

GRENADA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.7 OF 2004

BETWEEN:

[1] STANLEY CHARLES
[2] EDWARD FREDERICK

Appellants

and

[1] KEITH MITCHELL
[2] GREGORY BOWEN
[3] LAURINA WALDRON
[4] MARK ISAAC
[5] ADRIAN MITCHELL
[6] CLARIS MODESTE
[7] OLIVER ARCHIBALD
[8] ELVIN NIMROD
[9] WILLIAM DEWSBURY
[10] LAWRENCE JOSEPH
[11] JOSLYN WHITEMAN

Respondents

Before:

The Hon. Mr. Albert Redhead
The Hon. Michael Gordon, QC
The Hon. Joseph Archibald, QC

Justice of Appeal
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Dr. Francis Alexis with Mr. Ruggles Fergusson and Mr. Dwight Horsford for the Appellants
Mr. Peter Cline with Ms. Rosalyn Wilkinson for the Respondents

2004: July 1;
2006: July 17.

JUDGMENT

[1] **GORDON J.A.:** It would be appropriate to commence this judgment with an apology to the parties and their counsel for the long delay in its delivery.

Factual background

- [2] In February 2002 Sylvester J. ordered that there be judgment in favour of the respondents (as claimants) against the appellants, who together with the Grenada Broadcasting Network Ltd (hereafter referred to as GBN), were defendants in a suit for defamation brought by the respondents. To put it another way, the appellants and GBN were found liable as joint tortfeasors. Damages in the sum of \$200,000.00 were awarded to the respondents together with costs in the sum of \$10,000.00
- [3] GBN and the respondents entered into an agreement dated November 11, 2003 styled "Deed of Composition" by which designation it will hereafter be referred to in this judgment. In the Deed of Composition it was recited that GBN was unable to pay the respondents the sum of \$200,000.00 and costs as awarded by the Order of Sylvester J. and proposed to pay to the respondents, as judgment creditors, the sum of \$70,000.00 by instalments which the respondents agreed to accept in full discharge and satisfaction of their respective claims against GBN.
- [4] GBN duly paid the instalments called for under the Deed of Composition and was released, by operation of the terms of the Deed of Composition, of its obligations under the judgment.
- [5] The appellants contended, in proceedings on judgment summonses brought by the respondents, that the Deed of Composition operated to release them from the judgment debt as well, and that therefore the examination pursuant to the judgment summons should be discontinued. The single issue to be decided by this court is whether the Deed of Composition was a discharge or release of the joint debt, in which case it would operate as a release of all the joint tortfeasors, or was it an agreement not to sue or not to execute an extant judgment entered into by the respondents with GBN, in which latter case the benefit would be personal to GBN and the appellants would remain liable for the balance of the judgment debt.

[6] The trial Judge before whom this matter came at first instance found in the following terms:

"In conclusion, I am not satisfied having analysed the agreement that this is a case in which the deed of composition has resulted in a release of the joint debt owed by the judgment debtors as against the first named and second named Defendants absolutely." To put another way, he found that the appellants continued to be liable to satisfy the judgment debt. It is against this judgment that the appellants have appealed.

[7] A good starting point is the covenants entered into between the respondents and GBN in the Deed of Composition, which, to the extent relevant, are reproduced hereunder:

NOW THIS INDENTURE WITNESSETH as follows:

1. The Judgment Debtor¹ covenants with the Judgment Creditors and [sic] that the Judgment Debtor will pay to the Judgment Creditors the sum of Twenty-three Thousand Three Hundred and Thirty-three Dollars and Thirty-three cents (\$23,333.33) on October 15th 2003; the sum of Twenty-three Thousand Three Hundred and Thirty-three Dollars and Thirty-three cents (\$23,333.33) on 31st October 2003; sum [sic] of Twenty-three Thousand Three Hundred and Thirty-three Dollars and Thirty-three cents (\$23,333.33 on 30th November 2003; and the sum of Seven Thousand and Eighty-eight Dollars and Twenty-two Cents (\$7,088.22) being interest at the rate of 6% accrued from the date of judgment on 26th February 2002.
2. In consideration of the premises the Judgment Creditors hereby jointly and severally covenant that if and so long as the Judgment Debtor shall punctually pay the installments of the said composition and the said costs charges expenses and remuneration in accordance with the covenant in that behalf hereinbefore contained neither the Judgment Creditors nor any of them will bring or prosecute any action or proceeding whatsoever against the Judgment Debtor or attach molest or impede the Judgment Debtor its goods or estate for or on account of any of the debts or claims of the Judgment Creditors in respect whereof the Judgment Creditors are entitled to receive the said composition hereunder and this deed may be pleaded as a defence to any such action or proceeding which may have been or may be brought or prosecuted against the Judgment Debtor its goods or estate for or on account of any Judgment debt or claim.
3. If and when the Judgment Creditors shall certify under their hands that the said costs charges expenses and remuneration and the aggregate amount required for the said composition have been paid to them then the Judgment Debtor and its effects shall be released and discharged from the liabilities now owing by the Judgment Debtor to the Judgment

¹ "Judgment Debtor" is defined as Grenada Broadcasting Network Limited in the Deed of Composition

Creditors respectively and from all actions claims and demands in respect or on account thereof and shall be released from all liability under this deed and each Judgment Creditor shall deliver to the Judgment Debtor properly discharged all documents instruments or other evidence of indebtedness now held by such Judgment Creditors in connection with the liabilities.

4. All rights and remedies of the Judgment Creditors respectively against the Judgment debtor are hereby expressly reserved as are the rights and remedies against Stanley Charles and Edward Frederick the other Judgment Debtors in Suit 704 of 1998.

[8] It is common ground between the parties that a discharge of one joint debtor by a release under seal or by accord and satisfaction discharges all of the joint debtors whereas a covenant not to sue one of a number of joint debtors or execute a judgment against one judgment debtor does not discharge the others. Thus the issue before this court resolves itself into an interpretation of the Deed of Composition.

[9] In **Watts v Lord Aldington**² a not dissimilar circumstance as is presented in this case arose. In that case Mr. Watts and another, Count Tolstoy, were found liable in defamation and ordered to pay GBP 1,500,000.00 and his costs to Lord Aldington. A letter from the solicitors of Lord Aldington to Mr. Watts proposed a settlement on terms, which terms Mr. Watts accepted by signing a copy of the solicitor's letter. The letter sought to settle not only the issue of the damages for defamation but issues of future litigation between the parties and to provide for future behaviour in that there was a clause in the following terms:

“...in the event that you break any term of this agreement such breach may be treated as a repudiation of this agreement, leaving Lord Aldington free, at his option to treat the agreement at an end and to proceed for the full entirety of what is owed under those judgments....”

[10] As stated by Neill LJ at paragraph 33 of his judgment, in trying to fit the agreement into a particular category, namely a release or an agreement not to sue or execute a judgment, “one may lose sight of the true enquiry: what is the meaning and effect of the agreement having regard to the surrounding circumstances and taking into account not only the

² [1993] EWJ No. 3964 (Court of Appeal)

express words used in the document but also any terms which can properly be implied.” In other words, the exercise that faces the court is no more than an exercise in interpretation.

[11] Lord Justice Steyn, in his judgment took the matter further. At paragraph 65 he said:

“These appeals illustrate the absurdity of the rule that the release of one of two joint and several tortfeasors operates as a release of the other. In Victorian times judges of great distinction reasoned that in a case involving joint and several liability of joint tortfeasors there is only a single cause of action, and accordingly a release of one of two joint tortfeasors extinguishes that single cause of action, or as it was usually put, releases the other joint tortfeasors. The rule has been relaxed by statute. The fact that joint tortfeasors can be sued successively heavily compromised the perceived rule of logic. But the old rule apparently still survives. In truth there is no inexorable march of logic. In a less formalistic age it is now clear that the question whether the release of a joint tortfeasor should operate to release the other tortfeasor is a policy issue. Either solution is logically defensible. But good sense, fairness and respect for the reasonable expectations of contracting parties suggests that the best solution is that the release of a joint tortfeasor should not release the other tortfeasor. On this basis the consequence that the unreleased tortfeasor may bring an action for contribution against the released tortfeasor must be faced. As far as the unreleased tortfeasor is concerned the settlement between the plaintiff and the released tortfeasor is *res inter alios acta*. If this solution is not perfect, it at least has the merit of promoting more sensible results than any other solution.”

[12] One is therefore led to an examination of the language of the Deed of Composition. The first item of note is the covenant at clause 2 of the Deed which states that if the Judgment Debtor (GBN) shall perform its obligations to pay as set forth in clause 1 of the Deed then “neither the Judgment Creditors nor any of them will bring or prosecute any action or proceeding whatsoever against the Judgment Creditor...” I have great difficulty in interpreting this language as anything other than an agreement not to sue. At no point does the covenant include what may be termed a release.

[13] Lawyers are creatures of precedent and frequently rely on books of precedents in the drafting of their agreements. One of the more famous and widely used works of precedents is the *Encyclopaedia of Forms and Precedents* published by Butterworths. In Volume 2 of the 4th Edition at page 605 in a precedent of a deed of composition can be found at clause 4 the exact language used in clause 2 of the Deed of Composition. The marginal note of that clause reads: “Covenant not to sue”. There is no doubt in my mind

that what the drafter of the Deed of Composition intended, and undoubtedly what he or she advised the parties, was that this agreement was an agreement not to execute the judgment against GBN and not a release of the other joint tortfeasors.

[14] It is trite law that where the meaning of an agreement is clear from its language a court may not interfere with the agreement so as to make it mean what the clear language does not mean. It is equally commonplace that where language is capable of two or more meanings, or where clarity of expression is deficient, then there are rules of construction which a court may employ to determine the intentions of the parties. I am of the view that clause 4 of the Deed of Composition in the context of the whole document is ambiguous.

[15] The argument raised by learned counsel for the respondents is that clause 4 of the Deed of Composition contains an express reservation of the respondents' rights against the appellants, reserved against them by name. Clause 4 must, in my view, be interpreted in its context, and in particular in the context of the preceding clause which is a conditional release of the Judgment Debtor (as therein defined) from the consequences of the judgment debt now owing to the respondents, not a release of the debt. Again, the language of this clause closely parallels that to be found in Volume 2 of the Encyclopaedia of Precedents at page 605, clause 5 of the deed of composition. The misfortune is that the drafter did not effectively take the help offered by clause 6 of the same precedent which reads as follows:

"6. All rights and remedies of the creditors respectively against any surety or sureties or parties other than the debtor [defined as the party to the agreement] liable to the creditors or any of them are hereby reserved."

In attempting to adapt that clause the drafter imported an ambiguity in that there is a conditional release in clause 3 of the Deed of Composition which appears negated by the reservation of the respondents' rights in clause 4.

[16] Given the specific language of the Deed of Composition referred to at paragraph [12] above I have no doubt that clause 4 can only be properly interpreted by implying certain terms into its body, namely that absent the performance by GBN of its covenants the debt as against GBN and the appellants is preserved and the rights of the respondents are

preserved. It is only if the obligations undertaken by GBN are performed that the respondents undertake not to pursue GBN. Nowhere in the Deed of Composition is there language that approaches a covenant not to sue (or execute the judgment) of which the appellants can take advantage.

- [17] In the circumstances, I would dismiss the appeal and confirm the order of the learned trial judge “that the examinations being conducted in respect of the said Defendants (appellants) being conducted pursuant to the Judgment Summonses proceed.” Costs of this appeal shall be paid by the appellants to the respondents such costs to be assessed if not agreed to.

Michael Gordon, QC
Justice of Appeal

I concur.

Albert Redhead
Justice of Appeal

I concur.

Joseph Archibald, QC
Justice of Appeal [Ag.]