

They think it's all over: settlements with concurrent contract-breakers



Daniel Gatty and Richard Hayes

Where A and B are liable to X for the same or overlapping damage, difficult questions arise as to whether a compromise “in full and final settlement and satisfaction” between A and X precludes X from later proceeding against B. Two recent Court of Appeal cases, *Heaton v. Axa Equity & Law Life Assurance Society* [2000] 4 All ER 673, and *David Yablon Minton v. Kenburgh Investments (Northern) Ltd*, *The Times*, 11/7/2000 provide an interesting examination of this area against the background of the House of Lords’ decision in *Jameson v Central Electricity Generating Board* [1999] 2 WLR 141. They highlight the problems that arise when attempting to apply the decision in *Jameson*, which was concerned with concurrent tortfeasors, to settlements with concurrent contract-breakers.

Jameson v. CEGB

Mr Jameson was an asbestos worker formerly employed by Babcock Energy Limited. He developed malignant mesothelioma allegedly as a result of exposure to asbestos dust while working on behalf of Babcock at a number of premises, including those of the CEGB. Shortly before dying, Mr Jameson compromised proceedings he had brought for negligence and breach of statutory duty against Babcock by accepting a sum of money expressed to be in full and final settlement of all causes of action in his claim. After his death, Mr Jameson’s executors brought proceedings against the CEGB for breaches of different duties but in respect of the same damage that had been the subject of his claim against Babcock.

The House of Lords held that the CEGB was released by the Babcock settlement. Their Lordships decided that the effect of a settlement in full satisfaction of a claim was to fix its value not only against the parties to the settlement but also against concurrent tortfeasors responsible for the same loss. Whether a settlement was in full satisfaction turned on the construction of the agreement in the context of the claim. Lord Hope, with whom Lords Browne-Wilkinson and Hoffmann agreed, held that as Mr Jameson had accepted a sum in full satisfaction of his claim, his losses were extinguished, leaving no damage upon which to found a tortious claim against the CEGB.

Heaton v Axa Equity and Law

The Claimants were directors of Glyne Investments Limited which sold investment products as agents of Target Life Assurance Limited. Equity & Law purchased the sales and marketing divisions of Target and entered into an agreement with Glyne appointing them to service new business. A similar agreement was entered into between Glyne and Target to service existing clients. Subsequently, alleging misconduct, Target summarily terminated its agency agreement with Glyne. Days later, Equity & Law terminated their agency agreement with Glyne making connected allegations.

Glyne brought proceedings for breach of contract against Target. The benefit of those proceedings, and Glyne’s rights against Equity & Law, were assigned to the Claimants on Glyne’s subsequent liquidation. The sum claimed in the Target proceedings included damage caused by Equity & Law’s termination. The Target proceedings were subsequently compromised by a Tomlin Order under which Target paid the Claimant’s £10m “in full and final settlement” of all claims between the Claimants and Target. The Claimants then brought proceedings against Equity & Law (who were not parties to the Tomlin Order) primarily for breach of contract. The contractual damages claimed were entirely encompassed within the damages claimed from Target.

Equity & Law raised the settlement between the Claimants and Target as a defence. There was a hearing to determine whether that settlement precluded the Claimants from pursuing Equity & Law. Laddie J (The Times, 19/7/99) held that it did and struck out the action. He thought there was no reason why the principle in Jameson should apply only to torts. He considered that the matter turned on the construction of the settlement agreement and on public policy. He held that there was no express or implied reservation in the Target settlement of the right to sue Equity & Law. Laddie J observed that Target had "paid a high price for peace" under the terms of their settlement but would not achieve that result if the Claimants were permitted to carry on with the present action because Equity & Axa could make a contribution claim against them (indeed had done so).

In a detailed judgement reversing Laddie J, Chadwick LJ (with whom Robert Walker LJ and Sir Roy Beldam agreed) distinguished the case before it (same or overlapping damage caused by concurrent contract-breakers) from Jameson (same damage caused by concurrent tortfeasors). In his analysis Chadwick LJ identified two separate questions: the full satisfaction question and the final settlement question.

The full satisfaction question: Where A and B separately cause X the same loss, does X still have a subsisting cause of action against B after accepting a sum in full satisfaction of his claim against A?

Damage is an essential element of the cause of action in most tortious claims. If X suffered the same loss as a result of A and B's separate torts, upon payment by B of a sum accepted in full satisfaction of X's claim, there will be no loss recoverable from A and so no cause of action against him. So A will be discharged. That Chadwick LJ identified as the heart of the decision in Jameson, labelling it the "full satisfaction question". Whether the amount payable under the settlement represents full satisfaction depends upon construing the settlement agreement in the context of the claims made.

Chadwick LJ distinguished Jameson, on the ground that the instant case was one of successive contract-breakers, not concurrent tortfeasors. As damage was not an essential element in a breach of contract claim, X would retain a cause of action against B even if his loss had been fully satisfied by the settlement with A (although arguably it would be for nominal damages). So the full satisfaction question alone could not provide an answer to the facts of Heaton (unless public policy precluded a claim for nominal damages).

The final settlement question: Is it inconsistent with X's full and final settlement with A to permit X to pursue B in respect of the same heads of loss, leading B to seek a contribution from A?

This Chadwick LJ labelled the "final settlement question". It arises only if there is still a subsisting cause of action against B notwithstanding the settlement with A. He held that to answer the final settlement question the court must construe the settlement agreement between X and A in the context of the claim to discover whether it was intended that B should be discharged. Some guidance was provided to assist in the task of construing the agreement: Where A and B have joint contractual liabilities to X, there is a presumption that it was intended that B would be released, unless the words or context show a contrary intention. Where A and B have joint and several contractual liabilities to X, it may well be appropriate to hold that B is released by the settlement between A and X - any presumption in that direction is weaker than with joint liabilities. Where A and B have separate, not joint, contractual liabilities to X (for the same or overlapping damage) there is a presumption that the settlement between X and A does not release B, unless the context shows otherwise.

On the facts it was held that there was no intention to discharge Equity & Law. Chadwick LJ then went on to deal with the question whether public policy would require the Equity & Law action to be stayed if the result of the Target settlement was that only nominal damages could be recovered from Equity & Law. He rejected the proposition that an action for a declaration that a breach of contract has been committed and for nominal damages (in the absence of any substantive recoverable loss) could and should be stayed on policy grounds. He observed that it has long been the practice to permit such a claim unless the action can properly be characterised as an abuse of process.

David Yablon Minton v. Kenburgh Investments (Northern) Ltd The Appellants, DYM, were solicitors sued for professional negligence by the liquidators of the Respondents, KIN. KIN's liquidators had previously brought proceedings under s. 212 of the Insolvency Act 1986 against KIN's former directors and its parent, Kenburgh PLC, arising out of an allegedly fraudulent transaction in which DYM had acted for both KIN and KPLC. Those proceedings were settled by a deed of compromise by which the directors and KPLC agreed to pay KIN £1.25m. KIN's liquidators then sued DYM for negligent failure to protect its interests in relation to the dubious transaction. DYM issued Part 20 notices claiming a contribution from KPLC and the former directors of KIN. The directors resisted the Part 20 claims on the ground that they expected the compromise with KIN to be an end of their liability. DYM raised the compromise as a defence to KIN's claim.

At first instance HHJ Behrens held that the principle in *Jameson* did not apply and that the settlement of the proceedings under s. 212 with the directors and KPLC did not preclude an action for professional negligence against DYM. The Court of Appeal agreed. The argument turned on the full satisfaction question (DYM accepted it could not succeed on the final settlement question). Robert Walker LJ held that KIN's action against DYM should proceed because the cause of action in the compromised insolvency proceedings was special and different from that in the professional negligence action against DYM, and the damages recoverable might exceed the claim in the s. 212 proceedings. He observed that while he would not exclude the application of the principle in *Jameson* to situations "closely analogous" to that of concurrent tortfeasors causing the same loss, extension of it to the instant case would be exorbitant. He thought that abuse of process might sometimes be a safer foundation to restrict further proceedings.

Commentary

The limits of the application of the principle in *Jameson* (the "full satisfaction question") remain unclear. Should it be narrowly confined to cases in which the same damage is caused by concurrent tortfeasors? If it extends to contractual and other non-tortious claims but only so long as they are "closely analogous" to claims against concurrent tortfeasors causing the same damage, where is the dividing line drawn?

If, as Chadwick LJ seems to suggest, it might apply to a case such as *Heaton* but for the fact that a cause of action in contract survives when only nominal damages are recoverable, a further problem arises: what effect ought the settlement with A have on the amount recoverable from B? Utilising Lord Hope's reasoning in *Jameson*, even though B may not be discharged by the settlement, payment of a settlement held to be in full satisfaction of the whole claim against A would arguably define the amount recoverable from B for the heads of loss common to both claims. As that amount would have been paid by A, only nominal damages would be payable by B for the common heads of loss. So there would be nothing for B to claim from A in contribution proceedings, save perhaps costs. On the other hand, if *Jameson* simply does not apply to settlements with contract-breakers, and the settlement with A is held not to have been intended to discharge B, then the amount accepted from A would not limit the amount recoverable from B for the common heads of loss. Equity & Law have petitioned for permission to appeal to the House of Lords. Hopefully their Lordships will provide some clear guidance on the extent, if any, to which

Jameson can be applied in the contractual arena.

Practical consequences

In the meantime, what practical guidance can be given regarding settlements with concurrent contract-breakers? The difficulties discussed above can be avoided by using precise language in a compromise agreement so that it makes clear that (a) third parties are intended to be discharged, or (b) they are not intended to be discharged. When the settlement agreement makes no express reference to claims against other parties, the following factors ought to be considered to determine the intentions of the parties: The express words of the agreement Any terms which can be read into the agreement by necessary implication. The statements of case in the action(s) which, when considered with the settlement document, ought to show what heads of claim were included in the settlement. The commercial context of the settlement, such as the lack of means of the defendant with whom the settlement is made, whether the claimant was actively pursuing the other defendant(s) at the time the settlement was made, whether negotiations were only entered into with one of two or more defendants. It is irrelevant whether the amount of the settlement represents full value for what has been claimed, but if an apparently nominal sum is accepted from one of several co-obligees in settlement of a good case, that may be evidence of an intention not to discharge the other co-obligees.

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