**[1980–87 Gib LR 201]**

# CALYPSO INVESTMENTS LIMITED v. J.T. MACKLEY AND COMPANY LIMITED

# ASQUEZ INVESTMENTS LIMITED v. J.T. MACKLEY AND COMPANY LIMITED

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SUPREME COURT (Alcantara, A.J.): May 11th, 1984

*Civil Procedure—stay of proceedings—removal of stay—limited jurisdiction to remove stay imposed by consent or operation of law, as undesirable to reopen apparently finished litigation—removal of stay if new facts which might have affected initial grant of stay*

*Civil Procedure—settlement of proceedings—finality of settlement—finality inferred if parties consent to adjournment sine die on day settlement reached—settlement supersedes original cause of action—further remedies to be sought under settlement, not original cause of action*

The second plaintiff sought an order for the removal of a stay imposed in proceedings to recover damages.

The first and second plaintiffs brought actions (which were later consolidated) against the defendant for damages arising out of a building contract. After an initial adjournment by the judge of the hearing of their action, there was a further adjournment by consent *sine die*. On the day of the hearing before the judge in chambers, however, the defendant obtained a stay of the consolidated actions by way of consent, as an out-of-court settlement had allegedly been reached. The second plaintiff subsequently sought the removal of the stay.

It submitted that the court should exercise its jurisdiction to order the removal of the stay as (a) a stay was neither equivalent to a discontinuance of the proceedings, nor to judgment for the defendant and accordingly its removal could be ordered in certain (albeit rare) cases if proper grounds were shown; (b) its solicitor had not been authorized to enter into the out-of-court settlement with the defendant; (c) the settlement was not valid as the contract signed by all the parties was invalid and incapable of

performance; and (d) the hearing in chambers in which the stay was granted had been defective as its solicitor had failed to put forward all the necessary facts and arguments with the result that the judge had granted the stay solely on the strength of the affidavits filed on behalf of the defendant.

The defendant submitted in reply that the court had no jurisdiction to remove the stay as (a) the settlement reached with the plaintiffs completely superseded the original cause of action and, if it were dissatisfied, the second plaintiff could now only seek a remedy under that settlement; and (b) the second plaintiff's solicitor had had ostensible authority to bind it to the settlement reached.

**Held**, dismissing the motion:

(1) While the court had jurisdiction to remove the stay, there was nothing to justify it doing so. No new facts or circumstances had come to light, which, had they been taken into consideration initially, would have influenced the judge's original decision to grant the stay. The court's jurisdiction to remove a stay was limited, both in cases in which the stay had been imposed by way of consent (as in the present case), and in those in which it had been imposed by operation of law. It would only be used rarely as it was undesirable that litigation which was apparently finished be reopened lightly (paras. 8–11; para. 19).

(2) The second plaintiff's solicitors had had ostensible authority to reach the settlement with the defendant which now superseded the original cause of action. It was a valid document signed by all the parties and the inference could be drawn that it was final as the parties had consented to an adjournment *sine die* on the same day it was reached. Any remedy now sought by the plaintiff would have to be sought under that settlement (paras. 14–15).

(3) The hearing before the judge in chambers had not been defective, since what arguments were to be advanced was for counsel concerned to decide. The second plaintiff had been adequately represented by counsel who had forcefully argued that the settlement reached by the parties was not final and that no stay should be imposed (para. 18).

**Cases cited:**

(1) *Cooper* v. *Williams*, [1963] 2 Q.B. 567; [1963] 2 W.L.R. 913; [1963] 2 All E.R. 282, followed.

(2) *Green* v. *Rozen*, [1955] 1 W.L.R. 741; [1955] 2 All E.R. 797, considered.

(3) *Lambert* v. *Mainland Market Deliveries Ltd.*, [1977] 1 W.L.R. 825; [1977] 2 All E.R. 826; [1978] 1 Lloyd's Rep. 245, considered.

(4) *Waugh* v. *H.B. Clifford & Sons Ltd.*, [1982] Ch. 374; [1982] 2 W.L.R. 679; [1982] 1 All E.R. 1095, considered.

*P.J. Isola* for the second plaintiff;
*J.E. Triay, Q.C.* and *P. Triay* for the defendant.

1 **ALCANTARA, A.J.:** This is a motion for an order that the stay imposed in this action on February 6th, 1984 be removed.

2 The matter comes before me in the following way. Proceedings were commenced in January 1980 by the first and second plaintiffs, in separate actions against the defendant, claiming damages arising out of a building contract. After pleadings were delivered, an order for consolidation of actions was made on March 4th, 1981. Amended pleadings were delivered and on May 24th, 1982, the proceedings were set down for hearing on October 11th, 1982. The hearing was adjourned by the parties from time to time until May 24th, 1983, when there was a consent adjournment *sine die*. Then on November 23rd, 1983, a summons was issued on behalf of the second plaintiff asking for an order to deconsolidate the action, but this was withdrawn on December 16th, 1983. Instead, a new summons was issued asking for leave to amend the statement of claim. This was due to be heard on January 16th, 1984. Two things happened on that date. There was a request and consent adjournment to February 6th, 1984, and a summons was issued by the defendant for hearing also on February 6th, 1984, asking that "this consolidated action be stayed on the ground that terms of settlement have been arrived at by the parties."

3 On February 6th, 1984, the summons for the stay of proceedings was heard first. All the parties were represented. After hearing the evidence and arguments by all the parties, I granted a stay. The following is a note I made in my minute-book:

> "I am satisfied that a solicitor has power to compromise an action. I am satisfied on the evidence before me, affidavit evidence, that the present action was compromised on terms. On the authority of *Green* v. *Rozen* that is the end of the present action, and it should be stayed."

4 *Green* v. *Rozen* (2) is authority for the proposition that an agreement compromising an action between the parties completely supersedes the original cause of action and the court has no further jurisdiction in respect of that cause of action. Slade, J. deals with it thus ([1955] 1 W.L.R. at 743):

> "There are various ways in which an action can be disposed of when terms of settlement are arrived at when the action comes on for trial, or in the course of the hearing. I have had experience of at least five methods of disposing of an action in such circumstances. They are not exhaustive . . . I am dealing, however, with methods of disposing of an action of a less formal character . . ."

5 Slade, J., after dealing with the first four methods, continues (*ibid*., at 746):

> "The fifth method, which is the only one I propose to decide, is the one adopted in the present case. The court has made no order of any kind whatsoever, and having considered such authorities as I have been able to find, I arrive at the conclusion that in those circumstances the court has no further jurisdiction in respect of the original cause of action, because it has been superseded by the new agreement between the parties to the action, and if the terms of the new agreement are not complied with, then the injured party must seek his remedy on the new agreement."

And later on he added (*ibid*., at 746) that counsel "cannot come here and ask me to remove the stay because I have made no order for the stay at all; there is nothing to be removed."

6 The other case that was brought to my attention was *Waugh* v. *H.B. Clifford & Sons Ltd.* (4), which deals with the ostensible or apparent authority of a solicitor or counsel to bind his client to a compromise of an action. Brightman, L.J. deals with the matter in this manner ([1982] Ch. at 388):

> "I think it would be regrettable if the court were to place too restrictive a limitation on the ostensible authority of solicitors to bind their clients to a compromise . . . So many compromises are made in court, or in counsel's chambers, in the presence of the solicitor but not the client. This is almost inevitable where a corporation is involved. It is highly undesirable that the court should place any unnecessary impediments in the way of that convenient procedure. A party on one side of the record and his solicitor ought usually to be able to rely without question on the existence of the authority of the solicitor on the other side of the record, without demanding that the seal of the corporation be affixed; or that a director should sign who can show that the articles confer the requisite power upon him; or that the solicitor's correspondence with his client be produced to prove the authority of the solicitor. Only in the exceptional case, where the compromise introduces extraneous subject matter, should the solicitor or counsel retained in the action be put to proof of his authority. Of course it is incumbent on the solicitor to make certain that he is in fact authorised by his corporate or individual client to bind his client to a compromise. In a proper case he can agree without specific reference to his client. But in the majority of cases, and certainly in all cases of magnitude, he will in practice take great care to consult his client, and I think that his client would be much aggrieved if in an important case involving large sums of money he

relied on his implied authority. But that does not affect his *ostensible* authority *vis-à-vis* the opposing litigant."

Brightman, L.J. has this to add (*ibid*., at 390):

"A statement that the client is prepared in principle to compromise on certain specific terms is not an intimation that the client has withdrawn the ostensible authority of the solicitor to compromise on any other terms."

7 Before considering this motion on its merits, I have to be satisfied that the court has power to remove a stay. Before 1963 there was a doubt, which is expressed in 2 *The Supreme Court Practice 1982*, para. 3350, at 947, dealing with the effect of a stay of proceedings: "Two views may be taken: first that it is a discontinuance, and therefore cannot be removed; secondly, that it is not equivalent to a discontinuance, but may be removed if proper grounds shown."

8 In 1963, *Cooper* v. *Williams* (1) was decided and the Court of Appeal was unanimous in its decision that the court has power, if it thinks fit for good cause, to remove a stay. The *ratio decidendi* of the case was that the court had jurisdiction to remove a stay imposed by a consent order. The basis of the decision was stated by Lord Denning, M.R. ([1963] 2 Q.B. at 580), after referring to the note in *The Annual Practice 1963*, as:

"I am of the opinion that the effect of a stay is that it is not equivalent to a discontinuance, or to a judgment for the plaintiff or the defendants. It is a stay which can, and may be removed if proper grounds are shown."

9 The last sentence in Lord Denning's quotation gives rise to the query: are there some stays which cannot be removed? The Court of Appeal in this case was dealing with a stay by consent.

10 The next case is *Lambert* v. *Mainland Market Deliveries Ltd.* (3), also brought to my attention by counsel for the second plaintiff, the headnote of which is in the following terms ([1977] 2 All E.R. at 826):

"(1) Where there had been a stay of proceeding as a result of a payment into court and the operation of CCR Ord. II, r.7(2), the court had jurisdiction to set aside the stay in a proper case. The jurisdiction to set aside the stay should, however, be exercised with great care since it was desirable that litigation which apparently had been finished by a payment into court, either of the full amount claimed or of an amount deliberately accepted by the plaintiff, should not lightly be allowed to be re-opened."

11 On the exercise of this jurisdiction, Megaw, L.J. uttered a warning that should always be borne in mind (*ibid*., at 833):

> "It is a jurisdiction which ought to be exercised with very great care, and it may well be that the cases in which it falls to be exercised should only be rare. It is desirable that litigation, once apparently finished, including litigation finished by means of payment into court which is either of the full amount claimed or an amount deliberately accepted by a plaintiff, ought not lightly to be allowed to be re-opened."

12 The position as I see it is that the *Cooper* case (1) was a stay by consent whereas the *Lambert* case (3) was a stay by operation of the County Court Rules. In the instant case the stay, if *Green* v. *Rozen* (2) is a good authority, was imposed by operation of law. Further and additionally the judge in chambers granted an order of stay of proceedings on the merits of the application before him. Whether in those circumstances a stay can be removed before there is an appeal on the merits of the stay is something which has not been fully argued and which in my view is not fully covered by the authorities of *Rozen* or *Lambert*.

13 However, the defendant is opposing the removal of the stay on its merits, so I am going to assume that the court has power to remove the stay in a case such as this. Now as to the merits of ordering a removal of the stay granted on February 6th, 1984.

14 The first contention by the second plaintiff is that his solicitor was not authorized to arrive at a settlement—in other words that he did not have authority. This matter was ventilated in chambers and I arrived at the conclusion that the solicitor had not only implied authority but also obstensible authority *vis-à-vis* the other parties. Nothing I have heard in this motion is contrary to that finding.

15 It is true that Mr. Asquez in his affidavit dated May 2nd, 1984 states in para. 6 the following: "Mr. Azopardi was not authorized to arrive at a settlement without referring the matter back to me for prior approval." Nowhere in his affidavit does he state that he informed the other parties or that the other parties to the action were aware or cognizant of this limited authority. At para. 8, Mr. Azquez deposes:

> "When he informed me that damages had been agreed as far as my claim was concerned at £3,000, I immediately protested and told him that he had no authority to settle my damages claim in that amount and we agreed to meet in the offices of J.A. Hassan & Partners on the following day."

16 It is agreed that a settlement took place on May 23rd, 1983 and on that same day, Mr. Asquez was informed. What is highly significant is that on the following day, Mr. Azopardi, his solicitor, signed a request and consent adjournment *sine die*, which was filed in court that same day. The action had been set down for hearing on June 1st, 1983. Previously, all

adjournments of the hearing had been for a future date. An inference that can be drawn is that there was a final settlement on May 23rd, 1984.

17 The second contention by the second plaintiff is that the settlement arrived at on May 23rd, 1983 between the solicitors for the first plaintiff, the second plaintiff and the defendant was not a valid settlement as the contract was invalid, and incapable of performance. Whether it was a good or bad contract is not for me to say in these proceedings, but there can be no doubt that it was a valid contract. The formula for remedial measures was signed by the three solicitors present representing all the parties and the second plaintiff was to receive not only damages but also legal costs.

18 The third contention is that the then legal advisers of the second plaintiff (there has been a change of solicitors since the hearing in chambers) failed to put forward all the facts and arguments before the judge in chambers, and that the hearing was defective because the judge decided the granting of the stay solely on the strength of the affidavits filed on behalf of the defendant. I am unable to accept this. The second plaintiff was represented in chambers by leading counsel, who argued forcefully that this was a partial, not a final agreement and that no stay should be imposed. How a hearing should be conducted is entirely up to counsel concerned to decide.

19 Finally, I have purposefully tried to avoid the temptation of reviewing the facts which lead up to the granting of the stay of proceedings. It appears to me that the issue now before me is not whether the granting was proper or not, but whether, assuming that the stay was properly granted, there are any new facts which would justify a removal. By new facts I am not necessarily referring to facts of recent creation, but to facts which should have been taken into account when the stay was granted, *i.e.* facts or circumstances of which the parties were either unaware or were unknown to them, which if taken into consideration would have influenced the granting of the stay. As I have already said, the contentions put forward and the evidence adduced are insufficient in my view to justify a removal in this case. There are no "new facts" on which a removal is justified.

20 During the course of the hearing it has been intimated to me that there is a possibility, nay, a probability, of an appeal. I am prepared to grant leave to appeal, not so much because I am in doubt about my present decision, but because any party has the right to exhaust all legal recourses.

*Order accordingly.*