



[2023] JMSC Civ. 231

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU2021CV05022

BETWEEN	EARLE HONEYWELL	CLAIMANT
AND	DONALD GEORGE STEPHENSON	1st DEFENDANT
AND	BCIC INSURANCE COMPANY LIMITED	2nd DEFENDANT

IN CHAMBERS

**Richard R. Reitzin, Attorney-at-Law, instructed by Messrs. Reitzin & Hernandez,
Attorneys-at-Law, for the Claimant**

**Annalise Bennett, Attorney-at-Law, instructed by Angele Powell-Hylton, for the 1st
and 2nd Defendants**

Heard: July 25 and December 8, 2023

Application for rectification of contract - Alleged mistake when drafting third party release agreement - Whether the third party release agreement as executed between the claimant and 2nd defendant evinced the true and common intention of the parties - Whether common or unilateral mistake was made in the drafting and preparation of the agreement - Whether the court can exercise its equitable jurisdiction to rectify the instrument of agreement to reflect the true and common intention of the parties - Whether the agreement should be set aside - Whether the agreement as executed by the parties reflected an unconscionable bargain - Whether the claimant, who had received compensation for property damage only, may claim for personal injuries arising out of the same accident

ANDERSON K. J

BACKGROUND

The application before the court

[1] The claimant filed a fixed date claim form on June 29, 2023 for the rectification of a Third Party Release agreement executed by the claimant and the 2nd defendant, seeking the following orders:

'1. a declaration that the Third Party Release issued by the second defendant to the claimant dated 9 September, 2020 and signed by the claimant, -

i. does not reflect the true and common intention of the parties; and/or

ii. represents a catching and/or unconscionable bargain; and/or

iii. the second defendant's reliance on it is tainted by fraud in equity.

And orders that –

2. The Third Party Release be rectified by deleting –

i. the words 'personal injuries and' in the first paragraph;

ii. by deleting the words 'or any losses of any nature' in the first paragraph;

iii. by deleting the words 'and for damage and injuries' and substituting therefor the words 'for property damage only' in the second paragraph;

iv. by inserting the words 'for property damage only' at the end of the third paragraph.

3. The second defendant pay the claimant's costs of and incidental to this application which costs may be taxed on an indemnity basis and may be taxed forthwith.

4. Such further or other order or orders as this Honourable Court deems fit.'

The facts as outlined below are integral to this matter.

- [2] The claimant, Earle Honeywell, a Roofing Contractor/Carpenter, was involved in a motor vehicle accident on August 16, 2019 when another vehicle driven by the 1st defendant collided in the rear of Mr. Honeywell's parked car. This occurred at approximately 3:10 p.m. on August 16, 2019. Mr. Honeywell had parked his Toyota Corolla Fielder 2010, registered number 8261 HA, on the left side of the Daniel Town main road heading in the direction of Falmouth, Trelawny, when a 2005 Great Wall Jeep Pickup driven by the 1st defendant, Donald George Stephenson, registered number 6081GC, collided with the rear of Mr. Honeywell's car. The Motor Accident Report Form dated August 19, 2019 indicates that the claimant's car trunk, back bumper, back light and corner post were damaged in the accident.
- [3] The claimant made a claim upon BCIC Insurance Company Limited ('BCIC') supporting his claim for property damage and demurrage on account of the said accident for property damage and loss of use only, through his broker, Marathon Insurance Brokers Limited ('Marathon') and his insurer, Key Insurance Company Limited ('Key'). Negotiations resulted in BCIC agreeing to pay and the claimant agreeing to accept **\$328,808.46** which comprised amounts for parts, labour, assessor's fee and loss of use only. Both Mr. Honeywell and BCIC executed a Third Party Release agreement in furtherance of Mr. Honeywell's claim. The said claimant signed the said Agreement on or about September 9, 2020. The 1st defendant, Mr. Stephenson, did not sign the Agreement.
- [4] The claimant claims that he suffered personal injuries as a result of the accident on August 16, 2019. By way of Claim Form and Particulars of Claim filed on May 8, 2020, the claimant commenced legal proceedings against the defendant, Donald George Stephenson, for damages, interest and costs for the injuries, loss and damage he suffered, and continues to suffer, as a result of the negligence of

the defendant in his driving, management and/or control of the said Great Wall Jeep Pickup registered number 6081 on August 16, 2019. The claimant submitted a radiograph report dated August 19, 2019 prepared by Dr. Marian Allison of Apex Radiology. Further, the claimant submitted an interim medical report dated August 25, 2019 prepared by Dr. Yolanda HoSang of Providence Medical Services. Both reports were submitted in support of his claim for personal injuries.

ISSUES

The following issues are now before the court for determination:

- a. Whether the third party release agreement evinces the true and common intention of the parties or whether a mistake was made in the drafting and preparation of the agreement.
- b. Whether the court should exercise its equitable jurisdiction to rectify the instrument (agreement as drafted) to reflect the true and common intention of the parties.
- c. Whether the third party release as originally executed should be set aside.
- d. Whether the instrument as executed by the parties reflects an unconscionable bargain.
- e. Whether the claimant, who had received compensation from the 2nd defendant for property damage arising out of the motor vehicle accident which occurred on August 16, 2019, can now claim compensation for personal injuries arising out of the said accident.

LAW AND ANALYSIS

[5] Central to this matter is the Third Party Release executed on September 9, 2020

by the claimant and the second defendant, the contents of which are as follows:

*'I, **Earle Honeywell**, of Mount Salus District, Stony Hill P.O., St. Andrew, hereby agree to accept the sum of **Three Hundred and Twenty Eight Thousand Eight Hundred and Eight Dollars and Forty Six Cents (\$328,808.46)** which is paid to me by **British Caribbean Insurance Company Limited** on behalf of **Donald George Stephenson and Donald George Stephenson** in respect of personal injuries and loss or damage to property or any other losses of any nature sustained by me through an incident which occurred on or about **August 16, 2019**.*

*I agree to accept this sum in full and final settlement, satisfaction and discharge of all claims upon the said **British Caribbean Insurance Company Limited** on behalf of **Donald George Stephenson and Donald George Stephenson** or any other person or persons in respect of or in anyway arising out of the said occurrence and for damage and injuries whether now or thereafter to become manifest.*

*Further, I accept this sum only by way of compromise of the claim that I have made and it is not an admission of liability on the part of the aforesaid persons and in consideration therefore I hereby release and discharge them from all claims costs and demands whatsoever arising directly or indirectly out of the said accident. AND I do hereby agree not to file or pursue any action or suit against the said **British Caribbean Insurance Company Limited, Donald George Stephenson and Donald George Stephenson** or any other person or entity with respect to this accident and that other persons be absolutely and finally exonerated and discharged from all future and other claims of every nature and kind whatsoever by me or on my behalf arising out of or in connection with or traceable to the said occurrence.*

*It is therefore understood and agreed that payment of the above mentioned sum should be made to and received by **Earle Honeywell**.'*

[6] In the claimant's affidavit in support of the said Fixed Date Claim Form also filed on November 29, 2021, he avers, inter alia:

'4. I own a white a 2010 Toyota Fielder registered number 8261 HA ('my car') and I owned it as at August 16, 2019.

5. My car was comprehensively insured with Key Insurance Company Limited ('Key Insurance') through Marathon Insurance Brokers Limited ('Marathon').

6. On 16 August, 2019, I was involved in a motor vehicle in which I suffered serious injuries. I sought medical treatment the same night.

7. The first defendant was the owner and driver of the vehicle that crashed into my vehicle.

8. My car was damaged in the accident. I took my car to a repairer whom I only know as 'Such' and got a written estimate of the repairs. I submitted the estimate to a loss assessor recommended by Marathon and the assessor produced a report and an invoice. Armed with the assessor's report I submitted a claim to Key Insurance by delivering it to Marathon.

9. To the very best of my recollection all of my dealings in relation to my claim for the damage to my car were with Marathon and not directly with Key Insurance itself...

24. BCIC insured the first defendant for third party risks and was on cover at the time of the accident to which I referred...

27. It is my understanding that in order for Key Insurance to have been reimbursed by BCIC for the money that Key Insurance paid me in respect of the repairs to my car, it was necessary for Key Insurance and Marathon to have me sign a Third Party Release issued by BCIC.

28. It is my further understanding that prior to 9 September, 2020, BCIC sent a Third Party Release to Key Insurance which forwarded it to Marathon.

29. Shortly before 9 September, 2020, I received a telephone call from a person with a female-sounding voice. She asked me to come in to Marathon Insurance Brokers' New Kingston office. I was attended to there by Mrs. Patrice Roberts-King, a Senior Claims Officer. She had a printed up document on her desk. She asked me where I was living and my TRN number which I told her. Mrs. Patrice-King then wrote in my address in the paper...

31. Mrs. Patrice-King did not explain to me or advise me that the Third Party Release provided for me to release the defendants, Donald George Stephenson and BCIC, from my right to pursue my claim for damages (monetary compensation) for the personal injuries that I suffered. Nor did she ask me

whether I had instructed attorneys to represent me in any personal injury claim. She didn't ask me anything. No-one asked me anything - neither anyone from BCIC, Key Insurance nor Marathon nor even the first defendant.

32. Mrs. Patrice Roberts-King asked me to sign the document in her presence and she witnessed my signature.

33. It is my understanding that the amount of \$328,808.46 which is referred to in the Third Party Release was made up as follows –

- i. Cost of parts as assessed by the loss assessor.....\$136,787.00*
- ii. Cost of labour as assessed by the loss assessor.....\$157,400.00*
- iii. Loss of use \$19,600.00*
- iv. **Total.....\$328,808.46***

34. It was my understanding and my intention that I was signing the Third Party Release document as part of my claim for the damage to my car. It was certainly no part of my intention nor any part of my understanding that by signing the third party release I would be giving up, once and for all, my rights to make or continue a claim for compensation for the injuries and disabilities that I suffered, and continue to suffer, as a result of my being involved in the accident August 16, 2019.

35. No part of the money that I received as a result of my insurance claim related to my personal injury claim. No part of the money was for pain or suffering or loss of amenities of life or reduction of earning capacity or any form of medical expenses, x-ray expenses, medication or travelling or anything of that nature.

36. I am 54 years old. I went to Barton All Age School in Old Harbour, St. Catherine. After that I went to Old Harbour Secondary School. I never sat for the Common Entrance Exam. I did not get any subjects.

37. I can read to help myself but I would not describe myself as a proficient reader. I have no genuine understanding or appreciation of legal documents at all...

40. I am reliably informed by my attorneys and I believe it to be true that they had requested BCIC to agree to the Third Party Release to be rectified upon equitable grounds but that BCIC refused to agree.'

The claimant made it abundantly clear that in all other respects, his affidavit which was sworn on November 29, 2021, was and remains correct, in every material particular.

[7] The claimant filed a second affidavit on April 29, 2022 in support of Fixed Date Claim Form which was filed on November 29, 2021, where there was an adjustment made to the table of calculations in paragraph 33 as follows:

<i>i. Cost of parts as assessed by the loss assessor</i>	<i>\$136,787.00</i>
<i>ii. Cost of labour as assessed by the loss assessor.....</i>	<i>\$157,400.00</i>
<i>iii. Assessor's fee.....</i>	<i>\$15,021.46</i>
<i>iv. Loss of use (7 <u>days @\$2,800.00</u> per day).....</i>	<i>\$19,600.00</i>
<i>v. Total</i>	<i>\$328,808.46'</i>

Whether the third party release agreement evinces the true and common intention of the parties or whether a mistake was made in the drafting and preparation of the agreement.

[8] Learned counsel for the claimant proffered arguments claiming that a mistake was made in the drafting and preparation of the third party release, and therefore, the parties' true and common intention was not reflected in the instrument of agreement. On the other hand, counsel for the defendants propounded that no mistake was made because BCIC offered and the claimant accepted the sum of \$328,808.46 in *'full and final settlement, satisfaction and discharge of all claims upon the said **British Caribbean Insurance Company Limited** on behalf of **Donald George Stephenson** and **Donald George Stephenson** or any other person or persons in respect of or in anyway arising out of the said occurrence and for damage and injuries whether now or thereafter to become manifest.'*

Claimant's Submissions

[9] Counsel submits that the court's approach to mistake was summarized by Street CJ in **Australasian Performing Right v Austarama Television Limited** [1972] NSWLR 467 and approved by the High Court of Australia in **Hooker Town Developments v The Director of War Service** (1973) ALJR:

'It seems rather that the true principle involves finding an identical corresponding contractual attempt intention on each side, manifested by some act or conduct from which one can see that the contractual attempt intention on each side, manifested by some act or conduct from which one can see that the contractual intention of each party met and satisfied that of the other. On such facts there can be seen to exist objectively a consensual relationship between the parties.'

- [10] Further, it is the claimant's case per **Meagher, Gummow & Lehane's Equity Doctrines and Remedies** by Dyson Heydon, Mark Leeming and P.G. Turner 5th Edition, 2014, that *'the parties must disclose their intentions to one another in order for there to be an accord, but the evidence of that disclosure may be evidence of conduct other than speech or writing which explicitly asserts the belief or will of the communicating party. Evidence of communication (written, spoken and otherwise) which passed between the parties is admissible to prove common intention. Evidence of matters which did not pass between the parties might also reveal what the parties knew and took for granted in reaching their agreement but did not spell out to one another; it may assist in deciding what the parties agreed and meant by their agreement.'*

Defendant's Submissions

- [11] It is the defence's case that further to the signing of the Third Party Release the claimant had already retained the services of an attorney before he had executed the Third Party Release. Therefore, in the circumstances where he outlined in his affidavit that he would not be able to understand legal documents, he could, the defence submits, have simply consulted with his attorney before signing the release. Thus, as was held in the case of **Ralph Graham v Guardian General Insurance Company** [2021] JMSC Civ 44, by the learned Reid J (AG):
- 'Having found that the Claimant had legal advice before he executed the release, he cannot now rely on what his intentions might have been. The Court will look to the natural meaning of the document.'*

[12] The terms of the release and discharge were clear, and therefore it is submitted by the defence that, there is nothing to suggest that there was any mistake on the part of the 2nd defendant in generating the release and discharge. They submit that, upon payment of the agreed sum, the requirement for accord and satisfaction was satisfied and therefore the 2nd defendant and, by extension, the 1st defendant, were discharged from any further obligation or any further claim for that specific incident, by the claimant. They further submit that the claimant does not have the right or legal basis upon which to request the setting aside of the release and discharge.

[13] It is my considered view that what occurred between the parties at bar may be termed a common mistake, in that, both parties had an intention and agreement that the Third Party Release should contain terms to the effect that the sum offered by BCIC and accepted by Mr. Honeywell was only for property damage. However, the error seems to have occurred during the drafting or preparation of the instrument, the said Release, which did not reflect the original bargain. **Treitel The Law of Contract, Fourteenth Edition by Edwin Peel, 2015** outlines that, the requirements for rectification of a written document on the grounds of common mistake are:

'i. The parties had a common continuing intention, whether or not amounting to an agreement, in respect of a particular matter in the instrument to be rectified.

ii. There was an outward expression of accord.

iii. The intention continued at the time of the execution of the instrument sought to be rectified.

iv. By mistake, the instrument did not reflect that common intention.'

The principles above were explored in the case, **Daventry District Council v Daventry & District Housing** [2012] 1 W.L.R. 1333.

[14] The facts in the case at bar indicate that the claimant made a claim through his

insurers against BCIC for property damage only and BCIC responded to said claim by preparing and submitting a Third Party Release and offering payment in order to settle the claim. Arguably, these actions reflect the parties' common continuing intention. Secondly, the fact that the parties executed the Release and the money was accepted by the claimant, suggests that there was an outward expression of accord. Thirdly, the intention of the parties more than likely continued until the time when the agreement was executed, since the facts show that the claimant avers that he had always believed that the sum of money he accepted from BCIC was for property damage only and BCIC, through its attorney-at-law, confirmed that the claim was processed for property damage only. Thus, it appears that the parties demonstrated a continued intention at the time of execution. Lastly, because of a mistake, the executed instrument did not reflect those common intentions. It is evident from the Third Party Release that it purports to discharge BCIC from '*personal injuries and loss or damage to property or any other losses of any nature sustained*' by the claimant; however, the claimant only received a sum which covered property damage. Therefore, the Release did not reflect the parties' common intention. In the premises, it is my view that the elements of common mistake have been satisfied in the case at bar. It is to be noted that the law provides for the equitable remedy of rectification of the written instrument as a remedy for mistake in contract law.

[15] I find it proven by the claimant that, based on the facts outlined above and the law concerning mistake, the parties made a common mistake when reducing their true intentions in writing; thus, the Third Party Release agreement of September 9, 2020, does not reflect the true intentions of the parties. The amount of money (totalling **\$328,808.46**) that BCIC paid over to the claimant per the Third Party Release, which the claimant accepted, clearly covers the damage to his motor vehicle arising out of the motor vehicle accident of August 16, 2019 according to the loss assessment done and table showing the breakdown of costs for repairs and loss of use. However, this sum does

not reflect any compensation for personal injuries that the claimant alleges to have sustained in the said accident. Further, the affidavit of Angele Powell-Hylton, BCIC's attorney-at-law, dated May 13, 2022 asserted that BCIC was not, at any time during negotiations with the claimant, advised of the claimant's intention to submit a claim for bodily injury.

[16] In addition, Mrs. Powell-Hylton asserted in the said affidavit that the process in negotiating a claim to include bodily injuries and property damage is completely different from the process of a claim for property damage only. Further, Mrs. Powell-Hylton asserted that BCIC did not receive any correspondence from the claimant's broker or his insurer advising of the claimant's intention to make a bodily injury claim so BCIC proceeded to process the claim by issuing a Third Party Release and Discharge in full and final settlement of the claimant's claim for property damage only. In light of the foregoing, it appears that BCIC's attorney-at-law is consenting and/or conceding that the Third Party Release executed by BCIC and the claimant was only in relation to property damage; therefore, the payment of \$328,808.46 only covered the damage to his motor vehicle. I would conclude that both the claimant and BCIC achieved consensus ad idem as to the intention and agreement between them, which should have been reflected in the Third Party Release, since the claimant averred in his affidavit of November 29, 2021, that he believed that the Third Party Release was only in relation to property damage only. In the circumstances, it appears that the court is at liberty to exercise its equitable jurisdiction in ordering rectification of the Third Party Release to reflect property damage only and exclude the sections of the agreement which do not reflect the same.

[17] This court has also considered whether the facts of this matter could also give rise to that which is known in law as 'unilateral mistake'. The claimant has claimed that he was mistaken as to the actual contents of the Third Party Release, in that, he believed the Third Party Release only contained terms

concerning property damage. However, if BCIC knew of the mistake, that the instrument also purported to cover personal injuries and other losses, but did not draw it to the attention of the claimant, then it would be inequitable to allow BCIC to insist on the binding force of the document. If this is the case and the court upholds the agreement as is, it would benefit the company and be detrimental to the claimant, since the claimant would be barred from gaining any compensation for his personal injuries. If this situation is found to exist, then the court may also grant rectification in this matter.

Whether the court should exercise its equitable jurisdiction to rectify the instrument (agreement) to reflect the true and common intention of the parties.

The next question for this court to answer is: Can the court exercise its equitable jurisdiction to rectify the third party release in the circumstances?

Claimant's Submissions

[18] The claimant, through his counsel, has advanced arguments for rectification of the agreement in this matter. Counsel submits that the basis of rectification is the protection of an applicant so that he is not put at risk or prejudiced by the existence of a document, reliance on which would, without rectification, be unconscionable, per **The Principles of Equitable Remedies: Specific Performance, Injunctions, Rectification and Equitable Damages 8th Edition I.C.F. Spry, Published: December 2009, page 630**. According to **Cuthbert v Roberts** (2004) 13 Tas R 83 and **Whiting v Diver Plumbing & Heating Ltd** [1992] 1 NZLR 560, the need for rectification will thus arise when the court can discern from the document itself and surrounding evidence that, '*something has gone wrong*', which cannot be cured by construction. Per **Meagher, Gummow & Lehane's Equity Doctrines and Remedies**, where the written form of a document embodies a mistake, the document may be corrected or, 'rectified' by a court of equity. Rectification may be ordered for a common mistake. In common mistake the parties share a common intention as to what the instrument should say. Rectification for common mistake corrects instruments to

accord with the common intentions of the parties. According to **Chartbrook Ltd. v Persimmon Homes Ltd.** [2009] A.C. 1101 and **Daventry District Council v Daventry & District Housing** [2012] 1 W.L.R. 1333, where all parties who execute a document intend that the provisions of the document should accord with an agreement entered into by them, or with a common intentions possessed by them, but due to a mistake shared by all of them it does not do so, rectification is ordered by the court, in the absence of special circumstances that render this course unjust. Further, a prior accord need not be shown where *‘the instrument sought to be rectified [purportedly] constitutes the only agreement between the parties but does not reflect their common intention.’* See: **Bishopsgate Insurance v Commonwealth Engineering** [1981] 1 NSWLR 429 at 430.

- [19] The claimant further advances that **Daventry District Council v Daventry District Housing** (op. cit.) establishes that rectification may be granted where, although one party is not under a mistake as to the provisions in fact contained in a document, he executes it in the knowledge that another party has executed it or will execute it under a mistake as to those provisions, or other circumstances render it unconscionable that those provisions should not be rectified. The mistake must be of such nature as to render it unconscionable for the party with knowledge to insist on performance without rectification, such as where the other party would be unjustly prejudiced: **Thomas Bates and Son Ltd. V Wyndham’s (Lingerie) Ltd.** [1981] 1 W.L.R. 505. In **Joscelyne v Nissen** [1970] 2 QB 86, Russell LJ for the Court of Appeal said *‘...Remembering always the strong burden of proof that lies on the shoulders of those seeking rectification, and that the requisite accord and continuance of accord of intention may be the more difficult to establish if a complete antecedent concluded contract be not shown it would be a sorry state of affairs if when that burden is discharged a party to a written contract could, on discovery that the written language chosen for document did not on its true construction reflect the accord of the parties on a particular point, take advantage of the fact.’*

[20] Learned counsel for the claimant submits that there are several factors which would allow the court to form the view that the parties' common intention was to effect a settlement of the claimant's claim for property damage only so as to justify the court in granting rectification of the Third Party Release. These include:

- 1. All the documents which the claimant supplied to BCIC through Marathon and Key related to property damage and loss of use only. The claimant did not supply any documents for personal injuries.*
- 2. BCIC negotiated and settled the claimant's claim for property damage only.*
- 3. BCIC's intention to settle the claimant's claim as one for property damage only is evidenced by the fact that BCIC processed the claim as one for property damage and not one for personal injuries. This is clearly indicated by paragraph 14 of Mrs. Angele Powell-Hylton's affidavit sworn on May 13, 2022 in which she avers –*
That the process in negotiating a claim to include bodily injuries and property damage is completely different from the process of a claim being made for property damage only.
- 4. The assertion by BCIC that those dealing with the property damage claim were not aware of any claim by the claimant for damages for personal injuries can only mean that BCIC could not have been processing and settling a claim for personal injuries. That only left room for processing and settling a claim for property damage.*
- 5. The claimant's own intention was, equally, that in signing the Third Party Release, he was effecting a settlement of his claim for property damage as evidenced in paragraph 34 of his affidavit sworn and filed on November 29, 2021.*
- 6. BCIC's intention to effect a settlement of the claimant's claim for property damage only is evidenced by the fact that the total of \$328,808.46 paid by BCIC, and as referred to in the Third Party Release, was comprised exclusively of items of property damage only.*

7. BCIC has never asserted that its intention was to 'purchase' the claimant's rights to claim for his personal injuries by paying only for his property damage.

8. The only reasonable conclusion from all of the facts is that both BCIC and the claimant shared a common intention that the negotiations between them were for BCIC to pay the claimant for his property damage only and that was to be reflected in the Third Party Release.'

[21] In the circumstances, I find that the claimant's submission is in alignment with the discussion regarding the legal principle of mistake, in **Halsbury's Laws of England, 5th Edition, Volume 77, 2021. Halsbury's Laws** which propounds *'that rectification is an equitable remedy by which a court will modify the terms of a written instrument so as to give effect to the intention of the parties to it... It is thus the mistake in the way in which the agreement is expressed in writing that is rectified, and not a mistake in the agreement itself... The document can be rectified if both parties believe that the document expresses their (genuine or apparent) consensus but they are both mistaken in that on its true construction it does not carry out their common intention. Further, a document can be rectified where one party sees that the other mistakenly believes that the document expresses that other's own intention, and realizes that this mistake may operate to that party's disadvantage, but says nothing about it and executes the instrument as it stands. In such a case, there is no estoppel consensus on the terms of the document, because the knowing party is not deceived by the mistaken party's representation that he intended to be bound by those terms. Instead, there is an estoppel binding the knowing party, preventing him from relying on the document to show that a different agreement was made to that alleged by the mistaken party. Thus, as against the mistaken party, the document does not avail the knowing party, and equity will rectify it to make it conform to the agreement the mistaken party believed to exist... In rectifying a document, the court acts on the principle that the parties are to be placed as far as possible in the same position as that in which they would have stood if the error to be corrected had not been made. Normally, a claim for rectification must be*

specifically pleaded, but the court may grant relief even though it is not asked for in the statement of case. The court will not act on the footing of fraud unless fraud is pleaded with the utmost particularity.'

[22] In addition, **Chitty On Contracts, Twenty-Eighth Edition, Volume 1, General Principles, 1999** advances, regarding common mistake, that *'rectification naturally applies to contracts which have been reduced to writing. Further, courts of equity do not rectify contracts but instruments purporting to have been made in pursuance of the terms of contracts. It is unnecessary to show that there was a binding agreement prior to the execution of the written document, but there must be an 'outward expression of accord'... With respect to unilateral mistake, where one party is mistaken as to the incorporation of the agreement in the document, and the other knows of the mistake, and does not draw it to the attention of the first party, it suffices that it would be inequitable to allow the second party to insist on the binding force of the document, either because this would benefit him or because it would be detrimental to the mistaken party.'*

[23] I am in agreement with the submission of learned counsel for the claimant that in instances, such as this one, where it is found that mistakenly, the Third Party Release does not properly reflect the parties' true intention and consensus, the court may exercise its equitable jurisdiction to bring the instrument in accord with their original intention and accord. That is so, whether the mistake is on the part of one or more, or all of the parties to that contract. In the case at hand, there is sufficient evidence to prove, on a balance of probabilities, that at the very least, the claimant was the only one mistaken as to the effect and meaning of the Third Party Release. I so state, in the event that I am considered to be wrong, in having reached my earlier stated conclusion that there appears to have been a joint mistake of the parties, as regards what the Release agreement was intended to relate to.

Whether the third party release as originally executed should be set aside.

Learned Counsel for the defence submitted arguments that the third party release as originally executed should not be set aside.

- [24] Counsel has proffered the case of **Rio Brown v N.EM. Insurance Company (JA) Ltd** [2012] JMSC Civil 27 para 30 which outlined that *‘the general principles of contract law apply to the contract of insurance. This includes the principles surrounding offer, acceptance, consideration, accord and satisfaction and release’*...Secondly, defence counsel argued that, *‘in accordance with the leading decision in the jurisdiction, the case of **Alcan Jamaica Company Limited v Delroy Austin and Hyacinth Austin** SCSA 106/2002, at page 8 properly outlined the law concerning release and discharge as it was provided in judgment by Smith JA:*

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 agreement binding is called Satisfaction...see Clerk and Lindsell on Torts Edition pg. 30-06 p. 1559.

Thus Accord and Satisfaction is the purchase of a release from an obligation arising under contract or by means of any valuable consideration, not being the actual performance of the obligation itself. When the satisfaction agreed upon has been performed and accepted, 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. Where the demand is disputed or the amount unliquidated, payment of any sum agreed upon by the parties is a good satisfaction. It is therefore submitted that from the aforementioned dictum by Smith JA, it suggests that where there is an accord, there must be satisfaction agreed upon in order for a claim to be discharged.’

- [25] I am of the considered opinion that the cases above do not advance the defence’s case since the general principles of contract law were not satisfied in the circumstances. Further, the claimant and BCIC did not achieve accord or satisfaction because the Third Party Release which was supposed to contain the accurate terms of their original intention and agreement did not reflect same. Instead, the said instrument purported to discharge and release BCIC in respect

of personal injuries and loss or damage to property or any other losses of any nature sustained by the claimant arising out of the motor vehicle accident. This is incongruous with the facts that indicate that the claimant only received a sum of money which represented the costs of parts, labour, loss of use and assessment of damage, related to his vehicle. Thus, only the aspect regarding property damage would be satisfied. Moreover, BCIC's attorney-at-law, Mrs. Powell-Hylton admitted in her affidavit, that the insurer, having not received any claim for bodily injury, proceeded to process the claim by issuing a Third Party Release and Discharge in full and final settlement of the claimant's claim for property damage only. Therefore, good satisfaction could only be had if the Third Party Release had reflected the true state of affairs which would have excluded the aspects concerning, 'personal injuries' and 'any other losses of any nature.'

[26] BCIC, through its counsel, also advanced the case of **Jameson and Another v Central Electricity Generating Board and others** [1999] 1 ALL ER, 193, to support the argument that the Third Party Release should not be set aside. Lord Hope of Craighead stated that:

'But it is well known that many claims are settled without the amount due as damages having been adjudicated by the Court. They are settled by the agreement between the parties...Once the agreement sum has been paid, his claim against the defendant will have been satisfied...Satisfaction discharges the Tort and is a bar to any further action of it...'

It is the defence's case that, in respect of the claim between the claimant and defendants, there has been accord and satisfaction in accordance with the terms of the signed Release and Discharge by the claimant, and, the defence further submits that such would be considered as binding on the basis that there is an offer, acceptance and consideration as the sum agreed by the parties was paid over to the claimant.

[27] Defence Counsel further relied on the case of **Shayne Raynor v Anthony Lee Lloyd and Leslie Gilbert Anderson** [2022] JMSC Civ. 47. In that case, it was held that where payments were made to the claimant's insurers after a Third

Party Release was signed, then that would be sufficient to show that satisfaction has been executed. It was therefore held by Stephanie Jackson-Haisley J that:

'The Defendant has therefore proved on a balance of probabilities that there has been accord and satisfaction and that the satisfaction has been performed and there has been through his insurance company an acceptance of the consideration provided. As a consequence, I am of the view that the claimant's right to bring an action against the Defendant in Negligence for personal injury and property damage has been extinguished.'

It has been submitted by defence counsel that as per the terms of the Third Party Release signed by the claimant, it would have expressly outlined that *'it is therefore understood and agreed that payment of the above mentioned sum should be made and received by Earle Honeywell...in full and final payment.'* The defence was further submitted, *'that once a Third Party Release is fulfilled on the basis that payment is made and it is expressly stated to be full and final, then in such circumstances, said release can no longer be changed or set aside, as the claim will fully be discharged and the Claimant can no longer bring a claim against the defendants.'*

- [28] It is my considered view that the case, **Shane Raynor**, is distinguishable from the case at bar, in that, in **Shane Raynor**, the defendants' insurance company, sought to ascertain whether the claimant intended to pursue a personal injury claim. Thereafter, the claimant signed a letter indicating that he was no longer interested in pursuing a personal injury claim. These facts clearly differ to the facts in the case at bar since Mr. Honeywell had only intended to claim for and, in fact, did claim for property damage only under the Third Party Release executed between him and BCIC. Also, there is no evidence provided to indicate that BCIC or his own insurers sought to enquire of the claimant whether he desired to make a personal injury claim against the defendants in the claim at bar. Moreover, there is no evidence to suggest that Mr. Honeywell signed any letter or other correspondence or agreement that he would not make any personal injury claim in this matter; therefore, the claimant did not exonerate and discharge BCIC from its liabilities in respect to his personal injuries and/or other losses. Furthermore, according to the learned author of **Chitty on Contracts, General Principles, 27th Edition**, regarding Accord and Satisfaction:

'Accord and satisfaction is the purchase of the release from an obligation whether arising under contract or tort by means of any valuable consideration, not being the actual performance of the obligation itself. The accord is the agreement by which the obligation is discharged. The satisfaction is the consideration which makes the agreement operative...In the modern law, therefore, a claimant may still insist upon the performance of some act by the other party in satisfaction of his claim. In that case, there is no satisfaction until performance, and the other party remains liable on the original claim until the satisfaction is executed...'

[29] Based on the above, I am of the view that the claimant in the case at bar, by bringing his personal injury claim against BCIC, is exercising his legal right to satisfaction of his claim against the company. Since he did not claim for both property damage and personal injury in the original claim, he only received compensation for property damage. However, he is now seeking compensation for his personal injuries and/or other losses which also arose out of the said motor vehicle accident of August 16, 2019.

Whether the instrument as executed by the parties reflects an unconscionable bargain.

[30] Learned counsel for BCIC submitted that in the case of **Shayne Raynor**, they relied on **Gordon Stewart, Andrew Reid and Bay Roc Limited v Merrick (Herman) Samuels (Supreme Court Civil Appeal 02 of 2005)** delivered November 18, 2005, Harris J in that case at page 42 outlined: 'In dealing with 'unconscionable transactions', the learned authors of **Modern Equity**, Hanbury and Maudsley, in the 12th Edition 1985, at page 803, stated:

'Equity intervenes to set aside unfair transactions made with 'poor and ignorant' persons. It is enough to show that the transaction was hard and unreasonable. Three elements must be established: first, that one party was at a serious disadvantage to the other by reason of poverty, ignorance, lack of advice or otherwise, so that circumstances existed of which unfair advantage could be taken; secondly, that this weakness was exploited by the other in a morally culpable manner; and thirdly, that the transaction was not merely hard, but oppressive.'

[31] Likewise, in the case of **Leslie Augustus Watts v Leleith Watts and Watts**

Investments Limited [2013] JMCC Comm. 15, para. 43:

‘There is a well-established equitable jurisdiction to set aside a purchase from a poor and ignorant man at a considerable undervalue unless the purchaser satisfies the court that the transaction was fair, just and reasonable...

However, a bargain cannot be unconscionable unless one of the parties has imposed the objectionable terms in a morally reprehensible; that is to say, in a manner which affects his conscience. All of the leading authorities stress the importance of a finding not only that there is an imbalance in the relationship between the parties and the terms agreed but also that the party who imposed them was guilty of morally culpable or reprehensible terms.

*In the case of **Watts** as mentioned above, the court took into consideration the claimant’s inability to read and write and they were of the view that:*

...it would be within the province of a trial court to decide whether a properly advised, uneducated, indigent, physically handicapped claimant would have accepted...compensation for his injuries and whether the appellants had gained an unfair advantage over him by unconscientious use of power, he having an urgent need of resources.’

[32] The defence has further submitted that *‘in the present circumstances the claimant in his affidavit outlined that although he did not complete his Secondary level of education, he is able to read to help himself. The defence submits that before signing the Third Party Release, he did not take it upon himself to properly read the contents of the release and ask questions accordingly. Furthermore, there is no evidence that at any point in time did the claimant express to his brokers/insurers of his intentions of making a claim for personal injury. Based on the circumstances of the case, we submit that there was not any unconscionable bargain by the 2nd Defendant when fulfilling the terms of the executed Release and Discharge. Furthermore, in taking into consideration the case of **Rio Brown v N.E.M. Insurance Company (JA) Ltd** [2012] JMSC Civil 27, it provides in paragraph 36:*

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

It is the defence's case that prior to him (the claimant) signing the release he had the guidance and expertise of his brokers and insurers to guide him had he informed them of his intentions with regards to his claims. Further, that it was only after the Third Party Release in full and final settlement of his claims was signed and fulfilled, that almost one (1) year later he made it known that he was interested in an additional claim. In the case of **Shayne Raynor**, Stephanie Jackson-Haisley J was of the view that:

The Claimant had the benefit of his insurance company and their expertise guiding and advising him as well as advancing negotiations on his behalf...In these circumstances there is no disparity or disadvantage to the Claimant. The Claimant had the benefit of the guidance of his insurers with whom he was in constant contact. He also had the benefit of them negotiating on his behalf. In all the circumstances, the Claimant is therefore hard pressed to prove that the element of unconscionable bargain existed.'

[33] I find that the defence counsel's argument that unconscionable bargain did not exist in the case at bar, has merit. The claimant, in the present case, gave affidavit evidence that he has had limited education; he is not a proficient reader; and he has no genuine understanding or appreciation of legal documents. He further averred that he had no intention of giving up his rights to claim for compensation for injuries and disabilities he suffered and continues to suffer arising from the motor vehicle accident. In addition, he alleges that neither his insurers, BCIC or any other person explained the meaning of the Third Party Release to him before execution; thus, he did not fully understand the legal ramifications in signing it. Further, he said that he had believed he was signing in order to receive compensation for property damage only. On the other hand, he did not aver why he did not seek independent legal advice in the circumstances.

[34] According to the learned authors of **Modern Equity**, equity intervenes to set aside unfair transactions in the following circumstances:

'i. Where one party was at a serious disadvantage to the other by reason of poverty, ignorance, lack of advice or otherwise, so that circumstances existed of which unfair advantage could be taken;

- ii. *Secondly, that this weakness was exploited by the other in a morally culpable manner; and*
- iii. *Thirdly, that the transaction was not merely hard, but oppressive.'*

In the circumstances, one could argue that, in the case at bar, the claimant was at a serious disadvantage to BCIC, the defendant's insurance company. The company generated the Third Party Release to include personal injuries and losses sustained by the claimant even though he submitted a claim for property damage only. The claimant alleges that, due to his limited education, he could not properly appreciate the instrument and he was not advised by his own insurers or BCIC what executing the document in its original state, meant. Thus, he is claiming lack of advice and this could fit squarely in the first limb above.

- [35] Regarding the second limb, the claimant would have a difficulty establishing this, since, according to the Court of Appeal case, **Pauline Holness v Aughuton Grant** (2022) JMCA Civ 43, *'unconscionable relates not merely to the terms of the bargain but the behavior of the stronger party, which must be characterized by some moral culpability or impropriety. Unequal bargaining power or objectively unreasonable terms provide no basis for equitable interference in the absence of unconscientious or extortionate abuse of power...A contract cannot be set aside in equity as unconscionable bargain against a party innocent of actual or constructive fraud; even if the terms of the contract are 'unfair' in the sense that they are more favourable to one party than the other...The plaintiff who seeks relief [must] establish...that unconscientious advantage has been taken of his disabling conditions and circumstances...'*

I am of the view that the claimant in this present case cannot satisfy all of the ingredients of unconscionable bargain since he would have a difficulty establishing limbs 2 and 3 outlined above. In the circumstances, I cannot find that this present case gives rise to unconscionable bargain.

Whether the claimant, who had received compensation from the 2nd defendant for

property damage arising out of the motor vehicle accident which occurred August 16, 2019, can now claim compensation for personal injuries arising out of the said accident.

[36] The law and facts discussed in paragraphs 28 and 29 of this judgment deal with the issue above. It is clear on the facts presented in this case that the claimant, by virtue of his own evidence, and the admission of the 2nd defendant's own attorney-at-law, had only claimed and received compensation for property damage only.

CONCLUSION

[37] In view of the foregoing discussions, the claimant's application for the rectification of the Third Party Release on the ground of mistake so as to reflect the true and common intention of the parties is successful. The court should exercise its equitable jurisdiction to grant an order for rectification to correct the mistake made in the drafting and preparation of the said release. I am of the view that the said Release reflected either a joint error on the part of the parties, or at least, a singular fundamental error on the part of the claimant. There is no finding of unconscionable bargain herein. The claimant is not barred from bringing a claim for personal injuries and other losses arising out of the said motor vehicle accident of August 16, 2019.

DISPOSITION

[38] This court, therefore, now orders as follows:

1. The claimant's application by way of fixed date claim form filed on June 29, 2023 for the rectification of the Third Party Release, executed between the claimant and the 2nd defendant, so as to reflect the true and common intention of the parties, is granted.

2. The said Release is rectified by-
 - i. deleting the words 'personal injuries and loss or damage to property or any other losses of any nature' and substituting 'property damage only' in paragraph 1;
 - ii. deleting the words 'and for damage and injuries' and substituting 'property damage only' in paragraph 2; and
 - iii. inserting the words 'for property damage only' at the end of paragraph 3.

3. The claimant is not barred from bringing a claim for personal injuries and/or other losses arising out of the motor vehicular accident involving the said claimant and 1st defendant which occurred on August 16, 2019.

4. The costs of this claim are awarded to the claimant. Such costs shall be taxed, if not sooner agreed.

5. The claimant shall file and serve this order.

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Hon. K. Anderson, J.