

**EASTERN CARIBBEAN SUPREME COURT
SAINT CHRISTOPHER AND NEVIS
NEVIS CIRCUIT**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

Claim Number: **NEVHCV2014/0031**

Between

Applewaite Lake

Claimant

-and-

**Barbara hardtman
Laughton Browne
Kirtley Hardtman**

Defendants

Before: His Lordship Justice Ermin Moise

Appearances:

Mr. John S. Jeremie S.C, Mrs. Keesha Carty with Mr. Ricaldo Caines of counsel for the claimant/applicant
Mrs. Angela Cozier of counsel for the defendants/respondents
Mr. Brian Barnes of counsel with a watching brief

2020: November, 20th, 27th

JUDGMENT

[1] **Moise, J:** This is an application to set aside a consent order. The defendants had obtained summary judgment in their counterclaim against the claimant to which there has 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 part 42.7 of the CPR. The claimant now seeks to set this order aside primarily on the ground that he did not consent to the terms of the order, was not provided with certain advice from his attorneys and that his attorneys were acting outside of the scope of his instructions. He therefore wishes that the matter be relisted for an assessment of damages. I have determined that the application should be denied with costs to the defendants. These are the reasons for my decision.

- [2] The court's powers to set aside a consent order are not disputed. However, rather than filing a separate cause of action, as is normally done in instances like these, the claimant seeks to set aside this consent order by way of application in the current proceedings. Although counsel for the respondents had initially challenged the procedural approach taken by applicant, this challenge has since been abandoned. The question for determination therefore is whether there is a proper basis for interfering with the consent order by setting it aside.
- [3] The balance which the court seeks to create in such an instance is to firstly appreciate that there must be finality to litigation. The court is obligated to give no more of its time and resources to the parties in any case than what is reasonably necessary to resolve the substance of the dispute between them. In the case of a consent order it is an order of the court and insofar as it brings an end to proceedings, the parties are bound by its terms. On the other hand, it is appreciated that consent orders are of the nature of a contract mutually entered into by the parties. Insofar as that is the case, it is not an order which was made after the court had considered the substance of the case. The prevailing principle therefore is that the court is able to set aside a consent order for the same reasons it may invalidate a contract. This principle was highlighted by Byron JA in the case of **Cecilia Francis v Louis Boriel**¹ where he stated the following:

“The legal principles to be applied are not in dispute as this branch of law has been settled for a long time. A consent order is binding on the parties to it but is no less than a contract, because there is added to it the command of the court, and as such it is subject to the incidents of a contract including the liability to be set aside. The point is succinctly stated in Huddersfield Banking Company, Limited v Henry Lister & Son, Limited (1895) 2 C, 273 by Lindley L.J, at 280: “ In a consent order, I agree, is an order and so as it stands I think it is as good as an estoppel an any order. I have not the slightest doubt on that: nor have I the slightest doubt that a consent order can be impeached, not only on the ground of fraud, but upon any grounds which invalidate the agreement it expresses in a more formal way than usual.”

¹ Saint Lucia CIVIL APPEAL NO. 13 OF 1995

- [4] In the case of *Davidson Ferguson v Sarah Ferguson*² Master Actie (as she then was) noted that ***“[t]he court will only interfere with a consent order on any ground that would invalidate any other contract such as fraud, misrepresentation, undue influence, non-disclosure and supervening events which invalidate the whole basis of the order, if the justice of the case requires it.”*** Counsel for the applicant also refers to *Halsbury’s Laws of England* which states that ***“a consent order or compromise may be set aside on a ground which would invalidate any other agreement between the parties including mistake, illegality, duress or misrepresentation.”***
- [5] As I have stated earlier, the parties do not disagree on the state of the law which is applicable. The question is whether the application before me falls within the general ambit of the law. In other words, is there a valid reason to set this order aside in much the same way as the court would be minded to invalidate a contract? The grounds upon which the applicant would wish to so move the court relate not 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. He claims to also be aggrieved at the fact that he had not been given proper advice and that there was a conflict of interest which his attorneys did not disclose to him.
- [6] The consent order is dated 24th February, 2020 and was entered on 26th February, 2020. It contains a pre-amble which states that the parties had discussed the matter and came to an agreement on the terms set out in the order. The pre-amble also notes that the claimant had authorized his counsel to enter into this agreement. It was agreed, at least insofar as the order outlines, that judgment should be entered in the sum of \$4,000,000.00 with costs amounting to \$600,000.00. The claimant was to also relinquish shares in a company known as Oualie Masonry Products Limited.
- [7] By way of email dated 16th March, 2020 the claimant acknowledged this debt and assured the 3rd defendant that he had every intention to comply with the order. He also made requests for periodic payments of the debt. This came on the heels of a threat of committal proceedings against him. I note however, that he did 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.

² SLUHCV2012/0387

[8] In his affidavit in support of the application, the claimant states that he was previously represented by another firm of attorneys. Unfortunately summary judgment had been entered against him. He thereafter sought alternative legal representation. He states that he was informed by his new counsel that nothing could be done about the summary judgment and that he should negotiate a settlement in the matter. He complains that he was not informed that he had a right to file affidavit evidence in the assessment of damages, notwithstanding the fact that judgment had already been entered. He also complains that no one informed him that he had a right to be heard on the assessment as well as a right to cross examine witnesses. It was also his evidence that he had given instructions to his counsel to offer a settlement in the sum of \$1,000,000.00 - \$1,500,000.00. He goes on to complain that although he was informed by counsel that the matter was settled, it was only after a conversation with the 2nd defendant was he made aware of the terms of the settlement. He goes on to exhibit a number of correspondences and refers to a number of conversations he has had with his attorneys thereafter. He also complained that one of his attorneys was a director in a bank which was seeking to recover monies from the defendants. 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 crystalized into a consent order in addition to the conflict of interest he claims to have existed.

[9] 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. It is accepted that the court should only do so if it would have also been a basis upon which a contract would be invalidated. Counsel for the claimant submits that *“a consent order may also be invalidated for lack of consent from counsel.”* For that proposition he refers to the authority of ***Racz v. Mission (District)***³ where 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.”*** Counsel also goes on to argue 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.”*

³ 1988 Carswell BC13

Counsel relies on the case of **Re Newman**⁴ for that proposition. Reference was also made to the case of **Ramrakha v. Zinner**⁵ where the following was noted:

A solicitor is in a fiduciary relationship to his client and must avoid situations where he has, or potentially may, develop a conflict of interest: ... The logic behind this is cogent in that a solicitor must be able to provide his client with complete and undivided loyalty, dedication, full disclosure, and good faith, all of which may be jeopardized if more than one interest is represented.

[10] I note that neither of these cases addresses the issue of setting aside a consent order. The argument here is that there were various conflicts of interest which the claimant states arose with his attorneys which undermined their duty towards him. Essentially therefore, the argument of the claimant is that the court ought to set aside this order on the basis of the lack of authority of his counsel and their 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 that very day. It has been sealed by the court and he has so far attempted to comply with its terms.

[11] Insofar as the court's powers to set aside the consent order are based on the contractual nature of the relationship, the court enquired of counsel as to whether the attorney's ostensible authority was a factor to consider. Counsel was of the view that this would not prohibit the court from setting aside the order. However, I note that this very issue was considered in the case of **Rock Jean v. 1st National Bank of Saint Lucia**⁶ where Master Taylor Alexander (as she then was) noted that she was ***"satisfied that order filed met the requirements for a consent order as set out in CPR 42.7(1). I am satisfied that the claimant pleaded that at the time the consent order was negotiated Mr. Gerard Williams was his retained counsel and in my view he would have had the implied authority to act on his behalf."***

[12] In fact there may be authority for the proposition 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

⁴ [1903] 1 Ch. 812

⁵ 1994 ABCA 341

⁶ SLUHCv2010/0934

client. In the case of *Sheonandan Prasad Singh v. Abdul Fateh Mohammad Reza*⁷ Lord Atkin noted that ***“the authority is an actual authority implied from the employment as counsel. It may, however, be withdrawn or limited by the client; in such a case the actual authority is destroyed or restricted, and the other party if in ignorance of the limitation could only rely upon ostensible authority.”*** Lord Atkin's comments seem to suggest that once counsel is on record to act on behalf of the claimant he has the actual authority to compromise and settle the action. That much is implied. If the litigant withdraws that representation then the respondents may still rely on the ostensible authority of counsel if they are ignorant to this withdrawal. Lord Atkin did however accept that in particular classes of contracts ***“...if in fact counsel has had his authority withdrawn or restricted, the Courts will not feel bound to enforce a compromise made by him contrary to the restriction even though the lack of actual authority is not known to the other party.”*** It does not appear to me that this case falls within a class of exceptions referred to by Lord Atkin.

[13] Lord Atkin's decision was referred to in the Australian case of *Harvey v. Phillips et al*⁸. There the court considered a case where the litigant appeared to have been under some pressure from not only her attorneys, but also the judge in some instances, to settle the matter. In the end a consent was arrived at which she subsequently wished to have set aside. In coming to its conclusion the court stated that:

“The issue is one which must be considered from the defendants' point of view as well as from hers. When the defendants accepted the compromise requiring them to pay £4,000 they believed that thereby they were putting an end to the litigation. They acted upon the statement made by her counsel that the compromise was made with the authority of the plaintiff. Once it appears that the plaintiff did in fact give an assent which had not been withdrawn up to the moment when the terms of settlement were signed, it can be nothing to the point to say afterwards to the defendants that it was the result of her real desires or her judgment being overborne by her advisers, whatever may have been the degree of moral pressure that she felt.”

⁷ (1935) 62 Ind. App. 196.

⁸ H. C. A. 1956, 95 C.L.R..

[14] To my mind, a critical aspect of such an application as the present is the defendants' point of view.

Such an application raises serious allegations about the relationship between the applicant and his lawyers. It need not surprise anyone if the court were to say that an application to set aside a consent order on this basis places a 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. The basic laws of contract do provide for a principal to be bound by the actions of his agent where there is a clear basis for a third party to have relied on and acted upon the implied authority of the agent. As it relates to the authority of a solicitor, the law has created very few exceptions. In the case of ***Development Bank of Saint Kitts v. Michael Hanley et al***⁹ Ramdhani J had this to say about the issue:

“[21] The law is clear that an attorney at law retained in a matter by a client even without express authority, has an implied authority as between himself and his client to compromise the suit without reference to the client, provided that the compromise does not involve matter collateral to the action; that a matter was not collateral to the action unless it involved extraneous subject matter.”

[22] Further, the attorney at law has ostensible authority as between himself and the opposing counsel to compromise the suit without actual proof of authority, subject again to the same limitation, namely that the compromise should not involve matters which are collateral to the action. There is no need for opposing counsel to seek to confirm that the claimant's attorney at law has authority to settle the matter. ‘The magnitude of the compromise or the burden which its terms impose on the other party is irrelevant.’

[23] All opposing counsel need to do is to ask whether the compromise relates to matters collateral to the action, as if it does, he should require proof of actual authority.”

⁹ SKBHCV 2012/0273

[15] This is compatible with the decision in the case of *Waugh v. HB Clifford Ltd*¹⁰ where a similar statement was made. Ramdhani J went on to say that “[a]n attorney seeking to settle or compromise a matter may, depending on the nature of what he proposes to do, may do well to seek the express authority from his client, but that is a matter between his own client and himself and has nothing to do with the ostensible authority to settle or compromise the matter.” Essentially, what must be observed is that the defendants as third parties to the relationship between the claimant and his client are not under an obligation to satisfy themselves that the client has expressly agreed to the terms of the consent order. This is in addition to the fact that in the present case the Master was careful to put in the preamble of the order that the claimant had in fact agreed to its terms. This could have only been on the basis of representations made by the attorneys.

[16] As it relates to the claimant’s allegations of the failure on the part of his attorneys to advise him on various aspects of the process, I refer to the judgment of Kokaram J in the case of *Kisundaya Soogrim v. Indar Singh*¹¹ which was referred to by the claimant. The judge there noted that “it would be difficult to assert that the negligence of one’s own attorney would give rise to setting aside a consent order.” I share a similar sentiment. I do appreciate that the allegations leveled at the claimant’s prior solicitors go beyond mere negligence. However I am not of the view that the alleged conflict of interest is a matter to be weighed against the defendants. In my view, the court should be rather slow to accede to such a request as has been made by the claimant. 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 respondents ought to have been entitled to rely on the implied authority of the claimant’s lawyer in agreeing to terms of the consent order which was arrived at.

[17] Finally, the claimant would wish to invoke the court’s inherent jurisdiction to set aside the order “if good grounds for doing so are shown”, as was stated in the case of *Purcell v. F.E. Trigell Ltd*¹². I take counsel’s submissions to invoke the overriding objective of the CPR in that it is argued that the

¹⁰ [1982] Ch. 374

¹¹ CV2015-03713

¹² [1971] 1 Q.B. 358

justice of the case requires that this order be set aside. The court also has an inherent jurisdiction to protect its process. This may very well be invoked to set aside a consent order if the justice of the situation so requires. To my mind I do not find the issues raised by the claimant to be sufficient to trouble this consent order on that basis. If he is aggrieved by the relationship between himself and his former attorneys then that is a matter for them. It would be the wrong precedent to set for the court to allow persons to revisit litigation in this way once a consent order has been arrived at with reliance on the implied or ostensible authority of the attorney at law.

[18] In the circumstances the application is dismissed with costs to the defendants to be assessed by way of application before the court if not agreed within 21 days from the date of delivery of this judgment.

**Ermin Moise
High Court Judge**

By the Court

Registrar