[1988–90 Gib LR 241]

AVILA (as personal representative of the ESTATE of DURAN) v. DRAGADOS Y CONSTRUCCIONES S.A.

SUPREME COURT (Alcantara, A.J.): May 24th, 1990

Civil Procedure—costs—security for costs—security for costs not to be ordered as matter of course if plaintiff resident abroad—depends on circumstances of case

Employment—death benefits—scope of benefits—widow of deceased not necessarily estopped from bringing claim for benefit of deceased's children if own claim barred by accepting compensation payment purporting to discharge employer from liability

Estoppel—conduct—acquiescence—acceptance by widow of compensation payment for herself from husband's employer not acquiescence in final settlement even though purports to discharge employer from liability—may still bring claim for benefit of deceased's children

Tort—fatal accidents—contractual compensation—widow of deceased not necessarily estopped from bringing claim for benefit of deceased's children even if own claim barred by accepting compensation payment purporting to discharge defendant from liability

The plaintiff claimed damages for negligence against the defendant applicant in respect of the death of her husband.

The plaintiff's husband had died as the result of an accident in the course of his employment by the defendant as a labourer. The defendant paid the widow £5,000 compensation, pursuant to an agreement between the Gibraltar Master Builders Association and the Transport & General Workers' Union; the plaintiff signed a receipt discharging the defendant from any further liability in respect of the accident without reading the document or receiving legal advice. Nearly three years later, the plaintiff, as personal representative of the deceased's estate, commenced the present proceedings for negligence. The defendant sought security for costs against the plaintiff, who lived in Spain.

The plaintiff submitted that (a) she had signed the receipt, which had been portrayed to her as no more than that, without reading it and without the benefit of legal advice; (b) her signing of the receipt, even if it estopped her from bringing a claim on her own behalf, could not bar a claim made on behalf of her children; (c) there had not been an inordinate

delay in bringing the proceedings, which were not out of time; (d) the merits of the claim fell to be assessed at a later date; and (e) security for costs was not an automatic step to be taken when one party resided outside the jurisdiction, and was not appropriate in the present circumstances.

The defendant submitted in reply that (a) the payment of the £5,000 had constituted a full and final settlement of the plaintiff's claim, and that she was therefore estopped from bringing the present action; (b) the plaintiff had delayed inordinately in bringing the proceedings; (c) the proceedings had little or no merit; and (d) the plaintiff's residence outside the jurisdiction required that security should be given for costs, as the defendant was otherwise unlikely to be able to recover them.

Held, dismissing the application:

(1) The plaintiff was not barred from bringing the claim because of the signing of the receipt, as it could not be said that the plaintiff's signing the receipt excluded any claims that her children might have against the defendant (para. 10).

(2) There had been no inordinate delay in the bringing of the proceedings, which fell within the limits imposed by the Limitation Ordinance. It was too early to tell whether the claim had any merit to it; in any case, this was not an application for striking out (para. 7).

(3) Security for costs was not to be ordered as a matter of course merely because the plaintiff lived abroad: whether an order would be made would depend on the circumstances in each case. In the present case, no such order would be made, although the plaintiff was poor (as the widow of a labourer with four children) and resident outside the jurisdiction (paras. 11–12).

Cases cited:

(1) *Arrale* v. *Costain Civil Engr. Ltd.*, [1976] 1 Lloyd's Rep. 98; (1975), 119 Sol. Jo. 527, applied.

(2) *Parkinson (Sir Lindsay) & Co. Ltd.* v. *Triplan Ltd.*, [1973] Q.B. 609; [1973] 2 W.L.R. 632; [1973] 2 All E.R. 273, observations of Lord Denning, M.R. referred to.

M.P.J. McDonnell for the plaintiff;
L.E.C. Baglietto for the defendant.

1 **ALCANTARA, A.J.:** The defendant is asking for security for costs against the plaintiff. In the affidavit by the defendant's solicitors, three grounds are given why security should be ordered. These are that—

(a) on November 20th, 1986 the defendant paid to the plaintiff the sum of £5,000 which she accepted in full and final settlement of all claims on her own behalf and on behalf of the heirs and dependants of the deceased in connection with the death of her husband, the deceased;

(b) there has been inordinate delay in instituting the proceedings, which have no or little merit; and

(c) the defendant is unlikely to recover its costs if successful, as the plaintiff resides out of the jurisdiction.

2 The relevant facts are as follows: Salvador Perez Duran was employed by the defendant as a labourer on the building known as the Water Gardens Complex, which was in the process of being built. On November 4th, 1986 he fell from a height of 10 ft. in the course of his employment and suffered severe injuries. He died on November 11th, 1986 as the result of those injuries. He left his widow and 4 children: 3 girls, aged, respectively, 16, 10 and 2, and a boy aged 14.

3 On November 20th, 1986, the employers—the defendants—paid the widow £5,000, and she signed a receipt discharging the defendant from any further liability. The said receipt states that the payment was made pursuant to para. 15(i) of a Memorandum of Agreement between the Gibraltar Master Builders Association and the Transport & General Workers' Union dated June 29th, 1986.

4 It is pertinent at this stage to set out what para. 15(i) is all about. It is headed "Death Benefit," and reads:

> "All operatives shall be entitled to cover, to be provided by the employer, that in the event of any death resulting from an accident at the place of work, a lump sum death benefit of £5,000 shall be payable to the dependants of the deceased operative."

5 Nearly three years later, the plaintiff issued and served a writ against the defendant, suing as legal personal representative of the estate of Salvador Perez Duran. She claims damages for negligence for the benefit of herself and the four children of the marriage.

6 The defendant in its defence denies liability, and, in the alternative, alleges contributory negligence on the part of the deceased; further and in the alternative, it submits that the acceptance of the £5,000 in full and final settlement exonerates it from any further liability.

7 I shall first deal with the defendant's ground (b). I cannot come to the conclusion that there has been an inordinate delay in bringing the proceedings. It is within the limitation period. I need not say anything more about this aspect of the matter. Insofar as the merits are concerned, it is far too premature to come to the conclusion that the case of common law negligence will not succeed. In any case, this is not an application for striking out. I find that the defendant fails on its second ground.

8 Now, as to the first ground, (a) the acceptance of the £5,000. This is what the plaintiff's solicitor states in an affidavit sworn by him:

"4. I am instructed that she did not read the contents of the said document, nor was the true purport of the said document related to her. The plaintiff understood the document to be no more than a receipt for money paid.

5. I am also instructed that the plaintiff signed the said document without the benefit of legal advice."

9 Counsel for the plaintiff has brought to my attention a case, which I find helpful: *Arrale* v. *Costain Civil Engr. Ltd.* (1), to which the headnote in *Lloyd's Law Reports* ([1976] 1 Lloyd's Rep. at 98) reads as follows:

"On July 3, 1968, the plaintiff was injured in an accident at Dubai in the Persian Gulf, while he was in the employ of the defendants, and engaged in the building of a harbour wall at Dubai. As a result of the accident the plaintiff's arm had to be amputated below the shoulder.

An ordinance in Dubai provided for compensation for workmen who were permanently disabled as a result of their employment, and the figure for loss of the left arm was 50 per cent of the death compensation.

On Aug. 19, 1968, the defendants paid to the plaintiff 5616 QDR in Dubai currency, being the full amount provided for by the ordinance. The plaintiff signed a receipt accepting the amount

'. . . in full satisfaction and discharge of all claims in respect of personal injury whether now or hereafter to become manifest arising directly or indirectly from an accident which occurred on 3rd July, 1968.'

The plaintiff later came to England and on July 1, 1971, he issued a writ claiming damages for negligence at common law against the defendants. The defendants denied liability on the ground that all liability had been discharged by the receipt which the plaintiff had signed on Aug. 19, 1968.

—*Held,* by Nield, J., that the receipt operated as a discharge of all claims and the plaintiff's claim would be dismissed.

On appeal by the plaintiff:

—*Held,* by C.A. (LORD DENNING, M.R., STEPHENSON and GEOFFREY LANE, L.JJ.), that

(i) under the ordinance the plaintiff was entitled as of right to payment of the sums paid to him . . . and since the workmen's compensation was settled by the defendants at its full value there was nothing else the plaintiff could legitimately claim under the ordinance . . . ;

(ii) with regard to the claim at common law, if there was true accord and satisfaction in that the plaintiff with full knowledge of his

> rights freely and voluntarily agreed to accept the one sum in discharge of all his claims, he would not be permitted to pursue his claim at common law . . . ; but there was no evidence of a true accord at all. . .; and the plaintiff was not barred from pursing his claim at common law;
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> . . .
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> (iii) accordingly the defendants were not entitled to rely upon the receipt of Aug. 19, 1968 as being a binding agreement by the plaintiff not to pursue his claim at common law . . ."

10 The case before me is even stronger. It cannot be said that the signing of the receipt by the mother excluded any claims which the children, as dependants, might have against the defendant. I find that this ground also fails.

11 Finally, I come to the defendant's ground (c), that the plaintiff resides out of the jurisdiction. Counsel for the defendant has quite rightly and properly referred me to a passage in *The Supreme Court Practice 1988*, para. 23/1–3/2, at 397, which reads: "Security cannot now be ordered as of course from a foreign plaintiff, but only if the Court thinks it just to order such security in the circumstances of the case." Counsel also referred me to the judgment of Lord Denning, M.R. in *Parkinson (Sir Lindsay) & Co. Ltd.* v. *Triplan Ltd.* (2) ([1973] 2 All E.R. at 285–286).

12 There is evidence that the plaintiff is in a dire financial situation. I would not expect otherwise, taking into account that she is the widow of a labourer with four children. In the circumstances of this case I will not order security for costs; the application is dismissed. The parties have agreed that the costs should be costs in the cause.

Application dismissed.