

Lawyers' Settlements of Civil Actions

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ON DECEMBER 11, 1989, the Manitoba Court of Appeal decided *Pearson v. Plester et al.*¹ The case had to do with an application by the defendants for a summary judgment enshrining a settlement negotiated between the parties' lawyers, but which the plaintiff repudiated. In deciding *Pearson v. Plester* the Court of Appeal changed the law of Manitoba.

The law respecting lawyers' authority to settle litigation disputes is comprehensively treated in Linda Vincent's ovular article, "Compromising Positions."² Before an action is actually commenced, a settlement of a threatened action is only binding on a client if the client has vested her lawyer with express actual authority to settle or the client has made an express representation to the other party that her lawyer has (apparent) authority to settle. Merely retaining a lawyer in connection with a possible civil action neither vests the lawyer with implied actual authority to settle, nor represents to the other party that the lawyer has (apparent) authority to settle.

Once an action is commenced lawyers have both implied actual authority and apparent authority to settle,³ unless their clients have expressly limited their authority to settle. If a client has limited her lawyer's authority to settle or prohibited the lawyer from settling without approval and the limitation or prohibition is known to the other party then no settlement in the face of the limitation or prohibition will be binding, unless the settlement was made, or announced in court, in the presence of the client. In the latter

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¹ (1989), 62 Man. R. (2d) 142 (C.A.), rev'g (1989), 59 Man. R. (2d) 110 (Q.B.).

² (1985), 15 Man. L.J. 1.

³ Actual and apparent authority can coincide: *Freeman & Lockyer v. Buckhurst Park Properties (Mangal) Ltd.*, [1964] 1 All E.R. 630, 644 (C.A.); note also *Western Supplies Ltd. v. Governing Bd. of Morden Hospital District No. 21*, [1971] 1 W.W.R. 634, 637 (Man. C.A.).

situations the settlement is binding on the basis of deemed ratification or apparent authority.

Where the limitation or prohibition is not known by the other party and a settlement occurs in the face of the limitation or prohibition, there is continuing controversy about the bindingness of such settlements. There are apparently two irreconcilable lines of cases, one enforcing such settlements on the basis of apparent authority and the other not enforcing such settlements considering the situation entirely on the basis of actual authority. As well, there is a third line of cases asserting an overriding judicial discretion respecting enforcement of settlements.

In *Pearson v. Plester*, according to the facts found by the trial judge, the plaintiff expressly limited the (actual) authority of his lawyer to settle the case. The lawyer was to obtain the client's approval of any proposed settlement. Nonetheless, the plaintiff's lawyer purported to settle the case with the defendants' lawyer without first obtaining the plaintiff's approval. With reference to the two irreconcilable lines of cases, including their leading Canadian cases, *Scherer v. Paletta*⁴ and *Yannacopoulos et al. v. Maple Leaf Milling Co. Ltd.*,⁵ and a Manitoba case, *Phillipp v. Southam*,⁶ which followed the *Yannacopoulos* line, the trial judge dismissed the application saying that he preferred to follow *Phillipp v. Southam* because "injustice will result if the application ... for summary judgment is granted...".

The *Yannacopoulos* case, which represents the line of cases reasoning that settlements in the face of an express limitation or prohibition should not be enforced because the lawyer lacked actual authority, has been followed in Manitoba and Alberta.⁷ The *Scherer* case, which represents the apparent authority line of cases enforcing such settlements, has been followed over and over again in Ontario and in Nova Scotia.⁸ As well, reference has been made to *Scherer* with

⁴ (1966), 57 D.L.R. (2d) 532 (Ont. C.A.).

⁵ (1962), 37 D.L.R. (2d) 562 (B.C.S.C.).

⁶ (1981), 9 Man. R. (2d) 413 (Q.B.).

⁷ *Chomik v. Chomik* (1986), 70 A.R. 304 (C.A.); but note *C & M Farms Ltd. v. Rottacker Farms Ltd.* (1976), 71 D.L.R. (3d) 263 (Alta. C.A.) in which the court applied *Scherer v. Paletta*.

⁸ *Pineo v. Pineo* (1981), 45 N.S.R. (2d) 576 (T.D.) and *Landry* (1981), 48 N.S.R. (2d) 136 (N.S.C.A.).

apparent approval in several cases which did not involve limited retainers respecting settlement.⁹

Had the trial judge in *Pearson v. Plester* referred to and chosen to follow the third line of cases, the leading case of which is *Neale v. Gordon Lennox*,¹⁰ he might have been on firmer ground. As Professor Vincent indicates,¹¹ in *Neale v. Gordon Lennox* the House of Lords refused to adopt either of the other two lines of cases and instead simply asserted an over-riding discretion to refuse to enforce an agreement reached by the parties' counsel. However, it seems that the applicability of the *Neale v. Gordon Lennox* overriding discretion has been narrowed to cases in which the settlement or agreement calls for the court's approval in some form or other, such as the parties agreeing to a consent or summary judgment being obtained on the basis of the settlement.¹² In *Pearson v. Plester*, while the defendants were seeking a summary judgment, the settlement did not contain a term whereby the parties agreed that a summary judgment would be obtained.

In reversing the trial judge a unanimous Manitoba Court of Appeal applied *Scherer* describing it as the "leading authority in Canada". As well, the Court stated that *Phillipp v. Southam* "was incorrectly decided" and it distinguished *Yannacopoulos*. As did Moir J.A. in *Poon v. Dickson*¹³, the Court considered *Yannacopoulos* to be an example of a court exercising the *Neale v. Gordon Lennox* overriding discretion in connection with a settlement that by its terms required a consent judgment to be obtained.

The *Neale v. Gordon Lennox* overriding discretion has never been exercised in connection with a settlement involving *sui juris* parties where the settlement did not contain a term by which the parties agreed to obtain a consent or summary judgment. It is a matter of continuing controversy whether the *Neale v. Gordon Lennox* overriding

⁹ For example, *Revelstoke Companies Ltd. v. Moose Jaw*, [1984] 1 W.W.R. 52 (Sask. Q.B.) and *Bandag Inc. v. Vulcan Equipment Co. Ltd. & Penner Tire and Rubber Co. Ltd.*, [1977] 2 F.C. 397 (T.D.).

¹⁰ [1902] A.C. 465 (H.L.).

¹¹ *Supra*, note 2 at 18-19.

¹² *Ibid.* at 19; a recent example is *Begg v. East Hants (Municipality) and Nova Scotia (Director of Assessment)* (1986), 74 N.S.R. (2d) 231 (T.D.).

¹³ (1982), 134 D.L.R. (3d) 559 (Alta. C.A.).

discretion even exists when the court's approval is a "mere formality"¹⁴ pursuant to a term in a settlement whereby *sui juris* parties agree to obtain a consent or summary judgment. Unfortunately, the Court in *Pearson v. Plester* declined to comment upon the controversy because the settlement in question did not contain such a term.

In the interest of promoting litigation settlements the *Neale v. Gordon Lennox* overriding discretion should be restricted to cases in which the court's approval is real and substantial, such as a settlement involving a minor party, and to cases in which it can be said that the settlement is so unreasonable that the party seeking to enforce it should have been suspicious of the authority of the other party's lawyer to make it.¹⁵ Professor Vincent points out that having the *Neale v. Gordon Lennox* overriding discretion applicable to settlements involving *sui juris* parties which contain a term whereby the parties agree to obtain a consent or summary judgment but not to settlements which do not contain such a term is ultimately unsatisfactory. "It is based, not on legal reasoning, nor even some moral principle, but only on an accident of practice".¹⁶ There is no real difference between an application for consent or summary judgment in the former case and an action to enforce a settlement in the latter case. If courts are not prepared to exercise an overriding discretion in the latter case, why should they in the former case?

Although it did not add to a resolution of the *Neale v. Gordon Lennox* controversy, the Manitoba Court of Appeal has furthered clarification of the law of the bindingness of lawyers settlements by applying *Scherer* and by relegating *Yannacopoulos* to being at best an application of the *Neale v. Gordon Lennox* overriding discretion and not an alternative to *Scherer*.

¹⁴ *Pearson v. Plester*, *supra*, note 1, para. 19.

¹⁵ *Russell v. Brown*, [1948] O.R. 835 (C.A.) is a classic example.

¹⁶ *Supra*, note 2 at 22.