HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

PHILLIP JULIUS BAXTER APPELLANT

AND

OBACELO PTY LTD & ANOR RESPONDENTS

Baxter v Obacelo Pty Ltd
[2001] HCA 66
15 November 2001
S10/2001

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of New South Wales

Representation:

D F Jackson QC with D P Robinson for the appellant (instructed by Baker & McKenzie)

A J Sullivan QC with D T Miller for the respondents (instructed by Moray & Agnew)

CATCHWORDS

Baxter v Obacelo Pty Ltd

Torts – Joint tortfeasors – Satisfaction – Settlement with one tortfeasor – Entry of consent judgment against one tortfeasor – Settlement figure less than total damages claimed by the respondents – Whether settlement prevented respondents continuing claim against other tortfeasor – Whether cause of action against joint tortfeasors is one and indivisible – Whether settlement was paid and received in "full satisfaction" of respondents' loss.

Practice and procedure – Rule against "double satisfaction" – Settlement amount in first action less than amount otherwise recoverable in second action – Respondents conceded that credit is to be given for the amount recovered upon settlement of the first action – Whether second action in breach of rule against "double satisfaction" – Nature of the rule against "double satisfaction".

Words and phrases – "full satisfaction" – "double satisfaction" – "action" – "cause of action".

Law Reform (Miscellaneous Provisions) Act 1946 (NSW), s 5(1).
Law Reform (Married Women and Tortfeasors) Act 1935 (UK), 6(1).

1 GLEESON CJ AND CALLINAN J. The respondents commenced an action for damages against two alleged joint tortfeasors, one of whom was the appellant. They settled their case against the co-defendant, and entered judgment against him. The amount of the judgment was satisfied. They continued their action against the appellant. The appellant contends that it was not open to them to do so. Whether that contention is correct depends in part upon the meaning and effect of s 5(1) of the *Law Reform (Miscellaneous Provisions) Act* 1946 (NSW) ("the Act"), which was transcribed from s 6(1) of the *Law Reform (Married Women and Tortfeasors) Act* 1935 (UK) ("the UK Act"), and in part upon principles concerning recovery and satisfaction in the case of claims against persons subject to co-ordinate liabilities.

2 There are many circumstances in which a person with a claim against a number of joint tortfeasors may wish to settle with one, or some, of them, and continue with, or commence, proceedings against others. The situation which arose in the present case is not unusual.

3 Section 5(1) of the Act provides, so far as presently relevant:

> "5(1) Where damage is suffered by any person as a result of a tort (whether a crime or not) -
>
> (a) judgment recovered against any tort-feasor liable in respect of that damage shall not be a bar to an action against any other person who would, if sued, have been liable as a joint tort-feasor in respect of the same damage;
>
> (b) if more than one action is brought in respect of that damage by or on behalf of the person by whom it was suffered … against tort-feasors liable in respect of the damage (whether as joint tort-feasors or otherwise) the sums recoverable under the judgments given in those actions by way of damages shall not in the aggregate exceed the amount of the damages awarded by the judgment first given; and in any of those actions, other than that in which judgment is first given; the plaintiff shall not be entitled to costs unless the court is of opinion that there was reasonable ground for bringing the action;
>
> …"

4 Paragraph (a) does not assist the appellant, and is not relied upon by him. The appellant relies upon par (b), and also, if necessary, what was described in argument as the rule relating to double satisfaction. The appellant contends that since judgment for damages has been given in an action against the co-defendant, and has been satisfied, no further sum is recoverable against him.

The proceedings

5 The appellant was employed as a solicitor in a legal practice conducted by Mr Whitehead. The respondents retained Mr Whitehead's firm to act for them in a conveyancing transaction. The appellant had the conduct of the matter. The respondents allege that the matter was handled negligently. The details of that allegation are not important. The respondents claim to have suffered damages in excess of $430,000. The manner in which that claim was assessed is presently irrelevant.

6 The respondents sued both Mr Whitehead and the appellant, in one action, in the Supreme Court of New South Wales. Originally, the respondents, acting under the mistaken belief that Mr Whitehead and the appellant were partners, framed their statement of claim on that basis. They sued both defendants in contract and tort. In the claim in tort, they alleged that Mr Whitehead was vicariously liable for the appellant's negligence.

7 The respondents then learned that the appellant was an employee, and could not be liable in contract. At about the same time, the respondents and Mr Whitehead reached an agreement to settle the claim against Mr Whitehead for $250,000 inclusive of costs.

8 A deed of release was executed by the respondents and Mr Whitehead. It included the following provisions:

> "1. In consideration of payment to the Releasor by the Releasee of the sum of $250,000.00 as hereinafter described the Releasor does for itself, and its assigns by these presents remit release and forever quit claim unto the Releasee, all manner of actions suits causes of action claims expenses and demands whatsoever which they have or which they could or might but for these presents at any time or times hereinafter have against the Releasee, by reason or on account of the hereinbefore recited circumstances or any manner cause or thing whatsoever arising therefrom.
>
> 2. PROVIDED HOWEVER that payment of the monies payable pursuant to paragraph 1 hereof shall be subject to the Releasor amending the Statement of Claim filed in proceedings issued in the Supreme Court of New South Wales Common Law Division bearing the number 14486 of 1987 herein in accordance with the annexure hereto marked 'A' and the filing of Terms of Settlement in the said action in accordance with the terms annexed and marked 'B'.
>
> 4. The Releasee shall pay the said sum of $250,000.00 to the Releasor within 21 days from the date of this deed or within 3 days from the date of

filing of the amended statement of claim (annexure A) and terms of settlement (annexure B) in the said action, whichever shall be the later together with interest from that date at the rate of 19.5% per annum on the sum of $250,000.00 or any part of that sum outstanding on the expiration of the said period."

9 An amended statement of claim in accordance with annexure A was then filed. It still named Mr Whitehead and the appellant as defendants, but it alleged that the appellant was an employee, and sued him only in negligence. The claim against Mr Whitehead was framed in contract and tort. In tort, he was said to be vicariously liable for the appellant's negligence.

10 Terms of settlement in accordance with annexure B to the deed of release were then filed. They provided for judgment for the respondents against Mr Whitehead for $250,000. Mr Whitehead, in the terms of settlement, undertook to take no further part in the proceedings. The argument in this Court, and in the Supreme Court of New South Wales, was conducted on the basis that judgment against Mr Whitehead was entered, and satisfied.

11 The appellant filed an amended defence which included the following:

"16 In further answer to the whole of the Further Amended Statement of Claim at all material times Baxter was employed as a solicitor in the law practice of Whitehead and acted in the course of that employment in carrying out his duties in relation to the affairs of the Plaintiffs.

17 At all material times Whitehead was vicariously liable for the acts and omissions of Baxter acting in the course of that employment in carrying out his duties in relation to the affairs of the Plaintiffs.

18 If (which is denied) Baxter was a tortfeasor with respect to the Plaintiffs by reason of the matters alleged in the Further Amended Statement of Claim then Whitehead was a joint tortfeasor.

19 By deed of release dated 16 December 1987 and in consideration of the sum of $250,000 the Plaintiffs released Whitehead from all actions claims expenses and demands whatsoever in respect of the circumstances which allegedly gave rise to these proceedings.

20 On or about 11 February 1988 the Supreme Court entered judgment for the Plaintiffs against Whitehead in these proceedings in the sum of $250,000.

21 On or about 16 February 1988 Whitehead paid the judgment sum to the Plaintiffs.

22 In further answer to the whole of the Further Amended Statement of Claim Baxter says the action on behalf of the Plaintiffs is brought in respect to the same damage as that sought and fully recovered against Whitehead."

Decisions in the Supreme Court of New South Wales

12 The appellant applied for summary dismissal of the respondents' action against him pursuant to Pt 13 r 5 of the Supreme Court Rules (NSW). In brief, he argued that the facts set out in pars 16 to 22 of the defence, which (subject to one qualification) were not in contest, meant that the action was bound to fail, that the test for summary dismissal formulated in *General Steel Industries Inc v Commissioner for Railways (NSW)*[1] was satisfied, and that the case should be dismissed without the parties being required to litigate the issues of negligence and quantum of damages.

13 Master Harrison ruled against the appellant, declining summary dismissal of the action. An appeal to Hulme J failed. The appellant then sought leave to appeal to the Court of Appeal[2]. In the Court of Appeal, for the purpose of avoiding the possibility that the case might go off on questions relating to the standard of conclusiveness required to make good an application for summary dismissal, an application was made under Pt 31 r 2 of the Supreme Court Rules for the Court to determine, as a separate question, whether the matters of defence in pars 16 to 22 of the defence provide a defence to the respondents' claim against the appellant. The precise expression of the question was a matter of argument, but the Court of Appeal ultimately decided to treat that as a separate question. The Court of Appeal dismissed the application for leave to appeal from Hulme J, and answered the question in the negative[3].

14 It was mentioned above that there is a qualification to the statement that the facts asserted in pars 16 to 22 of the defence were not in contest. The qualification concerns the relationship between the sum of $250,000 and the respondents' total claim for damages. Master Harrison noted that the total claim was $433,247 and that the sum of $250,000 inclusive of costs "represented less than the totality of the claim against both defendants". At all stages the respondents have conceded that, if an award of damages is assessed against the appellant, in that assessment he will have to be given credit for the amount received from Mr Whitehead. The Court of Appeal decided the case on the basis

---

1 (1964) 112 CLR 125.

2 *Baxter v Obacelo Pty Ltd & Anor* (2000) 48 NSWLR 522.

3 *Baxter v Obacelo Pty Ltd & Anor* (2000) 48 NSWLR 522 at 546.

that the sum of $250,000 could not have been received in full satisfaction of the respondents' loss "because recovery of further compensation was contemplated". As a matter of fact, that is correct, but it is not easy to reconcile with the concluding words of par 22 of the defence, which were assumed, for the purposes of the question asked and answered in the Court of Appeal, to be accurate. Evidently, no one considered that par 22 required the Court of Appeal to make the factual assumption that the damage actually suffered by the respondents had already been fully recovered, in the sense that the respondents suffered no loss or damage in excess of that for which they were compensated by Mr Whitehead. If such a point had been taken, it may have demonstrated the inappropriateness of framing a question along the lines asked in the Court of Appeal, but there would have remained for determination the appellant's original application under Pt 13 r 5, which did not require any artificial assumption about the extent of the respondents' claim. In argument in this Court, counsel for the appellant accepted that the case was not one where, (apart from whatever might be the legal effect of the entry and satisfaction of judgment), the respondents' loss had been fully recouped.

15 Two other matters concerning the question formulated in the Court of Appeal should be mentioned. First, at all stages of the proceedings, it has been common ground that it was appropriate to refer to the whole of the deed of release and the terms of settlement, and not merely to such parts of them as are set out in the defence. Secondly, it is theoretically possible that there might be facts, additional to those raised in pars 16 to 22 of the defence, which bear upon the application of the principles concerning recovery and satisfaction invoked by the appellant. If there are such facts, they are outside the scope of the arguments presently under consideration. The appellant contends that (subject to what has been said above) the bare facts set out in pars 16 to 22 mean that the action against him is bound to fail.

Section 5 of the Act

16 It is common ground that, if the respondents' allegations concerning negligence and damage are correct, the appellant and Mr Whitehead were liable as joint tortfeasors in respect of the same damage. The circumstance that the appellant was Mr Whitehead's employee is immaterial, except insofar as it explains how they came to be joint tortfeasors. The outcome of the case would be the same if Mr Whitehead had been the employee and the appellant the employer; or if, as was supposed originally by the respondents, they had been partners.

17 One fact emerges clearly from the language of the deed of release and the terms of settlement, and from the conduct of the parties. At the time the respondents settled with Mr Whitehead, it was contemplated by the respondents, and by Mr Whitehead, that the respondents would pursue their claim against the appellant. The continuation of the claim was expressly referred to in the deed of

release and the terms of settlement. There was nothing to suggest that the sum of $250,000 was intended to be paid, or received, in full satisfaction of all claims arising out of the allegedly negligent conduct of the conveyancing transaction. On the contrary, it was made clear that the respondents intended to continue with the action against the appellant, and to seek to recover from him an amount in addition to the amount they recovered from Mr Whitehead. At the same time, the respondents have acknowledged consistently, both in the Supreme Court of New South Wales and in this Court, that if damages are ultimately assessed at more than $250,000, they will be obliged to give credit for that amount in any determination of the amount of the judgment against the appellant. For this reason, they say, no question of double satisfaction arises. Their intention is, and has at all times been, clear. Having recovered $250,000 from Mr Whitehead, they say that the damages to which they are entitled exceed that amount, and they seek to recover the balance from the appellant. The first question is whether s 5 of the Act permits, or prevents, that.

18 Glanville Williams, in *Joint Torts and Contributory Negligence*, published in 1951, used "concurrent tortfeasors" as a generic term for joint tortfeasors and several concurrent tortfeasors. Concurrent tortfeasors are persons whose acts concur to produce the same damage. Joint tortfeasors are responsible for the same wrongful act leading to single damage. Such joint responsibility may arise from vicarious responsibility of one for another, or from the non-performance of a joint duty, or from concerted action. Several concurrent tortfeasors are independent tortfeasors whose separate acts combine to produce damage. In their case, "concurrence is exclusively in the realm of causation"[4]. In *Thompson v Australian Capital Television Pty Ltd*[5], Brennan CJ, Dawson and Toohey JJ said:

> "The difference between joint tortfeasors and several tortfeasors is that the former are responsible for the same tort whereas the latter are responsible only for the same damage. As was said in *The 'Koursk'*, for there to be joint tortfeasors 'there must be a concurrence in the act or acts causing damage, not merely a coincidence of separate acts which by their conjoined effect cause damage'. Principal and agent may be joint tortfeasors where the agent commits a tort on behalf of the principal, as master and servant may be where the servant commits a tort in the course of employment. Persons who breach a joint duty may also be joint tortfeasors. Otherwise, to constitute joint tortfeasors two or more persons must act in concert in committing the tort."

---

4 Glanville Williams, *Joint Torts and Contributory Negligence*, (1951) §1 at 1.

5 (1996) 186 CLR 574 at 580-581.

19 At common law, the liability of joint tortfeasors was joint and several. A plaintiff could sue joint tortfeasors separately, in independent actions, for the full amount of the loss. Or the plaintiff could sue all the joint tortfeasors in the same action[6]. Several concurrent tortfeasors, on the other hand, could not be joined as defendants in the one action. That was because they were severally liable "on separate causes of action"[7]. The difference between action and cause of action was significant. A person suffering injury as a result of the wrongdoing of joint tortfeasors had only one cause of action[8]. Some consequences of this will be considered below. Such a person might bring one action (ie proceeding), or more than one action. In the case of several concurrent tortfeasors, there was a separate cause of action against each, and if a plaintiff desired to sue more than one, it was necessary to commence separate actions.

20 One corollary of the principle that a plaintiff had only one cause of action against a number of joint tortfeasors was that, where an action was brought against two or more joint tortfeasors, only one judgment for one sum of damages could be given in favour of the plaintiff[9]. In *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd*[10] this Court had to consider the effect upon that rule of s 5 of the Act in a case where one of two joint tortfeasors was liable for exemplary damages, but the other was not so liable.

21 Another corollary, sometimes referred to as the rule in *Brinsmead v Harrison*[11], was that the single cause of action resulting from the joint commission of a tort merged in the first judgment which the plaintiff obtained in respect of it. A plaintiff who recovered action against any one joint tortfeasor was "barred from subsequently recovering judgment against any other joint tortfeasor responsible for that tort whether in an action commenced before, at the same time as, or after the action in which a final judgment had already been recovered".[12] The Privy Council, in *Wah Tat Bank Ltd v Chan*[13] described this

---

6 *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574 at 603-604 per Gummow J; *Bryanston Finance Ltd v de Vries* [1975] QB 703 at 730 per Lord Diplock.

7 *Sadler v Great Western Railway Co* [1896] AC 450 at 454 per Lord Halsbury LC.

8 *Wah Tat Bank Ltd v Chan* [1975] AC 507 at 515.

9 *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448 at 454 per Gibbs CJ.

10 (1985) 155 CLR 448.

11 (1872) LR 7 CP 547.

12 *Wah Tat Bank Ltd v Chan* [1975] AC 507 at 515.

common law rule as "highly technical and unsatisfactory" and cited, as its only possible justification, what was said about it by Blackburn J in *Brinsmead v Harrison*[14]:

> "Is it for the general interest that, having once established and made certain his right by having obtained a judgment against one of several joint wrongdoers, a plaintiff should be allowed to bring a multiplicity of actions in respect of the same wrong? I apprehend it is not; and that, having established his right against one, the recovery in that action is a bar to any further proceedings against the others."

22 It may be noted that Blackburn J clearly distinguished between action and cause of action. By "action" he meant a proceeding by which the jurisdiction of a court was invoked. Both in England, and in New South Wales, at the end of the nineteenth century and the beginning of the twentieth century, the word "action", in its proper legal sense, was "a generic term … [that] includes every sort of legal proceeding"[15]. The *Common Law Procedure Act* 1899 (NSW) used the term in that sense[16].

23 One technique that was adopted to circumvent the rule in *Brinsmead v Harrison* was the Tomlin form of order by which a settlement agreement was made and recorded without entry of judgment. As the Privy Council observed in *Wah Tat Bank*, this was not a complete solution to the inconvenience and injustice caused by the common law rule. The rule was considered in England by the Law Revision Committee[17] which recommended legislation which took effect as s 6(1) of the UK Act. In *Wah Tat Bank*, the Privy Council was required to consider the effect of Singapore legislation modelled on the UK Act. (Similar legislation was enacted in many parts of the Commonwealth, including New South Wales). Their Lordships concluded that the legislation, and, in particular, par (a), (which corresponds to s 5(1)(a) of the Act), abolished the old common

---

13 [1975] AC 507 at 515-516.

14 (1872) LR 7 CP 547 at 553.

15 *Re W Carter Smith; Ex parte The Commissioners of Taxation* (1908) 8 SR (NSW) 246 at 249 per Street J.

16 eg sections 4(1), 6.

17 Great Britain, Law Revision Committee, *Third Interim Report*, (1934) (Cmd 4637). For a discussion of the Report and legislation, see *James Hardie & Coy Pty Ltd v Seltsam Pty Ltd* (1998) 196 CLR 53.

law rule in its entirety[18]. In that case it had been argued that the reference to "action", in par (a), was only to an action successive to the action in which judgment was recovered[19]. Therefore, it was said, if two or more joint tortfeasors were sued in the one action, and judgment was entered against one of them, that was a bar to any further pursuit of the action against the other. The argument was rejected. Lord Salmon, giving the judgment of the Privy Council said[20]:

> "The crucial words in paragraph *(a)* are 'any other person who would, if sued, have been liable.' Whether or not a person is liable for a tort cannot, apart from the context of those words, depend upon whether or not he is sued. He is liable for the tort from the moment when he commits it. But paragraph *(a)* contemplates the case of a person being 'liable' only 'if sued'. A person is *held liable* only when he is *sued to judgment*, not at the moment when he is sued. Accordingly, to construe the words 'if sued' as meaning 'if sued to judgment' and the word 'liable' as 'held liable' is not to put a strained meaning upon words (as argued on behalf of the respondent) but to give them their ordinary and natural meaning in their context in paragraph *(a)*. The paragraph begins by postulating that a person has recovered judgment against tortfeasor A for damages suffered as the result of a tort. It then goes on to state the circumstances in which that judgment shall not bar an action against tortfeasor B who was jointly responsible for the same tort. It does this by reference to a hypothetical action. It supposes such an action being brought against both A and B and lays down that if in such a hypothetical action B would, under the common law, have been held liable if sued to judgment, then the actual judgment already recovered against A shall not be a bar to an action against B.
>
> If judgment in the hypothetical action had first been recovered against A, there could not, at common law, have subsequently been any judgment against B. Paragraph *(a)* must therefore assume that in the hypothetical action there can have been only one judgment against A and B. Unless that assumption is made, paragraph *(a)* is wholly nugatory. If it is made, it deprives B, in the actual action brought against him, of the immunity which he would have enjoyed at common law as a result of the judgment already recovered against A. This would follow whether in the actual action A were sued jointly with B (as in the present case) or whether the action against A had been instituted before or after the action against B.

---

18 [1975] AC 507 at 518.

19 [1975] AC 507 at 518.

20 [1975] AC 507 at 518.

> Their Lordships accordingly conclude that paragraph *(a)* abolishes the old common law rule in its entirety; it does not abolish that part of it which according to one view may have been defensible and preserve the other part which is indefensible from any point of view save that it may have followed logically from the part which has been abolished. Their Lordships consider that this construction of paragraph *(a*) accords equally with the manifest intention of the legislature and with fairness and common sense."

24 The appellant does not contend, either that *Wah Tat Bank* was wrongly decided, or that s 5(1)(a) has a meaning different from s 6(1)(a) of the UK Act, or from the corresponding legislation relating to Singapore under consideration in that case. The New South Wales Act directly copied the UK Act, and the common law rule at which it was directed was a rule developed by the common law in England which, at the time, was part of the law in New South Wales. The *Common Law Procedure Act* 1899 of New South Wales used the term "action" in a sense that was familiar both in New South Wales and in England.

25 In *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd*[21] this Court held that s 5(1)(a) of the Act abolished, in its entirety, the old common law principle that a person who suffers damage by a joint tort has only one cause of action which merges in the first judgment recovered in respect of it. That was a case concerning joint tortfeasors sued in the one action. The appellant accepts that any attempt to rely upon the rule in *Brinsmead v Harrison* is foreclosed by authority, which establishes that s 5(1)(a) of the Act abolished that rule in its application to a case where joint tortfeasors are sued in the one action as well as in its application to a case where separate actions are brought.

26 A third corollary of the principle that a plaintiff had only a single cause of action against a number of joint tortfeasors was that an unqualified release of one joint tortfeasor released the others[22]. It is unnecessary for present purposes to go into the distinction between a release and a covenant not to sue, but it may be noted that Glanville Williams referred to the qualification that, even if a document were expressed as a release, if it expressly reserved the plaintiff's rights against the other parties liable, it would be read as a covenant not to sue and would not operate to release those others[23]. In *Thompson v Australian*

---

21 (1985) 155 CLR 448.

22 *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448 at 456 per Gibbs CJ; *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574 at 608-611 per Gummow J.

23 Glanville Williams, *Joint Torts and Contributory Negligence*, (1951) §11 at 45.

Capital Television Pty Ltd[24] it was held that, since the effect of s 5(1)(a) was that the cause of action against joint tortfeasors was no longer one and indivisible, the rule that a release given by one joint tortfeasor releases any other had been abolished. In this respect it appears that the law in Australia may be different from that in the United Kingdom. The judgment of Auld LJ in the English Court of Appeal in *Jameson v Central Electricity Generating Board*[25] indicates that the English courts have not gone that far. It is important to bear that in mind in considering English authority.

27 The appellant accepts that the effect of s 5(1)(a) is that he cannot rely on the release of Mr Whitehead, or on the rule in *Brinsmead v Harrison*.

28 But what of s 5(1)(b)? The appellant submits that it applies to the present case, and produces the consequence that, there having been damages awarded by the judgment given against Mr Whitehead, the sums recoverable under any judgments given by way of damages against both Mr Whitehead and the appellant shall not in the aggregate exceed the amount of the damages awarded by the judgment against Mr Whitehead. There is no further sum recoverable against the appellant. The action against the appellant should therefore be dismissed. This argument does not depend upon the judgment entered against Mr Whitehead having been satisfied.

29 The argument requires a departure from the literal meaning of par (b). The paragraph applies "if more than one action is brought", and it refers to "those actions". At first sight, it appears to be directed to the problem of multiplicity of actions. It applies to actions against joint tortfeasors, and several concurrent tortfeasors. It operates in relation to the recoverability of sums awarded under judgments rather than upon rights of action. It does not bar proceedings. It limits recoverability. And it is also concerned with legal costs. Nevertheless, the appellant submits, by parity of reasoning with the approach taken to the meaning of par (a), the reference to "more than one action" should be understood as including a reference to claims against two or more joint tortfeasors made in the one proceeding.

30 There are inconsistent judicial dicta touching the point.

31 In *Wah Tat Bank*[26], in a passage immediately following that quoted above, Lord Salmon said:

---

24 (1996) 186 CLR 574 at 584 per Brennan CJ, Dawson and Toohey JJ.

25 [1998] QB 323.

26 [1975] AC 507 at 518.

> "It has been rightly pointed out that paragraph *(b)* does not contemplate a single action but only a number of actions; moreover it limits only the amount of money to be awarded in judgments which may be recovered after the judgment in the first action and gives a discretion as to costs only in actions subsequent to the first. This is certainly true. It is argued that it follows from this that since paragraph *(b)* applies no limit to the amount recoverable in judgments given in one action against joint tortfeasors and makes no provision for any special discretion as to costs in such an action, paragraph *(a)* cannot be intended to apply to separate judgments given in one action. Their Lordships cannot accept this argument. Paragraph *(b)* is clearly devised merely to discourage the multiplicity of actions which the old rule was designed to prevent. Since more than one judgment being given in a single action has nothing to do with a multiplicity of actions, there is no reason why any express provision should be made to limit the amount of damages recoverable under such judgments nor to give any special discretion in respect of costs."

32 Gibbs CJ, in *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd*, referring to *Wah Tat Bank*, repeated that par (b) "clearly contemplates a number of actions and not a single action" and that it "was designed to prevent a multiplicity of actions"[27].

33 Curiously, in *Bryanston Finance Ltd v de Vries*[28], Lord Denning MR cited *Wah Tat Bank* as authority for precisely the opposite proposition. In the same case, Lord Diplock[29] referred to the absence of reference in par (b) to cases where separate judgments are recovered in the same action as a *casus omissus*. The precise ground of the decision in that case is elusive, although the merits seem fairly clear.

34 The construction that the appellant seeks to give s 5(1)(b) of the Act should be rejected. The words of the paragraph should be given their ordinary meaning, as applying to cases where there is more than one action, that is to say, more than one proceeding.

35 This conclusion does not result in any inconsistency between pars (a) and (b). They are addressed to different, although related, topics. The word "action" has the same meaning in both paragraphs, but the expression which is controlling

---

27 (1985) 155 CLR 448 at 457 and 458.

28 [1975] QB 703 at 722.

29 [1975] QB 703 at 732-733.

in par (a) is that judgment recovered against one joint tortfeasor "shall not be a bar to an action against" another. A bar to an action is a ground upon which an action must fail. It makes no difference whether the action in question is a pending proceeding or one yet to be commenced, or whether it is the same proceeding as that in which judgment has been entered against one tortfeasor or a separate proceeding. That is not inconsistent with reading par (b) as meaning what it says. What it says does not apply to the present case because there was not more than one action.

36 It is necessary to turn to the appellant's second argument. Although s 5(1)(b), in cases where it operates, has an effect that might be described as preventing double recovery, its application should not be confused with the principles relating to what is described, sometimes, as double recovery, and sometimes as double satisfaction[30].

Recovery and satisfaction

37 We are not presently concerned with contribution between tortfeasors. Nor are we directly concerned with rules relating to the assessment of damages, although such rules may constitute part of a wider principle upon which the appellant relies. In that regard, the respondents accept that if they are able to pursue to trial their claim against the appellant, and if they establish the alleged negligence and consequent damages, when it comes to assessing the damages for which the appellant is liable the trial judge will be bound to give credit for the amount already received from Mr Whitehead. The appellant contends that the principle goes further than that, and precludes any award of damages against the appellant. In order to resolve the issue, it becomes necessary to identify the principle. The justice of the rule which the respondents accept is more evident than that of the rule for which the appellant contends. The respondents claim to have suffered damages in excess of $430,000. Since they have already received $250,000 pursuant to their settlement with Mr Whitehead, the concession that, if and when a judge comes to assess damages against the appellant, the sum of $250,000 must be deducted from any larger amount that would otherwise be awarded, is not surprising. A conclusion that the receipt of $250,000 rules out the possibility of any further award of damages against the appellant (given the changes effected by the Act) is more difficult to justify.

38 Where a plaintiff has suffered loss or damage caused by the conduct of a number of tortfeasors, whether joint tortfeasors or several concurrent tortfeasors, the plaintiff's claims may be pursued in one or a number of actions. The timing and form of the proceedings may be affected by a variety of circumstances, as

---

30 *Castellan v Electric Power Transmission Pty Ltd* (1967) 69 SR (NSW) 159 at 181-182 per Asprey JA.

may the approach of the individual parties to the conduct of the litigation. The present case provides a simple example. Other cases may be more complex. We do not know why the respondents decided to settle with Mr Whitehead for $250,000, or why they would not, or could not, settle with the appellant. That is not our concern. It is not easy to understand the rationale of a rule of law or equity that would make it impossible, as a matter of principle, for the respondents to settle with Mr Whitehead and press on with their claim against the appellant, always assuming that, if and when damages are assessed against the appellant, credit is given for the amount received from Mr Whitehead. We say "as a matter of principle" because we are dealing with the issue as to whether the bare facts asserted in paragraphs 16 to 22 of the defence defeat the respondents' claim. We do not have before us a question whether there might be other features of the case that make it unconscientious for the respondents to pursue their claim against the appellant.

39 In *Tang Man Sit v Capacious Investments Ltd*[31] Lord Nicholls of Birkenhead, delivering the judgment of the Privy Council, said, concerning cumulative remedies:

> "Faced with alternative and inconsistent remedies a plaintiff must choose between them. Faced with cumulative remedies a plaintiff is not required to choose. He may have both remedies. He may pursue one remedy or the other remedy or both remedies, just as he wishes. It is a matter for him. He may obtain judgment for both remedies and enforce both judgments. When the remedies are against two different people, he may sue both persons. He may do so concurrently, and obtain judgment against both. Damages to the full value of goods which have been converted may be awarded against two persons for successive conversions of the same goods. Or the plaintiff may sue the two persons successively. He may obtain judgment against one, and take steps to enforce the judgment. This does not preclude him from then suing the other. There are limitations to this freedom. One limitation is the so called rule in *Henderson v Henderson* … In the interests of fairness and finality a plaintiff is required to bring forward his whole case against a defendant in one action. Another limitation is that the court has power to ensure that, when fairness so requires, claims against more than one person shall all be tried and decided together. A third limitation is that a plaintiff cannot recover in the aggregate from one or more defendants an amount in excess of his loss. Part satisfaction of a judgment against one person does not operate as a bar to the plaintiff thereafter bringing an action against another who is also liable, but it does operate to reduce the amount

---

31 [1996] AC 514 at 522.

> recoverable in the second action. However, once a plaintiff has fully recouped his loss, of necessity he cannot thereafter pursue any other remedy he might have and which he might have pursued earlier. Having recouped the whole of his loss, any further proceedings would lack a subject matter. This principle of full satisfaction prevents double recovery."

40 Discussion of this subject often contemplates judgment entered by a court following a judicial assessment of damages. That will ordinarily involve a judicial assessment of the entire extent of the plaintiff's loss or damage. Or judgment may be entered by consent, and this may be by way of compromise. Recoupment of the whole of a plaintiff's loss may not be the only circumstance in which it might be unconscientious to pursue a claim against another. Subject to those qualifications, the principles stated by his Lordship are in point. They were referred to in *Thompson v Australian Capital Television Pty Ltd*[32].

41 In *Castellan v Electric Power Transmission Pty Ltd*[33], both Walsh JA and Asprey JA accepted that it was a common law rule that, if an injured person obtained judgment and full satisfaction against one tortfeasor, the liability of another concurrent tortfeasor was thereby discharged. Walsh JA considered that there was also an equitable principle which had the same result. But what exactly is meant by "full satisfaction" in a context such as the present?

42 Leaving to one side procedures relating to payment of money into court, which are governed by rules of court, frequently aimed at imposing costs sanctions upon parties in relation to their conduct of litigation, a plaintiff's claim against one tortfeasor may be resolved by judicial decision or by settlement. Settlement may or may not be accompanied by, or result in, a consent judgment. Judicial decision will result in judgment for an amount usually (although not invariably) assessed as the full amount of the plaintiff's loss or damage (subject to any question of contributory negligence). A settlement may, or may not, expressly or by implication reserve a plaintiff's rights against other tortfeasors and may or may not make it clear that, if a consent judgment is entered pursuant to the terms of settlement, such judgment is not intended by the parties to the settlement to represent the full amount of the plaintiff's loss or damage. The different senses in which the term "satisfaction" are used were considered by Gummow J in *Thompson v Australian Capital Television Pty Ltd*[34].

---

32 (1996) 186 CLR 574 at 608 per Gummow J.

33 (1967) 69 SR (NSW) 159 at 176 per Walsh JA and at 180-181 per Asprey JA.

34 (1996) 186 CLR 574 at 608-611.

43 In *Jameson v Central Electricity Generating Board*[35], the House of Lords was dealing with a case where a plaintiff, who claimed damages for personal injury, first sued one of several concurrent tortfeasors. He settled with the defendant, agreeing to accept £80,000 in "full and final settlement and satisfaction of all the causes of action in respect of which the plaintiff claimed in the statement of claim". That amount was significantly less than the full liability value of his claim. A Tomlin order was made. There was no consent judgment. The plaintiff then died. His executors sued a second concurrent tortfeasor. The House of Lords held that the second action must fail. Lord Hope of Craighead, with whom Lord Browne-Wilkinson and Lord Hoffmann agreed, treated the outcome as turning upon the meaning and effect of the agreement by which the first action was settled. His Lordship, who used the expression "concurrent tortfeasor" in contradistinction to joint tortfeasor, said[36]:

> "… The causes of action are indeed separate. And it is clear that an agreement reached between the plaintiff and one concurrent tortfeasor cannot extinguish the plaintiff's claim against the other concurrent tortfeasor if his claim for damages has still not been satisfied. The critical question ... is whether the claim has in fact been satisfied. I think that the answer to it will be found by examining the terms of the agreement and comparing it with what has been claimed. The *significance of the agreement is to be found in the effect which the parties intended to give to it*. The fact that it has been entered into by way of a compromise in order to conclude a settlement forms part of the background. But the extent of the element of compromise will vary from case to case." (Emphasis added)

44 His Lordship pointed out that the fact that a settlement sum involves an element of compromise does not mean that it is not intended to be paid, or received, in full satisfaction (using that term with the meaning it has in the expression accord and satisfaction) of a plaintiff's claim or claims. *Ruffino v Grace Bros Pty Ltd*[37] is an example of a case where there was such an intention.

45 In most cases in which this problem arises, as in the present case, the second tortfeasor will not be a party to the settlement agreement. The agreement will not have contractual effect as between the plaintiff and the second tortfeasor. A defence of accord and satisfaction is not available to the second tortfeasor.

---

35 [2000] 1 AC 455.

36 [2000] 1 AC 455 at 473.

37 [1980] 1 NSWLR 732.

46 Nevertheless, the significance of the contractual basis upon which a plaintiff settles with one tortfeasor, and its consequences as between the plaintiff and another tortfeasor, may be found both in the equitable principle which prevents double satisfaction, and in the common law principle that a plaintiff who has fully recouped the loss cannot obtain a further award of damages. If a plaintiff has agreed with one tortfeasor to accept a sum upon the basis that it will be received in full discharge of all claims for compensation for the loss or damage incurred by the plaintiff, it would ordinarily be unconscientious to pursue a further claim in relation to the same damage against another tortfeasor. And if a single loss has been fully recouped, there is no further remedy for a plaintiff to pursue.

47 If there has been a judicial assessment of the whole of the plaintiff's loss or damage, resulting in an award of damages by way of judgment in that amount against one tortfeasor, satisfaction of the judgment by that tortfeasor will put an end to any claim, or possible claim, against another tortfeasor, whether a joint tortfeasor or one of several concurrent tortfeasors, for two reasons. First, the damage, as assessed by judicial decision, has been fully recouped and the claim against another tortfeasor lacks a subject matter. Where, as here, damage is an essential element of the cause of action, that element will have gone. Secondly, it would be inequitable to permit additional recovery.

48 If there has been no judicial assessment of damages, then, in the light of current Australian authority on the effect of s 5(1)(a) of the Act, it would be anomalous if the consequences of a settlement with one tortfeasor upon a claim against another tortfeasor should turn upon the difference between a consent judgment and a Tomlin order, or between joint tortfeasors and several concurrent tortfeasors. If it would be unconscientious of the plaintiff to pursue a claim against another tortfeasor, or if the amount received pursuant to the settlement is, or ought to be regarded as, recoupment of the whole of the plaintiff's loss or damage, then action against another tortfeasor, whether in separate proceedings, or, where the other tortfeasor was a party to the original proceedings, by way of continuation of those proceedings, must fail. If, either expressly or by implication, a settlement agreement manifested a common intention of the parties to the agreement that the settlement sum was to be paid and received in full satisfaction of the rights of the plaintiff, against the defendant or anyone else, in relation to the loss or damage incurred, then, for both of those reasons, a further claim would fail. The most obvious way to negative such an intention would be by an express reservation of rights. While the effect of the settlement agreement, in the ordinary case, will be the most significant factor bearing upon either or both of the two possible grounds mentioned, it is not possible to eliminate any other circumstances which, in a given case, could indicate unconscientiousness, or loss of the subject matter of a claim. Bearing in mind the obligation to give credit for the amount already recovered, a defendant who could show that the actual loss or damage incurred by the plaintiff did not exceed the amount already recovered would succeed in any event. Leaving aside questions of onus of proof,

to say that there is no such excess is simply to say that the loss has been fully recouped.

49 In the present case, the deed of release, the terms of settlement, and the conduct of the parties to the settlement, clearly showed that it was contemplated that the respondents would pursue their claim against the appellant, and that they were not accepting the sum of $250,000 in full satisfaction of the loss or damage they said they incurred. There is no reason why they should be prevented from continuing with their claim against the appellant.

Conclusion

50 The appeal should be dismissed with costs.

51 GUMMOW AND HAYNE JJ. The relevant facts, including the procedural history of the litigation, are described, and the issues presented in this Court are identified, in the reasons of the Chief Justice and Callinan J.

52 We agree, for the reasons given by the Chief Justice and Callinan J, and by Kirby J, that the appellant's submissions respecting the construction of par (b) of s 5(1) of the *Law Reform (Miscellaneous Provisions) Act* 1946 (NSW) should be rejected. The result is that that statute does not provide an answer to the action by the respondents to recover damages from the appellant, Mr Baxter, in a sum greater than that already provided for in the settlement reached between the respondents and Mr Whitehead.

53 The second basis upon which the appellant puts his case is that, by reason of the settlement with Mr Whitehead, any recovery by the respondents in their action against the appellant, no matter what the measure of the recovery, would offend the principle or rule respecting "double satisfaction" of claims upon co-ordinate liabilities.

54 The consequence of the holding in *Thompson v Australian Capital Television Pty Ltd*[38] is that the release given by the respondents to Mr Whitehead did not have the effect in law of releasing their cause of action against the appellant as the other joint tortfeasor. Further, once it is accepted, as *Thompson* requires, that the effect of statute was to sever the unity of the cause of action against Mr Whitehead and Mr Baxter as joint tortfeasors and that the release of Mr Whitehead did not thereby as a matter of law effect a release of Mr Baxter, there appears no basis in law for treating the agreement effecting that release of Mr Whitehead as full satisfaction in respect of the action against Mr Baxter. He was not a party to the deed of release. Nor has it been contended that, by any relaxation of the rules respecting contractual privity[39], the release effected by the deed enured to his benefit. Therefore, in the action brought by the respondents against the appellant, Mr Baxter, no defence of accord and satisfaction is available to him.

55 Nevertheless, the appellant contends that on a basis respecting the law's abhorrence of "double satisfaction", the deed of release may be pleaded by him as a complete bar to the respondents' action.

---

38 (1996) 186 CLR 574.

39 cf *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107.

56 Some care is required here in distinguishing between the different senses in which the term "satisfaction" is used. In *Osborn v McDermott*, Phillips JA said[40]:

> "Where there is an accord and satisfaction, the agreement for compromise may be enforced, and indeed only that agreement may be enforced, because *ex hypothesi* the previous cause of action has gone; it has been 'satisfied' by the making of the new agreement constituted by abandonment of the earlier cause of action in return for the promise of other benefit."

The distinction between accord and satisfaction and the defence of satisfaction was drawn by Auld LJ in the English Court of Appeal in *Jameson v Central Electricity Generating Board*[41]. His Lordship said[42]:

> "The defence of satisfaction, in the sense of full satisfaction of a wrong or liability, is different from that of accord and satisfaction. First, it must be full satisfaction and, second, it must be given, executed. Its basis is the simple one that a claimant should not receive more than is necessary to compensate him for the wrong or wrongs done to him or in respect of the liability or liabilities owed to him. Where accord and satisfaction cannot be relied upon, as where a claimant settles with only one of two concurrent tortfeasors, the tortfeasor facing a claim will nevertheless have a defence if the plaintiff's settlement with the other has fully compensated him for the separate wrongs done to him."

Several points should be made respecting this passage. The first is that the decision of the Court of Appeal in *Jameson* was reversed by the House of Lords[43]. However, we do not read the majority judgments given by Lord Hope of Craighead and Lord Clyde as involving a denial of this statement of general principle. In any event, that statement should in Australia be accepted as correct. Secondly, in his dissenting judgment in *Jameson*, Lord Lloyd of Berwick, again correctly in our opinion, observed[44]:

---

40 [1998] 3 VR 1 at 8.

41 [1998] QB 323.

42 [1998] QB 323 at 338.

43 *Jameson v Central Electricity Generating Board* [2000] 1 AC 455, Lord Browne-Wilkinson, Lord Hoffmann, Lord Hope of Craighead, Lord Clyde; Lord Lloyd of Berwick dissenting.

44 [2000] 1 AC 455 at 466.

> "On the face of it, it would seem strange and unjust that a plaintiff who settles a claim against A in respect of one cause of action should be unable to pursue a claim in respect of a separate cause of action against B. Of course if the plaintiff recovers the whole of his loss from A, then he will have nothing left to recover against B. The payment received from A will have 'satisfied' his loss, though I would for my part prefer not to use the term 'satisfy' in this context, in order to avoid confusion with the quite different concept of accord and satisfaction."

The third matter is that the reasoning in these passages from *Jameson* concerning distinct causes of action in respect of the one loss in Australia is, as a result of the decision in *Thompson*, applicable to joint torts because the cause of action is not now treated as unitary and indivisible.

57 In *Haines v Bendall*[45], in the joint judgment of four members of this Court, reference was made to what was identified as the "universal" rule that a plaintiff cannot recover more than he or she has lost. Their Honours referred to a statement to that effect by Lord Reid in *Parry v Cleaver*[46]. The principles respecting "double satisfaction" may be seen as a particular application of that rule. That particular application involves the unconscientious exercise of legal rights.

58 The subject is best illustrated with reference to the treatment by Viscount Simon LC in *United Australia Ltd v Barclays Bank Ltd*[47] of the decision of the Court of King's Bench in *Morris v Robinson*[48]. The Lord Chancellor said of that case[49]:

> "There, cargo belonging to the plaintiffs had been improperly sold during the course of a voyage. There were thus two lines of remedy which the plaintiffs could pursue. They first brought an action against the shipowners for breach of their duty as carriers, with a count in trover. They recovered a verdict, but they did not enter up judgment and there had been no actual satisfaction of their claim. Instead, they brought another

---

45 (1991) 172 CLR 60 at 63.

46 [1970] AC 1 at 13.

47 [1941] AC 1.

48 (1824) 3 B & C 196 [107 ER 706].

49 [1941] AC 1 at 20.

> action against different defendants – namely, an action for conversion against the purchasers who had bought the cargo. It was held by the Court of King's Bench that the former action was no bar, and that the defendants in the second action were liable for their act in purchasing the plaintiff's goods. Bayley J, in giving judgment, observed[50]: 'If concurrent actions had been brought, that against the owners could not have barred the other; why then should it have that effect because they have been brought at different times? If indeed the plaintiffs were to recover the full value of the goods in each action, a Court of Equity would interfere to prevent them from having a double satisfaction, but there is nothing in the former action which can, in a Court of Law, prevent the recovery in this.'"

59 Bayley J was speaking before the provision for the entertainment of equitable pleas in common law actions which was made by the *Common Law Procedure Act* 1854 (UK)[51]. It is unnecessary now to determine whether, without the necessity for an injunction to restrain the pleading by the plaintiff of facts asserting an unsatisfied loss, an equitable plea by the defendant might have been entertained under the statute to deny the entry of judgment where there had already been full recovery.

60 However, it should be observed that in *Castellan v Electric Power Transmission Pty Ltd*[52], which was decided by the New South Wales Court of Appeal before the commencement of the *Supreme Court Act* 1970 (NSW) ("the Supreme Court Act"), there was some uncertainty expressed on the subject. Asprey JA spoke in terms suggesting an incorporation of equitable principles into the common law itself. His Honour referred to[53] "the doctrine against double satisfaction, well established in the common law and embedded in equitable principles".

61 On the other hand, Walsh JA dealt with the matter more cautiously, saying[54]:

> "I am prepared to assume that it was a rule of the common law that, if an injured person obtained judgment and also satisfaction against one

---

50 (1824) 3 B & C 196 at 205-206 [107 ER 706 at 710].

51 17 & 18 Vict c 125; see also *Common Law Procedure Act* 1899 (NSW), ss 95-98.

52 (1967) 69 SR (NSW) 159.

53 (1967) 69 SR (NSW) 159 at 181.

54 (1967) 69 SR (NSW) 159 at 176.

> tortfeasor, the liability of another concurrent tortfeasor was thereby discharged, although there is some ground for thinking that the source of the inability to maintain a further action in such a case was an *equitable* principle which would preclude the plaintiff from obtaining double satisfaction[55]. But at all events his further action could be defeated, and for present purposes it may not matter whether this would be done by a plea at common law of the former judgment and satisfaction or by a perpetual stay of the action or by an injunction."

Now, the Supreme Court of New South Wales, the seat of the present litigation, is enjoined by s 63 of the Supreme Court Act to determine all matters in controversy without a multiplicity of proceedings, thereby avoiding the need for the further steps identified by Walsh JA.

62 In *B O Morris v Perrott and Bolton*[56], the English Court of Appeal treated the equitable jurisdiction to restrain execution so as to avoid double satisfaction as preserved by s 41 of the *Supreme Court of Judicature (Consolidation) Act* 1925 (UK) and added to the judgment of the court below the words "so however that the plaintiff is not to recover more than [the sum claimed] in all".

63 In their reasons for judgment in the present appeal, the Chief Justice and Callinan J refer to the somewhat limited factual material upon which the dispute has been conducted. This may give incomplete means for a determination as to where the balance of the equities lie. However, what is apparent is that the respondents accept that in any recovery against the appellant they must do equity by allowing for the receipt pursuant to the settlement with Mr Whitehead.

64 Where it is accepted that the recovery under a settlement of the first action is of a sum less than that otherwise recoverable by judgment in the second action, it is not apparent that a question of "double satisfaction" arises. There will be no breach of the universal rule that the plaintiff cannot recover more than he or she has lost if the judgment in the second action gives credit for the recovery upon settlement of the first. The source of the equity described by Viscount Simon LC in *United Australia* will not be present.

65 However, in *Jameson*, Lord Hope of Craighead answered affirmatively the second of the two questions he posed in the following passage[57]:

---

55 cf *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1 at 20.

56 [1945] 1 All ER 567. See also *Kohnke v Karger* [1951] 2 KB 670 at 675; *Black v Yates* [1992] QB 526 at 550-551.

57 [2000] 1 AC 455 at 473-474.

> "What then is the effect if the amount of the claim is fixed by agreement? Is the figure which the plaintiff has agreed to accept in full and final satisfaction of his claim from one concurrent tortfeasor open to review by the judge in a second action against the other concurrent tortfeasor on the ground that, despite the terms of his agreement, he has not in fact received the full value of his claim? Or is the fact that that figure was agreed to as the amount to be paid in full and final settlement of the first action to be taken as having fixed the amount of the claim in just the same way as if it had been fixed by a judgment, so that the claim must be held to have been extinguished as against all other concurrent tortfeasors?"

His Lordship said[58] of the agreed sum in the compromise with the first tortfeasor that its effect was "to fix the amount of [the plaintiff's] claim in just the same way as if the case had gone to trial and he had obtained judgment".

66 It is, with respect, not immediately apparent that this conclusion follows. Difficult questions may arise where words such as "in full and final satisfaction" are used in a negotiated settlement with one tortfeasor for a sum less than the formulated claim. First, there is a question of construction as to whether, as between the parties to that settlement, the plaintiff covenants not to seek recovery of any further sum at all from any other tortfeasor liable for the same loss. If it appears that such a covenant was given, the next question is whether, perhaps to forestall a claim for contribution by the second tortfeasor against the first tortfeasor, the first tortfeasor may enjoin the plaintiff from proceeding on the second action. If so, the injunction may be granted only in limited terms or upon the acceptance by the moving party of conditions.

67 In considering the injunctive remedy in these situations, regard may profitably be had to the following passage (directed specifically to releases given for consideration but not under seal and to contracts not to sue) in the judgment of Dixon J in *McDermott v Black*[59]. His Honour said[60]:

> "A negative stipulation gives the party a prima-facie equity to have a violation of the contract restrained because the legal remedy by way of damages is not sufficient to protect the party and secure the interest for which he bargained. But like all other titles to equitable relief the prima-

---

58 [2000] 1 AC 455 at 474.

59 (1940) 63 CLR 161.

60 (1940) 63 CLR 161 at 187-188.

facie right to restrain the breach of an agreement not to sue or not to set up specified matters is subject to the well-known rules or principles upon which courts of equity act. Relief would not be granted if the agreement were unfairly obtained or oppressive. The stipulation, whether express or implied, must be sufficiently certain and not too vague and indefinite. The consideration must not be illusory or inadequate."

68 A further question is whether, in any event, the circumstance that the pursuit of that second action is in breach of the undertaking to the first tortfeasor renders unconscientious any recovery on the second claim where that recovery does not, when taken with the first recovery, exceed the plaintiff's loss. We do not regard the reasoning of the majority of the House of Lords in *Jameson* as foreclosing debate upon any of these questions in an appropriate case at any level in the Australian court system.

69 These questions do not arise for decision in this appeal. That is because the text of the deed of release, taken with the terms of settlement and the conduct of the parties in relation thereto, plainly indicate that the respondents and Mr Whitehead contemplated that the respondents would pursue their claims against the appellant. There was no acceptance of the sum paid under that settlement as full satisfaction of the loss or damage the respondents claimed they had suffered. That being so, no basis has been shown to render it unconscientious for the respondents to continue the pursuit of their claim against the appellant.

70 The appeal should be dismissed with costs.

71 KIRBY J. One would have thought that in its comparatively long history, all of the problems presented by s 5(1) of the *Law Reform (Miscellaneous Provisions) Act* 1946 (NSW) ("the Act"), and its equivalents enacted throughout the British dominions after 1935, would have been addressed and clarified. However, they continue to present themselves as the recent decision in *James Hardie & Coy Pty Ltd v Seltsam Pty Ltd*[61] and this appeal demonstrate.

72 The basic problem that has led "gallons of ink"[62] to be spilt over the meaning of s 5(1) of the Act is "the economy of expression practised in the provision and the apparent failure to advert to … the many practical problems"[63] liable to arise in consequence of its application. That is why the sub-section was described, once the original English template[64] was copied in so many common law jurisdictions, as "a piece of law reform which seems itself to call somewhat urgently for reform"[65]. These words were said in relation to the language of the legislation providing for contribution between concurrent tortfeasors liable in respect of the same damage – the problem presented in *Seltsam*. However, they apply equally in this appeal where the issue concerns the meaning and application not of s 5(1)(c) of the Act but of s 5(1)(b). Of the words in that paragraph it was rightly said in another decision that they are "elliptical and somewhat obscure"[66].

73 To respond to the various practical problems not expressly covered by the language of the section this Court[67], the Privy Council on appeal from a decision concerning the Singapore equivalent of the Act[68] and the Court of Appeal[69] in

---

61 (1998) 196 CLR 53.

62 *Bakker v Joppich* (1980) 25 SASR 468 at 472 per Wells J.

63 *Bitumen and Oil Refineries (Australia) Ltd v Commissioner for Government Transport* (1955) 92 CLR 200 at 207.

64 *Law Reform (Married Women and Tortfeasors) Act* 1935 (UK) (25 & 26 Geo V c 30).

65 *Bitumen & Oil Refineries* (1955) 92 CLR 200 at 211.

66 *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448 at 458 per Gibbs CJ.

67 *XL Petroleum* (1985) 155 CLR 448.

68 *Wah Tat Bank Ltd v Chan Cheng Kum* [1975] AC 507 at 517-518.

69 *Bryanston Finance Ltd v de Vries* [1975] QB 703 at 722, 732, 739.

England, have attempted to fill the gaps by stretching somewhat the words of the legislative text in order to apply them to the problems presented, doing so in the spirit of the legislative language and so as to achieve its apparent purposes. That was the approach which I favoured in *Seltsam*[70]. It led me (and McHugh J[71]) to a conclusion in that case concerning the meaning of s 5(1)(c) of the Act different from that reached by the majority. I remain of the view which I expressed there as to the appropriateness of applying a purposive construction to the meaning of an uncertain expression in the Act. There is no reason to adopt a different approach to elucidating the meaning of s 5(1)(b) of the Act. There is every reason to adopt the same.

74 There is a further consideration to which I referred in *Seltsam* which I consider is applicable to this appeal and helpful in resolving the questions that must be decided. It is a consideration of legal policy. Without clear legislative provisions requiring a contrary decision, a court should not readily come to a conclusion about ambiguous provisions of a statute – or uncertain requirements of the rules of the common law or of equity – that would inhibit the early settlement of litigation as between those parties to a dispute who are agreed, even if they do not represent all of the parties to the litigation. In *Seltsam*, I said[72]:

> "[A] requirement, in effect, that the consent of all defendants be had before settlement of claims against particular defendants is achieved would represent a most serious practical inhibition on the disposal of those parts of such claims as can be settled. Such settlements put the plaintiff in funds at the earliest possible time. They leave it to the defendants to fight out their respective claims for contribution as the … hearing priorities permit."

75 The present appeal is not concerned with the exact problem that arose in *Seltsam*. The decision in that case does not yield a rule governing the outcome in this. Here it is not a question of securing consent of multiple defendants to a settlement or of recovering compensation as between such defendants for a sum paid to the plaintiff. However, in my view, the policy of the law is relevantly the same. Unless the Act clearly obliges a different conclusion or unless a clear principle of the common law or of equity mandates the opposite result, it is ordinarily desirable that parties should be able to settle severally, as between each other, the issues they have brought to court for resolution according to law. Any inhibition upon that attribute of personal and economic freedom has to be

---

70 (1998) 196 CLR 53 at 80-83 [72]-[75].

71 *Seltsam* (1998) 196 CLR 53 at 69 [45].

72 (1998) 196 CLR 53 at 90 [96].

clearly justified and based on statutory language or legal authority that is certainly applicable.

The facts and common ground

76 The facts of the dispute between the appellant, Mr Baxter and Obacelo Pty Ltd and Mr Moon ("the respondents") are described in the reasons of Gleeson CJ and Callinan J[73]. So are the details of the course of the proceedings that took the parties first to a Master, then to a single Judge of the Supreme Court of New South Wales (Hulme J) and finally to the Court of Appeal of that Court[74]. It is from the judgment and orders of the Court of Appeal that, by special leave, this appeal now comes to this Court. There was no dispute about the facts nor about the description of the two issues presented for decision. These issues concern the requirements of s 5(1)(b) of the Act and of the rule of the common law or of equity that limits the recovery by a plaintiff of damages where the plaintiff has already obtained judgment and recovered full satisfaction against another tortfeasor liable in respect of the same damage.

77 It is important to note the limited issue that was before the Court of Appeal, even after it enlarged the issues by formulating a separate question of law for determination[75]. The Court was not engaged, as such, in an exploration of the facts of the respondents' claims of negligence against Mr Baxter. Nor was it concerned to resolve defences to that claim raised by Mr Baxter, including a defence of contributory negligence which was available to meet such a claim (framed in the tort of negligence) whereas it would not have been available to respond to the claims of the respondents against Mr Whitehead, Mr Baxter's employer (who was sued in contract)[76].

78 The sole question for decision was whether, upon the facts pleaded and elaborated slightly by matters taken to be agreed, those facts, on their face without more, entitled Mr Baxter, in law, to succeed. In short, Mr Baxter mounted a preliminary objection to the maintenance of the respondents' action against him. His was in the nature of a pre-emptive strike. If successful, it would obviate the necessity of any further litigation. If it failed, it would not deprive Mr Baxter of any other defences or answers he might have to the respondents' action against him.

---

73 Reasons of Gleeson CJ and Callinan J at [5]-[11].

74 *Baxter v Obacelo Pty Ltd* (2000) 48 NSWLR 522.

75 Explained reasons of Gleeson CJ and Callinan J at [13].

76 *Astley v Austrust Ltd* (1999) 197 CLR 1.

79 The settlement of the first proceedings between the respondents and Mr Whitehead took place as long ago as February 1988. The litigation then fell into a slumber from which it was only awakened in 1998, apparently as a result of Mr Baxter's initiative in applying to have the claim against him summarily dismissed[77]. This appears to have produced a belated flurry of pleadings – both of the respondents' further amended statement of claim, Mr Baxter's amended defence and the current litigation. Perhaps it would have been wiser for Mr Baxter to have let the sleeping dogs of litigation lie. One cannot but have a measure of sympathy for him that his attempt to bring the dormant proceedings to finality has brought on his head all of the hearings that have followed.

80 However, having initiated the strike out application, and having consented to the formulation and contest upon the separate question stated in the Court of Appeal, all that a court can do is to resolve those issues in accordance with law. It is not enough to give effect to sympathy for Mr Baxter. He still has several lines of resistance to the respondents' action against him. And the resolution of the question of statutory construction, and of the issues of common law and equity raised by the case, potentially have implications for other litigants who settle by compromise part of a proceeding with one party but intend to keep the rest of the proceedings alive for later prosecution against other parties, alleged to be concurrent tortfeasors, with whom they do not, or cannot, settle.

81 I have referred to these matters to make it clear what this appeal is *not* about. It is not about any dispute concerning the facts. It is not about Mr Baxter's asserted defences on the merits of the respondents' claim against him, including that based on contributory negligence. It is not about any larger issues, not presently pleaded, to which that claim might potentially give rise, such as whether *Romford Ice and Cold Storage Co Ltd v Lister*[78] is now, or ever was, a correct statement of the common law of Australia; whether if it was, it was repealed by statute with effect in the circumstances of this case; or whether, in the case of an employment contract such as that between Mr Baxter and Mr Whitehead, a term would be implied to the effect that Mr Whitehead would hold Mr Baxter indemnified in respect of any negligent acts or omissions performed in the course of his employment and/or secure such professional indemnity insurance cover for his practice as would extend to, and indemnify, Mr Baxter during such employment[79]. Nor does this appeal concern any entitlement that Mr

---

77 Under Pt 13 r 5 of the Supreme Court Rules (NSW). It was accepted that the approach applicable to such an application was that expressed in *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125.

78 [1956] 2 QB 180.

79 As to which see *Commercial and General Insurance Co Ltd v Government Insurance Office (NSW)* (1973) 129 CLR 374 at 380-381; *Morris v Ford Motor Co*

(Footnote continues on next page)

Baxter may have against Mr Whitehead to recover under the Act and otherwise than under a term of his contract of employment with Mr Whitehead, contribution or indemnity in respect of any recovery that the respondents make against him personally[80].

82 All of the foregoing issues lie in the future if Mr Baxter loses this appeal. The only questions now presented for decision are those considered by the Court of Appeal. In short, does Mr Baxter's pre-emptive strike succeed as a matter of law? Or is he obliged to proceed to trial to explore some, or all, of the foregoing points, such as are proper to the resolution at trial of the action between the parties and its determination on its factual and legal merits?

Meaning of s 5(1)(b) of the Act

83 Mr Baxter's submissions sought to rely upon some, and to distinguish other, judicial decisions about s 5(1)(b) of the Act so as to maintain his first argument that that paragraph, properly understood, rendered the respondents' attempt to recover damages from him, beyond those already recovered from Mr Whitehead, untenable as a matter of law. The terms of the provisions of the Act are set out in the reasons of Gleeson CJ and Callinan J[81]. I will not repeat them.

84 This Court is not bound by any of the many inconsistent judicial dicta about the Act, or by the holdings of overseas courts struggling with the section's opaque language. Obviously, the statutory template being a common one, the mischief to which it was addressed being a problem of the shared common law and the courts involved being courts of high authority analysing an identical legislative text applicable in many jurisdictions, close attention will be paid to the approach adopted by the earlier judges who have considered the meaning and operation of the Act. However, the starting point for analysis is an appreciation that this Court has not, as such, decided the point in issue. The most that the earlier judicial opinions offer are therefore persuasive observations. Our duty is to the text of a statute of an Australian Parliament as it is designed to operate to repair a pre-existing problem of the common law of Australia.

Ltd [1973] QB 792 at 801-802; cf *Insurance Contracts Act* 1984 (Cth), s 66 and Meagher, Gummow and Lehane, *Equity Doctrine and Remedies*, 3rd ed (1992) at 308 [1039].

80 cf the Act, s 5(1)(c).

81 Reasons of Gleeson CJ and Callinan J at [3].

85 That problem is made plain by reference to the old law on the liability of joint tortfeasors[82] and the distinction that was originally drawn between the positions of joint and several tortfeasors.[83] It was to repair the inconvenience and injustice which the old law could occasion (and to answer judicial appeals for reform) that the English Law Revision Committee was eventually moved to suggest redress in a report that proposed legislation[84]. Whereas, in earlier times, it was regarded as impermissible to take an antecedent report of this character into account in giving meaning to the Act to which the report gave rise, now the opposite approach is adopted. This is so, both by reason of legislative prescription and advances in the common law[85]. The Committee's report makes it clear that the general object of the legislation was, relevantly, to abolish the old rule that release of one joint tortfeasor automatically released the other so far as the law was concerned. This is the work that s 5(1)(a) of the Act performs. The meaning of s 5(1)(b) must be derived in a context in which that was a principal purpose of the legislative reform. The terms of s 5(1)(b) must be read accordingly. It would be to undermine the obvious objectives of s 5(1)(a), read with the Committee's report, to construe s 5(1)(b) in such a way as to restore, or preserve, the anomalous position of joint tortfeasors, unless the language of par (b) was intractable and allowed no other interpretation.

86 Mr Baxter submitted that his construction of par (b) required nothing more than according to this provision its literal meaning. However, the better view is that the literal meaning supports the respondents' argument. It does so when it is appreciated that "action" in par (b) is a reference to a proceeding. This was the normal meaning given to the word both in England and Australia, both in 1935 (when the English legislation was enacted) and in 1946 (when the relevant Australian legislation was enacted by the Parliament of New South Wales). The word was then used, as it is now, both in legislation and in common speech, to describe a proceeding commenced by an originating process in a court, particularly one amenable to claims at common law.

---

82 The history is explained in *Seltsam* (1998) 196 CLR 53 at 58-60 [2]-[10], 75-80 [60]-[71].

83 *Sadler v Great Western Railway Co* [1896] AC 450 at 454; *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574 at 580-581, 603-608; Glanville Williams, *Joint Torts and Contributory Negligence*, (1951); cf reasons of Gleeson CJ and Callinan J at [18].

84 Great Britain, Law Revision Committee, *Third Interim Report*, (1934) (Cmd 4637) ("the Committee's report").

85 See *Seltsam* (1998) 196 CLR 53 at 77 [64].

87 This interpretation also accords with a view of par (b) that is consistent with the object given effect by par (a) of s 5(1) of the Act. It confines the operation of par (b) to the two subjects with which its language specifically deals in the closing words – namely control of the aggregate recovery so as to prevent double dipping by reason of the reform effected in par (a); and control of the recovery of multiple costs in several actions against concurrent tortfeasors where it would have been reasonable for the plaintiff to have brought one action, that is one proceeding. Viewed in this light, par (b) does not contradict the reform in par (a). On the contrary, it is a supplementary provision designed to protect defendants from the risks of excessive recoveries by multiple actions (that is proceedings) which the reform in par (a) permitted for the first time in the case of joint tortfeasors.

88 Because this interpretation is compatible with the language of s 5(1)(b) of the Act, is consistent with the reform achieved by s 5(1)(a) and is harmonious with the considerations of legal policy mentioned earlier in these reasons relevant to personal and economic liberty, it is the interpretation that I would adopt. Although it deprives Mr Baxter of success on his first argument, it does so fundamentally to uphold the central reform which s 5(1)(a) of the Act was enacted to introduce. And it does so in circumstances in which specified limitations are imposed by the Act upon recovery of "damages" (in the sense of a money sum) in respect of the same "damage" (in the sense of a civil wrong) and upon the entitlement to recover full costs for unreasonably bringing multiple actions (in the sense of proceedings).

The argument of double satisfaction

89 It may be accepted that very clear language would be needed to impute to the Act a purpose of abolishing the rule of common law or of equity which forbids a person recovering twice in respect of the same damage[86]. It may also be accepted that the Act does not, by its terms, displace that rule. In my view, it is unnecessary on this appeal to identify the precise legal source of the rule against double satisfaction: whether it be a principle of the common law, a rule of equity based on good conscience and the prevention of unconscientious conduct or a principle founded in notions of preventing unjust enrichment. In my opinion, Mr Baxter's second argument fails at the threshold on the facts as they stand at this time.

90 Those facts appear relevantly in the circumstances of the settlement as between the respondents and Mr Whitehead. Having regard to the terms of that settlement, expressed in the deed of release between those parties, with appropriate additional reference to the amended statement of claim filed prior to

---

86 *Castellan v Electric Power Transmission Pty Ltd* (1967) 69 SR (NSW) 159 at 181.

the settlement and the judgment entered, it cannot seriously be disputed that the parties to the settlement were on notice that the respondents were keeping open the possibility of pursuing separately, and later, their action against Mr Baxter. No other interpretation is compatible with the record.

91 It is unnecessary to resolve the question of whether the intention of the parties to the settlement is to be derived subjectively – from what they expected and meant in their own minds – or (as I would prefer) objectively from the effect of what they did – from what a reasonable observer (represented ultimately by a court) would impute to the parties[87]. In either event, the only interpretation of the conduct of the respondents and of Mr Whitehead was that the respondents were reserving their right to proceed against Mr Baxter in respect of the residue of their damage which they continued to assert.

92 The respondents had originally claimed against Mr Whitehead and Mr Baxter considerably more by way of damages than the amount for which they settled their claim against Mr Whitehead ($250,000), for which settlement judgment was entered against him. Properly, Mr Baxter conceded in this Court that, before the Master, there had been evidence which, if accepted, would have entitled the respondents to recover from himself and Mr Whitehead (the two named defendants in that matter) more than the amount of the settlement and the consent judgment against Mr Whitehead that followed. In these circumstances, it is impossible to conclude, without more facts, that a recovery now from Mr Baxter would amount to a form of double satisfaction. There is no basis in the facts as they stand to regard the possibility of recovery from Mr Baxter as constituting recovery for damage already accorded by the earlier judgment or as unconscionable or as amounting to unjust enrichment of the respondents.

93 It is conceivable that future litigation, and further facts, may bear out Mr Baxter's complaint. By force of s 5(1)(b) of the Act, and as conceded by the respondents, they must give credit to Mr Baxter for the recovery for their damage which they have already made against Mr Whitehead. But as the proceedings now stand, the claim of double satisfaction is not made good in the facts to which reference may be had. The second argument of Mr Baxter also fails.

Orders

94 In the result, both arguments having been rejected, the appeal must be dismissed with costs. That order confirms the first order of the Court of Appeal. Under it, the application for leave to appeal from the judgment of the Supreme Court entered by the primary judge was refused. By that judgment, the appeal from the Master was dismissed. The Master had dismissed Mr Baxter's motion

---

87 cf *Jameson v Central Electricity Generating Board* [2000] 1 AC 455 at 476.

for peremptory dismissal of the proceedings against him. The Master's conclusion was that "there should be a trial [of the respondents' action] on its merits". That is what must now follow.