

THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

SAINT CHRISTOPHER AND NEVIS

NEVHCVAP2020/0005

BETWEEN:

APPLEWAITE LAKE

Appellant

and

[1] BARBARA HARDTMAN
[2] LAUGHTON BROWNE
[3] KIRTLEY HARDTMAN

Respondents

Before:

The Hon. Mr. Davidson Kelvin Baptiste
The Hon. Mde. Gertel Thom
The Hon. Mr. Gerard St. C Farara

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

Appearances:

Mr. John Jeremie, SC with him Mr. Ricaldo Caines, Ms. Keesha Carty and
Ms. Shivana Lalla for the Appellant
Ms. M. Angela Cozier for the Respondents

2022: March 22.

Interlocutory appeal – Consent order – Court’s power set aside consent order – Approach of appellate court to challenges of findings by judge - Whether learned judge fell into error and made incorrect findings of fact – Restraint by appellate court in interfering with trial judge’s findings of fact, evaluation and inference from facts – Whether learned judge failed to place sufficient/any weight on facts and evidence – Whether judge pre-determined the outcome of the case disposing of facts central to the determination of the case in a pre-emptory fashion- Exercise of discretion afresh by appellate court – Whether learned judge incorrectly stated the law with respect to his jurisdiction to set aside consent order - Actual authority – Ostensible authority - Whether learned judge erred in finding that the appellant had given his attorney ostensible and or actual authority to settle the damages and costs at the assessment hearing

ORAL JUDGMENT

- [1] **BAPTISTE JA:** This is the judgment of the Court. This is an appeal against the order of Moise J refusing to set aside a consent order dated 24th February 2020 (“the Consent Order”). The appellant challenges findings of fact and law and alleges various errors on the part of the judge in refusing to set aside the Consent Order.
- [2] The appellant alleges in the grounds of appeal that the learned judge:
- a. Erred by relinquishing his duty to satisfy himself of the duty placed on him as a matter of law to determine whether the court had jurisdiction to treat with the application to set aside the Consent Order before attempting to determine whether to set aside the Consent Order.
 - b. Erred in failing to find that as a fact on the uncontradicted evidence before him the appellant’s former counsel had acted outside the scope of their actual authority.
 - c. Erred in finding that none of the cases, in particular **Racz v Mission (District)**¹ on facts *pari materia*;
 - d. Erred in failing to make a determination as to whether there was a lack of authority of the appellant’s former counsel so as to set aside the Consent Order.
 - e. Erred in giving undue weight and consideration to the position of the defendants when determining whether to set aside the Consent Order and in so doing applied an incorrect test. The question was, and remains, whether counsel was in law and on these facts empowered to enter into the Consent Order on behalf of the appellant. The relevant test on the facts is that pronounced in **Racz v Mission (District)**. The test is not based on an examination of the position of the defendant.

¹ 1988 CanLII 2937 (BC CA).

- f. Erred in law and fact by finding that the appellant's former counsel had acted within their ostensible authority in the face of the only evidence before him which was to the effect that they had in fact had an express limitation placed on their authority to compromise the claim so that in law they had no authority to compromise the claim.
- g. Erred by conflating the law in respect of implied, express and ostensible authority of counsel.

[3] In the introductory paragraph of his judgment, Moise J stated that the respondents had obtained summary judgment in their counter-claim against the appellant to which there had not been an appeal. The matter was thereafter scheduled for an assessment of damages. Although the claimant was absent during the assessment, he was represented by counsel. On the day of the assessment the parties held discussions and arrived at a settlement. A consent order was presented to the Master having been signed by counsel acting on behalf of the parties in accordance with rule 42.7 of the **Civil Procedure Rules 2000** ("CPR"). The appellant sought to set this order aside primarily on the ground that he did not consent to the terms of the order, was not provided with any advice from his attorneys and that his attorneys were acting outside the scope of his instructions. He therefore wished that the matter be listed for an assessment of damages. The judge then concluded: "I have determined that the application be dismissed with costs to the defendants."

[4] There is no issue that the court has power to set aside a consent order. Moise J correctly recognised that the question for determination was whether there was a proper basis for interfering with the consent order by setting it aside. The learned judge stated that the balance which the court seeks to create in such cases is finality to litigation. He recognised that a consent order is an order of the court and so far, as it brings an end to proceedings, the parties are bound by its terms. The judge also appreciated that consent orders are of the nature of a contract mutually entered into by the parties. It is not an order which is made after the court has considered the substance of the matter. The judge went on to say that the prevailing principle is that the court is able to set aside a consent order for the same reason that it may invalidate a contract. This represents the legal position.

- [5] Moise J observed that the grounds on which the appellant has moved the court, does not relate to mistake, illegality, duress or misrepresentation. His quarrel is that he did not agree to the terms of the consent order despite the fact that his attorneys had represented to the court that he did. The judge noted that the appellant claimed to be aggrieved at the fact that he had not been given proper advice and that there had been a conflict of interest which his attorney did not disclose to him.
- [6] The learned judge noted that the Consent Order, dated 24th February 2020, was entered on 26th February 2020. It contained a preamble stating that the parties had discussed the matter and came to an agreement on the terms set out in the order. The preamble also stated that the appellant had authorised his counsel to enter into this agreement. It was agreed, at least in so far as the order outlined, that judgment should be entered in the sum of \$4,000,000.00 with costs of \$600,000.00. The appellant was to also relinquish shares in a company known as Qualie Masonry Products Limited.
- [7] Moise J noted that by way of email of 16th March 2020, the appellant acknowledged the debt and assured the third defendant that he had every intention to comply with the order. He also made requests for periodic payments of the debt. This was on the heels of a threat of committal proceedings against him. Interestingly, the learned judge noted that he did not go on in that email to state that his proposal for the initial settlement of the matter had not been put to the defendants by his attorneys. The appellant started to pay and transferred the shares.
- [8] Having referred to the appellant's affidavit in support of his application to set aside the default judgment, Moise J stated that the question for the court to consider is whether the facts relied on by the claimant constitute grounds upon which the court should interfere with the consent order by setting it aside. In that regard, he stated that it is accepted that the court should only do so if it had also been a basis upon which a contract would be invalidated.

- [9] In his supporting affidavit, the applicant deposed that he was previously represented by another firm of attorneys; summary judgment had been entered against him; he thereafter sought alternative counsel; his new counsel informed that there was nothing he could do about the summary judgment and that he should negotiate a settlement in the matter. He was not informed of his right to file affidavit evidence in the assessment of damages, notwithstanding the fact that judgment had already been entered. No one informed him that he had a right to be heard on the assessment and to cross – examine witnesses. He also stated that he had given instruction to counsel to offer a settlement in the sum of \$1 million to \$1.5 million. He stated that although he was informed by counsel that the matter was settled, it was only after a conversation with the second respondent that he became aware of its terms. He also complained that one of his attorneys was a director in a bank which was seeking to recover money from the respondents. In sum, his evidence is that he had not been given sufficient advice and had not consented to the terms of the settlement, which was crystallized into a consent order in addition to the conflict of interests he claimed to have existed.
- [10] John Jeremie, SC for the appellant, had submitted before the learned judge that the Consent Order could also be invalidated by lack of consent from counsel, relying on **Racz v Mission (District)**. In **Racz**, it was noted that grounds upon which a consent order may be set aside include lack of authority of counsel, common mistake, fraud, collusion, duress and illegality. The learned judge noted counsel's argument that while an attorney in a contentious matter has the general authority to compromise an action on behalf of his client provided he acts *bona fide* and reasonably, an attorney must not act in defiance of his direct and positive instructions of his client.
- [11] The learned judge summarised the appellant's argument thus: the court ought to set aside the consent order on the basis of lack of authority of his counsel and his breach of fiduciary duty towards him. He takes no issue with the procedural requirements under Part 42.7 of the CPR. The consent order was signed by counsel on his behalf and endorsed by the Master on the very day. It has been sealed by the court and he has so far attempted to comply with its terms.

- [12] Moise J stated that in so far as the court's power to set aside the consent order is based on a contractual relationship, he inquired of counsel whether the attorney's ostensible authority was a factor to consider. Counsel opined that this would not prohibit the court from setting aside the Consent Order. The learned judge opined that the issue may not necessarily be one of ostensible authority at all, but actual authority of counsel to compromise a case on behalf of his client.
- [13] It would be useful at this stage to set out the principles of Agency pertaining to this matter. Where a person, by words or conduct, represents or permits it to be represented that another person has authority to act on his behalf, he is bound by the acts of that other person with respect to anyone dealing with him as an agent on the faith of any such representation, to the same extent as if such other person had the authority that he was represented to have, even though he had no such authority.² In : **Bowstead & Reynolds on Agency** (21st Ed.) at paragraph 8-024, the authors add that "The third party must have relied on the representation."
- [14] Unlike actual authority, ostensible authority is a form of estoppel arising from a representation by the principal to the third party that the agent has authority to act in the matter on the principal's behalf.³ Ostensible or apparent authority is the authority of an agent as it appears to others. It often coincides with actual authority, but sometimes ostensible authority exceeds actual authority.⁴
- [15] In **Hely - Hutchinson v Brayhead Ltd**, Lord Denning formulated the principle of implied actual authority thus: "... Actual authority may be expressed or implied. It is expressed when it is given by express words ... It is implied when it is inferred from the conduct of the parties and the circumstances of the case ..."
- [16] As to implied authority, an agent has authority to do whatever is ordinarily incidental to the effective execution of his express authority (sometimes referred to as usual authority) and such

² Bowstead & Reynolds on Agency (21st Ed.) paragraph 8 – 010.

³ Hely - Hutchinson v Brayhead Ltd [1968] 1 QB 549.

⁴ Ibid at page 583.

authority as is to be inferred from the conduct of the parties and the circumstances of the case. Implied authority focusses on the conduct of the principal and the agent, because there is implied authority where the agent takes, and is allowed to take, authority with the consent and acquiescence of the principal.⁵

[17] In **Glencore Agriculture B.V. v Conqueror Holdings Limited**,⁶ Popplewell J stated at paragraph 43, that although actual and ostensible authority are conceptually very different, there are cases in which, what is relied on are the same essential facts and in which they therefore coincide.

[18] Moise J stated that a critical aspect of such an application is the defendant's point of view. Such an application raises serious allegations about the relationship between the applicant and his lawyer. An application to set aside a default judgment on this basis places the defendant in a precarious position, in that he or she will have to defend against facts which are very far outside the scope of his or her knowledge. Weight is a contextual evaluation for the judge; absent perversity, this court should not interfere.

[19] As it relates to the appellant's allegations of the failure of his attorneys to advise him on various aspects of the process, Moise J shared the view that it would be difficult to assert that the negligence of one's own attorney would give rise to setting aside a consent order. In that regard he relied on Kokaram J in **Kisundaya Soogrim v Indra Singh**.⁷ While accepting that the allegations against the appellant's former attorney go beyond mere negligence, Moise J was not of the view that the alleged conflict of interest is a matter to be weighed against the defendants. He rightly observed that the court should be slow to accede to such a request as has been made by the claimant. He said that to do so would give rise to the potential that litigants can simply circumvent compliance with consent orders by having them set aside in circumstances where the respondents are not in a position to adequately defend themselves against allegations which are purely issues to be ventilated between a litigant and his attorney. The respondent ought to have been

⁵ Supra note 3 at 583 B-C, 587 D-F.

⁶ [2017] EWHC 2893.

⁷ CV2015-03713.

entitled to rely on the implied authority of the claimant's lawyer in agreeing to terms of the consent order which was arrived at.

[20] The appellant's counsel states that the appellant's central contention is founded in the requirements of CPR 42.7 (2) which provides that all relevant parties agree to the terms in which judgment should be given or an order made. In my judgment, Moise J clearly considered the central issues in relation to the question of whether to set aside the Consent Order, before exercising his discretion in the matter.

[21] It is clear from a reading of the entire judgment that Moise J did not predetermine the outcome of the case or dispose of facts central to the determination of the case in a preemptory manner in the first paragraph but rather provided a summary of the facts and issues at paragraph 1 of his judgment and then proceeded to deal with the said facts and issues in the succeeding paragraphs of the judgment. It cannot be said that the judge failed to address the relative weight of the rival contentions on the evidence as to the authority given to counsel in respect of the consent order and the question of whether this affected the Consent Order when he exercised his discretion to refuse to set it aside.

[22] There is a world of difference between a case management decision made at the instance of one party to which the other party makes no objection, and a genuine settlement of a substantial dispute as to the parties' rights. In **Pannone L.L.P v Aardvark Digital Limited**,⁸ Tomlinson LJ said where a settlement is embodied in an order of a court, it can rarely be appropriate for the court to intervene further than to the extent to which the contract can, by its own terms or pursuant to general contractual principles, be modified or discharged in light of changed circumstances.⁹

[23] At paragraph 33 of **Pannone L.L.P**, Tomlinson LJ said that the weight to be given to the consideration that an order is agreed will vary in accordance with the nature of the order

⁸ [2011] EWCA Civ 803.

⁹ Ibid at paragraph 27.

and therefore the agreement. Where the agreement is the compromise of a substantive dispute or the settlement of proceedings, that factor will have very great and perhaps ordinarily decisive weight. Where the agreement is no more than a procedural accommodation in relation to case management, the weight to be accorded to the fact of the parties' agreement as to the consequences of non - compliance, while still real and substantial, will none the less ordinarily be correspondingly less, and rarely decisive.

[24] In his oral arguments, Mr. Jeremie SC submitted that the Consent Order ought to be set aside and the learned judge was plainly wrong not to so do. He stated that the governing principle was to determine whether or not there was in fact consent, then to interrogate the evidence to determine whether the consent reflects the position of the parties. Mr. Jeremie emphasised that the judge did not interrogate that issue. He stated that counsel had no authority to settle the matter on the terms on which it was settled, thus acted outside the scope of authority. The authority was to settle the matter between \$1 and 1.5 million dollars. The authority of counsel on the facts was limited.

[25] The judgment of Moise J was well reasoned. He properly applied the relevant law when exercising his discretion against setting aside the Consent Order. While the learned judge may have been more thorough in his interrogation, it is pellucid that there was sufficient evidence for him to have come to his conclusion both as a matter of fact and law.

[26] The appellant's email of 16th May 2020 to Mr. Hardtman is instructive. In the email he stated he had every intention of honouring the Consent Order. He made proposals as to how he was going to pay the judgment of \$4,600,000.00. The shares were relinquished. The appellant clearly started acting on the terms of the Consent Order. There was also the affidavit of Mr. Hardtman that the appellant's attorney had made an initial offer of \$1,500,000.00 in full settlement, but that was rejected outright. He indicated that the least he could accept was \$4,000,000.00 and \$600,000.00 in costs. Mr. Barnes contacted the appellant in his presence via telephone and conveyed that his client, the appellant had agreed to the amount. The offer was accepted by the respondents and the parties

returned before the Master, the Consent Order was duly signed, sealed and perfected the same day. I note learned Senior Counsel's criticism of that telephone call as evidence.

[27] The learned judge correctly found that the appellant had given his attorney ostensible and or actual authority to settle the damages and costs at the assessment hearing and the respondents were entitled to rely on that ostensible authority and or actual authority in agreeing the terms of the Consent Order. I have examined the principles relating to actual, implied and ostensible authority and do not agree that the judge conflated them. As stated, ostensible or apparent authority is the authority of an agent as it appears to others. It often coincides with actual authority.

[28] With respect to the issue of weight, weight is a matter of judgement, unless it is perverse, it cannot be assailed. It cannot be said that the learned judge was plainly wrong in refusing to set aside the consent order.

Conclusion

[29] It is ordered that the appeal is dismissed with costs to the respondents on the appeal being two thirds of the costs to be awarded upon assessment by a judge in the court below.

I concur.
Gertel Thom
Justice of Appeal

I concur.
Gerard St. C. Farara
Justice of Appeal [Ag.]

By the Court

Chief Registrar