COLONY OF MONTSERRAT:

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 1 OF 1978

BETWEEN: DESIGN PROPERTIES (MONTSERRAT) LTD. Defendant/Appellant

AND

THE ATTORNEY GENERAL OF MONTSERRAT Plaintiff/Respondent

CIVIL APPEAL NO 2 OF 1978

BETWEEN: THE ATTORNEY GENERAL, MONTSERRAT Plaintiff/Appellant
for the Government of Montserrat

AND

DESIGN PROPERTIES (MONTSERRAT) LTD. Defendant/Respondent

Before: The Hon. Sir Maurice Davis, Q.C. - Chief Justice
The Honourable Mr. Justice Peterkin
The Honourable Mr. Justice Berridge (Acting)

Appearances: C. Phillips for Appellant Company
K. Allen with him.

Attorney-General for Respondent
D. Brandt with him.

1978; October 10 and 11,

J U D G M E N T

DAVIS, C.J.:

These two appeals were heard together by consent. The first appeal in point of time, No. 1 of 1978, is against that part of the decision of Hewlett, J, dated 16th December, 1977, which gives judgment for the Appellant Company in the sum of $12,548.50, and the only ground of appeal is that this Court was not competent to give such a judgment.

The second appeal, No. 2 of 1978, is against that part of the judgment which (a) dismissed the Appellant's claim for specific performance, (b)

dismissed the Appellant's claim for a declaration of forfeiture, and (c) entered judgment for the Company, Design Properties (Montserrat) Limited, in the sum of $12,548.50. The grounds of appeal are stated at pages one to four of the record.

The two appeals arose from a case brought by the Government of Montserrat in the name of the Attorney-General claiming specific performance of a contract of sale against Design Properties (Montserrat) Limited in respect of a parcel of land at Gingoes, Montserrat, containing 50,194 sq. ft., and in the alternative, for a declaration of forfeiture of the said land to the Crown for breach of the Land Holding Control Ordinance, 1970. The parcel in question was originally vested in William Hopwood of Montserrat and Eric Smith of Antigua whose intention it was to utilise the site for an hotel. In 1969 Smith joined a firm of architects in Antigua known as Deans and Fraser and threw in this parcel of land by arrangement with Hopwood as his contribution towards the assets and good-will of the partnership which then became known as Deans, Fraser and Smith. The partners subsequently formed themselves into a company called Design Properties Limited for the purpose of holding and developing this land. The company was registered in Antigua where they resided. The company then instructed Mr. John Kelsick, a solicitor of Montserrat, by letter dated 1/7/69 as follows:-

> "We would be happy if you would undertake the following business on behalf of Design Properties Limited, Antigua, of which Walter Deans is a Director.
>
> We wish to transfer or sell title of a property at Gingoes, Montserrat at present held by Conveyance in the names of Eric G.T. Smith, Antigua and Wm. Roy Hopwood, Montserrat.
>
> Agreement has been made with Mr. Hopwood to obtain his interest in the property as per the attached letter from Mr. Hopwood to Design Properties.
>
> The Conveyance is at present in the hands of Mr. Kenneth Allen, Solicitor, who was preparing application for Certificate of Title, but this has not been done.
>
> The property should be transferred or sold for 'consideration received' or for nominal sums since no exchange of money is being asked of any of the parties involved.

/Should

> Should you be willing to undertake this business for us, please ascertain firstly if licence to hold this property will be probably granted to us.
>
> We look forward to your early advise."

Mr Kelsick replied to the company agreeing to effect transfer of title and undertaking to proceed with the licence application In addition he inquired of them the reasonable market value of the property for purposes of stamp duty to which the company replied,

> "The Gingoes property is being transferred to Design Properties at a face value of $7,000 ECC, based on the original purchase cost of $5,272 plus allowance for devaluation and a small annual appreciation. We would think this sum of $7,000 a fair value for stamp duty."

Up to September, 1969 no licence was obtained, and the company instructed Mr. Kelsick by letter of 21st May, 1970, to incorporate and register the company in Montserrat as Design Properties (Montserrat) Limited They also instructed him that after incorporation and registration of the new company he should arrange for completion of transfer of title of the land at Gingoes to the new company. The new company was then duly incorporated as Design Properties (Montserrat) Limited. It is hereinafter referred to as the company. A transfer deed in favour of the company was drawn and executed by the vendors on 5/12/70. No registration of the deed had, however been effected. Up to 18/1/72 the necessary licence to hold land in Montserrat had not yet been obtained, and by letter of that date the company advised Mr. Kelsick inter alia as follows:-

> "Further to our conversation we advise you that we are not anxious at this moment to make a quick sale of the property but would do so at a price of $21,000 ECC, on which 5% commission would be available on completion of the transaction."

There was apparently no further communication of any significance between the company and Mr. Kelsick until sometime in 1974 when Deans, while in Montserrat on other business, had occasion to visit his home. Mr Kelsick's evidence of their conversation runs,

> "We discussed the position with the land. I told him I was pretty certain that they would never get a licence and that they should sell. He agreed that I should sell at the best price obtainable."

/Deans..

Deans' evidence of this meeting is almost identical except that he added that he thought that he had told him that the price could not be less than $7,000 because it was the original book value. He went on to say, however,

> "I did not intend anything by this conversation. I had no authority from the company to tell Kelsick to sell the land."

He had earlier in his evidence said,

> "In my opinion I would think a valuation would be between $21,000 and $24,000. This is a conservative estimate."

It is this conversation with Deans upon which Mr. Kelsick relies as his authority to sell at $7,000.

On 18/1/76, after a lapse of nearly two years, Mr. Kelsick wrote to Deans advising him that he had sold the land to the Government of Montserrat for $7,000. The Company refused to execute the conveyance in favour of the Government. The Company took the view that it had no knowledge of the sale or negotiations leading to the sale, and that in any event, the price was not that approved by their letter of 18/1/72, namely, $21,000.

The witness Kelsick denied ever having received this letter, and so considered himself only bound by Deans' instructions to sell at the best price obtainable. The learned trial judge has, however, found that on the balance of probabilities he did in fact receive the letter, and I can see no reason to differ from his finding. He then went on to conclude as follows:

> "This then should dispose of the matter because as an agent of the company he would have acted beyond the scope of his authority in concluding the sale at an unauthorised price whereby his principals would not be liable to the third party."

Having so concluded the only course available to him was to have dismissed the claim of the Government. Instead, he went on to assess the value of the property and to enter judgment for the Company in the sum of $12,548.50, the effect of which was to sell the property to the

/Government....

Government in the sum mentioned. In my view he had no authority whatever to make such an order, and the Company's appeal on this aspect of the matter should be allowed.

The appeal in relation to specific performance turns on whether or not there can be said to have been in existence a valid contract of sale between the Government and the Company. In arguing this issue the Attorney-General conceded that Kelsick had exceeded his actual authority, but argued that he had not exceeded his usual or ostensible authority. He then submitted that Government was not bound by any limitation on his authority if he acted in the usual courseof such business. He referred the Court to Mendelssohn v. Normand Ltd., 1969, 2 A.E.R., 1215, and to Halsbury's Laws of England, 3rd Edition, Vol. I, page 161, paragraph 378, and page 208, paragraphs 473 and 477

Counsel for the Company has cited to the Court two cases:

(1) Freeman and Lockyer v. Buckhurst Park Properties, 1964 1 A.E.R., 630

(2) The Attorney-General for Ceylon v. Silva, 1953 A.C., 461.

In my opinion the law as gleaned from these authorities may be summarised as follows -

The extent of the liability of a principal for the acts of his agent is governed by the terms of the authority conferred by him upon the agent. When the terms of the authority actually conferred by the principal are known to the person dealing with the agent, such person can only make the principal liable for acts within the scope of such authority. When, however, the terms of such authority are not known to the person dealing with the agent, the liability of the principal depends upon whether the agent is a "general agent" or a "special agent". A "general agent" is an agent appointed to act as agent: (i) in a course of dealing which comprises all the affairs of his principal, or all the affairs of his principal in a particular business or character, or (ii) in the ordinary course of the agent's recognised trade or profession. A

"special ...

"special agent" is an agent appointed to do a particular act, not being in the course of his recognised trade or profession. A person who employs a special agent is only liable to third parties for acts of the agent which are authorised by him

In the instant case Mr Kelsick was in my view requested to do a particular act of a kind not being in the course of his recognised trade or profession, and he was given expressed instructions in this regard as to how he was to act within the limits of the letter of 18/1/72. In so doing the company was careful all along to issue its instructions in writing on their special stationery. In the circumstances, I would agree with the trial judge's conclusions that he would have acted beyond the scope of his authority in concluding a sale at an unauthorised price and that the company would not be liable to the third party. There would, accordingly, be no contract to perform.

The question of forfeiture was argued by Mr Brandt on behalf of the Government, who referred the Court to Section 3(1) of the Land Holding Control Ordinance, 1970, (No 2 of 1970), and submitted that the forfeiture referred to is automatic the moment an alien holds land. This submission was in conformity with para (4) of the amended statement of claim filed by the Attorney -General on behalf of the Government which reads,

> "The Plaintiff says that the land is forfeited to the Crown by operation of law."

Section 3(1) reads,

> "3.(1) Subject to the provisions of this Ordinance, neither land in the territory nor a mortgage on land in the territory shall, after the commencement of this Ordinance, be held by a person not belonging to the territory, and any land or mortgage so held shall be forfeited to Her Majesty:
>
> Provided that land may be acquired and held by a person not belonging to the territory under a lease for a term not exceeding five years or an annual tenancy or for any less interest for the purposes of residence, trade, or business, but such person shall not so hold more than five acres of land in all;"

The issue here is whether there can be automatic forfeiture or not, or whether it is necessary for the Court to declare it under Section 7(1) of the Ordinance which reads,

/"7(1) . . .

> "7(1) Land or a mortgage forfeited under this Ordinance shall not vest in Her Majesty unless and until a judgment is obtained declaring the forfeiture; but on such judgment being obtained the title of Her Majesty shall relate back to and commence at the time when the forfeiture took place "

Counsel submitted in regard to Section 7(1) that it was only machinery through which Government's title could be declared publicly, and that once there was evidence in respect of forfeiture before the trial judge he had no discretion in the matter.

Learned Counsel for the Company has submitted that the question does not arise until there is a writ, and the Crown has taken some step under Section 7. In short, that the Crown has to bring an action for forfeiture and get an order. I would agree. He referred the Court to (i) Attorney-General v. Parsons and Others, 1956 1 A.E R. 65, and (ii) Lehrer v. Gordon, 7 W I R., 247.

In the former case it was held that the word "forfeited" in the Mortmain and Charitable Uses Act, 1888, Section 1(1), was to be construed as meaning "liable to be forfeited" and accordingly the land comprised in the lease would not vest in the Crown unless and until Her Majesty took steps to enforce the forfeiture.

In the latter case which dealt with the non compliance of the conditions attached to a licence issued to an alien under the Alien Land Holding Regulation Act, Cap. 76 of the Laws of Antigua, Archer P. stated as follows,

> "The argument that the licence is inchoate until the conditions attached to it have been met (which is now impossible) is fallacious. A licence is, by virtue of the provisions of s. 4 of the Aliens Land Holding Regulation Act, Cap. 76 operative immediately upon its registration. Failure to observe conditions attached to a licence may, but does not automatically, result in forfeiture of the land to which the licence refers. The procedure for forfeiture is laid down by section 16 of the Act: a judgment declaring the forfeiture must first be obtained (s.5) and until it is obtained the licence retains its validity.

In the instant case no steps were taken to enforce the forfeiture and consequently in my view there could have been no judgment declaring it

/In the . . .

In the result, I would allow the appeal of the Company and set aside the order of the learned judge in so far as it relates to the award of $12,548.50. I would also dismiss the appeal by the Government of Montserrat. The Company should have their costs of both appeals to be taxed

(Sir Maurice Davis)
CHIEF JUSTICE

(N.A. Peterkin)
JUSTICE OF APPEAL

(N A Berridge)
JUSTICE OF APPEAL (Acting)