with the said rule. Should the attorneys fail to sign the order within 14 days of the date of this judgment, the court should direct that the order can be filed in the registry, be sealed, and in any event, remain a valid order of the court, which can be implemented as such. The stay of execution of the order of F Williams J made on 8 May 2015, granted by

Wint-Blair J (Ag) on 23 November 2016 until the hearing of the appeal, ought to be removed.

[112] The respondent had submitted that this court should make a wasted costs order. However, there is no indication that section 30 of JAJA, and the requirements set out in rule 64.14 of the CPR have been complied with. By virtue of rule 64.14 of the CPR the respondent would have been required to serve notice on the attorney-at-law for the appellant and set out in an affidavit the grounds on which the application was being made. These requirements have to be satisfied in order for this court to consider making such an order. There was no such material placed before this court, and as a consequence, I did not find it necessary to give any consideration to that submission.

[113] I would therefore recommend that the appeal be dismissed. The order of Wint-Blair J (Ag) made on 23 November 2016 should be affirmed. The appeal having been determined in favour of the respondent, the stay of execution of the order F Williams J, granted by Wint-Blair J (Ag) ought to be removed, and the consent order ought to be signed, filed and sealed in the registry in accordance with 42.7 of the CPR, and implemented by the parties as an order of the court. Should the attorneys fail to sign the order within 14 days of the date of this judgment, the court should direct that the order can be filed in the registry, be sealed, and in any event, remain a valid order of the court, which can be implemented as such. I would also order costs both here and in the court below, to the respondent to be agreed or taxed.

McDONALD-BISHOP JA

[114] I have had the distinct privilege of reading in draft the judgments of my sisters, Phillips JA and Edwards JA (Ag). While I do appreciate the thoughtful discussion of Edwards JA (Ag) of the salient issues arising for resolution in this appeal, I regret that I cannot agree with some aspects of her reasoning, and the conclusion she has arrived at as to how the appeal should be disposed of. The reasoning and conclusion of Phillips JA accord more with my views, and so I stand in concurrence with her decision.

[115] While I am quite mindful of the detailed judgments already prepared by my sisters, I do feel constrained to add a few comments of my own, given the import of the subject matter under consideration, and the opposing views expressed by my sisters on some important aspects of the case.

[116] The issues that have arisen on this appeal concern the exercise of the powers of a judge of the Supreme Court in cases that had been referred by the court to mediation and, particularly, in which a full agreement for the settlement of the dispute had been arrived at by the parties at the mediation. It, primarily, brings into focus, as a matter of law, the provisions of rules 74.12 and 42.7 of the Civil Procedure Rules (CPR).

[117] Before embarking on a consideration of the relevant provisions and the circumstances of the case, I have considered it necessary to place the mediation process within its proper historical and legal framework, in so far as is relevant to my analysis of the issues that have arisen for resolution in the appeal. This, I believe, will serve not only as a fitting background to the discourse on the matter, but should also

promote a clearer appreciation for the conclusion I have arrived at that the appeal should be dismissed.

The legal framework for the referral to mediation

[118] On 26 April 1999, following an enquiry conducted by Lord Woolf CJ into the civil justice system of England and Wales and the release of his report "Access to Justice. Final Report", London: HMSO, 1996, the conduct of civil litigation within that jurisdiction was revolutionized with the introduction of the English Civil Procedure Rules 1998. Lord Woolf, in his report, made a number of recommendations, which were geared at improving access to justice, reducing the costs of litigation and removing unnecessary complexity in civil litigation. Many of these recommendations were implemented by the English CPR, which were designed to encourage parties to be more open and cooperative and to settle their disputes.

[119] Part of Lord Woolf's recommendations was that the court should further the overriding objectives of the English CPR by actively managing cases, which includes encouraging parties to use alternative dispute resolution ("ADR") procedures, if the court considers that appropriate, and by facilitating the use of such procedures.

[120] As reported by the learned authors of Blackstone's Civil Practice, 2004 at paragraph 70.1, Lord Woolf, in his "Access to Justice. Interim Report", London: Lord Chancellor's Department, 1995 (chapter 18, paragraphs 1 and 2), explained his reason for including ADR procedures as part of his recommendations in these terms:

> "In recent years there has been, both in this country and overseas, a growth in alternative dispute resolution (ADR) and an increasing recognition of its contribution to the fair, appropriate and effective resolution of civil disputes. The fact that litigation is not the only means of achieving this aim, and may not in all cases be the best, is my main reason for including ADR in an Inquiry whose essential focus is on improving access to justice through the courts. My second reason is to increase awareness still further among the legal professional and the general public of what ADR has to offer... From the point of view of the Court Service, ADR has the obvious advantage of saving scarce judicial and other resources. More significantly, in my view, it offers a variety of benefits to litigants or potential litigants."

[121] He recommended then that the court system and ADR should work together. He put it this way in his "Interim Report" (chapter 18, paragraph 31):

> "Where there is a satisfactory alternative which offers a prospect of resolving a dispute in a way which is to the advantage of the litigants, then the court should encourage the use of this alternative. This is the responsibility which the courts should accept. It is in their interest that they should do so."

[122] In his "Final Report" (chapter 1, paragraph 7(d)), Lord Woolf expressed the view, that although the primary role of the court is as a forum for deciding cases, it is right that the court should encourage the parties to consider the use of ADR as a means to resolve their dispute and to help them to settle a case. As he saw it, ADR is part of the court's active case management role, which, in turn, is how the court furthers the overriding objective (see Blackstone's, 2004 at paragraph 70.10).

[123] Lord Woolf's strong belief in the value of ADR to the civil litigation process was given authoritative judicial expression by him in **R (Cowl) and Others v Plymouth City Council** [2001] EWCA Civ 1935, a case concerning an application for judicial review. There, he stated:

> "[1] The importance of this appeal is that it illustrates that, even in disputes between public authorities and the members of the public for whom they are responsible, insufficient attention is paid to the paramount importance of avoiding litigation whenever this is possible. Particularly in the case of these disputes both sides must by now be acutely conscious of the contribution alternative dispute resolution can make to resolving disputes in a manner which both meets the needs of the parties and the public and saves time, expense and stress.
>
> [2] ...The courts should then make appropriate use of their ample powers under the [Civil Procedure Rules] to ensure that the parties try to resolve the dispute with the minimum involvement of the courts. The legal aid authorities should co-operate in support of this approach.
>
> [3] To achieve this objective the court may have to hold, on its own initiative, an inter partes hearing at which the parties can explain what steps they have taken to resolve the dispute without the involvement of the courts. In particular the parties should be asked why a complaints procedure or some other form of [alternative dispute resolution] has not been used or adapted to resolve or reduce the issues which are in dispute. If litigation is necessary the courts should deter the parties from adopting an unnecessarily confrontational approach to the litigation..."

[124] Our CPR, which were first promulgated in 2002, were informed and influenced by the English CPR. However, it was by way of an amendment to our CPR in 2006 that mediation, as an ADR procedure, was adopted and introduced by way of part 74.

According to rule 74.1, part 74 establishes automatic referral to mediation in the civil jurisdiction of the court through a mediation referral agency appointed to carry out the objects of part 74. The mediation regime was established for several purposes as enumerated by the rules. They are: improving the pace of litigation; promoting early and fair resolution of disputes; reducing the costs of litigation to the parties and the court system; improving access to justice; improving user satisfaction with dispute resolution in the justice system; and maintaining the quality of litigation outcomes (see rule 74.1).

[125] As the interpretation section of part 74 explains, mediation is a dispute-resolving process in which a neutral third party, the mediator, facilitates and coordinates negotiations by parties in a dispute with a view to resolving or reducing the extent of the dispute ((rule 74.2(1)). It means then that there may be full or partial resolution of a dispute by the mediation process, that is to say, that all issues in dispute between the parties, or also some of them, may be resolved by that means, thus eliminating or reducing the dispute to be resolved by the court.

[126] Part 74 possesses the force of law as the rules pertinent to meditation were promulgated by the Rules Committee of the Supreme Court pursuant to the Judicature (Rules of Court) Act. Section 4(1) of that Act states that it is the function of the Committee to make rules ("rules of court") for the purposes of the Judicature (Supreme Court) Act, among other statutes. The Act further states that rules of court, may make provision for, *inter alia*, regulating and prescribing the procedure and the practice to be

followed in the Supreme Court in all causes and matters whatsoever with respect to which the court has jurisdiction.

[127] Section 28 of the Judicature (Supreme Court) Act states, in so far as is relevant to these proceedings, that the jurisdiction of the Supreme Court "shall be exercised so far as regards procedure and practice in a manner provided by this Act, and the Civil Procedure Rules...".

[128] The CPR is, therefore, a legitimate source of law for the exercise of jurisdiction in the civil division of the Supreme Court. It therefore means that a judge of the court is bound to apply the CPR to a given situation once the rules are applicable. It follows from all this that the court has the jurisdiction to invoke the mediation process established by the CPR, and is bound to abide by the provisions of the CPR relating to the process. The same applies to the parties to the litigation and their legal representatives, if the parties are represented. The mediator who conducts the mediation must also comply with the provisions of the relevant rules as well as with the standards of certification that mediators must meet before being certified. He must also abide by the code of conduct for mediators approved by the Chief Justice (rule 74.7(2)).

[129] It is to the court that the mediator must ultimately report, upon the completion of the process, and it is the court that must have the final say as to how a matter should proceed after a referral to mediation. These are the features of the court-annexed mediation procedure. It is clearly court-driven and so must be taken seriously by litigants and their legal representatives.

[130] Any discussion of issues relating to the mediation process must, therefore, commence with an inward look to the relevant provisions of the CPR. Accordingly, the pre-CPR authorities, which do not specifically treat with proceedings involving court-annexed mediation, would not serve as suitable guides to the resolution of issues arising from the mediation process. This is a critical consideration, particularly in the light of case law cited by the appellant, which treats with consent orders at common law, as well as the issues that have arisen for resolution in this appeal.

[131] The CPR set out the scope and application of part 74. It makes it clear in rule 74.3(1) that while the part relates generally to all matters arising in the civil jurisdiction of the court, there are matters that are exempted from automatic referral. One such exception of immediate relevance to this appeal is fixed date claims under rule 8.1.

[132] However, rule 74.3(1), which creates the exemption, is subject to rule 74.3(2). Rule 74.3(2) provides that a judge or master may by order direct mediation in any proceedings. This means that a referral may be made to mediation, even if the proceedings were commenced by a fixed date claim. This referral can be done at any time (rule 74.3(5)). The parties to any matter may also consent, prior to pre-trial review, for the matter to be referred. So, although some matters may not fall within the automatic referral scheme, the court still has the power to refer such matters, as it thinks fit, to mediation and parties may also consent to a referral of their dispute.

[133] In this case, the claim was one commenced by way of fixed date claim form. It was, however, referred to mediation by the court outside of the automatic referral

scheme. By virtue of rule 74.3(2), the referral would not run afoul of the CPR, and no issue arises on appeal that this referral was not properly made. This court must, therefore, proceed on the premise that the referral to mediation was properly made.

[134] I find too that nothing of materiality in this case would be affected by the fact that the referral to mediation was not automatically made. No distinction is made in the CPR between matters that are referred automatically, and those that are not so referred otherwise, in so far as the conduct of the process is concerned, and what is to obtain upon the completion of the process. So, once the referral is made, the relevant provisions of the CPR, treating with the procedures to be engaged following the referral, would become operable, without regard to whether or not the referral was automatically made.

Whether F Williams J had no jurisdiction to make the order pursuant to the mediation agreement

[135] In the instant case, upon the completion of the mediation process, the mediator filed his report as required by rule 74.11(1). He indicated in that report that "the parties have reached full agreement" and a signed copy of the agreement was attached to the report. The report and the mediation agreement were indisputably signed by the parties, their attorneys-at-law and the mediator. It means that all persons concerned at the mediation accepted that there was no issue in dispute between the parties on the claim before the court that remained outstanding for resolution, either by further mediation or by the court. It was this signed report, with the signed attached mediation agreement, that was filed at the registry by the mediator.

[136] Upon the filing of the report by the mediator, the operation of rule 74.12 would have been triggered. The rule states:

> "Action by the court after filing of report
>
> 74.12 (1) Where an agreement has been reached, the court must make an order in the terms of the report [pursuant to rule 42.7].
>
> (2) Where the report states that no mediation has taken place or that no agreement was reached, the Registrar must immediately fix a case management conference, pursuant to rule 27.3 and give notice to the parties as required by that rule."

[137] It is important to note that the rule does not expressly require that notice be given to the parties to attend the court for the making of the order, where an agreement has been reached, and there is nothing to suggest that such a requirement is necessarily implied. This is contrasted with rule 74.12(2), which states that a notice for attendance at a scheduled case management conference must be given by the registrar, in situations where no mediation had taken place, or where no agreement was reached. The registrar's responsibility to schedule a date and to give notice of the date is expressly and unequivocally stated in respect of rule 74.12(2), but not so in relation to the companion sub-rule dealing with the situation where an agreement is arrived at.

[138] Furthermore, a thorough examination of the CPR has revealed that in all cases where notice is required, it is expressly stated, and in almost all instances, the requisite

notice period is also prescribed. See for example: rule 15.4 (application for summary judgment); rule 26.2(4) (when the court is making orders on its own initiative); rule 26.4(4) (consideration by the court of a striking out application); rule 27.3(6) (case management conference date); and rule 27.13(1)(b) (fixing of a trial date). It is my view, therefore, that if it were intended for the parties to be given notice to attend court before the order may be made by a judge, when there is a mediation agreement, the requirement would have been clearly expressed with the prescribed notice period stated.

[139] It seems to me that the framers of the rules may not have considered it necessary to require the parties and/or their attorneys to attend for the making of the order by the court. This is because of the stringent requirements of the CPR in relation to the mediation process in addition to the strength of the report, which bears the signatures of all relevant parties to the mediation, indicating that a full agreement had been arrived at. The framers of the rules must be taken to have intended that the court should be able to act on the signed report from the mediator, containing the signed agreement arrived at between the parties. This would have been after a circumscribed and circumspect procedure in which all relevant parties, with their legal representatives, would have participated.

[140] The mediation agreement must, therefore, be taken by the court as representing a proper contract between the parties to the dispute, and so nothing more would be needed to satisfy the court that a valid and legally binding agreement was arrived at between them. It is no doubt for that reason that rule 74.12(1) stipulates that the court

must (as distinct from **may**) make an order in the terms of the report, and there is no requirement for any notice to the parties to attend upon the court to give their consent for the order to be made in terms of the report. The order to be made, in resolving the dispute between the parties, would have been known and understood by them. There would be no useful purpose served for any party to the agreement to attend upon the court, unless upon an application made to the court to set aside the agreement on one or other of the usual vitiating grounds (fraud, duress, mistake, etc). It saves time, expenses and costs, in keeping with the overriding objective.

[141] I would venture further to add that the making of an order, based on a mediation report, without requiring the parties to attend court, is not at all strange, unjust or impermissible. It is part and parcel of the court's case management powers under the CPR. Rule 26.1(2)(n), for instance, provides that except where any rule provides otherwise, the court may deal with a matter without the attendance of the parties.

[142] Be that is it may, in this case, the registry, upon receipt of the report, had scheduled a date for the mediation agreement to be approved by the court, and notice of the date was issued to the parties. So, this is not a case where notice was not given, even if required. On the date fixed by the registry for F Williams J to make the order in terms of the report, as stipulated by the rule, one party (the appellant), and his legal representatives were absent. The record before the learned judge showed that service was effected upon the appellant (through service on his counsel). With proof of service of the notice and with there being no explanation before the learned judge for the

absence of the appellant and his counsel, the learned judge proceeded to deal with the matter in their absence.

[143] There is nothing to prevent a court from making an order in all circumstances where it is satisfied that notice of the hearing at which the order will be made was given to the parties, and there is nothing communicated to the court explaining the absence of a party so notified. This is a common course for a court to adopt, and one permitted by law. The court must have control of its proceedings to ensure proper management of cases before it. There is thus no duty for the court to adjourn any matter to await the attendance of a party who it is satisfied has had proper notice of the relevant proceedings. It is all a matter of discretion. There is nothing in this case to say that F Williams J exercised his discretion wrongly when he proceeded to deal with the matter in the absence of the appellant, given that he had no reason before him for the absence.

[144] Furthermore, quite apart from there being no provision in the rules for the attendance of the parties, and the fact that it was not incumbent on the judge to adjourn the matter in the absence of the appellant, even more importantly, there is no provision that the court should first obtain the consent of the parties to the making of the order. There is no rule requiring the attendance of parties after mediation where a full agreement had been arrived at in settlement of the dispute, the subject of the claim. The power to make the order is predicated upon the agreement of the terms of the settlement of the claim, arrived at by the parties at the court-referred mediation. The court could have dealt with the matter without the attendance of the parties on the

strength of the duly executed agreement. The mediator would have stood between the parties, as the unattached and objective court-appointed umpire, to engender confidence in the court to accept that an agreement was duly arrived at (the fact that the mediator is from an approved list of persons established by the court itself cannot be ignored in the scheme of things). This is not like an agreement arrived at between the parties outside the court-endorsed mediation scheme, where the court would have had to take steps to ensure that all parties agree, in truth and in fact.

[145] It is for that reason that the rules provide that the order is made in terms of the report, pursuant to rule 42.7 (which governs consent judgments and orders) and not rule 42.5 (which treats with "[d]rawing and filing of judgments and orders" generally). Rule 74.12 provides for the order to be made in terms of the report, pursuant to rule 42.7 because it is, in substance, an order being made based on an agreement between the parties as to how the dispute between them should be determined, as evidenced by the mediation report, and not on terms ordered by the court of its own volition. It is for that reason that the order is not to be drawn up in the form and manner stipulated by rule 42.5, because the judge has no input in the terms of the agreement contained in the mediation report on which the order is based.

[146] The rule could not properly dictate that it is obligatory on the judge to make the order, while at the same time requiring the parties' consent to first be obtained before the order may be made. Those two requirements would be inherently inconsistent with each other, because absence of the consent of any party to the order would mean that the judge cannot make the order, while the requirement that it is obligatory on the

judge to make the order would mean that he would have to do so, whether or not there is consent of the parties. Plainly, this would be unworkable.

[147] In my view, the rule is clear on its literal reading, and as a matter of common sense, that it is obligatory on the judge to make the order, once he is satisfied that a full agreement had been arrived at between the parties during the mediation process. He can do so without their consent to him making the order on the basis of the duly executed mediation agreement and the duly signed mediation report.

[148] The pronouncement of the order in terms of the report is, therefore, as a result of the jurisdiction conferred on the court under rule 74.12. In other words, the court's jurisdiction to make the order is pursuant to rule 74.12 that deals specifically with mediation agreements. So, part 42 (of which rule 42.7 is a sub-rule), can only be applied to mediation agreements, to the extent that rule 74.12(1), the rule which confers the jurisdiction for the making of the order, incorporates it.

[149] In this regard, it would be useful to invite attention to rule 42.1, which states:

> "42.1 (1) This Part contains rules about judgments and orders made by the court.
>
> (2) They do not apply to the extent that any other rule makes a different provision in relation to the judgment or order in question."

So, the provisions of rule 42.7 must be read in light of and subject to the provisions of part 74, where mediation agreements and orders made pursuant to such agreements are concerned.

[150] It is clear, therefore, that having conferred jurisdiction on a judge to make an order upon a mediation agreement arrived at by the parties, the framers of the rules had seen it fit to have such orders drawn up as consent orders. This is, simply, because of the nature of the order, it being based on the written agreement of the parties, which is required by rule 74.10(5) to be signed by the parties and their attorneys-at-law (if any), and not as a result of the input or the adjudicative process of the court. Hence the correlation or interplay between rule 74.12 and rule 42.7(5).

[151] In this case, rule 42.7(5) would have become operable upon the pronouncement of F Williams J's order in terms of the mediation report, pursuant to rule 74.12. Rule 42.7(5) reads:

> "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."

[152] Rule 42.7(5) is, therefore, prayed in aid, in so far as the drawing up, signing and sealing of the order is concerned. It must be noted that rule 42.7(5) does not require the consent or signature of the parties themselves (as distinct from their attorneys-at-law) to the order. This is obviously because the agreement filed by the mediator and signed by the parties, would have signified their consent to the terms of the order which would have been made by the court. The order would contain the agreement

arrived at by the party and nothing else. One can see nothing objectionable to that in the absence of any averment of fraud, duress or mistake, or any other matter which would vitiate consent.

[153] It means then that the order pronounced by the judge to be in terms of the report, must be drawn up in the terms of the mediation agreement, in accordance with rule 42.7(5)(a). If the parties agreed for the terms to be confidential, then that would be reflected in the order. It would still represent the terms of the agreement arrived at. If the terms are not agreed to be confidential and are expressly disclosed, as in the instant case, then the order must be drawn up in those terms.

[154] The order must also be expressed as being 'by consent', in keeping with rule 42.7(5)(b). The rule does not say that consent must first be obtained to trigger the application of this sub-rule. The consent would be manifested by the parties' signatures and those of their attorneys-at-law (where represented, as in this case) to the mediation report and the agreement itself. So, the rule merely indicates how the order should be worded, and has not set out a pre-requisite for the making of the order. The requirements of rule 42.7(5) certainly do not go to the question of jurisdiction.

[155] Also, the requirements that that order should be signed by the parties' attorneys-at-law (rule 42.7(5)(c), and filed at the registry for sealing (rule 42.7(5)(d)), cannot be read as requiring the attorneys-at-law to prepare and present a draft order for signing by the judge before the order is made. There can be no signing or sealing of the order until the order is made by the court, based on how the rule is worded. The wording of

rules 74.12 and 42.7 are in contradistinction to, say, rule 11.7, which requires a draft order to be filed by the party at the time of the filing of a notice of application for court orders. There is no such requirement for a draft order to be filed before the making of an order by the court under part 42 (see rules 42.7 and 42.5).

[156] It is clear to my mind that rule 42.7(5)'s stipulations are not 'pre-order' but rather 'post-order' stipulations, that is to say, that there must first be an order made by the judge, before the requirements of 42.7(5) can come into play. Furthermore, a draft order cannot confer jurisdiction.

[157] It is for these reasons that I find it difficult to agree with Edwards JA (Ag) that the judge, before making the order under rule 74.12(1), should have ensured that rule 42.7(5) was fully complied with. The only thing the judge needed to be satisfied about before making the order is that there was a full agreement between the parties as indicated by the terms of the mediation report. Once he was so satisfied, and there is nothing to say he had no basis to be so satisfied, he was obliged to make the order in terms of the report. Thereafter, the order to be drawn up must be done in the terms of the agreement arrived at, as indicated in the report. Therefore, in the end, nothing turns on the use of the words "in terms of the report" in rule 74.12 as distinct from "the terms of the agreement" because the terms of the agreement arrived at by the parties must be reflected in the order to be drawn up, pursuant to rule 42.7(5)(a). The report contains the agreement arrived at as to how the dispute between the parties should be resolved. The judge had not made an order in terms of what was not agreed by the

appellant. In fact, to date, the appellant has not challenged the terms of the mediation agreement, which was reflected *verbatim* in the order.

[158] There is no question that F Williams J had the jurisdiction to make the order he did in terms of the mediation report and had the jurisdiction to do so in the absence of the appellant, and without his consent. F Williams J cannot be faulted in proceeding to carry out the dictates of rule 74.12(1), to make an order in the terms of the mediation report, in the absence of any application filed by any of the parties to set aside the mediation agreement. That rule is the source of law from which his jurisdiction flowed to make the order he did. There is, therefore, nothing unlawful or inherently unjust in what the judge did in making the order.

[159] If the attendance at court and the express consent of the parties are required before an order in terms of a mediation agreement may be made, then that must be seen as a shortcoming in the rules for not so providing. This shortcoming, if it may correctly be viewed as such, would warrant a call for the necessary amendment to be made to the CPR and ought not to be used to deprive the court of the jurisdiction clearly conferred by the rules. The alleged shortcoming cannot, fairly and justifiably, be laid at the feet of the judge who complied with the rules of court in making the order in terms of the report, as he was obliged to do. The learned judge did exactly what he was mandated to do by rule 74.12(1), and there is no basis for this court to hold that he acted without jurisdiction.

Whether the failure to comply with rule 42.7 renders the judge's order null and void

[160] It is clear that the order did not comply fully with rule 42.7(5) for, apart from being drawn up in the terms of the agreement arrived at by the parties in accordance with sub-rule (1), it was not expressed as being 'by consent' or signed by the parties' attorneys-at-law. The failure of the order to conform to the stipulations of rule 42.7(5) does not, in my view, render the judge's order a nullity. The jurisdiction of F Williams to make the order was not affected by any failure to comply with the requirements of rule 42.7(5). The jurisdiction to make the order is distinct from the contents and form of the order. The highest that the non-compliance with rule would be is an irregularity. It is settled law that an irregularity can be rectified, while a nullity cannot be. Accordingly, I cannot accept the appellant's contention that the order made by F Williams J in the terms of the agreement he had arrived at the mediation, is void *ab initio.*

Was Wint-Blair J (Ag) wrong in refusing to set aside the order of F Williams J?

[161] Wint-Blair J (Ag) was correct in refusing to set aside the order on the grounds of alleged want of jurisdiction on the part of F Williams J and or for non-compliance with rule 42.7.

[162] There is no consequence specified in the CPR for a failure to comply with rules 42.7(5)(b) and (c), which stands as the non-compliance in this case. It means then that rule 26.9 would apply. Rule 26.9 confers a general power on the Supreme Court to rectify matters where there has been a procedural error. More specifically, rule 26.9(2) states that an error of procedure or failure to comply with a rule does not invalidate any

step taken in the proceedings, unless the court so orders. The failure to comply with rule 42.7(5) cannot invalidate the order made by the learned judge, approving the mediation agreement, which was a step taken in the proceedings within the meaning of rule 26.9(3).

[163] In the light of the wide powers of case management bestowed on a Supreme Court judge, Wint-Blair J (Ag) could have taken the necessary steps to make matters right by rectifying the order to be expressed as being 'by consent'. The contention of Wint-Blair J (Ag) that rule 42.7(5) is merely directory and not mandatory cannot be accepted. The appellant is correct in this contention in ground (d). It was an irregularity and she could have corrected it. This is in keeping with the same rule 26.9(3) which states, in so far as is relevant, that where there is a failure to comply with a rule, the court may make an order to put matters right. Furthermore, rule 26.1(2)(v) provides that the court may take any other step, give any other direction or make any other order for the purpose of managing the case and furthering the overriding objective.

[164] The appellant has argued before this court that the judges below were wrong to give effect to the mediation agreement, not on the basis that the agreement was not arrived at between the respondent and him, but on the basis that he did not consent to the court order and that there were outstanding issues not resolved. In fact, to date, the appellant has not challenged any terms contained in the agreement, which would have been made the terms of the court order. His position that there were unresolved issues is, however, contradicted by the mediation report, which was before the learned judges. Wint-Blair J (Ag), being the judge who was to determine whether, had he been

present a different order would have been made by F Williams J, was entitled to examine the credibility of the appellant's assertion concerning unresolved issues on which he was contradicted by the respondent.

[165] It was within the sole discretion of Wint-Blair J (Ag) to form a view as to whether the appellant should be allowed to litigate those matters he said were outstanding. A strong indicia militating against the appellant, was the fact that he, with his attorney-at-law, had signed off on the agreement as being a full agreement, not a partial one. There was too the indication of the mediator as well as of the respondent and her attorney-at-law that a full agreement was arrived at. There was nothing to indicate outstanding or unresolved issues between the parties. The appellant was not on solid ground with his assertion, particularly, as his contention was against the weight of the undisputed documentary evidence of his assent to the agreement. It was open to Wint-Blair J (Ag) to reject him as a witness of truth. There is no basis on which this court could interfere with her finding in that regard, as it cannot be said that she was plainly wrong in coming to that conclusion.

[166] Furthermore, when one examines the parties' statements of case that were before the Supreme Court, and which were referred to mediation, there was no issue arising on the claim that was left for ventilation by the court. So, for all intents and purposes, this was a claim that was resolved at mediation, in that, the mediation agreement would have settled the issues arising between the parties on the fixed date claim form. It is also for this reason that Wint-Blair J (Ag) cannot be faulted for refusing to set aside the order of F Williams J, as all matters relative to the claim were dealt with

at mediation, as evidenced by the mediation report. There is no proper basis on which this court could interfere with her finding in that regard and with the exercise of her discretion in refusing to set aside the order of F Williams J.

[167] Had the appellant been present before F Williams J, it is not at all likely that a different order would have been made in all the circumstances of the case and having regard to the construction of rules 74.12 and 42.7.

[168] I can discern nothing in the *ratio decidendi* of any of the cases relied on by the appellant that can avail him in the special circumstances of this case. I cannot fault Wint-Blair J (Ag) for finding them unable to assist his cause. Ground (e) is without merit.

[169] Apart from ground (d), I find that the grounds of appeal failed. Ground (d) however is not sufficient for this court to interfere with the decision of the learned judges and to set aside the orders made by them.

Approach of this court in treating with the orders

[170] Before this court is an order that was properly made on the basis of the mediation agreement, but which was not fully drawn up in compliance with the rules of court. There was thus an irregularity in the drafting of the order, which could have been rectified. Wint-Blair J (Ag), not having rectified the situation, this court has the power to make things right, pursuant to the Court of Appeal Rules (CAR) and the general law. I share the views of Phillips JA that given that this appeal is by way of re re-hearing, this court could seek to act within the parameters of the CAR to rectify the irregularity in the

order, thereby giving effect to the rules of the Supreme Court, including the overriding objective. I therefore endorse her application of all the relevant rules of this court, as detailed in her judgment at paragraphs [103] to [108].

[171] There is no real risk of prejudice to the appellant who, indisputably, consented to the terms of the mediation agreement that have been approved by the court and which he has not challenged on appeal.

[172] I too would dismiss the appeal and concur with Phillips JA that the consequential orders proposed by her be made the final orders in the disposition of the appeal.

EDWARDS JA (AG) (DISSENTING)

[173] I have had the privilege to read in draft the judgments of Phillips JA and McDonald-Bishop JA and I agree with most of their reasoning on the interplay between part 74 and rule 42.7 of the Civil Procedure Rules 2002 (CPR). However, it is with great regret and utmost respect that I find myself unable to agree with their interpretation of the relevant rules and their conclusion on the effect of the interplay between these rules.

[174] In this case, the parties were before the court in proceedings for division of property under the Property (Rights of Spouses) Act (PROSA) which was begun by fixed date claim form filed 15 June 2012. This meant that their matter was not one subject to automatic mediation under part 74 by virtue of the exception in rule 74.3(1). They were, however, ordered with their consent, to conduct mediation, pursuant to rule

74.3(2) which empowers a judge or master to direct that mediation takes place in any proceeding. I accept, therefore, that nothing turns on this point.

[175] The parties having gone to mediation, they arrived at a mediation settlement agreement and the agreement, signed by them as well as the mediator and witnessed by their attorneys-at-law, was filed in court by the mediator along with his report, pursuant to rule 74.11. The registrar, thereafter, gave "Notice of Appointment to Approve Mediation Settlement" to the attorneys-at-law for both parties. It is worthy of note that there is no provision in the rules for such an appointment to be made. Only one side (the respondent's attorneys) turned up for this appointment which was set to be heard by F Williams J (as he then was) on 8 May 2015.

[176] F Williams J, on that day, made a 'consent order' in terms of the mediation report. The order drafted by the respondents did not bear the words 'by consent' (as required by rule 42.7(5)(b)) and was not signed by either party or their attorneys-at-law (as required by rule 42.7(5)(c)) but was, in fact, drafted for signature by the judge or the registrar. It was, in actual fact, signed by the registrar. The order, therefore, was not drafted in the format required by rule 42.7 of the CPR, which governs consent judgments and orders. This is significant for reasons I will state later. The appellant was aggrieved by the action of F Williams J and appealed to this court on the ground that there was no consent to the order, and therefore, the judge had no jurisdiction to make the order he did. He was further aggrieved by the action of Wint-Blair J (Ag) who later refused, on the appellant's application, to set aside the order of F Williams J.

[177] The majority of this court have taken the view that the absence of the words 'by consent' on the order does not make it less a consent order, and, in principle, I agree with that approach. If the order were truly a consent order, the fact that the words 'by consent' is absent would be of little moment and could be corrected under the slip rule provided for in rule 42.10 of the CPR, as well as by virtue of the court's powers under rule 26.9(3). By virtue of these two rules under the CPR, the court may at any time correct any error, accidental slip or omission in a judgment or order, or it may make an order to put matters right where there has been an error in procedure or failure to comply with a rule, practice direction, court order or direction. It must, however, be a genuine slip or omission or error of procedure. Where I take issue, however, is with the conclusion of the majority that the order made by F Williams J was, in fact, a consent order made by the parties and that there was only an error in the form of the order which the court can rectify. In my view it was not, and therefore, it must be set aside.

[178] The issue is to be determined by the interpretation that is to be placed on the relevant rules in part 74 and part 42 of the CPR as amended in 2006. Rule 74.1 provides for automatic referral to mediation in the civil jurisdiction of the court. Its purposes are stated, *inter alia*, to be for the improvement in the pace of litigation; promoting early and fair resolution of disputes; reducing the cost of litigation; and improving access to justice. All cases are automatically referred to mediation except fixed date claims under rule 8.1; administrative law proceedings under part 56; writs of Habeas Corpus under part 57; bail applications under part 58; and non-contentious

probate and admiralty proceedings under parts 68 and 70, respectively (per rule 74.3(1)).

[179] Where a claim is subject to automatic referral to mediation under part 74, all parties and their attorneys-at-law, where they are represented, must attend mediation sessions. Any agreements reached by the parties at mediation must be recorded in writing and signed by the parties and their attorneys-at-law, if they are represented.

[180] The mediator is expected to file a report to the court. Rule 74.11 deals with the report of the mediator. This rule is important, so I will set it out in full. It states:

> "(1) Subject to any extension pursuant to rule 74.8 (2), within 8 days of the completion of the mediation and in any event, within 98 days of the referral, the mediator shall file a report in form M5 at the registry, indicating:
>
> a) the date(s) of the mediation;
>
> b) the persons receiving notice and the date of notification of the last mediation session;
>
> c) the persons who attended the mediation;
>
> d) **whether agreement was reached**; and
>
> e) where no agreement or a partial agreement was reached, whether the parties are prepared to continue with mediation and the mediator considers that there are reasonable prospects of an agreement being reached if an extension of time is granted.
>
> (2) **Where an agreement is reached between the parties, the signed written agreement shall accompany the report or be filed at the registry not later than 30 days after the completion of**

the mediation, unless it is a term of the agreement that it remains confidential.

(3) Where the written agreement does not accompany the report but it is to be filed, the mediator shall indicate in the report who will be responsible for filing the written agreement." (Emphasis added)

If the parties have reached an agreement, the signed written agreement must be filed in court by the mediator, or if he does not file it, he must indicate which of the parties is responsible for filing the agreement in court. The agreement need not to be filed in court if its terms are confidential.

[181] By virtue of rule 74.12, where an agreement has been reached the court must make an order in terms of the 'report' (pursuant to rule 42.7). Rule 74.12 entitled "Action by the court after filing of report" states:

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

(2) Where the report states that no mediation has taken place or that no agreement was reached, the Registrar must immediately fix a case management conference, pursuant to rule 27.3 and give notice to the parties as required by that rule."

[182] The report of the mediator is made on form M5 in the CPR, which is titled "REPORT OF MEDIATOR" and refers to rule 74.11. That form, when filled out by the mediator, is to be filed in the Supreme Court of Jamaica under the claim number of the original claim, with the names of the claimant and the defendant, as they would have appeared on the claim. It then requires the names of the attendees at mediation, the

dates on which the mediation was held, to whom notice of the final session of mediation was given, if that party did not appear. It then provides, at paragraph 4 of the form, for the mediator to indicate by ticking a box, whether the mediation was aborted; whether the parties met and did not agree; whether there was partial settlement; whether an extension of time is required; whether the parties have arrived at a full agreement; or whether the claim and defence are settled and the parties will keep the agreement confidential. It then requires a copy of the agreement to be either attached or sent in within 30 days of the mediation. The form is to be signed by the mediator, the claimant or his attorney-at-law and the defendant or his attorney-at-law.

[183] In considering that rule 74.12 requires the order to be made in terms of the mediation report pursuant to rule 42.7, it is important to note that rule 74.12 does not require the court to make an order in terms of the mediation 'agreement' but requires it to do so in terms of the 'report'. The order in dispute was made in terms of the 'agreement' and so it is necessary to determine the practical effect of that omission. The mediation 'agreement' is not the 'report'. The report is simply a form. It may state, if that box is ticked, that an agreement has been reached and a copy is accompanying the report, or that the agreement will be filed at a later date. The terms of the agreement are not written in the report, do not form part of the report, and are in a separate document.

[184] The majority have read the rule in such a way as to equate the report with the agreement. However, I disagree with that interpretation. I cannot agree that because rule 74.12 states that the court must make an order in terms of the 'report', this gives

the court the power to make a consent order in terms of the mediation 'agreement', without the further consent of the parties, or that their consent to the order is to be implied from their mediation agreement filed in the court. To my mind, if that was the intent of the framers of the rules, it would not be necessary for rule 74.12 to refer to rule 42.7. Rule 74.12 could simply have stated, for example, that if the parties have settled at mediation, within seven or howsoever many days after the filing of the report, the court must make an order in terms of the settlement agreement. The framers of the rule did not word the rule in that way, however, and in my view, it must be taken that they deliberately refrained from doing so.

[185] Part 42 was in existence long before the CPR was amended to include a part 74. Part 74 was a 2006 amendment to include court annexed mediation in the rules. If the intent of the draftsmen was to cause mediation agreements, once filed in court, to automatically become consent orders without an application from the parties, this could have been expressly stated in part 74, without any need to resort to part 42.

[186] Rule 42.7 deals with consent orders and judgments. This rule presupposes that the parties have agreed terms which they wish to formalise into a judgment or order. The rule stipulates how this is to be done and what claims can be dealt with in this way. Rule 42.7(1)(b) provides that all the relevant parties must agree with the terms in which judgment should be given or an order made. Rule 42.7(2) lists the types of judgments or orders to which the rule applies. It includes an order for dismissal of a claim, and for stay of proceedings on terms attached as a schedule to the order but not

part of it (Tomlin Orders). It also includes procedural orders by consent. Rule 42.7(2) provides that:

> "Except as provided by paragraphs (3) and (4), this rule applies to the following kinds of judgment or order-
>
> (a) a judgment for -
>
> (i) the payment of a debt or damages (including a judgment or order for damages or the value of goods to be assessed)
>
> (ii) the delivery up of goods with or without the option of paying the value of the goods to be assessed or the agreed value; and
>
> (iii) costs.
>
> (b) An order for-
>
> (i) the dismissal of any claim, wholly or in part;
>
> (ii) the stay of proceedings on terms which are attached as a schedule to the order but which are not otherwise part of it (a 'Tomlin Order');
>
> (iii) The stay of enforcement of a judgment, either unconditionally or on condition that the money due under the judgment is payable on a stated date or by instalments specified in the order;
>
> (iv) setting aside or varying a default judgment under Part 13;
>
> (v) the payment out of money which has been paid into court;
>
> (vi) the discharge from liability of any party;
>
> (vii) the payment, assessment or waiver of costs, or such other provision for costs as may be agreed; and
>
> (viii) any procedural order other than one falling within rules 26.7(3) 03 27.8(1) and (2)."

[187] There are some exceptions to the rule listed in rule 42.7(3) and (4). However, rule 42.7(5) states that:

> "Where the 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."

[188] An examination of rule 42.7 shows that the court must ensure that the rule applies before the order is made. If the rule applies, the order must be drawn in the terms agreed by the parties; expressed to be 'by consent'; signed by the attorneys for each party to whom the order relates; and then filed in the registry.

[189] The rule is specific as to the types of judgments and orders to which it applies. The reference to the rule in part 74 raises two issues. Counsel for the appellant has argued that the amendment in 2006 to the CPR meant that mediation agreements are now included in rule 42.7. I have no disagreement with that argument based on rule 74.12. The second issue, however, is less clear, that is, how is its inclusion to be viewed? Rule 42.7(2)(a) speaks to the kind of judgments to which the rule applies. A mediation agreement is not a judgment. However, in their agreement, the parties may ask for a judgment to be entered 'by consent', which accords with the rule, that is, a judgment for the payment of a debt or damages; the delivery up of goods with or

without the option of paying the value of the goods to be assessed or the agreed value; and costs.

[190] The rule also speaks to the type of orders to which it applies. A mediation agreement is not an order, but an order can be made based on the agreement. But 42.7(2)(b) speaks to the type of orders which can be made under the rule. Therefore, even though a mediation agreement can be formalised into an order pursuant to rule 42.7, the question arises whether the substance of the agreement, the terms of which are to be made into a judgment or order, must be in accordance with those specified in rules 42.7(2)(a)(i), (ii), and (iii) and 42.7(2)(b)(i)–(viii). In this case, the substance of the agreement does not fall into any of those listed in the rule. McDonald-Bishop JA is of the view that once the matter has been sent to mediation and an agreement has been reached, rule 42.7, by virtue of rule 74.12, will then apply to the subject of that agreement and therefore to the order to be made by the court. Fortunately, it is not necessary to decide that point in this appeal.

[191] To my mind the effect of reading rules 74.12 and 42.7 together, is that where the parties agree at mediation, and the report, accompanied by the agreement, is filed in court, the court is empowered at the appointed date and time to consider the report stating that an agreement had been reached. The court is empowered to make an order in terms of the report that the parties have settled at mediation. If the parties wish for a consent order in terms of the settlement agreement arrived at they must make a draft consent order, drawn up in the terms of the mediation agreement, the court will then make the order in those terms "by consent'. The order then takes effect

at pronouncement because the draft order would already have been drawn up and signed by the parties' attorneys, on the instructions of their clients, and as required by rule 42.7(5).

[192] I am fortified in my view by the fact that rule 42.5(2) of the CPR provides that every judgment or order must be drawn up and filed at the registry by the claimant or applicant. There are exceptions to this general rule and consent orders under rule 42.7 is one such exception. However, although rule 42.7(5) sets out the form the consent judgment should take it does not state who should draft it. Rule 42.5 states that every judgment or order should be drawn up by the claimant or the applicant or any other party so directed by the court unless it is a consent order under rule 42.7. However, rule 42.7 is silent as to who should draw up the consent order or judgment. To my mind however, implicit in the form of the order in rule 42.7(5) is the clear intent that any such consent order must be drawn up with the agreement and consultation of both sides, which is why it is made exempt from drafting by one party under rule 42.5.

[193] Upon the making of this consent order, it becomes enforceable against the parties as an order of the court. It is therefore enforceable in the same proceeding, and there is no need to bring fresh action to enforce its terms.

[194] The practical effect of mediation, regardless of its jurisprudential genesis, is not to force parties out of their right to take court action, but where settlement has been achieved, the parties must decide how to record their agreement, 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, the mediator has the responsibility to inform the court. The agreement itself can be viewed as a contract, which is binding, even if it is not made into a formal order of the court, or the parties may agree to utilize the benefit of the court rules and formalize their agreement into a consent order in court. That, to my mind, is the only rational reason for the framers of the amended rules in part 74 to make any reference to part 42.

[195] In this case, the order made by F Williams J was not expressed to be 'by consent', and was not signed by the parties' attorneys-at law as required by rule 42.7(5). The majority take the view that since the order is made in terms of the mediation agreement entered into by the parties, then any order made by the court subsequently must be 'by consent', and it is only a matter of form to correct the order to so reflect. However, to my mind, this leaves open the question of how the court should view the absence of the signatures of the parties' attorneys, which indicates assent and which are required by the rules for the order to be a consent order. I also do not agree that the court is empowered to use its considerable powers to direct the attorney to sign the order after it has been pronounced, where that attorney's client is disputing the fact of his consent to the order.

[196] I have also considered that nowhere in the rules does it state that a litigant, by attending mediation, and arriving at a settlement, has also agreed to a consent order being entered. There is also no rule that states that the court is empowered to direct a litigant or their attorney to sign a consent judgment. Also of concern to me is that the parties to the mediation agreement are the parties to the claim. The attorneys are not

parties to the claim or the agreement. The attorneys can only sign the formal order, on the instructions of their clients, in order to satisfy the rules, which require their signature signalling that the parties have consented to the order. If the court takes the approach that the settlement agreement is to be converted automatically to a consent order simply by the filing of the mediator's report in court, it raises several unanswered questions, such as:

i. Who will be directed to sign the perfected order to accord with rule 42.7(5), if a dispute arises, as it has in this case?

ii. Whether an attorney, although an officer of the court, can sign a consent order on behalf of a litigant, even though he has no instructions from the litigant to do so?

iii. What will the court do if one of the parties is unrepresented?

iv. What form will the sanction for refusal to sign take?

v. What happens if the report is filed but the agreement is not filed even after the expiry of the period for filing the agreement?

[197] The rules do not require the parties' signature to the consent order, although they are the parties to the agreement, therefore, they cannot be directed to sign the order. The court will have to direct the attorneys to sign, even though they are not the

parties to the agreement, and may no longer even represent the party disputing the consent. If one party is represented and the other is not, the consent order can only be signed by the attorney for the represented litigant.

[198] I cannot help but reiterate that the rule empowers the court to make the order in the terms of the report and not the agreement. The report is not the agreement and the agreement does not form part of the report even though it may be attached to the report or may accompany it. It is a separate document which may or may not accompany the report. I do not find that there is anything irrational in interpreting the rules in a manner which results in the parties entering into a separate consent order pursuant to rule 42.7. An illustration will suffice, I think. The parties may settle at mediation but on confidential terms. The court will only be able to make an order stating that the parties have settled. The terms will not be filed in court, and therefore, there will be no terms to incorporate into a consent order. The practical effect is that if there is a breach of the confidential terms, the innocent party must sue on the agreement and not on the court order. This is an uncontroversial fact, and the fact that the parties are allowed to enter into confidential agreements does not impugn the rational for mediation. It is simply the consequence of the parties choosing to make their agreement confidential so that there will be no 'consent order in terms' to be enforced.

[199] I am firmly of the view, that in the absence of the parties, and in the absence of a draft consent order signed by the attorneys for the parties, the only order a court is empowered to make is an order in terms of the report, that is, that the matter is settled

at mediation. That would be a judicial order and the parties would be left to either comply with the terms of the agreement, or it would be for the innocent party to sue on the agreement. I do not believe that my interpretation of the rules would cause mediation to otherwise be a waste of time.

[200] The approach sanctioned by the majority also raises two questions in my mind. The first is that, if the consent order is the automatic result of an agreement at mediation filed with a mediator's report in court, why are agreements on confidential terms exempt? To my mind, the only relationship between the agreement and the order is that the parties will have already agreed the terms in which the judgment or order should be given, and the court must give it in those terms, based on a draft consent order, in the format set out in 42.7(5) which the parties or any one of them present to the court. It may be argued that the rules make no mention of a draft consent order, but it seems to me that implicit in the requirements of the form of the order is the fact there has to be one.

[201] Although this case does not involve a litigant in person, it seems to me that an if the interpretation of the majority is correct then certainly rule 42.7(3) which excludes a litigant in person, would come into conflict with part 74 which does not exclude a litigant in person. This takes me to the second question raised in my mind which is how the court will treat with a litigant in person who goes to mediation and enters into a compromise agreement. If consent orders are to be made by the court in terms of the mediator's report without the necessity for the parties to further consent to the order, the court will be empowered to enter a consent order involving such a litigant in person

by virtue of part 74, even though under rule 42.7(3) he cannot enter into a consent order because that rule excludes litigants in person.

[202] The fact is that a mediation agreement is a contract in itself which carries legal consequences in the form of a cause of action for breach of an agreement. Neither party is obligated to hold to the bargain and may breach it and suffer the consequences of a court action, which may result in costs and damages being awarded against them. A party to a settlement agreement may also escape obligations under that agreement by raising, in court proceedings, such vitiating factors as with any other form of contract, such as fraud, duress, mistake and so on. In the case of a party consenting to a court order or judgment, the consequences are entirely different. The order is immediately enforceable by means of any enforcement procedure available under the rules. A court will not lightly reopen a consent order. Therefore, in light of the serious consequences to which a litigant will be exposed with regard to a consent order, I believe it is necessary to take a strict literal approach to the rules. In the absence of a clearly stated rule to the effect, I cannot agree that the court is empowered to make a consent order, without any further application by the parties, on the basis that the parties agreed a settlement at mediation.

[203] It seems to me also, that the approach by the majority to consent orders made after mediation, is inconsistent with the approach of the court to other consent judgments or orders that were not arrived at as a result of mandatory mediation, but by virtue of good faith discussions. Parties to a contract may be before the court because one is in breach of that contract and the other brings a claim. They may come to a

compromise agreement which is reduced to a draft order 'by consent' for both parties to sign. If the other side then refuses to sign, without further court action, can the court then direct them to sign on the basis that they had previously agreed to do so? I believe the court would have no power to do so. If the court has no power to direct in such a case, the power to do so in the case of a mediation agreement should be clearly established in the rules.

[204] To my mind, on a proper interpretation of the rules, on the parties being informed of the appointment for approval of settlement (which, not being provided for in the rules, is itself is a misnomer), the order should be drawn up by the parties' attorneys, agreed by the parties, and signed and presented to the court as the draft consent order. I can see no other way for the court to have before it a draft of the order in terms of the agreement which is signed by the parties' attorneys. The court will then make the order in terms of the draft consent order embodying the terms of the mediation agreement. If such a draft is presented then both attorneys need not be present at the court hearing and the judge need only to check that it is signed by both attorneys and the terms are the same as those in the filed agreement, and it is expressed to be 'by consent'. If the court is going to make an order in the absence of such a draft it can only do so when both attorneys are present and signal a willingness to draft and sign such an order.

[205] In my view, parties are free to compromise their case at mediation in any way they wish. The rules allow them to formalize this agreement by court order. It then has the same effect as a court order made by a judge after a hearing, and can be enforced

in the same proceeding. A court order signed by a judge or registrar after a court hearing, does not require the parties' consent because it is a decision of the court. Where the parties reach an agreement on a compromise, the court may never become involved beyond the filing of the report. In such a case, as required by part 74, the court makes an order in terms of the report that the matter has been settled at mediation. This is clearly the case for confidential agreements. But the rules provide an avenue for the parties to get a formal order made with their consent. The rules provide how that consent should be expressed.

[206] In this case, there was an absence of the required signatures on the order along with the absence of the expression 'by consent'. In fact there could have been no consent to the court order and no attorney to sign for the appellant. The attorney for one side did not attend and neither attorney had signed the order. The order, as I said, was drafted for the signature of the judge or registrar, and was not in accordance with rule 42.7(5) but was made as if it were an order after a court hearing. Therefore, in order for the consent order to conform to rule 42.7(5), the attorney who was the attorney for the appellant at the time the order was made would have to sign it, along with the attorney for the respondent. The appellant himself cannot be directed to sign the order because the rules do not require his signature.

The cases

[207] I will now examine the cases cited to this court and considered by the majority in coming to a decision in favour of the respondent.

[208] **Magwall Jamaica Limited and Others v Glenn Clydesdale and Another** [2013] JMCA Civ 4 was an appeal from the decision of Mangatal J, in which she firstly made an order pursuant to the report on the mediation by the parties, that is, that the parties had settled the matter and the terms were confidential. Secondly, she declared that the agreement was a Tomlin Order, and thirdly, she made an order 'by consent' staying all further proceedings on the terms set out in the mediation settlement agreement and permitted either party to apply to the court to enforce the agreement without the need to bring a new claim. There was a dispute between the parties as to whether the agreement was a Tomlin Order and whether the parties had agreed to stay all further proceedings. The appellant also took issue with the order that the either party could enforce the terms of the agreement without need to bring a new claim. The report of the mediator was that, *inter alia*, the parties had reached full agreement; the claim and defence were settled; and the parties would keep the agreement confidential as evidenced by their signatures. The respondent had submitted to Mangatal J that this was a Tomlin Order, whilst the appellant argued that the agreement was not a Tomlin order.

[209] Panton P in addressing the grounds of appeal filed by the appellant, examined rule 74.11 and rule 42.7. He also considered whether the judge was correct to order a Tomlin Order, and found that the agreement was not a Tomlin Order, therefore, Mangatal J was incorrect. He found that the common law interpretation of what was a Tomlin Order was not affected by the rules. The Court of Appeal therefore, set aside the order of Mangatal J, and made an order in terms of the report, that is, that the

claim and defence were settled and the parties would keep the agreement confidential. The Court of Appeal also declared that a final settlement had been agreed and a new contract entered into by the parties. It also declared that 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.

[210] Although this was a case where the terms of the agreement were confidential, I am of the view that the decision underscores the point that the order of the court must be in terms of the report. Mangatal J made the order in terms of the report but erred in making a Tomlin Order to which the parties did not consent.

[211] Other than the reference to rule 42.7, Panton P also made reference to several cases. He referred to **Horizon Technologies International Ltd v Lucky Wealth Consultants Ltd** [1992] 1 All ER 469, where the parties entered into a compromise agreement and also agreed to a separate Tomlin Order being made in respect of the agreement. Panton P also referred to **Green v Rozen and Others** [1955] 2 All ER 797 and **McCallum v Country Residences Ltd** [1965] 2 All ER 264. In the latter case, the parties agreed a settlement and the plaintiff's solicitor proposed that an order be made in that regard. A summons was taken out for a Tomlin Order to be made in respect of the settlement. The solicitor for the defendant did not consent to the order but the judge, having read the correspondence regarding the settlement, went ahead and made the order. On appeal, it was held by the 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. In **McCallum**, Lord Denning MR said:

> "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 LJ referred, of *Green v Rozen*.**" (Emphasis added)

Lord Denning MR in **McCallum** made it clear that the parties had arrived at a compromise 'agreement', but there was no consent to an 'order' being made.

[212] Panton P also considered the effect of the decision in **Green v Rozen** where the parties had arrived at an agreement endorsed on counsel's brief, but no order had been sought from the court in terms of the agreement. Slade J held that the agreement made on counsel's brief, superseded the original action, and no order having been sought of and none made by the court, the court had no further jurisdiction in the matter. It was held, *per curiam*, that the plaintiff's only remedy was to bring an action on the compromise agreement.

[213] In **Magwall**, Panton P quoted the above passage from Lord Denning MR and at no point did Panton P state that those statements were not applicable to this jurisdiction under the CPR. In fact, the court, in overturning Mangatal J, implicitly

approved this approach because Mangatal J had made an order to which one of the parties did not consent, although she purported to have made the order pursuant to the mediation report.

[214] The cases are in support of the proposition that there is a distinction between consent to the mediation settlement agreement and consent to an order formalizing that settlement agreement.

[215] I accept that these cases represent the common law position which predates the advent of the CPR. However, I take the view that if the rules were intended to reverse such a well-established common law position, it must clearly do so. It cannot implicitly do so. Nothing in part 74 suggests, to me at least, that it is so intended. To the contrary, it appears to me that the rules have simply codified the common law position.

[216] The case of **Neville Atkinson v Olamae Hunt** [2015] JMSC Civ 14 was also cited to this court. In this case, the claim was begun by fixed date claim form for shares in a property. The parties attended mediation and arrived at a partial settlement. They attended a subsequent session and arrived at an agreement. The claimant later sought, at the case management conference, to withdraw from the agreement. The defendant objected. The matter came before King J, who considered that the application by the claimant to withdraw from the mediation agreement raised the issue of what action the court was required to take pursuant to rule 74.12. King J decided that, on the plain meaning of rule 74.12, orders made pursuant to rule 42.7 were mere administrative acts without the need for judicial intervention; that by the 2006 amendment to the CPR,

orders made on mediation settlement were added to the list of orders which could be made administratively without the need for judicial intervention. He also found that since none of the exceptions in 42.7(3) applies, the judgment must be entered by administrative action. He said the judge was neither empowered nor obliged to intervene in the conversion of the mediation agreement into an order of the court. He also held that the unwilling party can be compelled to sign the order.

[217] I disagree with the conclusion arrived at by King J which is the same conclusion arrived at by the majority of this court. I also do not agree that the order is made by administrative action. The order is made by the court which is a judicial action. An administrative action implies that the order is made by a court officer such as a registrar. The entry of a default judgment by a registrar, for instance, is an administrative action. The judge in making the order must do so with the consent of the parties, in the terms agreed, but it is still a judicial function. The judge has the duty to ensure that the order he is making, although it is expressed to be 'by consent', is one he has the jurisdiction to make, as a judge cannot make an order even by 'by consent' which a court could not have otherwise made (see the **Horizon Technologies** case).

[218] I am in total agreement with the conclusion of the majority that it is the CPR which governs the issue. However, I find myself in the regrettable position of not being able to agree with the majority on their interpretation of the effect of the rules. I do not agree that it is open to the court below, based on the rules, to make a consent order because the parties agreed a mediation settlement and the report was filed in court. As I said previously, if it was so open to the court below, part 74 would state this expressly

without necessity to resort to rule 42.7. I also do not agree that the requirements in rule 42.7(5) are matters of form not substance.

[219] Rule 42.4 speaks to the standard requirements for judgments and orders. Judgment and orders of the court must state the name and judicial title of the person who made it, unless it is a default judgment (which are made by the registrar); judgments on admissions following a court order under rules 14.6, 14.7, 14.8, 14.10; and 14.11; or a consent order under rule 42.7, which are signed by the parties' attorneys). So, an order pronounced by a judge and signed by a registrar or the judge himself, cannot be a valid consent order. It has been said that because the rule states that the order takes effect on pronouncement, then the format of the written order is merely form and not substance. However, I take the view that the form of a perfected judgment is always a matter of substance. Litigants rely on the correctness and the validity of the perfected orders to validate their actions thereafter.

[220] The rules, therefore, contemplate that the consent judgments under rule 42.7, must be in the in the format provided. In the United Kingdom, where rule 40.6 of their Civil Procedure Rules is in similar vein to our rule 42.7, it is the parties' attorneys who draw up the consent order and submit with their signatures, for sealing. Their Practice Direction 40B also endorses this procedure. Where the order does not conform to the list in the English rules, which is equivalent to our rule 42.7(3), the order has to be approved by the judge. The parties will draw up the order leaving the space for the judge's name to be inserted. The judge then later signs having approved the order.

[221] One final point on this issue is the fact that if the majority is correct, litigants will have been sent to mandatory mediation and having entered into a compromise, they are deemed to have given consent to a court order being made once the report on the mediation is filed. Nothing in the rules, on the mediation forms, or even in the report on which the majority of this court relies, makes any indication to litigants that in agreeing to a compromise at mediation, they were automatically agreeing to a consent court order, with all its attendant consequences. There is therefore, to my mind, no informed consent to a court order.

Disposition

[222] It is my firm view that whatever may have been the purpose or intent of the framers of rule 74.12, it cannot be relied on to empower a court to enter a consent order on the filing of a mediator's report along with the mediation agreement, without any further action by the parties.

[223] I would therefore advise that F Williams J was in error when he made the order without the consent of the appellant signified by the signature of his attorney to the order filed in the court and Wint-Blair J (Ag) was in error in failing to set aside that order. I would also advise that the appeal should be allowed with costs to the appellant, to be agreed or taxed.

PHILLIPS JA

ORDER

BY MAJORITY (Edwards JA (Ag) dissenting)

1. The appeal is dismissed.
2. The order made my F Williams J is hereby amended to add 'by consent'. All orders made by F Williams J remain.
3. The attorneys-at-law for the parties are to sign the order made by F Williams J within 14 days of the date of this order, failing which, the order shall be filed in the registry for sealing, be sealed, and thereafter implemented by the respondent as an order of the Supreme Court.
4. The stay of execution of the order made by F Williams J on 8 May 2015, granted by Wint-Blair J (Ag) on 23 November 2016 is discharged.
5. Costs both here and in the court below to the respondent to be agreed or taxed.