JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEALS NO. 62/2005

BEFORE: THE HON. MR. JUSTICE PANTON, J.A.
THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MR. JUSTICE MARSH, J.A (Ag.)

BETWEEN:	**KEITH RECAS**	**1ST APPELLANT**
AND	**JOHN JOHNSON**	**2ND APPELLANT**
AND	**WINSOME WICKHAM**	**RESPONDENT**

Jeffrey Daley instructed by Blackridge Covington for the Appellants.

Ainsworth Campbell for the Respondent.

June 7, 29 and July 31, 2006

PANTON, J.A.

1. The appellants are challenging the decision of Beswick, J. which recognizes the right of the respondent to pursue a claim in negligence against the appellants in respect of injuries and loss she suffered in, and arising from, a motor vehicular accident on April 8, 1993. The respondent filed suit in this matter in the Supreme Court approximately ten years ago. No defence having been filed, a default judgment was entered in her favour on October 16, 1996.

This judgment remained undisturbed and unfulfilled for over four years until it was set aside on February 23, 2001, and a defence filed.

2. On June 30, 2004, that is, more than three years after the filing of the defence, the appellants applied for a Court order to bar the respondent from pursuing any legal action against them on the basis of a "settlement" entered into by the respondent's insurers as long ago as February 8, 1994, whereby a sum of money was paid to the appellants' insurers in consideration of the appellants executing a release and discharge.

3. Beswick, J., on April 21, 2005, at a pre-trial review at which the application was heard, dismissed it and adjourned the review pending the hearing of the appeal. In arriving at her decision, she considered the import and effect of a document entitled "Final Third Party Discharge" that was exhibited by the first appellant, the only party to these proceedings whose signature is on it. This document reads thus:

> "Received from Dyoll Insurance Company Limited on behalf Thomas Wickham.....the sum of $595,000.00 (Five Hundred And Ninety Five Thousand Dollars) as an ex gratia payment in full and final settlement of all claims in respect of injury and damage whether now or hereafter to become manifest arising directly or indirectly from an accident which occurred on or about 8th April, 1993.

> It is understood that no legal liability is admitted or accepted by Dyoll Insurance Company Limited or its Insured or Driver for the accident."

Thomas Wickham, referred to above, is the husband of the respondent and owner of the motor car that was being driven by her at the time of the accident.

4. The learned judge concluded that the payment by Dyoll was done of its own volition and, seeing that there was no evidence to indicate that the respondent was aware of or consented to the payment, the respondent was not bound by the discharge and so was able to pursue her suit.

5. The appellants' challenge of the learned judge's decision is set out in five grounds of appeal filed on April 29, 2005. These grounds may be summarized thus:

> "(i) the learned judge erred in failing to determine that, as a matter of law, the respondent is barred from commencing or pursuing any legal action against the appellants by virtue of a settlement entered into by her insurers, which settlement binds her;
>
> (ii) the learned judge erred in law as to the meaning and effect of the document headed "Final Third Party Discharge."

6. Mr. Daley, for the appellants, submitted that the decision of the learned judge is not in keeping with the true legal position. According to him,

the true position in law is to be seen at para. 675 of Vol. 25 of Halsbury's Laws of England (Fourth Edition 2003 Reissue). That paragraph reads thus:

> "The policy usually empowers the insurers to take over, in the name and on behalf of the insured, the conduct and control of the defence of proceedings within the ambit of the policy brought against him. This power enables the insurers to settle the proceedings without consulting the insured, and they can then recover from him any portion of the agreed damages which under the policy he has to bear."

He further submitted that Dyoll was entitled to proceed to a settlement with or without the knowledge and consent of the insured or the respondent. This, Dyoll did, and they have accepted liability. Having done so, such acceptance, he said, is not for part of the damage, but rather it is for the whole. Liability, he said, cannot be split. The respondent, he said, is estopped from bringing a claim and so, in the instant situation, her statement of case should be struck out as an abuse of the process of the Court.

7. In his response, Mr. Campbell submitted that there was no contract between the respondent and Dyoll or the appellant Recas; nor was there any contract between Mr. Wickham and Recas. Mr. Campbell maintained that no one had the liberty to sign away the rights of the respondent who suffered bodily injury as a result of the accident. So far as the cases cited by the appellants were concerned, he submitted that they were of no relevance to the situation.

8. It seems to me that the paragraph from Halsbury's (quoted above) is of no relevance to these proceedings or to the rights of the respondent. There, the learned authors are referring to the usual provisions in a contract of insurance in England whereby the insurer is authorized to conduct and control the defence of proceedings. So far as the respondent is concerned, no proceedings have been brought against her in respect of the accident so there is nothing for Dyoll the insurer to conduct and control. So far as the appellants are concerned, the conduct and control of the defence of proceedings would depend on the terms of the contract between their insurer and themselves. Even if their insurer had that authority, it would have no bearing on the ability of the respondent to pursue her claim.

9. The factual situation disclosed by the document on which the appellants hang their case may be itemized thus:

(i) The vehicle that was being driven by the respondent at the time of the accident was insured in the name of the respondent's husband with Dyoll;

(ii) Dyoll, purporting to act on behalf of the insured, made an ex gratia payment of $595,000.00 to the appellant Recas;

(iii) Dyoll's payment to Recas, though ex gratia, was stated to be in full and final settlement of all claims in respect of injury or damage arising from the accident;

(iv) Dyoll specifically did not admit or accept legal liability;

(v) The appellant Recas signed the document indicating receipt of the money on the terms stated in (iii) and (iv).

The picture created from this document is that the appellant Recas has received money from Dyoll in respect of the accident, but Dyoll is not admitting or accepting any liability. Nowhere in this picture is there even the image of the respondent.

10. The appellants have asserted that there has been a release and discharge from any obligation arising from the accident. They are in effect saying that there has been accord and satisfaction in the matter. The headnote in **British Russian Gazette and Trade Outlook Ltd. v. Associated Newspapers Ltd.** (1933) 2 K.B. 616 reads:

> "Accord and satisfaction is the purchase of a release from an obligation arising under contract or tort by means of any valuable consideration, not being the actual performance of the obligation itself. The accord is the agreement by which the obligation is discharged, and the satisfaction is the consideration which makes the agreement operative."

So far as a release is concerned, there is no particular form of words that is necessary to constitute a valid release. Words which show a clear intention to renounce a claim or discharge the obligation are sufficient. In the instant case,

there is nothing that has been produced before us to indicate or confirm that the respondent has released the appellants from any liability arising from the accident. There is nothing to indicate that the respondent has agreed to the waiving of any rights that may have accrued to her. In such circumstances, it cannot be fair and just to interpret the contract between Dyoll and Wickham as empowering the former to cancel the respondent's right of action. The appellants have prayed in aid the case **Bank of Credit and Commerce International SA (in liquidation) v Ali and others** [2001] 1 All ER 961. I do not think that it helps them. However, the case is important in that it reinforces the view that, if there is a contract, clear language is necessary for it to be interpreted that a party has given up his rights.

11. The appeal, in my view, ought to be dismissed and the judgment of the Court below affirmed. The pre-trial review that was adjourned pending the hearing of the appeal, ought to be resumed, and efforts made to let the respondent have her day in Court as early as possible. After all, the accident occurred thirteen years ago.

SMITH, J.A.

I agree, and there is nothing that I can profitably add.

MARSH, J.A. (Ag.):

This is an appeal from the decision of Mrs. Carol Beswick, J. who refused Appellants' Interlocutory application on 21st April 2005 to strike out Respondent's Statement of Case as being an abuse of process. The grounds on which the order was sought were as follows:

1. The Claimant is barred from pursuing any legal action against the defendants by virtue of a settlement entered into by the Claimant's Insurer in consideration of the defendants' executing a Release and Discharge.
2. That the said settlement estops the Claimant from pursuing this action against the 1st and 2nd defendants.

The facts are that on April 8, 1993, there was a collision between a Ford Escort motor car licensed 3008 AH, (owned by Thomas Wickham the Respondent's husband) and a motor truck licensed 4464 TEMP., owned by Keith Recas, (1st Appellant). The Ford Escort motor car was being driven by Winsome Wickham (Respondent) while the motor truck was being driven by John Johnson, the 2nd Appellant. Both vehicles suffered damage. This was reported to 1st Appellant's insurers United General Insurance Company Limited. Thomas Wickham had been insured by Dyoll Insurance Company Limited.

Sometime in January 1994 a settlement negotiation was entered into between Brown, Llewelyn and Walters, Attorneys-at-Law for United

General Insurance Company Limited and Dyoll Insurance Company (for Thomas Wickham).

On about the 8th of January, 1994, Dyoll Insurance Company Limited paid to Brown, Llewelyn and Walters the sum of Five Hundred and Ninety-five Thousand Dollars ($595,000.00) as full and final settlement of Keith Recas' claims arising out of the said collision. There was prepared a Final Third Party Discharge dated 26th January 1994. This document purportedly signed by Keith Recas, reads as follows:

> **FINAL THIRD PARTY DISCHARGE**
>
> "Received from Dyoll Insurance Company Limited on behalf of Thomas Wickham the sum of $595.00.00 (Five Hundred and Ninety-five Thousand Dollars) as an ex-gratia payment in full and final settlement of all claims in respect of injury and damage whether now or hereafter to become manifest arising directly or indirectly from an accident which occurred on or about 8th April, 1993. It is understood that no legal liability is admitted or accepted by DYOLL INSURANCE COMPANY LIMITED or its Insured or Driver for the accident."

Mr. Jeffrey Daley for the Appellant argued that the learned trial judge had failed to appreciate that the purpose of the Settlement was both for the benefit of the "insured Thomas Wickham and his driver Respondent Winsome Wickham."

At the time of the accident, the Respondent was driving her husband's motor car and the subsequent settlement of a claim on his behalf, as a matter of law and of fact made her at all material times his agent.

For this proposition he found support in the following passage from Chitty on Contracts 26th Edition Volume II at paragraphs 2519, and 2520:

> "It is an established rule that an act done for another by a person not assuming to act for himself, but such other person, though without any precedent authority, may become the act of the principal if subsequently ratified by him, and this is sometimes expressed in the maxim *omnis ratihabitio retrotrahitur et mandato priori aequiparatur.* Views vary as to whether or not the doctrine is anomalous.
>
> **Proof of ratification.**
> Ratification will be implied from any showing an intention to adopt the transaction, including commencement of or pleading in an action at law, on the transaction in question. It may be inferred in appropriate cases even from silence or mere acquiescence; and it seems clear that, like the grant of authority, it need not be communicated to the third party. But if an act is adopted at all, it will be held to have been adopted throughout. Ratification of a contract required to be in writing need not be in writing, but ratification of a contract required to be made by deed.'"

He further argued that the owner of a vehicle was liable for the negligent driving of a person to whom he had lent the vehicle if that person was using it on his behalf or for his purposes.

In **Carberry v Davies and Anor.** (1968) 1WLR 1103, it was held that the owner of a vehicle was liable for the negligent driving of a person to whom he had lent the vehicle if that person was using it on his behalf or for his purposes.

There was no clear evidence on which the trial judge could have made a finding that Dyoll Insurance Company Limited's payment to 1st Appellant was without the knowledge of Thomas Wickham or Winsome Wickham or for their benefit.

The Release and Discharge did not require Mr. Wickham's signature, as the trial judge found.

There was no evidence from the Respondent refuting evidence that the Release and Discharge was executed for Thomas Wickham's benefit and on his behalf.

The aim of the settlement between the parties was to achieve finality in the matter.

A compromise of an action or settlement of a claim, such as the one in the instant case, like a final judgment of the Court, creates a bar to any further proceedings by either party. The Appellant Keith Recas, in signing the Release contemplated that the settlement was full and final, and did not envisage any further litigation.

The effect of the Settlement was that it extinguished all claims arising out of the said accident.

The Respondent's attorney Mr. Ainsworth Campbell responding to Mr. Daley's arguments submitted inter alia that one cannot bind a party to contract unless that party is a signatory to that contract or through his agent acting on his behalf which agency must be explicit or implicit. Mr.

Campbell further observed that the Insurers apparently chose to cancel the rights of the Claimant/Respondent to bring her claim to Court by a contract to which she was not a party and of which she was unaware.

Can the Insurers of the two owners of the motor vehicles, having entered into an agreement to settle, bar the Respondent from pursuing legal action against the Appellants? In short, is the Respondent bound by the terms of the agreement? In my view the answers to both questions are in the negative.

This document appeared to have been signed by Keith Recas the 1st Appellant. There is no signature thereon purporting to be either Thomas or Winsome Wickham's.

The burden of Mr. Daley's submission is that the above mentioned agreement prevented the Respondent from pursuing any claim against the Appellants, arising from the accident of 8th April, 1993. She is estopped from making this claim, the matter having already been settled on her principal's behalf.

It is trite law that parties may agree that all claims between them, known or otherwise be settled. As Sir Richard Scott V.C. at first instance said in **Bank of Credit and Commerce International SA (in liquidation) v. Ali et al** [2000] 3 All ER 51 at page 56 and repeated approvingly by Lord Bingham of Cornwall:

> "The law cannot possibly decline to allow parties to contract that all and any claims, whether or

> not known, shall be released. The question ... is to ascertain, objectively, whether that was the parties' intention or whether, in order to correspond with their intentions, a restriction, and if so what restriction, should be placed on the scope of the release."

The cases relied upon by Mr. Daley for the Appellants all relate to situations where the parties have agreed to a release and later one of them proceeds to pursue an action arising from the particular incident that gave rise to the said release. These are parties to a contract and they are usually bound by the terms of that contract.

In London and South Western Railway Company v. Blackmore (1870) LR4 HL 610 AT 623 -624 Lord Westbury opined: "The general words in a release are limited always to that thing or those things which were specially in the contemplation of the parties at the time when the release was given."

Surely, Winsome Wickham was not a party to the Final Third Party Discharge on which the appellants rely. Consequently, she could not be barred by it, even if the most favourable interpretation of the document is made.

It was a clear finding of the Judge at first instance that there was no evidence before her that Mrs. Wickham was aware of or consented to the terms of the "discharge." There was no evidence to show that Mr. Wickham was a party to the agreement. Payment was made by Dyoll, his insurers, and his signature does not appear on the document.

The Respondent was therefore not bound by the terms of the said discharge. She was not a party to the agreement and there is no evidence that either Thomas Wickham himself or the Respondent had knowledge of this agreement to release and discharge.

For these reasons I too would dismiss the appeal and affirm the order of the Court below.

ORDER:

PANTON, J.A.

Appeal dismissed. Order of the Court below affirmed. Pre-trial review to be resumed as early as possible. Costs of the appeal to the respondent to be agreed or taxed.