[HIGH COURT OF AUSTRALIA.]

EMILY JOAN HARVEY . . . . . APPELLANT;
PLAINTIFF,

AND

CORALIE NGARITA PHILLIPS AND ANOTHER . . . . . } RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Mar.* 23; *April* 10;

MELBOURNE, *June* 8.

Dixon C.J., McTiernan, Williams, Webb and Fullagar JJ.

*Practice—Action—Compromise—Counsel's authority—Authority exceeded—Limitation of authority unknown to other party.*

The plaintiff brought an action for damages against the defendants as executors of a surgeon in respect of injuries which she attributed to an operation. Before the trial offers to settle were made by the defendants but were rejected by the plaintiff, against the advice of her counsel. When the case came on for trial discussions of settlement were held after the jury had been sworn, but the plaintiff remained adamant even after the judge had seen her in his chambers and had advised her to heed counsel's opinion. Senior counsel for the plaintiff then went from the court and it appeared that the plaintiff was left with the impression that he had thrown up her case. Ultimately, after extreme pressure from her friends and legal advisers, the plaintiff intimated that she would accept the offer. Senior counsel on each side signed terms of settlement and the judge adjourned the Court. It appeared that the plaintiff who was deaf did not hear these final proceedings. The plaintiff then said she had never given her consent to settle and applied by motion to the Full Court to set aside the judgment. Judgment had not in fact been signed or entered. The Full Court dismissed the motion. On appeal,

*Held*: that the facts found by the Supreme Court must be accepted and as a result the plaintiff must be considered bound by the settlement pursuant to the consent she had at length given and, since plaintiff's counsel acted in accordance with this authority, and since that authority, however reluctantly given, must have appeared considered and definitive to the defendants' counsel, there were no grounds for any exercise by the Court of its discretion to set aside the compromise or intercept formal judgment.

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The question of counsel's authority to compromise, and the grounds which justify the exercise of the Court's discretion, discussed.

Decision of the Supreme Court of New South Wales (Full Court): *Harvey* v. *Phillips* (1956) S.R. (N.S.W.) 161; 73 W.N. 131, affirmed.

APPEAL from the Supreme Court of New South Wales.

This was an appeal by the plaintiff, Emily Joan Harvey, widow, radio artist, from an order of the Full Court of the Supreme Court of New South Wales refusing an application to set aside a judgment given in pursuance of the compromise made between counsel for the parties of an action brought in the Supreme Court by the plaintiff against Coralie Ngarita Phillips, widow, and David Rossel as executrix and executor respectively of the will of Gilbert Edward Phillips, surgeon, deceased, in which the plaintiff claimed £40,000 by way of damages arising from serious injury and facial disfigurement she alleged she had sustained through a surgical operation allegedly negligently and carelessly performed by the deceased surgeon about a year prior to his death.

The plaintiff alleged that counsel appearing for her were not authorized or empowered by her to compromise the action.

An appeal by way of motion to the Full Court of the Supreme Court (*Street* C.J., *Herron* and *Manning* JJ.) was dismissed (1).

From that decision the plaintiff appealed to the High Court as of right.

Further facts appear in the judgment hereunder.

Appellant in person. The members of the Court below should have taken a wider cognizance of the facts as shown in the affidavit of the respondents' solicitor which substantiated in practically every detail the appellant's statements in relation thereto. The facts show that the settlement was made without my knowledge. I was not informed that the senior counsel who had appeared for me had revised his decision not to act further and re-accepted the brief. The terms of settlement were not made known to me, either verbally or in writing, nor was I asked whether any such terms were satisfactory to me. Some months previously I definitely rejected an offer of £5,000 submitted for my consideration by the senior counsel then appearing for me. On the morning of the hearing concentrated endeavours were brought to bear upon me to induce me to accept the offer then made, but I consistently refused. At all times I insisted that my case should be heard in court. In the result, my case was not called; the evidence was not even touched upon.

(1) (1956) S.R. (N.S.W.) 161; 73 W.N. 131.

*R. G. Reynolds*, for the respondents. The appellant, in fact, agreed to the settlement which was negotiated by her counsel. There is not any evidence nor any suggestion whatever of any communication of any limitation of her counsel's authority to the respondents in their legal advice.

[FULLAGAR J. There is not any room for the rule laid down in *Neale* v. *Gordon Lennox* (1).]

The respondents' counsel were entitled to assume that the appellant's counsel had her authority to agree on her behalf to a settlement of the action. The trial judge was told that the matter had been settled and he was handed a document which contained the terms of settlement " by consent ". Although the judgment could be it has not been signed. That is an administrative procedure. The point was not taken in the Full Court of the Supreme Court, and deliberately not taken in the circumstances of this particular case. It was not contested on the facts that the appellant, up till approximately 11-30 a.m. on the day of the hearing, was adamant, but her attitude was not known to the respondents or their counsel. What was done was done in open court. This Court will not disturb the finding of fact made by the Full Court that the appellant did in fact authorize her counsel to settle the action for the sum of £4,000. Relevant authorities on this matter are : *Welsh* v. *Roe* (2) ; *Shepherd* v. *Robinson* (3) ; *Hansen* v. *Marco Engineering (Aust.) Pty. Ltd.* (4) ; *Neale* v. *Gordon Lennox* (1) ; and *Strauss* v. *Francis* (5). Even if the Court be against the respondents on the proposition of fact as to disturbing the findings of the Supreme Court, there is not any evidence of any communication by the plaintiff to the defendants that counsel had any limitation of their implied or ostensible authority, or that they were proscribed completely from settling the matter. There not being any notice of any limitation or proscribing of the appellant's counsel's authority the matter is within the principles laid down by *Alverstone* C.J. in *Neale* v. *Gordon Lennox* (1) ; see also *Welsh* v. *Roe* (6).

The appellant in reply.

*Cur. adv. vult.*

June 8.

THE COURT delivered the following written judgment :—

This is an appeal as of right from an order of the Full Court of the Supreme Court of New South Wales. The order refused an application to set aside a judgment given in pursuance of a compromise

(1) (1902) A.C. 465.
(2) (1918) 118 L.T. 529 ; 87 L.J. (K.B.) 520.
(3) (1919) 1 K.B. 474.
(4) (1948) V.L.R. 198.
(5) (1866) L.R. 1 Q.B. 379.
(6) (1918) 87 L.J. (K.B.), at p. 522 ; 118 L.T. 529, at p. 531.

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of an action made between counsel. The plaintiff in the action is a lady who complains that she sustained serious injury and facial disfigurement through an operation performed by a surgeon. The surgeon afterwards died and she brought the action against the executrix and executor of his will. The operation was performed on 25th June 1952. The writ was issued on 29th May 1953. In the action the plaintiff claimed a large sum by way of damages in respect of the injuries which she attributed to the operation. The plaintiff had suffered from *tic douloureux* and it was for the purpose of giving her relief from that malady that the operation upon her face was performed. She complains that it resulted in some permanent disfigurement, a paralysis of the left side of the face, a diminution of capacity to hear, to taste and to smell and in other ill-effects.

A declaration was filed on the part of the plaintiff containing three counts. The first count alleged negligence in the performance of the operation. The second count was based upon an alleged contract to perform a particular operation and an allegation that without the plaintiff's knowledge the deceased surgeon performed another and different operation causing the damage complained of. The third count was framed as a count for assault and was based upon an allegation that the surgeon operated upon the plaintiff in a manner and to an extent which was not authorized and that he did so without her knowledge and consent.

At the commencement of the action the plaintiff's solicitor was Mr. Gordon L. Beard. On 3rd July 1953 the Public Solicitor took his place upon the record as her solicitor. But in November 1954 Mr. Beard became her solicitor again, the future conduct of the action having been assigned to him.

On 18th August 1954, the action was set down for trial. On 18th October 1954, an expedited hearing was sought. The application was made the occasion on the part of the defendants for suggesting a settlement of the action. Through counsel an enquiry was made whether the plaintiff would be prepared to accept an amount of £3,500 in full settlement of the claim. This suggestion was not entertained but in response an intimation was received by the defendant which suggested that the Public Solicitor might be prepared to recommend to his client a settlement of the action for the sum of £5,000. A further application was made for an expedited hearing and the date of the trial of the action was specially fixed for Monday, 14th March 1955. On that occasion in a conversation with the defendants' solicitor Mr. Beard appears to have referred to the possibility of the plaintiff accepting £15,000 in settlement of the action. The defendants' solicitor said that was out of the question.

On 2nd March 1955, Mr. Beard inquired of the defendants' solicitors whether they were in a position to make an offer of settlement. For the defendants it was intimated that no more than £3,500 would be offered. It seems unlikely that any of these inquiries with reference to the possibility for settlement originated with the plaintiff. Her desire appears to have been to fight the action and make public the wrong and injury which she considered that she had suffered. In the meantime some preparations for the trial on Monday, 14th March, were going forward. Inspection seems to have been had of a document which apparently formed part of the records of the hospital at which the operation upon the plaintiff had been performed. It is not in evidence but it seems to have expressed a consent on her part to undergo whatever surgical treatment might be considered proper. This apparently was regarded by the plaintiff's advisers as an obstacle to her success, at all events on the third count.

About a fortnight earlier at a conference with the plaintiff's senior counsel he recommended a compromise. At another conference on the Saturday before the trial he expressed the same view strongly. On the Monday, the day of the trial, a long drawn out attempt was made by her counsel to persuade the plaintiff to settle the action. It is unnecessary to state in detail what took place but it is plain that great pressure was exerted upon her to give her consent to a settlement. After a jury had been impanelled the court was asked to adjourn until twelve noon. During the negotiations between counsel which followed the defendants' offer was increased to £4,000. The plaintiff however proved obdurate. According to her account a strange scene took place in the precincts of the court in which she was subjected in various ways to extreme pressure and persuasion by her counsel which she withstood. But even if her account be disregarded it sufficiently appears from the record that she resisted the advice to compromise and that counsel went to unusual lengths to overcome her resistance. After a time both her counsel and counsel for the defendants requested the judge to see the plaintiff in his private chambers. This his Honour consented to do. We know from a communication from the learned judge to the plaintiff what took place. His Honour informed her that both counsel had told him that they had arrived at a compromise verdict which they both considered to be fair. He told the plaintiff that the acceptance of the verdict was a matter entirely for her own decision but he understood that her counsel and her solicitor both strongly recommended the acceptance. He then told her that in her own interests she should consider their views carefully

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and not lightly cast their advice aside as they were both capable and experienced in litigation of that nature. The plaintiff replied to his Honour that she would never agree to settle the action, that she would not accept their offer, that the amount offered was ridiculously inadequate, that their attitude towards her for years had been contemptuous and that she would not settle for any amount. She repeated this sentiment several times in different words and his Honour then said: "Very well, Mrs. Harvey, the case will go on" and terminated the interview. As she left his Honour's chambers the plaintiff said: "They are trying to force me to settle but I shall never agree". After this interview, however, further pressure was exerted upon the plaintiff to obtain from her a consent to settle the action. Mr. Beard's evidence is that for about another quarter of an hour her senior counsel continued to urge the appellant to accept the sum of £4,000, that she on her side maintained her refusal to do so and reiterated that she would not settle. Mr. Beard says that she was quite adamant that she did not want to settle the case. Ultimately counsel said to him: "Well, if your client won't take my advice I will have to return the brief to you, but you talk to her for a while now. I am going back to my chambers for half an hour. If there is any change in her attitude before the half hour is up you come and get me." He put down his brief upon the table and went back to his chambers. There can be little doubt that the plaintiff was left with the impression that her senior counsel had thrown up her case. The junior counsel and solicitor, the plaintiff's daughter and a number of other people were left either in the conference room outside the court or in the passageway. At some stage, perhaps before she saw the judge in his chambers, phenobarb tablets were administered to the plaintiff, apparently with the object of reducing the excitement into which she had been thrown. According to the evidence of Mr. Beard, whose testimony has been accepted by the Supreme Court, he, the junior counsel and the plaintiff's daughter all urged the plaintiff to accept the offer of compromise. The plaintiff was at one stage again reduced to tears. A Mr. Darby, M.L.A., who had taken an interest in the case and was there as a friend, put his arm on her shoulder and said: "There is no need to get any more upset about it, Joan. We are all trying to do our best for you", and she said "All right I will take it." Mr. Beard said that, if she was prepared to take it, he would go over and get counsel from his chambers. This he did and counsel for the parties took their seats at the Bar table. Ultimately the defendants' counsel were informed by the plaintiff's counsel that she would accept the offer of £4,000 and senior counsel on each side wrote out

and signed a paper entitled " Terms of Settlement ". Its contents were : " By consent :—1. Jury to be discharged. 2. Verdict for Plaintiff of £4,000. 3. Terms not to be disclosed." The judge took his seat in court, the paper was handed up to him and his Honour congratulated the parties on reaching a settlement of the action and said that he considered it was a satisfactory settlement for all concerned. The court then adjourned, the time being about ten minutes past twelve. During this proceeding the plaintiff was seated in the body of the court with her daughter. She is, however, deaf, and in all probability she did not herself hear what took place.

Her case is that she did not consent to the settlement, never expressed her agreement to take £4,000 or to settle at all and did not understand the proceedings. In this Court, however, we must accept the facts as found by the Supreme Court on Mr. Beard's evidence and take the facts to be as Mr. Beard stated them. Moreover it seems probable that those accompanying her did inform the plaintiff of what had taken place in court and that on that day she did understand that the case had been settled. However, by next morning she was firm in disowning the compromise.

From the foregoing facts it seems clear enough that in spite of her determination not to settle the action she was temporarily overborne by the extreme pressure exerted upon her by her counsel supported by her solicitor and perhaps others and was induced, when she understood that her counsel had refused to conduct her case and when Mr. Darby spoke gently to her, to express what proved a short-lived consent to accept £4,000 by way of compromise. There can be little doubt that the consent which she so expressed was to the knowledge of those present in opposition to her fixed desire and was given with a reluctance only too evident. But so far as the counsel and solicitors of the defendants knew, the plaintiff's counsel had his client's considered and definitive authority to accept the settlement. They were, of course, quite aware that for a long time the plaintiff had refused her consent to compromise the action and that the plaintiff's counsel was endeavouring to obtain her authority and was experiencing difficulty in doing so. It therefore does not seem a case in which reliance was placed upon the apparent or implied authority of counsel to compromise proceedings in court. All parties understood that the question whether the offer of £4,000 was to be accepted in settlement of the action depended upon the plaintiff's receding from her refusal and giving her express authority ; but of course the defendants' counsel acted upon the statement of the plaintiff's counsel that he had obtained that authority. In a judgment delivered on behalf of the Privy Council in an Indian

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appeal Lord *Atkin* dealt with such a situation. His Lordship said: "But whatever may be the authority of counsel, whether actual or ostensible, it frequently happens that actions are compromised without reference to the implied authority of counsel at all. In these days communication with actual principals is much easier and quicker than in the days when the authority of counsel was first established. In their Lordships' experience both in this country and in India it constantly happens, indeed it may be said, that it more often happens that counsel do not take upon themselves to compromise a case without receiving express authority from their clients for the particular terms, and that this position in each particular case is mutually known between the parties. In such cases the parties are relying not on implied but on an express authority given *ad hoc* by the client": *Sheonandan Prasad Singh* v. *Abdul Fateh Mohammad Reza* (1).

Before this Court the plaintiff appeared in person in support of her appeal. Her complaint was against the conduct of those representing her, not against the conduct of the defendants' counsel or solicitor. It is hardly necessary to say that, be the compromise wise or unwise in her interest, it was a matter for her to decide in the exercise of a judgment formed upon an appreciation of the advice of her counsel and solicitor but under no sense of coercion.

The learned judge authorized the entry of judgment in accordance with the terms of settlement drawn up. Judgment has not in fact been signed or entered, so we were informed. Had judgment been signed it may be doubted whether it was open to the plaintiff to attack it by making an application to the Full Court in the action to set aside the judgment and compromise. No objection was made on this score. But the difficulty which confronts the plaintiff is that her counsel when he signed the terms of settlement acted in accordance with the authority which she gave in the manner described by Mr. Beard. If the question whether the compromise should be set aside was a matter depending upon the discretion of the court, the course of events which led her, after she left the judge's chambers, at length to give way and express a consent might be very material. But in the circumstances of this case it does not appear to us that the court possesses a discretion to set aside the compromise or to intercept the formal entry of judgment. It is not a case of misapprehension or mistake made by counsel in consenting to an order or settlement: cf. *Hickman* v. *Berens* (2). It is not a case where the assistance of the court is sought or invoked to carry a compromise into effect which otherwise could not be enforced by the party

(1) (1935) 62 Ind. App. 196, at p. 200. (2) (1895) 2 Ch. 638.

relying upon it. In such a case the assistance may be refused on grounds not necessarily sufficient to invalidate a simple contract. It is not a case where a compromise has been agreed upon by counsel acting only in pursuance of his apparent or implied authority from his client but, owing to a mistake or misapprehension, in opposition to his client's instructions or in excess of some limitation that has been expressly placed on his authority. In such a case, at all events until the judgment or order embodying the compromise has been perfected, an authority exists in the court to refuse to give effect to or act upon the compromise and perhaps to set it aside: see *Neale* v. *Gordon Lennox* (1); *Shepherd* v. *Robinson* (2); *Little* v. *Spreadbury* (3), per *Bray* J.; *Hansen* v. *Marco Engineering Co. (Aust.) Pty. Ltd.* (4), per *Fullagar* J.; *Schwarz* v. *Clements* (5). In the course of the judgment in the case of *Sheonandan Prasad Singh* v. *Abdul Fateh Mohammad Reza* (6), already cited, Lord *Atkin* said that these cases qualified the implied authority of counsel to compromise an action. "In the first instance 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. In this particular class of contract, however, the possibility of successfully alleging ostensible authority has been much restricted by the authorities such as *Neale* v. *Gordon Lennox* (7) and *Shepherd* v. *Robinson* (2), which make it plain that 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" (8). It is said that this power of the courts is to be exercised as a matter of discretion when in the circumstances of the case to allow the compromise to stand would involve injustice in view of the restriction on counsel's authority. See *Halsbury's Laws of England*, vol. 3, 3rd ed., p. 51; 2nd ed., vol. 2, pp. 526, 527. But in the case of a compromise which is made within the actual as well as apparent authority of counsel a court does not appear to possess a discretion to rescind it or set it aside. The question whether the compromise is to be set aside depends upon the existence of a ground which would suffice to render a simple contract void or voidable or to entitle the party to equitable relief against it, grounds for example such as

(1) (1902) A.C. 465, particularly at pp. 469, 470, 473.
(2) (1919) 1 K.B. 474.
(3) (1910) 2 K.B. 658, at p. 662.
(4) (1948) V.L.R. 198, at pp. 201-203.
(5) (1944) 171 L.T. 305, at p. 309.
(6) (1935) 62 Ind. App. 196.
(7) (1902) A.C. 465.
(8) (1935) 62 Ind. App., at pp. 199, 200.

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illegality, misrepresentation, non-disclosure of a material fact where disclosure is required, duress, mistake, undue influence, abuse of confidence or the like. The rule appears rather from positive statements of the grounds that suffice (cf. *Halsbury's Laws of England*, vol. 26, 2nd ed., pp. 84, 85) ; but there is a dictum of *Lindley* L.J. which is distinct enough : ". . . 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 . . . . To my mind the only question is whether the agreement on which the consent order was based can be invalidated or not. Of course if that agreement cannot be invalidated the consent order is good " : *Huddersfield Banking Co. Ltd.* v. *Henry Lister & Son Ltd.* (1).

The difficulty in the present case lies in the very unwilling and ephemeral character of the consent which the plaintiff was led to give. But it is enough if she expressed a real intention to consent, even if experience might have suggested that it was an attitude she was not likely to maintain. In the circumstances one might have expected that she would be asked to sign a written authority. But that was not done. However the finding of the Supreme Court, supported as it is by evidence, suffices to establish that she definitely did give her authority, however reluctant it may have been. It is impossible to regard the authority she thus gave as insufficient to support the compromise. 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.

The appeal must therefore be dismissed.

*Appeal dismissed with costs.*

Solicitors for the respondents, *S. E. Cook & Son.*

J. B.

(1) (1895) 2 Ch. 273, at p. 280.