



[2021] JMSC Civ 44

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**CIVIL DIVISION**

**CLAIM NO. 2017HCV02496**

<b>BETWEEN</b>	<b>RALPH GRAHAM</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>GUARDIAN GENERAL INSURANCE COMPANY LIMITED</b>	<b>DEFENDANT</b>

**IN CHAMBERS**

Mr. Everol McLeod instructed by Kinghorn & Kinghorn Attorneys-at-law for the Claimant

Mr. Monroe Wisdom instructed by Nunes, Scholefield, DeLeon & Co. for the Defendant

December 14, 2020 and January 29, 2021

**Motor Vehicles Insurance (Third-Party Risks) Act s. 18 – Release and Discharge - Default Judgment granted in the Parish Court against insured – Whether the Third Party can recover the judgment from the insurer**

**REID J (AG)**

[1] Mr Ralph Graham (the Claimant) has sought a declaration that Guardian General Insurance Company Limited (the Defendant) is obliged, under the Motor Vehicles Insurance (Third-Party Risks) Act (the Act), to honour a default judgment that had

been entered against Clive Findlay and Dawnett LaForest, Saint Catherine Parish Court.

## **Background**

- [2] A two-vehicle collision occurred on December 31, 2014. One motor vehicle was being driven by the Claimant who was insured by British Caribbean Insurance Company Limited (BCIC). The other motor vehicle was being driven by Clive Findlay, but it was owned by Dawnett LaForest, and insured by the Defendant.
- [3] The Claimant was informed that Dawnett LaForest and Clive Findlay accepted liability and that the matter would be settled by the Defendant, their insurance company. The Defendant was informed via a letter from the Claimant's insurers, BCIC, that they (the Defendant) should deal directly with the Claimant and Covenant Insurance Brokers Limited, his insurance broker, with regards to the settlement of his claim.
- [4] The Defendant entered into settlement discussions with the Claimant through his insurance brokers, and on May 16, 2015, the Claimant executed a Third-Party Release in the presence of his insurance brokers.
- [5] By virtue of the Third-Party Release executed by the Claimant, he agreed to:
- a) *Accept the sum of one hundred and ninety four thousand, one hundred and fifty eight dollars and thirty cents (\$194,158.30) inclusive of cost and interest in full satisfaction and discharge of all claims competent for the claimant or anyone acting on his behalf against Dawnett LaForest and Clive Findlay for all personal injuries, loss and damage to property arising from the incident.*
  - b) *Release and discharge Dawnett LaForest, Clive Findlay and the Defendant from all claims and demands whatsoever arising directly or indirectly out of the said incident; and*
  - c) *Discontinue all claims or proceedings now pending and not at any time hereafter take or bring any further action or proceedings against Dawnett LaForest, Clive Findlay and the Defendant."*

- [6] The Claimant retained the services of Messrs. Kinghorn and Kinghorn. The Defendant received a Notice of Intended Proceedings from Attorneys-at-law Messrs. Kinghorn & Kinghorn on April 13, 2015 advising them that the Claimant intended to institute proceedings against the Defendant's insured, Dawnet LaForest and her driver Clive Findlay, for compensation for the Claimant's personal injuries and loss suffered as a result of the accident on December 31, 2014.
- [7] The Defendant, wrote to the Claimant's attorney-at-law on or about June 8, 2015 indicating that the Claimant had signed a full and final Third-Party Release. The Claimant's attorneys-at-law wrote to the Defendant requesting a copy of the Third-Party Release in order to facilitate discussions with their client. The Defendant subsequently sent a copy of the said Third-Party Release to the Claimant's attorneys-at-law.
- [8] In May 2016, the Defendant received a Notice of Proceedings from the Claimant's attorneys-at-law in relation to a claim that was filed in the St. Catherine Parish Court concerning the subject incident. The action in the St. Catherine Parish Court culminated in a default judgment being entered in favour of Mr. Ralph Graham against the defendants in that claim, Dawnet LaForest and Clive Findlay, on May 15, 2017.
- [9] The next time the Defendant heard from the Claimant's attorneys-at-law was when they were served with the Formal Order from the St. Catherine Parish Court informing them of the default judgment which was awarded to the Claimant for general damages, special damages, and cost in relation to the incident against Dawnett LaForest and Clive Findlay.
- [10] The Defendant's attorneys-at-law contacted the Claimant's Attorney-at-law to indicate that they would be relying on the release for its full effect.
- [11] The Claimant thereafter filed a Fixed Date Claim Form dated August 8, 2017 with an affidavit of Sean Kinghorn in support, whereby the Claimant sought:

*“(1) A Declaration that the Defendant is obliged under the Motor Vehicles Insurance (Third-Party Risks) Act to honour the judgment of the Parish Court for St. Catherine in the matter of Plaintiff No. 1582/16 – Ralph Graham v Clive Findlay and Dawnett LaForest whereby judgment was granted in favour of the Claimant against the defendant in the following terms:*

*By Default Judgment for the [Claimant] against the Defendants is as follows:*

- (1) General Damages in the sum of \$600,000.00 plus interest at the rate of 3% from the 24<sup>th</sup> August 2016 to 15<sup>th</sup> May 2017.*
- (2) Special Damages awarded in the sum of \$26,201.00 with interest of 3% per annum from the 31<sup>st</sup> day of December, 2014 to the 15<sup>th</sup> day of May 2017. Costs awarded to the Plaintiff in the sum of \$50,000.00*
- (3) An Order that the Defendant pays over to the Claimant the said Judgment sum within 7 days of the date hereof along with interest of 6% from the 15<sup>th</sup> day of May 2017 to the date of payment.*
- (4) The costs of this application be borne by the Defendants to be agreed or taxed.”*

### **The Claimant's case**

**[12]** The Claimant deponed that he did not sign a release to cover his personal injuries. He stated that he submitted the loss adjusters' report and other documents indicating damage and loss to his motor vehicle to his insurance company, BCIC and the Defendant. As such, he argued, the release which he executed was only relevant to his damage and loss to his motor vehicle.

**[13]** He said he made it clear to his insurers that he had an attorney-at-law and that they would be pursuing his personal injury claim. He further stated that at the time of the execution of the release he had already visited a doctor due to pains that he was feeling as a result of the said motor vehicle accident, but he had not yet received a medical report and that this was made known to both insurance companies.

[14] The Claimant argued that to date the judgment has not been honoured. There has been no application made by the insured nor the Defendant to set aside the judgment, neither was there any appeal filed against the judgment. The Claimant has not released the Defendant nor the insured from payment of the judgment, and as such, the Defendant has a statutory obligation to satisfy the judgment debt.

[15] The Claimant submits that there are two issues that arise in the case at bar:

- (1) Has the Claimant provided sufficient evidence that the Defendant is obligated to satisfy the judgment under the provisions of the Act?
- (2) Has the Defendant provided any evidence that it is not obliged to honour the judgment under the provisions of the Act?

[16] In response to the first issue, the Claimant relied on the authority of **The Administrator General v National Employers Mutual Association Limited** (1988) 25 JLR 459 for support his contention that there was sufficient evidence before the court to establish that the Defendant was obliged, under the Act, to satisfy the judgment. The Defendant's obligation to satisfy the judgment arose under the Act and therefore, the Defendant could not rely on the release to extinguish its statutory responsibility. The Claimant argued that technically, the claim in the High Court was not against the Defendant but against their insured, and it is by virtue of the Act, that the Defendant ought to honour the judgment.

[17] Counsel, Mr. Everol McLeod advanced that an agreement to settle the Claimant's property damage claim and the consequent release did not take away the Claimant's rights under the Act. Counsel pointed out that for the Claimant to have lost that right, Dawnett LaForest and Clive Findlay would have had to raise that defence at the Parish Court level, which had not been done, and so could not be raised in this court.

[18] Counsel for the Claimant further argued that the absence of Dawnett LaForest and Clive Findlay at the Parish Court was a deliberate election by them not to rely on

the defence of accord and satisfaction. He added that had that defence been raised at the Parish Court, then the Claimant would have had the opportunity to show that the release was only in relation to his property damage. He emphasized that the defence that the Defendant was now seeking to raise was only relevant at the Parish Court and could not be used to defeat its statutory obligation.

[19] The Claimant placed reliance on ***Kirk Burford v Advantage General Insurance Company Limited*** [2017] JMSC Civ. 84 to indicate the instances in which an insurance company could escape liability to an innocent third party.

[20] In answer to the second issue, counsel for the Claimant challenged the hearsay evidence in the affidavit of Ms. Remona Nelson, which indicated that her investigator revealed that Dawnett LaForest had migrated to the United States of America in April 2016. He countered this argument by pointing out that the fact that the Parish Court had granted the default judgment, was, in his view, sufficient indication that that court was satisfied with the proof of service upon Dawnett LaForest and Clive Findlay.

[21] Counsel further relied on the dicta of Bertram Linton J in ***Kirk Burford v Advantage General Insurance Company Limited***, at paragraph 22, where her Ladyship opined:

*“The court’s consideration is restricted to the interpretation of the Motor Vehicles Insurance (Third-Party Risks) Act and the authorities which prescribe the ways in which an insurance company can avoid liability to a third party.”*

[22] Counsel emphasized that the Defendant had done nothing to set aside the judgment in the Parish Court in keeping with its “rights of subrogation”. He pointed out that the default judgment could only be affected if it was set aside or appealed, neither of which could take place within this jurisdiction. It was therefore irrelevant to raise those arguments at this level as the Supreme Court had no jurisdiction to assess the validity of a judgment arising out of the Parish Court.

### **The Defendant's case**

- [23]** Counsel for the Defendant, Mr Munroe Wisdom, submitted that the sole issue to be determined was whether it was obligated to honour the judgment of the Parish Court in favour of the Claimant in the light of the Third-Party Release duly executed by the Claimant.
- [24]** Counsel argued that the Defendant can rely on the release signed by the Claimant as a full discharge from all claims arising from the incident involving its insured. He asserted that the Defendant was an independent beneficiary of the release. It is protected independently of its insured or insured's driver from all claims and demands whatsoever arising directly or indirectly out of the said December 31, 2014 incident (see paragraph (b) of the Release). Mr Wisdom pointed out that the only obligation owed by the Defendant to the Claimant arose by virtue of s. 18 of the Act, as the Claimant herein is an alien to the contract of insurance between the Defendant and its insured. Accordingly, without the Act, the Claimant could only claim against the insured and/or its driver, and the question of indemnity would be a matter of contract between the Defendant and its insured.
- [25]** Mr. Wisdom emphasized that the obvious and inescapable inference to be drawn from the Claimant expressly releasing the Defendant (and not merely its insured) from any obligation in relation to the incident, was that the Claimant waived and/or relinquished his right to claim by virtue of the Act against the Defendant. The instant claim (demand for payment of the judgment in relation to the December 31, 2014 incident) is the very type of claim or demand from which the Claimant contracted to release the Defendant from any obligation to him.
- [26]** Regarding the scope of the release, Mr Wisdom submitted that the release covered all claims competent for the Claimant, for all personal injuries, loss, and damage to property, whether now apparent or not, caused by or arising out of the incident which occurred on or about December 31, 2014 as expressly stipulated in the release.

- [27] Counsel challenged the Claimant's assertions at paragraphs 6 and 7 of his affidavit filed on June 25, 2018. He relied on the House of Lords decision of ***Investors Compensation Scheme Limited v West Bromwich Building Society*** (1998) 1 WLR 896, where the principles that were relevant to interpretation of a contract were identified.
- [28] In the light of the foregoing, the counsel posited that the express use of the words/phrase "*for all personal injuries*" should not be viewed as a mistake and must be interpreted to bear its obvious an ordinary meaning. He further argued that the Claimant, who by his own admission, had the benefit of his insurance brokers, had commenced medical treatment for his injuries; and who had retained counsel at the time of executing the short release, knew or ought to have known what was meant by a "claim for personal injuries".
- [29] In reliance on the argument that the release was validly executed, counsel found support in the dicta of Panton JA (as he then was) in ***Keith Recas and John Johnson v Winsome Wickham*** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 62/ 2005, judgment delivered July 31, 2006 where he addressed the scope and validity of releases. Counsel then emphasized that the words of the release made it clear that the parties contracted that the Claimant would discharge the Defendant from all obligations to the Claimant in respect to all claims, including those that are the subject matter of the default judgment, in consideration for the agreed sums.
- [30] Counsel stated that the principle of accord and satisfaction operates as a complete defence to a claim where there is expressed agreement for the discharge of an obligation in exchange for valuable consideration. In reliance on ***British Russian Gazette and Trade Outlook Limited v Associated Newspaper Limited*** [1933] 2 K.B. 616, counsel argued that in the case at bar, the Third-Party Release is evidence of the agreement between the parties and shows in the circumstances that there is accord between the parties. The agreement was executed by the Claimant in favour of the Defendant showing an obvious intention to release the



Defendant herein from any obligation that it may have to the Claimant. In furtherance of the said agreement, the Defendant made payments to the Claimant of the agreed sum in the Third-Party Release. It is submitted that this payment by the Defendant is valuable consideration in satisfaction of the accord between the parties.

[31] Mr Wisdom also submitted that unless the Claimant can successfully assert that the agreement was not consensual as between the parties, and that the Defendant obtained the release inequitably or fraudulently, the Claimant's claim must fail. He argued that there was no undue influence exercised over the Claimant when he signed the release. He pointed to the case of **National Commercial Bank v Hew** [2003] 63 WIR 183 in which the Privy Council defined undue influence and pointed out that the Claimant was armed with legal advice and the protection of his insurance brokers during the period leading up to the execution of the release. The insurance brokers, as the Claimant's agents, had a duty to the Claimant to advise him of the necessary steps in the matter. In those circumstances, the Claimant is unable to successfully argue that there was undue influence exerted over him when he signed the release.

[32] It was counsel's contention that the circumstances, as they existed, were not ones in which the Defendant could take unfair advantage, and neither was the agreement oppressive. The Claimant having availed himself of the necessary advice as to his legal option and being aware of his injuries at the time of the agreement would be in a position to assess whether he would be minded to pursue a suit for his personal injuries.

[33] Additionally, there was no misrepresentation on the part of the Defendant. There is no evidence before the court to suggest that the Defendant made any misrepresentation to the Claimant that would contradict the clear and expressed words of the release. The Claimant, with the assistance of his insurance brokers and attorney-at-law would be able to correctly interpret the release and ascertain the full effect of it.

[34] Counsel also challenged Claimant's reliance on *Kirk Burford v Advantage General Insurance Company of Jamaica* in support of its case. The Claimant's reliance on *Kirk Burford* is misconceived, he said, as that case is distinguishable from the case at bar since the defendant in *Kirk Burford* was not relying on a release.

[35] Mr Wisdom submitted that in the light of the foregoing, the Defendant was released and discharged from any and all obligations to pay any sums to the Claimant in respect of the incident in which the Claimant received the default judgment in the Parish Court by virtue of a validly executed Third-Party Release in favour of the Defendant. The release should not be set aside as it was executed with the free consent of the Claimant who was not labouring under undue influence, nor was the bargain unconscionable or oppressive. The court should not aid the Claimant in deliberately and/or calculatedly breaching his contract with the Defendant to gain a benefit for himself by declaring that the Defendant is obligated to pay him additional sums having regard to the release.

[36] As a consequence, counsel urged the court to refuse the orders sought by the Claimant in his Claim form and make a declaration that the Claimant is estopped from bringing any proceedings in relation to this matter and/or take any steps to enforce the Parish Court judgment.

### **Law and analysis**

[37] The following factors are not in dispute in this case:

- (1) There was a valid certificate of insurance in place by virtue of section 5(4) of the Act.
- (2) That judgment in respect of the liability as is covered by the policy under s. 5(1) (b) has been obtained against the insured.
- (3) That the liability was covered by the term of the policy.
- (4) The Claimant signed a release in March 2015 in relation to the incident involving the Defendant and its insured whereby the

Claimant suffered personal injuries, loss, and property damage.

- (5) He had legal counsel, both from his insurance brokers and the same attorneys-at-law who are currently representing him in the case at bar, at the time when he executed the release.
- (6) He signed the release before he brought an action against the Defendant's insured in the St. Catherine Parish Court.
- (7) The Defendant was informed by the Claimant's Attorneys-at-law of the pending litigation by the Notice of Proceeding which was served on them before the suit was commenced in the Parish Court.
- (8) The Defendant responded to the Claimant's Attorneys-at-law indicating that the Claimant had executed a release and they would be relying on it in respect of the said incident.
- (9) The formal order indicating the Default Judgment was served on the Defendant and they responded in June 2017 by sending a copy of the said release which the Claimant had executed to the Claimant's Attorneys-at-law.
- (10) The default judgment is still to be honoured because it has not been set aside neither has there been any appeal against the said judgment.

**[38]** The outcome of this case is dependent upon whether the release executed by the Claimant in March 2015, had the effect of also compensating the Claimant for the personal injuries and loss sustained as a result of the motor vehicle incident which occurred on December 31, 2014, between the Claimant and the insured.

**[39]** The Claimant places full reliance on s. 18(1) of the Act which reads:

*"If after a certificate of insurance has been issued under subsection (9) of section 5 in favour of the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under subsections (1), (2) and (3) of section 5 (being a liability covered by the terms of the policy) is obtained against any person insured*

*by the policy, then, notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment the amount covered by the policy or the amount of the judgment, whichever is the lower, in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.”*

- [40] The Claimant’s indicates that his claim is further bolstered by his reliance on **Kirk Burford**, which outlines the limits of section 18 of the Act, and the instances where an insurance company can avoid liability thereunder. The contention of the Claimant is that they have a valid judgment, and the Defendant cannot avoid satisfying it as, to date, there has been no other court decision which affords the Defendant the right to do otherwise.
- [41] However, the case of **Kirk Burford** is distinguishable from the case at bar. In **Kirk Burford**, the insurance company was seeking to avoid liability. In this case, the Defendant’s position is that they have already honoured their liabilities and their statutory obligations, and as such, should not be asked to pay a second time for those same liabilities.
- [42] The Defendant has relied fully on the release which the Claimant willingly executed after obtaining legal advice. The Claimant pleads that he did not execute the document to cover his personal injuries, and consequently, therein lies the issue of the extent and validity of the release. I note here, very importantly, that the Claimant is not saying that he did not sign the same release being relied on by the Defendant. He is simply saying that it did not cover his personal injuries.
- [43] Having accepted that a valid Third-Party Release was executed between the Claimant and the Defendant, it is necessary to examine whether there was accord and satisfaction as it relates to the personal injuries and loss sustained by the Claimant. In **Alcan Jamaica Company v. Delroy Austin and Hyacinth Austin** (unreported) Court of Appeal, Jamaica, Supreme Court Civil Appeal No. 106/2002, judgment delivered on December 20, 2004, Smith JA postulated that:

*“Any person who has a cause of action against another may agree with him to accept in substitution for his legal remedy any consideration. The agreement by which the obligation is discharged is called Accord and the consideration which makes the release binding is called satisfaction – see **Clerk and Lindsell on Torts 17<sup>th</sup> Edition 30-06 p.1559**. Thus, Accord and Satisfaction is the purchase of a release from an obligation arising under contract or tort by means of any valuable consideration, not being the actual performance of the obligation itself.”*

[44] It was further stated in **Alcan Jamaica Company** that once the agreed upon consideration had been accepted, then “the original right of action is discharged and the accord and satisfaction constitute a complete defence to any further proceedings upon that right of action”.

[45] In the case of **Elaine Dotting v. Carmen Clifford (Executrix of the Estate of Dr. Royston Clifford) and the Spanish Town Funeral Home Ltd** (unreported), Supreme Court, Jamaica, Claim No. 2006HCV0338, judgment delivered on March 19, 2007, McDonald-Bishop J (Ag.) as she then was, postulated at paragraph 25 that:

*“It is also established on good authority that in construing a release no particular form of words is necessary to constitute a valid release and so any words which show an evident intention to renounce a claim or discharge the obligation are sufficient...”*

[46] Furthermore, Mangatal J in **Rio Brown v N.E.M. Insurance Company (JA) Ltd.** [2012] JMSC Civil 27, highlighted at paragraph 36 that:

*“... There is a reason why one must be very careful what one signs. Appending one’s signature to the document can signify authorship or adoption of its terms ...”*

[47] Notwithstanding the Claimant’s submission that the release was executed solely in relation to the property damage suffered in the motor vehicle accident, it is apparent from the release (outlined in paragraph [5] herein) that the Claimant accepted a specific amount “***in full satisfaction and discharge of all claims competent for the claimant or anyone acting on his behalf against the insured, the driver and the Defendant for all personal injuries, loss and damage to property arising from the incident***”.

- [48] In addition, by executing the said release, the Claimant agreed to “discontinue all claims and proceedings now pending and **will not at any time hereafter take or bring any further action or proceedings ... or make any claim whatsoever against the said Dawnett Veronica LaForest or driver, Clive Findlay, and Guardian General Insurance Jamaica Limited in respect of this incident**”.
- [49] It is prudent to note that at the time of the execution of the Third-Party Release, the Claimant had the benefit of the knowledge and experience of his insurance brokers and the advice of his attorneys-at-law (the same counsel in the case at bar). The Claimant’s execution of the agreement was witnessed by a claim’s administrator employed to his insurance broker. Therefore, as stated in *Rio Brown*, by affixing his signature to the document, the Claimant would have adopted the terms of the agreement signed.
- [50] After consideration of the principles enunciated in *Dotting*, it is evident that the words contained in the release were sufficient to show an intention to discharge the Defendant’s obligations to the Claimant with respect to compensation for personal injury, loss and property damage resulting from the incident. Furthermore, it is generally accepted that terms in a contract are to be interpreted using their natural and ordinary meaning. Therefore, in the absence of any vitiating factor which would render the contract invalid, where the agreement explicitly states that consideration was in full and final satisfaction of personal injuries and loss sustained by the Claimant as a result of the incident, it is difficult to argue against the terms plainly written in the agreement.
- [51] In considering the principles posited in *Alcan*, the release executed between the Defendant and the Claimant would constitute accord. Further, upon the acceptance of the consideration agreed upon, there was satisfaction. As such, it is submitted that the original cause of action has been discharged. In essence, the Claimant’s third-party rights under the insurance policy would have been extinguished.

- [52]** The Claimant has argued that the claim is not against the Defendant but against the insured. The assertion is that they are enforcing the judgment not against the insurance company but the insured. This position, I believe, would be illogical as the release named all the parties as being released from further liabilities upon payment and execution of the said document.
- [53]** In those circumstances, based on the defence of accord and satisfaction, the liability relating to the Claimant's personal injuries and loss sustained from the accident no longer exist. Thus, this court is of the view that proceedings should not have been initiated because the liability that has been discharged.
- [54]** This court cannot ignore that a default judgment was granted by the Parish Court in relation to this matter. It is evident that the Defendant did not take any steps to intervene in the proceedings in the Parish Court and defend the claim against the insured. The result of this was that the defence of accord and satisfaction was never raised before that court. Further, this court does not operate as an appellate court and as such is unable to interfere with the default judgment granted in the Parish Court.
- [55]** The Claimant knew that the release which he executed covered all his personal injuries, loss and property damage and ought not to have brought an action in the lower court after execution of the said release. On the other hand, having brought a claim in that court he should have disclosed the release to the Court. The words of the release are noticeably clear and as such this court will not look behind them to enquire into his intention.
- [56]** I find that having had legal advice before he executed the release, he cannot now rely on what his intentions may have been. The Court will look to the natural meaning to determine the meaning of the document. This court is of the opinion that it would be unjust for the Claimant to be compensated twice for the same cause of action.

## **Conclusion**

**[57]** In the light of the foregoing, the court makes the following orders:

- (1) Orders sought in the fixed date claim form filed on August 8, 2017 are refused.
- (2) Costs to the Defendant to be agreed or taxed.