COMPROMISE OF ACTION BY COUNSEL

This article attempts to deal comprehensively with counsel's authority to compromise a pending action. Particular points sought to be established are that an English barrister, unlike an English solicitor, has nearly absolute implied authority to compromise; that the treatment in a recent English Court of Appeal case of counsel's apparent authority to compromise is correct and capable of resolving scattered inconsistencies in the case law; and that in a fused profession such as exists in Singapore and West Malaysia, the English case law is generally applicable and further that the barrister cases are tentatively to be preferred where the question is one of implied authority to compromise.

I. INTRODUCTION

The authority of counsel to compromise a pending action[1] has been discussed in numerous cases, not altogether easily reconcilable one with another, and only in recent years can it be said that the path is open to a clear and systematic treatment. There appear to be some important distinctions between the barrister and the solicitor in this regard and generally, the barrister cases will be discussed first and then the solicitor cases for contrast. It will be necessary also to consider whether the decided cases as they are here set out are capable of being applied indiscriminately in Singapore or whether they must receive some suitable qualification by force of the fusion of the profession.

II. IMPLIED AUTHORITY TO COMPROMISE

There is abundant authority to show that the barrister has an implied authority[2] to compromise in proceedings in court or in chambers,[3] and without referring to his client, even before the case is opened[4] or immediately after the end of the hearing.[5] But does counsel have implied authority to compromise in the face of express instructions to the contrary? The answer depends on whether counsel can be characterised as agent for the client. In the classic case of *Swinfen* v. *Lord*

[1] For a case where there was no pending action see *Green v. Crockett* (1865) 34 L.J. Ch. 606.
[2] There is no problem if the barrister is conferred expressly the authority to compromise.
[3] Furnival v.Bogle(1827)4Russ. 142;Re Hobler(1844)8Beav. 101;*Swinfen\.LordChelmsford* (1860)5H.&N.890;Strauss v.Francis(1866)L.R.1Q.B.379especially*Richardsonv.Peto*(1840) 1 Man. & G. 896, 897.
[4] *Harvey* v. *Croydon Rural Sanitary Authority* (1884) 26 Ch.D. 249.
[5] *Re West Devon Great Consols Mine* (1888) 38 Ch.D 51.

Chelmsford[6] *it* was alleged that the defendant, a barrister, during the progress of the cause, well knowing that he had no authority from his client to enter into any compromise, wrongfully and fraudulently did so. Pollock C.B. said:

> "The conduct and control of the cause are necessarily left to counsel. If a party desired to retain the power of directing counsel how the suit should be conducted, he must agree with some other counsel willing so to bind himself … We think, therefore, that no action lies against the defendant for consent to withdraw a juror, *even though contrary to the client's instructions,* provided it was done *bonafide* . . ."[7] (emphasis added).

Swinfen v. *Lord Chelmsford* was followed *in Matthews* v. *Munster*[8] *in* which the implied authority of counsel was more directly contrasted with that of an agent. Lord Esher M.R. roundly rejected any description of the relationship between counsel and client as an agency relationship. He said:

> "No counsel can be advocate for any person against the will of such person, and as he cannot put himself in that position so he cannot continue in it after his authority is withdrawn."[9]

But it is also true that:

> "... the client cannot give directions to his counsel to limit his authority over the conduct of the cause and oblige him to carry them out, all he can do is to withdraw his authority altogether, and in such a way that it may be known he has done so."[10]

Bowen L.J., more cautious then Lord Esher M.R., derived a more qualified conclusion which with characteristic lucidity and accuracy he stated as follows:

> "… it is sufficient to say that even if he is called an agent he is not one in the ordinary sense but has a particular authority… What is to be done if the client is in Court? Is it the duty of counsel to consult him? I should say - yes with regard to important matters in which the client has an interest. It does not follow that counsel will submit to carry out the view of the client if it appears it would be injurious to his client's interest. He has the alternative of returning his brief. I should be sorry to say that counsel ought not to consult his client on such a matter as a compromise of the action, but that is a point we have not to consider, for in the present case the client was not present and cannot complain if his counsel, who was in command and had authority to do the best for his client, compromised the suit within the reasonable limits of his authority to compromise."[11]

6 (1860) 5 H. & N. 890.
7 *Ibid.* at pp. 921-922.
8 (1877)20Q.B.D. 141.
9 At pp. 142-3.
10 At p. 143. Citing Pollock C.B. in *Swinfen* v. *Lord Chelmsford* (1860) 5 H. & N. 890 that counsel has complete authority over the suit. See also *Swinfen* v. *Swinfen* (1856) 18 C.B. 503.
11 At p. 145.

It can be seen from *Matthews* v. *Munster* that the implied authority of counsel to compromise is quite unlike the concept of implied authority familiar to agency law. In agency law, a principal can sue his agent for failure to carry out his directions and may if he acts timeously restrain by injunction a breach by his agent.[12] Where a principal's instructions confer a discretion to the agent, then the agent has a discretion to act and will not be liable simply because the judgment he exercises turns out to be less satisfactory than another.[13] Here, however, a client may not direct how counsel is to conduct the cause and, in particular, he has no direct control over counsel in relation to the wisdom of a compromise. It follows that generally no action will lie against counsel for compromising a cause against the wishes of his client.[14] Now the practical significance of this proposition is not as far reaching as it may at first sight appear. If a client does not wish to compromise, and counsel cannot induce him to change his mind, counsel's proper course is to return the brief. If counsel insists on carrying on, the client may withdraw counsel's authority altogether. The real significance of *Matthews* v. *Munster* then is that the burden is on the client to terminate the relationship between him and his counsel. If he allows his counsel to go on he must live with the consequence of counsel being capable of compromising against his wishes. And thus, as in *Matthews* v. *Munster,* if in truth he does not want to compromise although he does not say so to counsel, he should make himself present at the trial and withdraw counsel's authority altogether if counsel proceeds to compromise. It cannot make a difference that he has instructed counsel not to settle on certain terms. If at the trial counsel acting in his client's interest decides to compromise on different terms, as he may well do upon a better assessment of the merits of the case during the trial itself, counsel has a duty to consult him, but if he chooses to be absent, counsel is authorised to proceed to compromise. The vital point is that he cannot sue counsel for failure to follow his instructions. Nor can the client seek to set aside such compromise as beyond the scope of his counsel's authority. The compromise will bind the client as against the opposing side (subject to certain limitations later discussed) unless the client who is present in court makes it plain not just to his counsel but to all involved of his refusal to assent to the compromise by withdrawing altogether counsel's authority to act for him.[15]

To the proposition in *Matthews* v. *Munster,* the learning of Blackburn J. corresponds. He was emphatic that counsel is not his client's mouthpiece. Counsel is vested with discretion "on emergencies arising in the conduct of a cause and a client is guided in his selection of counsel by his reputation for honour, skill, and discretion."[16] However, not all judges have rested the foundation of counsel's implied authority on the discretion which counsel must of

[12] *Mutual Reserve Fund Life Associations. New York Life Insurance* Co.(1896) 75 L.T. 528.

[13] See, *e.g., Comber* v. *Anderson* (1808) 1 Camp. 523.

[14] See Mansfield C.J. in *Filmer v. Delber* (1811) 3 Taunt. 486 and *Swinfen* v. *Lord Chelmsford* (1860) 5 H. & N. 890. It may be that the judges in formulating the rule were influenced solely by counsel's incapacity to sue his client, but this nowhere clearly appears in the judgments.

[15] A vigorous, open protest may be sufficient: see *Rumsey* v. *King* (1876) 33 L.T. 728; *cf. Wright* v. *Soresby* (1834) 2 Cr. & M. 671. Absence of the party or his solicitor is immaterial: *Thomas v. Harris* (1858) 27 LJ. Ex. 353.

[16] See Blackburn J. in *Strauss* v. *Francis* (1866) L.R. 1 Q.B. 379, 381. Although he says at p 382: "I do not mean to say that counsel can compel a client to enter into a compromise against his will", that is consistent with saying that the client can put an end to the relationship at any time. See also Cresswell J. in *Swinfen* v. *Swinfen* (1856) 18 C.B. 503.

necessity have and according to these the implied authority of counsel must logically be even further removed from a doctrine of agency. The implied authority is necessary, according to Lord Langdale M.R. in *Re Hobler*,[17] so that the conduct of a cause in court may be enabled to proceed efficaciously. It is possible also that the proper conduct of a cause itself depends on the existence of an implied authority untrammeled by an overwhelming concern for the client's interests that is at the expense of counsel's duty to the court. This rationale in its rudimentary form is advanced as far back as the nineteenth century. So, for example, Pollock C.B. in *Swinfen* v. *Lord Chelmsford*[18] maintained that a barrister is to be considered, not as making a contract with his client, but as taking upon himself an office or duty, in the proper discharge of which not merely the client, but the court and the public at large have an interest. In the aftermath *of Rondel* v. *Worsley*[19] and *Saif Ali* v. *Sidney Mitchell & Co.*[20] it cannot be ignored.

The true rationale for and hence the principle giving rise to counsel's implied authority is somewhat difficult to identify. Admittedly it is not entirely beyond controversy why counsel should have such nearly absolute implied authority. That counsel must have some authority to compromise is easily established. If an action were brought for $ 10,000, surely the plaintiff's barrister might accept an offer of $9,999 without having to secure his client's consent.[21] If by reason of certain difficulties in the case of which his client cannot be expected to appreciate, counsel faced with a choice accepts a sure compromise in lieu of uncertain victory in the action, that must also be right. But where a client is adamant that he will not settle or that he will only settle on certain terms from which he will not budge, it is not clear that the necessity of discretion itself can satisfactorily explain why counsel is still not bound to respect his client's irrefragable instructions. For although counsel might be justified in compromising in the best interests of his client, yet the client might be considered to be *dominus litis,* in which case it is his perception of his own interests which must predominate. But if in addition to the necessity of discretion, counsel's duty to the court is kept firmly in view, the scales are now tipped in favour of the nearly absolute authority. The client's perception of what will serve him best must generally be correct but he could be quite sincerely wrong. When he puts his case into the hands of counsel he takes counsel as not just bound to serve him, but as bound by another and higher duty to the administration of justice. He must trust counsel therefore nearly absolutely to do the right thing in the conduct of the cause.

A contrary view on the nature of the implied authority to compromise seems to have been taken in cases where solicitors have acted as counsel. Lord Coleridge J. in *Little* v. *Spreadbury* said:

> "My view of the law is this: Where a client has given specific instructions for a compromise, or has given a prohibition against compromising, the

[17] (1844)8 Beav. 101.
[18] (1860) 5 H. & N. 890,920. One wonders if the court in *Ellender* v. *Wood*(1888) 32 S.J. 628 is hinting at this.
[19] [1969] 1A.C. 191.
[20] [1980] A.C. 195.
[21] See Lord Campbell C.J. in *Fray* v. *Vaules* (1859) 1 E. & E. 839, *in arguendo.*

> solicitor has no authority from the client to depart from those instructions without the client's consent expressed or implied."[22]

Fray v. *Voules*[23] is an even clearer case. There it was held that an attorney cannot disregard express directions from the client not to enter into a compromise and will be liable to an action for damages if he neglects those express directions. It is no defence that the compromise which is effected is reasonable and *bonafide* and for the benefit of the client. The ground upon which Crompton and Erie JJ. rested their decision is this; that the client is *dominus litis* and is entitled to decide whether he will compromise or not. Lord Campbell CJ. likewise stated that an attorney is entitled, in the exercise of his discretion, to enter into a compromise, provided always that his client has given him no express directions to the contrary. Then he said this:

> "I do not agree .. . that the attorney would be bound, in pursuance of his client's direction, to carry on the suit in a manner which he thought dangerous or absurd; but if he chooses, after those directions, to carry it on at all, he is bound not to act contrary to those directions and is guilty of a breach of duty if he does."[24]

The authority *of Fray* v. *Voules* is expressly limited by Lord Campbell C.J. to the question of the relation between attorney and client and therefore does not bear on the relation between counsel and client.[25] A further point of distinction might be taken in that the compromise was made not in Court but in the course of the cause. Although this is nowhere reflected in the judgments, it is not without significance. The attorney in question was an attorney of the Court of Queen's Bench and he therefore was not in any way acting as counsel. It is true that he took counsel's advice and acted upon it, but as Crompton J. observed in the course of argument, counsel seemed not to have known of the express directions and might have advised differently otherwise.

More difficult to deal with are scattered dicta in the cases which deny that counsel has nearly absolute authority to compromise. Crowder J., the dissenting judge in *Swinfen* v. *Swinfen*[26] was convinced that counsel had no authority to refer a cause against his client's wishes. Both the Earl of Halsbury L.C. and Lord MacNaghten in *Neale* v. *Gordon-Lennox*[27] took the view that counsel either exceeded his authority or acted without authority in referring a cause against his client's wishes.

It is perhaps a proper conclusion to say that the description of the relationship between counsel and client *in Matthews* v. *Munster* survives any doubts cast

[22] [1910] 2 K.B. 658, 665.
[23] (1859) 1 E. & E. 839.
[24] At pp. 847-8.
[25] An attorney was a law agent admitted to the roll of a particular superior court and thus entitled to practise before it in the sense of doing all the paperwork necessary for and during the trial of a suit. Later the attorney was conferred statutorily a right of audience in the inferior courts. *Little* v. *Spreadbury* was a case of an attorney exercising his right of audience in the county court. See also Tindal CJ. in *Richardson* v. *Peto* (1840) 1 Man. & G. 896, 897.
[26] (1857) 1 C.B. (N.S.) 364,402.
[27] [1902] A.C. 465. Counsel would of course exceed his authority if he did not act *bonafide* in the client's interest and *Neale's* case could perhaps be explained on this account. See discussion on the case below.

on it by *Little* v. *Spreadbury* and *Fray* v. *Voules* and may have a surer foundation in the case law than the contrary views in, for example, *Neale's* case.

III. APPARENT AUTHORITY TO COMPROMISE

The apparent authority of counsel to compromise is quite separate from the implied authority and clearly so appears from the judgment of Brightman L.J. in *Waugh* v. *H.B. Clifford & Sons Ltd*[28] to which Cumming-Bruce and Ackner L.JJ. assented and which though a solicitor's case settles a principle equally applicable to counsel.

Brightman L.J. carefully pointed out that there is the ostensible or apparent authority of a solicitor to compromise an action on behalf of his client without the opposing litigant being required for his own protection either (i) to scrutinise the authority of the solicitor of the other party, or (ii) to demand that the other party (if an individual) himself signs the terms of compromise or (if a corporation) affixes its seal or signs by a director or other agent possessing the requisite power under the articles of association or other constitution of the corporation. It is true that prior to *Waugh's* case, the courts sometimes used the terms "implied authority" and "ostensible authority" synonymously. Nonetheless, Brightman L.J. thought there was every reason to draw the distinction. He said:

> "Suppose that a defamation action is on foot; that terms of compromise are discussed; and that the defendant's solicitor writes to the plaintiff's solicitor offering to compromise at a figure of £100,000, which the plaintiff desires to accept. It would in my view be officious on the part of the plaintiff's solicitor to demand to be satisfied as to the authority of the defendant's solicitor to make the offer. It is perfectly clear that the defendant's solicitor has *ostensible* authority to compromise on behalf of his client, notwithstanding the large sum involved. It is not incumbent on the plaintiff to seek the signature of the defendant, if an individual, or the seal of the defendant if a corporation, or the signature of a director... But it does not follow that the defendant's solicitor would have implied authority to agree damages on that scale without the agreement of his client. In the light of the solicitor's knowledge of his client's cash position it might be quite unreasonable and indeed grossly negligent for the solicitor to commit his client to such a burden without first inquiring if it were acceptable. But that does not affect the *ostensible* authority of the solicitor to compromise, so as to place the plaintiff at risk if he fails to satisfy himself that the defendant' s solicitor has sought the agreement of his client. Such a limitation on the ostensible authority of the solicitor would be unworkable. How is the opposing litigant to estimate on which side of the line a particular case falls?"[29]

Drawing a clear distinction between implied authority and ostensible authority helps to resolve a question left undecided in *Shepherd* v. *Robinson.*[30] The difficulty has already been adverted to as to whether counsel's implied authority to compromise may be excluded, or qualified, or made exercisable conditionally,

[28] [1982] 1 All E.R. 1095.
[29] At p. 1105.
[30] [1919] 1K.B. 474.

and whether such exclusion will leave counsel bereft of authority, so that any compromise arrived at will be ineffective although there has been no communication to the other side. Such cases as *Matthews* v. *Munster* and *Strauss* v. *Francis*[31] say that the implied authority of counsel may not be excluded or qualified and further, that the effectiveness of a compromise cannot be defeated unless the client communicates to the opposing side his withdrawal of counsel's authority to act for him.

In *Shepherd* v. *Robinson*[32] Bankes L.J. observed that there seemed to be a considerable difference of opinion as to the effect of counsel' s apparent authority to settle a case where his client has instructed otherwise. He cited Lord Coleridge J.in *Little v. Spreadbury*[33] who said there would be no authority to depart from a client's instructions although the solicitor acting as counsel could step down if he felt unable to carry on in the manner which is insisted on. But as in *Little* v. *Spreadbury,* there was no necessity to decide the question, and Bankes LJ. refrained from expressing any view altogether.

Although the inconsistency in the cases is not adverted to, *Waugh's* case affords a neat solution to the difficulty which impressed Bankes L.J. The solution is to recognise that the view expressed by Lord Coleridge J. pertains solely to a question of implied authority as between solicitor (acting as counsel) and client. It cannot in the end affect a third party that the solicitor as counsel is without implied authority because a third party may rely on that counsel's ostensible authority. Ostensible authority need not be co-extensive with implied authority. Perhaps given that a barrister was thought to have nearly absolute implied authority to compromise, it would not have been necessary in relation to a barrister to distinguish between implied and ostensible authority. Even if a barrister misunderstood his client's instructions not to settle and settled in contradiction to those wishes, that mistake could not detract from his nearly absolute implied authority. It is otherwise with a solicitor acting as counsel for he does not seem to have been accorded the same measure of discretion (and some might say trust) in the management of a cause in court. So the solicitor may, unlike the barrister, exceed his implied authority when he compromises against contrary directions; some misapprehension as to his instructions in a complex case may quite easily operate to cause him to exceed his authority. Where there is no excuse to ignore or misconstrue a client's instruction, liability will sound in negligence or breach of duty. Nevertheless, there are good reasons, as *Waugh's* case shows, for saying that the position vis-a-vis that solicitor and the opposite side does not involve the same authority, but a different one, namely the ostensible authority. So understood, the fact that a solicitor acting as counsel has no implied authority is of little significance to the validity of the compromise in relation to the opposing party who is and should be entitled to rely on the ostensible authority of the solicitor-counsel unless he is aware of the prohibition against compromise.

IV. Limitations on Implied and Ostensible Authority

The implied authority is subject to an important limitation. It covers only matters in issue and does not extend to collateral issues. In *Swinfen* v. *Lord Chelmsford* Pollock C.B. said:

[31] (1866) L.R. 1 Q.B. 379.
[32] [1919] 1 K.B. 474.
[33] [1910]2K.B. 658.

> "We are of opinion, that although a counsel has complete authority over the suit, the mode of conducting it – such as withdrawing the record, withdrawing a juror, calling no witnesses, or selecting such as, in his discretion, he thinks ought to be called, and other matters which properly belong to the suit and the management and conduct of the trial – we think he has not, by virtue of his retainer in the suit, any power over matters that are collateral to it."[34]

So it is competent for counsel without express authority to assent to verdict for a certain amount and upon certain conditions and terms,[35] or to an order for stay of proceedings,[36] or to give an undertaking not to appeal against an adverse decision[37] or to refer a cause for trial,[38] or to withdraw imputations against the plaintiff in an action for malicious prosecution.[39] In some instances, which are fairly rare, two separate proceedings may be so intimately related that the authority to compromise will be held to include within its reasonable limits matters pertaining to either or both actions.[40]

The ostensible authority to compromise is subject to the same limitation, namely that the compromise must not affect matters collateral to the action. Here again, the discussion in *Waugh's* case is very useful. Brightman L.J. said:

> "I do not think we should decide that matter is 'collateral' to the action unless it really involves extraneous subject matter, as in *Aspin* v. *Wilkinson* (1879) 23 SJ 388 and *Re a Debtor (No 1 of 1914)* [1914] 2 KB 758."[41]

Re a Debtor (*No. 1 of 1914*)[42] was a case where after judgment a solicitor compromised by assenting to the execution by the defendant of a deed of assignment of his property to a trustee for the benefit of his creditors. What was done then was the making of an agreement not confined to the plaintiff and defendant but with the other creditors who were strangers to the action in which the judgment was obtained. Additionally there was the serious consequence that, by assenting to that agreement, the solicitor in effect was putting it beyond the power of his client to take bankruptcy proceedings herself, should some other creditor however choose to do so. On both grounds, it was held that the compromise which affected a collateral matter could not affect the client's right to a receiving order against the debtor. In *Waugh's* case itself, it was held to be within the ostensible authority of the builders' solicitors to agree to the handing back of the defective houses to their clients in return for a price reflecting their current value in proper condition. That compromise could not

[34] (1860) 5 H. & N. 890. The associated case *of Swinfen* v. *Swinfen* (1857) 1 C.B.N.S. 364 is often explained as peculiar. Crowder J. dissented on the ground that the compromise extended to collateral matters. See also *Prestwich* v. *Poley* (1865) 18 C.B.N.S. 806; *ReNewen* [1903] 1 Ch. 812; *Ellender* v. *Wood* (1888) 32 SJ. 628; *Kempshall* v. *Holland* [1895] 14 R. 336.

[35] *Matthews* v. *Munster* (1887) 20 Q.B.D. 141; *Kempshall* v. *Holland* [1895] 14R. 336; *Harvey* v. *Croydon Rural Sanitary Authority* (1884) 26 Ch. D. 249; *Thomas* v. *Harris* (1858) 27 L.J. Ex. 353; *Shepherd* v. *Robinson* [1919] 1 K.B. 474.

[36] *Rumsey* v. *King* (1876) 33 L.T. 728.

[37] *Re West Devon Great Consols Mine* (1888) 38 Ch.D. 51; *Re Hull and County Bank* (1879) 13 Ch.D. 261.

[38] See Collins M.R. in *Neale* v. *Gordon-Lennox* [1902] 1 K.B. 850.

[39] *Matthews* v. *Munster* (1887) 20 Q.B.D. 141.

[40] See *Hargrove* v. *Margrave* (1850) 12 Beav. 408. *Cf. Gardiner* v. *Moore* [1969] 1 Q.B. 55, 96.

[41] [1982] 1 All E.R. 1095, 1106.

[42] [1914] 2 K.B. 758.

trespass on collateral matters but went to the very heart of the action brought by the purchasers against the builders for negligence and breach of contract.

A second important limitation on the implied and the ostensible authority[43] is expressed by Lord Esher M.R. in *Matthews* v. *Munster* as follows:

> "If . . . counsel were to conduct a cause in such a manner that an unjust advantage would be given to the other side or to act under a mistake in such a way as to produce some injustice, the Court has authority to overrule the action of the advocate."[44]

In *Holt* v. *Jesse*[45] the court discharged a consent[46] which had been given by counsel with the sanction of his client upon a showing that the client had not fully understood the matter and had sanctioned the consent under a mistake or misapprehension. As it turned out, the consent prejudiced the client in a manner which neither he *nor his advisers* could have anticipated at the time. Malins V.C. said:

> "… I also would desire to say this, that where there has been a misapprehension on the part of counsel, where the case has been complicated or difficult, when either the materials have not been sufficiently before the counsel, or being before him, he does not fully comprehend them, and consent has been given prejudicial to the client,... it never has been the rule of this Court, . . . that the unfortunate client should be bound by such misapprehension."[47]

Lord Lyndhurst in *Furnival* v. *Bogle* similarly stressed that "if it had been shown that counsel, when they exercised their discretion, had not those materials before them on which a correct judgment might be formed, the decision of the Court might have been different."[48]

So understood, this jurisdiction of the court is a welcome ballast against the otherwise nearly unfettered discretion of counsel in compromising a cause. But a broader formulation seems to have been promoted and to be derivable, it is said, from the House of Lords decision in *Neale* v. *Gordon-Lennox*[49] It seems to be thought that after that decision a counsel has no authority to refer an action against the wishes of his client or upon terms different from those which his client has authorised. If he does so refer it, the reference may be set aside in effect by a restoration of the action to the list, although the limit put by the client on his counsel's authority is not made known to the other side. That at any rate is how the headnote writer in that case expressed the *ratio*. Actually, the decision is perfectly consistent with the earlier cases and the headnote is very inaccurate.

[43] Though not mentioned in *Waugh's* case, it can hardly be disputed that the ostensible authority is likewise subject to this limitation: see *Furnival v. Bogle* (1827) 4 Russ. 142.
[44] (1887) 20 Q.B.D. 141, 143.
[45] (1876) 3 Ch.D. 177.
[46] Before the order had been drawn up.
[47] At pp 183-4. See also *Lewis* v. *Lewis* (1890) 45 Ch. D. 281.
[48] (1827) 4 Russ. 142, 147.
[49] [1902] A.C. 465.

It was not the mere fact that counsel had exceeded his authority that justified the restoration of the cause to the list for trial. Counsel was told that his client, who was the plaintiff in a defamation suit, would not have the matter referred, unless the defendant made a public statement clearing the plaintiff's character. There was no mistake about these instructions because the condition was in writing. Counsel exercised his discretion and agreed to a reference without obtaining a disclaimer of the imputations on the plaintiff's character. The Earl of Halsbury L.C. said: "Can anybody doubt that that condition was one of supreme importance to the party who insisted upon it?"[50] A little later there occur these remarks:

> "... to suggest to me that a Court of justice is so far bound by the unauthorized act of learned counsel that it is deprived of its general authority over justice between the parties is, to my mind, the most extraordinary proposition that I ever heard."[51]

In intervening in the plaintiffs favour, the Lord Chancellor was not insensitive to the position of the opposing side, but considered that that position had not been totally altered by the compromise, nor would injustice be done by trying the action now insisted of its being tried then. Lord MacNaghten was equally clear that the court was not bound to give the seal of its authority to any arrangement that counsel might make, when the arrangement itself is not in its opinion a proper one. So then, there was in that case a compromise which operated most prejudicially to the plaintiff's interest. There would on the other hand be no prejudice to the defendant to undo the compromise. The court had the power to do so and in those circumstances the compromise was undone. Scarcer justification can be found for saying that the court will intervene so long as counsel ignores express instructions not to compromise.

In *Little* v. *Spreadbury*[52] Bray J. was right to resist an attempt to apply this broad formulation said to have sprung from *Neale*. The plaintiff who was seeking to upset the compromise by his counsel had led the other party reasonably to believe that he assented. He was bound accordingly because by a familiar rule of contract law a party must be judged by what he does and says as a reasonable man would understand him to be doing and saying.

In *Shepherd* v. *Robinson*[53] Bankes L.J. clearly treated *Neale* as embodying a distinct limitation and not to be confounded with the question of whether acting without authority would result in a binding compromise. It was shown that counsel would never have consented to the compromise if he had known that his client had given instructions that there should be no settlement without her consent. Indeed, his view was that the case was not one to be settled without his client's authority. He had settled because he thought by a mistake that that authority had been obtained. In those circumstances, the jurisdiction to set aside the compromise could be invoked so long as the final order had not been perfected.[54]

[50] [1902] A.C. 465, 469.
[51] At p. 470.
[52] [1910] 2 K.B. 658.
[53] [1919] 1 K.B. 474.
[54] See also *Welsh* v. *Roe* (1918) 118 L.T. 529, 531.

V. COMPROMISE OF ACTION BY SOLICITOR

Unlike counsel who acts in court and for purposes of the case and whose role out of court is purely an advisory one, a solicitor may be retained before any prospect of trial is even in the offing and his retainer may continue after judgment.

A solicitor who is retained for the purpose of bringing an action will have his name on the record and is authorised impliedly to accept service of all documents except those which must be served personally.[55] His implied authority extends to making formal admissions in the course of proceedings where this is reasonably felt to be in the best interests of his client. In *Groom* v. *Crocker*[56] there had been a motorcar collision and the respondent was being sued. The respondent's insurers took over the proceedings and got their solicitors, the appellants, to admit to negligence when they knew that the respondent had not been guilty of negligence. To the Court of Appeal there was no question that the appellants had breached their duty to the respondent. MacKinnon L.J. thought that even if there had been a doubt as to the respondent's negligence, the solicitors should have informed him of the course they had proposed to take, so as to give him the opportunity to choose to conduct the suit on other lines for himself. Scott L.J. likewise considered that the course of action taken was not one within the express or implied discretion left to the solicitors.

It may be regarded as settled that before an action is begun, there is no implied authority in a solicitor to compromise. In *Macauley* v. *Policy*[57] the plaintiff brought an action in negligence against the defendants and the latter applied for stay of proceedings on the ground that the plaintiff had by his solicitor accepted a settlement. It was proved that the solicitor had accepted a sum of money in satisfaction of the plaintiff's claim but this was before any action had been begun and upon the basis of a general retainer. The Court of Appeal held that the compromise could not bind the plaintiff and refused to stay.[58] This is really a case on apparent authority and the reason why there is no apparent authority may, as Chitty L.J. says, lie in the fact that before an action is begun any authority is not self-evident but a matter of evidence.

Whilst the action is pending, the ostensible authority of a solicitor conducting the litigation to compromise is virtually identical to the authority of counsel to compromise. This is abundantly shown by *Waugh's* case, as well as the cases there cited. However, it should be noted that the solicitor on the record, unlike the barrister, has ostensible authority to act in all matters which may reasonably be expected to arise in the proceeding, including receiving money, tender of debt, damages or costs. The solicitor's implied authority to compromise is rather more curtailed. First, he must have been expressly authorised to bring proceedings. Secondly, he cannot, generally speaking, compromise contrary to his client's directions.

The question of the scope of the authority after judgment remains controversial.[59] *Butler* v. *Knight*[60] seems to suggest that after judgment there is authority

[55] See *Petty* v. *Daniel* (1886) 34 Ch.D. 172.
[56] [1939] 1 K.B. 194; *cf. Grindell* v. *Bass* [1920] 2 Ch. 487.
[57] [1897] 2 Q.B. 123.
[58] Applying *Duffy* v. *Hanson* (1867) 61 L.T. 332.
[59] See *Re a Debtor (No. 1 of 1914)* [1914] 2 K.B. 758.
[60] (1867) L.R. 2 Ex. 109; *James* v. *Rickell* (1887) 20 Q.B.D. 164.

to compromise and accept a lesser sum than the judgment amount. However, in *Lovegrove* v. *White*[61] the Court of Common Pleas denied that an attorney had implied authority to agree to postpone execution. In the present view, the cases can be reconciled in this way. It is essential that on the facts the retainer is found to continue after judgment. If there is this retainer, an implied authority arises by virtue of it to do the best in obtaining the fruits of the judgment. In the words of Montague Smith J. in *Lovegrove* v. *White:*

> "[The solicitor] has, no doubt, control over the process of execution... but that he has not complete control over it is shown by the decision, that if the debtor has taken on a *ca.sa.* he cannot consent to his discharge; though in the case of *a fi.fa.* he can consent to the withdrawal of it..."[62]

However, notwithstanding there is no implied authority to postpone execution, there may in an appropriate case be apparent authority to do so and *Butler* v. *Knight* would seem to be in support of this. In that case, the Exchequer Court was clear that, though the attorney acted in defiance of his client's instructions in compromising for a smaller sum than the judgment amount, he nevertheless bound her to the compromise. But at the same time he violated his duty to her and so was held liable.

VII. The Singapore and Malaysian Position

That the profession in Singapore and Malaysia is of course fused should not make any difference in the law in regard to the ostensible authority. We can see this to some extent in the New Zealand[63] cases of *Kontvanis* v. *O'Brien (No. 2)*[64] and *Thompson* v. *Howley.*[65] The first case involved a solicitor practising as a barrister who was not the solicitor on the record. It was held that he had ostensible authority to bind his client by a compromise. In the second and more recent case, the distinction between apparent authority and actual (implied) authority was highlighted and Somers J. accepted that a client is bound by a compromise effected by his solicitor (practising as a barrister) pursuant to his ostensible authority.

The Malaysian position likewise is consistent with the proposition that an advocate and solicitor has ostensible authority to compromise and that the opposing side can generally rely on this unless some limitation of authority is communicated. In *Yap Chee Meng* v. *Ajinomoto (M) Bhd.*,[66] a client who instructed his solicitor to claim compensation in respect of physical injuries caused by negligence, alleged after settlement and withdrawal of the suit that he had expressly instructed his solicitor not to settle and brought a fresh action against the defendants. The defendants successfully obtained an order striking

61 (1871) L.R. 6 C.P. 440.
62 At p. 444; see also *Levi* v. *Abbott* (1849) 4 Ex. 588.
63 In New Zealand the profession is fused in the sense that a solicitor may practise as a barrister before the courts and a barrister may practise as a solicitor. A lawyer is admitted either as a barrister or a solicitor but there are no impediments to the work that either may undertake.
64 [1958] N.Z.L.R. 516.
65 [1977] 1 N.Z.L.R. 16.
66 [1978] 2 M.L.J. 249.

out the new action. According to Harun J., there was a conflict of authority in cases on limitation of authority by the client. He delineated the cases on apparent authority from the line of cases represented by *Neale* v. *Gordon-Lennox* and concluded:

> "On a review of the cases, it seems to me that each case should be decided on its merits. As a general rule, it is against public policy to allow settlements concluded between solicitors on behalf of their respective clients in accident cases to be challenged with impunity. To do so would open the flood-gates of endless litigation initiated by parties who become wise after the event. It will also discourage the practice of out of court settlements."[67]

In the present view, there is, as has been shown, no real conflict between the cases on apparent authority and *the Neale* line of cases. However, although Harun J.'s attempted reconciliation may be unnecessary, it is quite clear that he accepted the cases on apparent authority as applicable as well to the fused profession in Malaysia.

Where there is some difficulty is in relation to the implied authority to compromise. The difference between the barrister's and solicitor's implied authority appears, as has been shown, to be this. The barrister (or counsel) cannot be sued for breach of express instructions not to settle. (One's remedy is to sue the solicitor who has instructed counsel where he fails to communicate to counsel these instructions). But a solicitor who acts as counsel in a cause is liable to his client if he compromises contrary to instructions or if he compromises on terms other than those authorised. The gravamen of the complaint has often been laid either in negligence or as liability for breach of contract.[68] Whatever it may be, it is clear that liability exists even though the compromise is in the client's interest. (In that event, damages will be merely nominal).[69] Unfortunately, in *Thompson* v. *Howley* the defendant omitted to plead that he was in fact a barrister and so the court proceeded on the footing that he was a solicitor. Had it not been for that technical defect, we should have had the benefit of discussion on a matter of some importance and yet still obscure.

If only it were known why it was thought counsel could not be sued for compromising contrary to instructions, some surer comment might be ventured. If the reason was the inability of counsel to sue the client for payment,[70] the absence of such an "impediment" here leads automatically to the conclusion that the rule in the solicitor cases would be more appropriate. If the reason had to do with the nature of counsel's discretion, a further inquiry into the reason for this discretion must be undertaken and upon such an inquiry no clear reason may be discovered. Left at large and without means of verification, we may be disposed to assume that the disparity between the banister and solicitor cases on this point may be more a product of history and an archaism than of universal principle. Whatever compunctions one may have about the need for discretion in the conduct of a cause, it cannot be doubted that the client is in a real sense *dominus*

67 At p. 251.
68 The court in *Thompson* v. *Howley* [1977] 1 N.Z.L.R. 16 thought there could not be such a liability in contract.
69 *Fray* v. *Voules* (1859) 1 E. & E. 839.
70 Which was not clearly established until 1863 in *Kennedy* v. *Broun* (1863) 9 Jur. (N.S.) 1120.

litis. It is his litigation and it is a matter of recognising that he can to some extent dictate the course of it. It is suggested that only the existence of counsel's duty to the court can possibly justify counsel compromising in court against his client's wishes. Just as the existence of this duty immunises counsel from a suit in negligence in court, so also it can preclude a suit against counsel for compromising against or contrary to his client's wishes.[71] A client is not without remedy. He can, if he is present in court, immediately withdraw counsel's authority to act for him, making that plain to the opposite side. If not present, he can, provided he acts without unreasonable delay, invoke the court's jurisdiction to set aside the compromise, which will be available if he can show that the effected compromise is in fact not *bonafide* and in his best interest. The argument then is that the barrister cases should be followed.

A final comment on the jurisdiction to set aside. It may be that in England the jurisdiction is founded on the assistance whch the parties in the suit require of the court, so that where no such assistance is required, the jurisdiction cannot exist. In England, of course, a barrister is not an officer of the court[72] It is otherwise in the fused profession in Singapore. Even if no intervention of the court is sought for perfecting a consent order, could it not be said that the jurisdiction does exist because of the control which the court exercises over all its officers?

TAN YOCK LIN*

71 *Cf. Biggar* v. *McLeod* [1978] 2 N.Z.L.R. 9.
72 See Holdsworth, *A History of English Law,* (London, 1966) vol ii, pp. 317 *et seq.; cf. Hill's case* (1603) Cory 27.

* B.C.L. (Oxon), Senior Lecturer, Faculty of Law, National University of Singapore.