SUPREME COURT OF QUEENSLAND

CITATION:	*Wichmann v Dormway Pty Ltd* [2019] QCA 31
PARTIES:	**RAELENE MICHELLE WICHMANN** **(appellant)** **v** **DORMWAY PTY LTD AS TRUSTEE FOR THE DORMWAY UNIT TRUST** **ACN 010 359 001** (respondent)
FILE NOS:	Appeal No 9918 of 2018 SC No 5930 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2018] QSC 277 (Atkinson J)
DELIVERED ON:	26 February 2019
DELIVERED AT:	Brisbane
HEARING DATE:	12 February 2019
JUDGES:	Sofronoff P and Gotterson and Morrison JJA
ORDERS:	**Appeal dismissed with costs.**
CATCHWORDS:	DEEDS – DEED OF RELEASE – GENERAL WORDS OF RELEASE – where the appellant was employed by the respondent – where the appellant's employment was terminated after she misappropriated the respondent's monies for personal use – where, as part of the termination of employment, the parties entered into a deed that released the appellant from claims in civil proceedings – where the respondent was unaware of the extent of the appellant's misappropriation at the time the deed was entered into – where the respondent was successful in an application to recover the full sum of monies misappropriated by the appellant during her employment – whether the terms of the deed released the appellant from the proceedings brought by the respondent *Cloutte v Storey* [1911] 1 Ch 18, cited *Grant v John Grant & Sons Pty Ltd* (1954) 91 CLR 112; [1954] HCA 23, considered *Karam v ANZ Banking Group Ltd* [2001] NSWSC 709, cited
COUNSEL:	P Hackett for the appellant D D Keane for the respondent

SOLICITORS: Go To Court Lawyers for the appellant
Lander & Rogers Lawyers for the respondent

[1] **SOFRONOFF P:** This is an appeal against an order for summary judgment.

[2] The appellant had been employed by the respondent as an office manager. In that role, she had been responsible for managing the respondent's accounts. This enabled her to falsify the accounts in order to divert some of the respondent's money into her own bank account. Initially, the respondent discovered that the appellant had misappropriated $2,809.42. Having discovered this, the respondent decided to terminate the appellant's employment despite the appellant's offer to repay the money. The respondent's evidence was that the necessary trust had gone.

[3] As a result, on about 30 April 2018, the parties executed a deed that contained the terms of the appellant's departure. These included payments to the appellant by way of redundancy payments and a reimbursement to the respondent of the sum of $2,809.42. The balance of payments was in favour of the appellant. The deed contained mutual releases. Relevantly, the deed contained the following recital and the following term:

> "In recital E:
>
> > The parties have agreed to settle all matters effective from the 30 April 2018, relating to the employment and the cessation of the employment of WICHMANN, and any matters arising therefrom, save as to any statutory rights concerning superannuation or worker's compensation, or the subsequent enforcement by either party of the terms of this deed; and without any admissions of liability by either Party; as set out herein.
>
> In clause 4.2:
>
> > In consideration for the agreements herein, DORMWAY hereby releases and discharges WICHMANN from all causes of action, actions, suits, arbitrations, claims, demands, costs, debts, damages, expenses and legal proceedings whatsoever arising out of or in any way connected with:
> >
> > (a) The Employment or its termination or any circumstance relating to its termination; or
> >
> > (b) Any matter, act or circumstances occurring between the date of termination of the Employment and the date of this agreement; save as to any unlawful act; and
> >
> > (c) Whether arising under statute, common law or equity,
> >
> > Or any of these which DORMWAY now has or had the right to bring against WICHMANN at any time hereafter, but for the execution of this agreement; <u>save as to any matter relating to the enforcement of this deed.</u>"

[4] Soon after executing the deed, the respondent discovered that the appellant had misappropriated much more than just $2,809.42. In fact, she had taken

$321,593.85. The respondent sued the appellant to recover that sum. The appellant defended upon the basis that recital E and clause 4.2 precluded the claim. The respondent applied for summary judgment and Atkinson J granted that application. The appellant now appeals against that judgment.

[5] As long ago as 1751 it has been settled law that a release would be construed so that it related to the particular matter that was in the contemplation of the parties.[1] That principle of interpretation was authoritatively reaffirmed by Lord Westbury in *London and South East Railway Co. v Blackmore*.[2] There are abundant cases, both old[3] and new,[4] which have applied it and it has never been doubted.

[6] In *Cloutte v Storey*,[5] Farwell LJ summarised the principle as follows:

> "It is not in accordance with principle or authority to construe deeds of compromise of ascertained specific questions so as to deprive any party thereto of any right not then in dispute and not in contemplation by any of the parties to such deed."

[7] The whole question was considered and settled by the High Court in *Grant v John Grant & Sons Pty Ltd*,[6] a case in which the scope of a release was in issue. The point was raised for consideration by way of (the now archaic procedure of) demurrer. In answer to the defendant's pleaded reliance upon the terms of a release contained in a deed, the plaintiff pleaded[7] three demurrers in its replication. The first demurrer relied upon the principle that a release will be confined to the subject matter contained in the recitals.[8] The second demurrer was based upon the allied principle that a release is to be construed so that it is confined to the known disputes between the parties.[9] The third demurrer, raised in equity, was based upon the principle that it would be unconscientious for a party to rely upon a release obtained when the releasee knew of a liability (later sought to be enforced) but the releasor did not know.[10] This is to be distinguished from yet a further, fourth, basis where reliance upon a release might be precluded. This constraint arises when the releasee knows of a liability of which the releasor is unaware, and was under a duty to disclose it to the releasor before entering into the deed, but did not do so.[11]

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1 *Ramsden v Hylton* (1751) 2 Ves Sen 304 at 310.

2 (1870) LR 4 HL 610 at 623.

3 *Henn v Hanson* (1663) 1 Lev 99; *Stoke v Stokes* (1669) 1 Lev 272; *S C sub nom. Nokes v* --- 1 Vent 35; *Morris v Wilford* (1677-9) 2 Lev 214; *Farewell v Coker* (1725-9) 2 Ja & W 192; *Cholmondeley v Clinton* (1817) 2 Mer 171 at 353; *Lyall v Edwards* (1861) 6 H & N 337; *Turner v Turner* (1880) 14 Ch D 829.

4 *Fraser v The Irish Restaurant and Bar Co Pty Ltd* [2008] QCA 270; *IBM Australia Pty Ltd v State of Queensland* [2015] QSC 342.

5 [1911] 1 Ch 18 at 34.

6 (1954) 91 CLR 112.

7 The pleader was T.E.F. Hughes, then a junior, who by dint of his clever pleas earned his second reported appearance in the High Court led by W.J.V Windeyer: *High Court Centenary: Reminiscences and reflections* (2003) 77 ALJ 653 at 662.

8 *ibid* at 123 per Dixon CJ, Fullagar, Kitto and Taylor JJ.

9 *ibid*.

10 *ibid* at 130.

11 *ibid*.

[8] The first two demurrers were based upon common law principles about the interpretation of releases. The third was based upon equitable doctrines. The fourth is based upon the tort of deceit.[12]

[9] That is not to say that general words of release can never be effective to release one party from liabilities that are unknown to the other party. As Santow J said in *Karam v ANZ Banking Group Ltd*[13] liabilities that are not known to the releasor may be within the scope of a term provided that the language makes that intention plain.

[10] In this case, as Atkinson J found, the appellant had asserted, at the time of the discovery of the initial defalcation, that her diversion of funds had been inadvertent. She offered to repay the money. That finding has not been challenged on appeal.[14] Certainly there was no indication in the evidence that the parties were negotiating a compromise of a claim by the respondent against the appellant for fraudulent misappropriation in the order of the sum claimed. In this proceeding there is no evidence to suggest that that was so, and the terms of the deed, which allow for substantial payments to the appellant, suggest the contrary. Indeed, on this appeal the appellant acknowledges that the respondent did not know that she had taken a total of $321,593.85 from it.[15]

[11] The recitals do not identify the precise dispute that is the subject of the compromise contained in the deed. They are in general terms.

[12] The appellant argues that the release must be taken to have comprehended all of her defalcations because the respondent "did not ever swear that … had it known of the conduct [involving the misappropriation of $321,593.85] it would not have entered into the Deed," and that the respondent has not disclosed its instructions to the entity that prepared the Deed.[16]

[13] That submission is misconceived. The respondent's statement of claim pleads the misappropriation of the money and the facts that rendered the taking actionable. It is not the respondent who relies upon the release but rather the appellant. It is the appellant, therefore, who must plead and prove the facts that establish that the release applies to the claims against her. It is the appellant who must plead and prove the material facts that lead to the legal conclusion that the present dispute existed at the time of the execution of the deed and was within the parties' contemplation at that time. It is not for the respondent to "swear that … had it known of the conduct … it would not have entered into the Deed". The respondent has not sought to rescind the deed for fraud, although it might have done so. Such a plea would have been relevant to a cause of action in fraud. In *Grant*, Webb J analysed the issues in accordance with just such a pleading hypothesis and arrived at the same result as the plurality.[17]

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12 *ibid* at 133 per Webb J.

13 [2001] NSWSC 709; reversed on appeal on grounds that do not affect that dictum: *ANZ Banking Group Ltd v Karam* (2005) 64 NSWLR 149; [2005] NSWCA 344.

14 *Dormway Pty Ltd & Anor v Wichmann* [2018] QSC 277 at 6, [19].

15 as the appellant acknowledges in paragraph [9] of her outline.

16 paragraph [12(b)] of her outline; that sub-paragraph refers to paragraph [6] of her outline, but that is obviously a typographical error for it is paragraph [8] that refers to the taking of the money.

17 See *Grant v John Grant & Sons Pty Ltd* (1954) 91 CLR 112 at 132-133. The pleading was from New South Wales, which, at that time, operated under the pre-*Judicature Act* system of pleading. Webb J was a Queenslander and, probably for that reason, found it more comfortable to reason to his

[14] For those reasons, the appellant is also mistaken in submitting that she should be given the benefit of disclosure before summary judgment should be given. There is no issue on the pleadings that would give rise to disclosure that could assist the appellant.

[15] In accordance with the authorities, as Atkinson J rightly concluded, the release must be construed so that it does not extend to the claims made in this proceeding. If that were wrong, then in any case the appellant would have been precluded from reliance upon the release for two other reasons. Such reliance would have been unconscientious and equity would have prevented the appellant raising the release as a defence. Further, as an employee who has correctly admitted that she owed the respondent a duty of good faith, it would be arguable that she was under a duty, before the respondent executed the deed, to disclose the truth about her improper diversion of money. Being under such a duty, her failure to disclose the truth, in circumstances in which her silence induced the respondent to execute the deed, would have constituted common law fraud. The respondent would have been entitled to avoid the whole deed and, not only deny the appellant reliance upon the release, but also to recover the money paid under the deed.

[16] It is not necessary to go on to consider the argument about the release being void on the ground of public policy.

[17] For these reasons, the appeal should be dismissed with costs.

[18] **GOTTERSON JA:** I agree with the orders proposed by Sofronoff P and with the reasons given by his Honour.

[19] **MORRISON JA:** I have read the reasons of Sofronoff P and agree with those reasons and the orders his Honour proposes.

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conclusion upon the hypothetical basis that the post-*Judicature Act* rules of pleading, that were current in Queensland, applied.