

## MICHELLE APARTMENTS LIMITED

v.

## JAYANTI LAL PALA &amp; OTHERS

[HIGH COURT, 1989 (Byrne J) 26 September]

## Civil Jurisdiction

*Practice (Civil)- compromise of actions- whether the Court has jurisdiction to vary the terms of a settlement.*

The parties compromised an action, the terms of the settlement providing for the payment of a lump sum. The Defendants were late in making payment and the Plaintiffs sought interest on the agreed sum. Dismissing the application, the High Court HELD: the compromise of proceedings the terms of which are not made on order of the Court concludes those proceedings and the Court has no further jurisdiction arising from the original cause of action.

## Cases cited:

*Green v. Rozen & Ors* [1955] 2 All ER 797

*McCallum v. Country Residences Limited* [(1965) 2 All ER 264

*J. Singh* for the Plaintiff

*S.D. Sahu Khan* for the Defendants

Interlocutory application in the High Court.

**Byrne J:**

This action was commenced in 1984 and terms of settlement were signed by Counsel for the parties on 6<sup>th</sup> January 1989 and filed in this Court on that date but without any order being made by the Court. On 26th January 1989 the Solicitors for the plaintiff issued a Notice of Motion for Judgment returnable on 31st August 1989 seeking an order in terms of the terms of the settlement and an order that the Plaintiff do recover against the Defendants the sum of \$10,000.00 with interest at the rate of 10 percent per annum from 21st January 1989 to date of payment and for the costs of the present application.

It is not contested that the Defendants were very late in making payment of the terms of settlement. They did so by two instalments, the first of \$4,750 on 31st August 1989 and the second of \$5,250 on 19th September 1989. Mr. Singh submitted that since they had not paid the agreed amount of \$10,000.00 by the 21st January last as required by the terms of settlement they should pay interest at the rate of 10 percent commencing on 21st January until the dates of the two payments. He calculated the total interest due from 21st January 1989 until 18<sup>th</sup> September as \$635.54 and this was not disputed by Mr. Khan for the Defendants. Mr. Singh submitted finally that the Motion was necessary because of the failure

A of the Defendants to honour the terms of settlement. No explanation was given as to why the Plaintiff did nothing to enforce settlement earlier, although in fairness it must be stated that whilst the present Notice of Motion was filed on 26th January 1989 the file in this action appears to have been mislaid by the Court Registry and so no date was assigned for the hearing of the Motion until 31st August.

B In reply Mr. Khan argued simply that as the terms of settlement contain no claim for interest for the Plaintiff the Defendants are under no liability to pay the Plaintiff interest.

Paragraph 1 of the terms of settlement reads:

C “That it is hereby agreed that the Defendants within 14 days from the date hereof do pay to the Plaintiff the sum of \$10,000 in full and final settlement.”

Paragraph 2 reads:

D “That the settlement herein to be in full and final settlement of the Plaintiff’s claim against the defendants anal/or the defendants’ counterclaim against the Plaintiff in this action and/or Supreme Court Civil Action No. 333 of 1982 Fiji Court of Appeal Civil Appeal No. 7 of 1988 and/or of any other claims by the parties in the above actions pertaining to the affairs of Michelle Apartments Limited and/or any activities thereof involving the parties in the said actions as shareholders, Directors, Accountants, Auditors, Financial Advisors, Consultants or in any other capacity whatsoever pertaining to Michelle Apartments Limited.”

E Paragraphs 3 and 4 of the terms are immaterial for present purposes.

F Mr. Khan relies on two English cases both of which seem to me to be on all fours with the present case. They are Green v Rozen and Others [1955] 2 All E.R. 797 and McCallum v Country Residences Limited [1965] 2 All E.R. In the first case Slade, J. had before him an application by a Plaintiff for judgment to enforce agreed terms of settlement. The agreed terms were set out on the backs of Counsel’s briefs and signed by Counsel for both parties. The Court was not asked to make any order whatever and no order was made staying further proceedings. When the Defendants failed to pay the final instalment of the agreed terms and costs the Plaintiff made an application in the original action asking for judgment for the amount of the final instalment and an order for the costs. Slade, J. held that the application had to be refused because, the Court having made no Order in the action, the agreement compromising the action between the parties completely superseded the original cause of action and the Court had no further jurisdiction in respect of that cause of action.

G The Court held that the Plaintiff’s only remedy was to bring an action on the

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& 2 OTHERS

agreement of compromise. In the second case McCallurn v Country Residences Limited the Court of Appeal by a majority, Lord Denning, M.R. and Winn L.J., held, on consideration of the alleged settlement of an action, that in the absence of consent to an Order for costs, as distinct from consent to the agreement for settlement, the Court had no jurisdiction to make the Order. At page 265 Lord Denning, M.R. said: "When an action is compromised by an agreement to pay a sum in satisfaction, it gives rise to a new cause of action. This arises since the Writ in the first action and must be subject of a new action. The Plaintiff, in order to get judgment, has to sue on the compromise. That is the only course which the plaintiff can take in order to enforce the settlement; unless of course he can go further and get the defendant to consent to an order of the Court. In the absence of a consent to the order, as distinct from the consent to the agreement I do not think a Court has jurisdiction to make an order." His Lordship and Winn L.J. followed the decision of Slade J. in Green v Rozen and Others [1955] 2 All E.R. 797.

Mr. Khan also took a very technical point that the present motion was not properly before the Court in that no Notice of Intention to proceed under Order 3, Rule 5 of this Court had been given to the Defendants. It is unnecessary for me to consider this point because I am firmly of the view that Mr. Khan's first submission is correct and I accept the law as stated in the two cases he cited, but particularly that in Green v Rozen and Others.

I sympathise with the Plaintiff in not being entitled to interest on his settlement but at all times he has been represented by Solicitors, and it would have been a simple matter to have included a reference to interest becoming payable in default of compliance with the terms of settlement, but this was not done. It has always seemed to me that where an action is settled and the parties wish to preserve their rights to subsequent legal proceedings one of the terms of a compromise should be that the terms shall be made an order of the Court in that any default is easily remedied by the simple matter of applying to the Court to enforce the terms. This was the first of the five methods of disposing of an action which has been settled mentioned by Slade J. in his judgment in Green v. Rozen and Others, and of course, as his Lordship said, the list is not exhaustive.

The result is that the Plaintiff's Motion is dismissed with costs to be paid to the Defendants, such costs to be taxed if not agreed.

*(Application dismissed.)*