

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

2015/CLE/GEN/01470

Common Law & Equity

BETWEEN

TIMOTHY DAMES

First Plaintiff

**AND
ETHEL DAMES**

Second Plaintiff

**AND
DESMOND FRASER**

First Defendant

**AND
ERNEST LEVI GARNER, JR.**

Second Defendant

Before Hon. Mr. Justice Ian R. Winder

**Appearances: Yvette McCartney-Meredith with Valentino Hamilton for the
Plaintiffs**

**Damian Gomez QC with Edward Turner for the Second
Defendant**

9 December 2021

JUDGMENT

WINDER, J

This is the application of the Plaintiffs seeking to set aside the Consent Order made on or about 4 September 2018 and filed on November 22, 2018.

1. The Plaintiffs application is brought by Summons dated 3 June 2021 which sought an order in the following terms:

1. An Order that the Consent Order made on or about September 4, 2018, and filed on November 22, 2018, be set aside or varied on the grounds that:
 - a. The Writ of Summons in this action was issued and all proceedings thereon inclusive of the Consent Order in the name of the Second Plaintiff without her authority.
 - b. The Consent order was made based on either a common or unilateral mistake, misrepresentation or fraud of which said mistake, misrepresentation or fraud the Second Defendant was aware of.
 - c. It is in the interest of justice that the consent order should be varied or set aside.
2. An Order that the Order of the Honourable Mr. Justice Ian Winder pronounced on December 7, 2020 to the effect that "The Second Defendant be allowed to sell the freehold property being and known as all that piece parcel or tract of land situate on the South Side of West Bay Street approximately Six Thousand Six Hundred and Sixty-eight (6,668) feet East of Lyford Cay Circle in the Western District of the Island of New Providence one of the Islands of the Commonwealth of the Bahamas containing five acres by Public Auction and that the proceeds of sale, less the expenses of the said auction, be paid to the Second Defendant in this action in payment of the Judgment herein dated September 4, 2018 and filed on November 22, 2018" by stayed upon such terms and conditions as the court thinks fit.
3. Alternatively, an Order that the Court extend the time under the Order of Mr. Justice Winder pronounced on December 7, 2020, to enable the Plaintiffs to settle any debt (if found to be owing) or obtain a private sale of the property on its own terms to settle any debt (if any) found to be due and owing to the Second Defendant.

2. The application was supported by the affidavit of the Plaintiffs. The First Plaintiff (Timothy) says in his affidavit that:

5. That the other Plaintiff and I entered into a written agreement (the Agreement) dated the 16th day of January, A.D. 2012, with the Defendants whereby we agreed to purchase from them and they agreed to sell to us the issued shares in the said Fraser Trading Limited and Island Block Manufacturing Company Limited at the price of Seven hundred and Twenty-five thousand dollars (\$725,000.00), with the purchase price to be apportioned between the 1st Defendant and the 2nd Defendant as stipulated in the said agreement. A copy

of this agreement is produced and exhibited in my said Affidavit and therein marked exhibit "Exh. TD2".

6. That a copy of my said Affidavit is now produced and shown to me marked exhibit "Exh. TD 14"
 7. That other Plaintiff and I paid to McKinney, Turner and Co. the further sum of Three hundred thousand dollars (\$300,000.00) at the time of the execution of the Agreement or thereabout to be distributed to the Defendants. It was a term of the Agreement that the purchase price and all money connected with the Agreement should be paid to the attorneys, McKinney, Turner and Co., to be paid to the Defendants and or applied in accordance with the terms of the agreement. But Mr. Anthony McKinney, Q.C., due to the constant requests to him by the 1st Defendant for money under or connected with the Agreement, instructed me to pay the 1st Defendant's remaining portion of the purchase price directly to him (the 1st Defendant).
 8. That the Defendants delivered up possession of the land to the other Plaintiff and me pursuant to the Agreement shortly after the execution of the Agreement and the payment of the said Three hundred thousand dollars (\$300,000.00) to the said attorneys of the parties to the Agreement. The other Plaintiff and I were entitled to have possession of the land and to conduct the business of block manufacturing thereon without interference from the Defendants or any of them. It was also a term of the Agreement, express or implied, that the block plant would be in good and working condition. From the date of the Agreement and the taking of possession of the land and block plant, the 1st Defendant has interfered, and continues to interfere, with the Plaintiff possession of the land and operation of the block plant to the extent the production of the plant has been reduced by more than one half of its productive capacity and thereby causing the other Plaintiff and me to suffer serious loss and damage. The 1st Defendant, in spite of the fact that he has received more than his portion of the purchase money continues to conduct himself in such manner. Over the past week he has completely prevented the Mr. Norman McFallane, an agent of the other Plaintiff and me, from operating the plant and removed certain cars which this Honourable Court ordered the other Plaintiff and me to remove. Up to about three weeks ago the 1st Defendant repeatedly locked the property gate and removed the locks installed by Mr. Norman McFallane, thereby preventing him from removing the cars. He has also caused damage to the property and wrongfully removed items belonging to the other Plaintiff and me.
3. The Second Plaintiff (Ethel) says in her affidavit that:
4. That my attorneys have shown me the court documents which contain Statements that they were issued by various attorneys purportedly on my behalf.
 5. That since the filing of the Writ in this action and one or two early court hearings in this matter I have never authorized any attorneys or any other person to continue or institute proceedings, file applications, swear Affidavits

or agree to Orders on my behalf. Further, I was never served with a Notice of Continuation of hearing or Notice of Hearing in this matter.

6. Immediately after it was brought to my knowledge that court documents were issued in these proceedings on my behalf without my authorization, I instructed C Yvette McCartney-Meredith Chambers and Sears & Co Chambers to make an application to this Honorable Court to set aside the Consent Order entered herein in September 2018 and to stay the Ruling of the Honourable Mr. Justice Ian Winder pronounced in December 2020.

4. Ethel was subject to cross examination on her affidavit.

5. In **Paradise Island Ltd. v. Adderley [1996] BHS J. No. 75, Barnett J** (as he then was) provides a useful and comprehensive discussion on the relevant law on the setting aside a consent order. At paragraphs 15-37 of the decision Barnett J:

15 This case involves the balancing of two principles. The first is the need for finality in litigation and the avoidance of re-opening cases which, for all intents and purposes, have been dealt with by the Court. The second is to ensure that matters are decided on their merits and not to bind litigants to consents not properly made and where the Court itself has not determined the lis on its merits.

16 In *Shepherd v. Robinson* (1919) 1 K.B. 474 at p. 477, Bankes L.J. said, "There are two distinct lines of authority relating to compromises said to have been made by counsel against the wishes or instructions of their clients. The first is that represented by *Strauss v. Francis*; *Matthews v. Munster* and *Welsh v. Roe*. In all those cases the question was whether the act of counsel had been within the scope of his authority. It is clear that counsel has an apparent authority to compromise in all matters connected with the action and not merely collateral to it; and if he acts within his apparent authority and the other party has no notice of any limitation or restriction on that authority, the client will be bound by the agreement made by his counsel and embodied in some order or judgment of the Court. If Mr. Powell could bring this case within that line of decisions I should agree that this compromise must stand.

"But there is a second and different line of cases which decide that before a consent order has been drawn up and perfected the consent given by counsel or solicitor may be withdrawn by the client if the counsel or solicitor gave it under a misapprehension. In such cases the Court will not proceed further with the drawing up and perfecting of the order, and will not lend its authority to compel observance of an agreement arrived at through a mistake. This is the line represented by *Holt v. Jesse* and by *Neale v. Gordon-Lennox*, where Lord Halsbury L.C. said: "The Court is asked for its assistance when this

order is asked to be made and enforced that the trial of the cause should not go on; and to suggest to me that a Court of justice is so far bound by the authorized act of learned counsel that it is deprived of its general authority over justice between the parties is, to my mind, the most extraordinary proposition that I have ever heard".

17These principles have been affirmed in the other common law jurisdiction. See *Bank of Montreal v. Arvee Cedar Mills Ltd.* (1979) 93 DLR (3d) 58 and *Tresize et al v. Nat'l. Australia Bank Ltd.* (unreported).

18There can be no doubt that the attorney for the Defendant had the apparent authority to consent to the judgment of 22nd March, 1996.

"The law thus became well established that the solicitor or counsel retained in an action has an implied authority as between himself and his client to compromise the suite without reference to the client, provided that the compromise does not involve matter "collateral to the action", and ostensible authority, as between himself and the opposing litigant, to compromise the suit without actual proof of authority, subject to the same limitation and that a compromise does not involve "collateral matter" merely because it contains terms which the court could not have ordered by way of judgment in the action; for example, the return of the piano in the *Prestwich* case, 18 C.B.N.S. 806; the withdrawal of the imputations in the *Matthews* case, 20 A.B.D. 141 and the highly complicated terms of the compromise in *Little v. Spreadbury* [1910] 2 K.B. 658."

19The claim in this action was for (1) delivery of possession to Paradise Island Limited of premises known as "The Island Restaurant" situate on or in the vicinity of the Old Chalks Airport on Paradise Island one of the Islands of the Commonwealth and (2) that the amounts due under the said agreement be paid forthwith". The said agreement is referred to in the heading of the action as being "an agreement dated 1st January, 1985 between the Paradise Island Limited and John Adderley".

20The consent judgment ex facie falls within the scope of the Defendant's attorney's authority to enter on behalf of the Defendant. There is no evidence that the Plaintiff was aware of any restriction on the authority of the attorney for the Defendant to compromise or settle the action or consent to judgment.

21Mr. Maynard submits, however, that the then attorneys had no actual authority of the Defendant to settle and the consent given by her is vitiated on the ground that it was done in ignorance of the case for the Defendant. He argues that the attorney for the Defendant acted in a complete frolic, consenting to judgment without the authority of the Defendant and without even knowing the case or defence of the Defendant to the action brought against him by the Plaintiff.

22Mr. Adderley in his affidavit said he was not even aware that the claim by the Plaintiff was for possession of his restaurant and that his attorney told him that the claim was simply about "the electricity bill". In short, if the Defendant's attorney only advised the Defendant that the action was about

the electricity bill and that it did not involve possession of property, it could not be within the authority of the Defendant's attorney, given to her by the Defendant, that she could compromise the action by consenting to deliver up possession.

23 There is no affidavit before the Court from the Defendant's then attorney. There is no evidence that the attorney is even aware of this application.

24 What is the Court to do?

25 Mr. McCartney submits that the Order has already been drawn up and that there is no jurisdiction in the Court to set aside the Order. He refers to the decision in *Harvey v. Croydon Union Rural Sanitary Authority* (1854) 26 Ch.D. 249 and in *Attorney General v. Tomline* (1874) Ch.D. 388.

26 The Order of the Court was not filed until 22nd April, 1996. On the very same day, however, the Defendant filed the Summons for a stay, filed his Affidavit and instituted action No. 422 of 1996.

27 The Court's file indicates that the Plaintiff's attorney on the 22nd April, 1996 was aware of the Defendant's position. There is a copy of a letter from the Plaintiff's attorney to the Defendant's attorney, which was copied to the Clerk of the List, in the following terms:

"It is our understanding that you intend to make an Ex parte application to request a stay of execution of the Order dated the 26th March, 1996. Be advised that if such application is indeed made we would require that we are heard on the same."

28 Against that background this Court is prepared to consider the Defendant's application as one that has been made before the Order was perfected. It is apparent that the Plaintiff's attorney must have been aware of the Defendant's position on the "consent" if not before the 22nd April, 1996, certainly on the 22nd April, 1996 when the Order was perfected. In this regard, I adopt the approach of Watkins J. in *Marsden v. Marsden* (1972) 2 All ER 1162 where an application to set aside a consent order was made on the same day as the order was perfected. At p. 1166 he said,

"The facts relevant to the question of whether this application can be entertained at all are as follows. I pronounced a decree nisi on 24th February, 1972, but the other orders of which complaint is made in this application were not perfected until 14th March. I have not been able to ascertain the precise time of day on 14th March when this happened. It is not necessary for me to enquire into, nor do I think it relevant to enquire into, why the orders were not perfected sooner. On the previous day, or the day before that, the solicitor for the wife informed the court that the application which is before me would be made. In the afternoon of 14th March the application was made before Lane J. The matter was then referred to me since I had originally been seised of it. Having regard to those facts I have come to the conclusion that the high probability is that the application was made, if not contemporaneously with the order being perfected, then at some time before it. In any event, where circumstances are to the effect that

action was taken of informing the court of the intention to make an application before the perfection of the order and the application is actually made on the day of perfection of the order, it seems to me to be a manifest injustice to an applicant to exclude her application from consideration on the basis that she may not have made it before the order was perfected." [my emphasis]

29In my judgment, this approach applies with equal force when action was taken to inform the other party (if not the Court as well) of the intention to make application before the perfection of the Order.

30I accept that it is not the law that a consent given by the authority of the client can be arbitrarily withdrawn at any time before the order was drawn up. The English Court of Appeal in *Harvey v. Croyden Union Rural Sanitary Authority* (ibid) made that very clear. However, the Court was also very clear that "if the consent is given through error or mistake, there can be no doubt that the Court will allow it to be withdrawn if the Order has not been drawn up". See Cotton L.J. at p. 255.

31The question for the Court, therefore, is whether the consent given by the Defendant's attorney was given through error or mistake. The affidavit evidence of Mr. Adderley is not controverted. Although it borders on the incredulous, there is no evidence before the Court to the contrary and truth is at times stranger than fiction.

32In my judgment, the mistake or misappropriation which would vitiate the consent order may be either that of the attorney or of the client. The attorney may have been unaware of limitations put on his authority. See *Shepherd v. Robinson*, *Marsden v. Marsden* and *Bank of Montreal v. Arvee Cedar Limited*. The client may not have fully understood the nature of the consent he may have believed that he was agreeing to something radically different from that which he instructed his attorneys to consent to on his behalf. The Court must be satisfied that parties were in fact "ad idem".

33Mr. McCartney argues that the actions of the Defendant's attorney were within the attorney's apparent authority and that the Plaintiff was unaware of any limitations on it. In those circumstances he submits the Plaintiff should not be prejudiced by the actions of the Defendant's counsel within that apparent authority.

34In this regard, I can do no better than refer to the comments of the learned authors of Halsbury's Laws of England, Vol. 3(1), 4th ed. At para. 520:

"Questions of difficulty have arisen where the authority of counsel to compromise a case has been expressly limited by the client, and counsel has entered into an agreement or consented to an order or judgment in spite of the dissent of the client, or on terms differing from those which the client authorised.

If the limitation of authority is communicated to the other side, consent by counsel which exceeds the limits of his authority will be of no effect. The position is more uncertain where the authority of counsel is limited, but the limitation is unknown to the other side, who enter into the compromise believing that the opponent's counsel has the

ordinary unlimited authority. Counsel has an apparent or ostensible authority, at least as wide as his implied authority to compromise an action; and in some case, where the matter is within the apparent authority of counsel, the courts have refused to inquire whether there was any limitation, when it was not communicated to the other side, and have refused to set aside a compromise entered into by counsel. The true rule seems to be, however, that in such case the court has power to interfere; that it is not prevented by the agreement of counsel from setting aside the compromise; that it is a matter for the discretion of the court; and that when, in the particular circumstances of the case, grave injustice would be done by allowing the compromise to stand, the compromise may be set aside, even though the limitation of counsel's authority was unknown to the other side. It may be, however, that the court will not interfere on this ground if the compromise has been embodied in an order of the court which has been perfected."

35 In the present case, with some reluctance, I find that the Defendant's attorney acted under a misapprehension as to the scope of his authority and that it would be unfair and a "grave injustice" to the Defendant to hold him bound by the Consent Order made without his knowledge. His attorney really ought to have consulted with him and if he did not agree he should have been permitted to have a judicial consideration of his "defence" to the claim for possession.

36 Mr. McCartney has submitted that I should decline to exercise my discretion to set aside the Order on the ground that there is really no bona fide defence to the claim for possession. I am not unmindful of the force of the Plaintiff's case. I am not, however, prepared to deny the Defendant the opportunity to make his case and have a judicial determination of the same.

37 I order that the Order of the 22nd March, 1996 be set aside. However, this case is one that should be dealt with expeditiously. There should be an early trial and I will hear submissions on the appropriate directions as to consolidation, discovery, and setting the matter down for trial.

6. As in the *Paradise Island Limited* case, I am satisfied on the evidence that the Plaintiffs' former counsel acted without authority when purporting to supply the consent of his clients with respect to the Order made on 4 September 2018 and filed on 22 November 2018. I am satisfied that the parties were not ad idem as the consent was arrived at by mistake. They did not consent and it would be unfair and a "grave injustice" to hold them bound by the Consent Order made without their knowledge. Regrettably therefore I must order that the Order of the 22 November 2018 be set aside in the interest of justice. The Order made for the sale of the

property dated 7 December 2020 must likewise be set aside as it was made upon the basis that a valid judgment was in place.

7. I will hear submissions from all parties as to the proper directions for the resolution of this claim.

Dated this 1st day of February 2022

A handwritten signature in black ink, appearing to be 'I. Winder', written in a cursive style.

Ian R. Winder

Justice