ST. LUCIA

IN THE COURT OF APPEAL

CIVIL APPEAL NO 18 OF1998

BETWEEN:

B & D CONSTRUCTION LIMITED

Appellant

and

CONSOLIDATED INSURANCE CONSULTANTS [ST. LUCIA] LTD.

Respondent

Before:

The Hon. Mr. C. M. Dennis Byron	Chief Justice
The Hon. Mr. Satrohan Singh	Justice of Appeal
The Hon. Mr. Albert Redhead	Justice of Appeal

Appearances:

Mr. Peter I. Foster for the Appellant
Mr. Michael Gordon for the Respondent

1999: May 27;
June 21.

JUDGMENT

BYRON C.J.

This is an appeal against the judgment of Mitchell J. delivered on 14th October 1998 in which he dismissed the appellant's summons for summary judgment under Order 14 of the Rules of the Supreme Court.

The Background

On 23rd October 1997 the appellant issued a writ of summons indorsed with a statement of Claim. The allegation was that the

appellant engaged the respondent as an insurance consultant agent and/or broker to secure Insurance Coverage for certain Contract Works, and on 21st October 1996 the respondent issued to the appellant a Cover Slip purporting to provide the said insurance coverage. The Cover Slip was alleged to contain the following statement: “Principal: To be advised as required by contract.”. On the faith of the said Cover Slip the appellant paid the premium. The statement of claim alleged that “as indicated in the Defendant’s letter to the Plaintiff dated 20th December 1996 at the time of the signing of the said Cover Slip, there was no principal in existence for whom the Defendant acted.@ It was further alleged that during the currency of the Cover Slip the appellant=s property was damaged by flood causing special damages of $724,776.25 and general damages.

In its defence which was dated the 1st December 1997, the respondent admitted the arrangement but added the somewhat mysterious sentence at the end of the admission “The Defendant will refer to the said letter and Cover Slip at the trial for their full terms and effect.” In response to the crucial allegation that there was no principal in existence the respondent pleaded -

> “The Defendant admits that it wrote a letter dated 21st December, 1996 to the Plaintiff but denies the interpretation placed on the words of that letter by the Plaintiff. The Defendant will refer to the said letter at the trial of this matter for its full terms and effect.”

The other allegations of the defence were denial that the premium had been paid and non admittance of the damage alleged to have been suffered.

Against this background on 10th February 1998, the appellant applied for Summary Judgment on the ground that there was no defence to the claim except as to the amount of damages. The application was supported by affidavit which exhibited the letter of 21st October and Cover Slip, the letter of 20th December and a receipt

showing part payment of the premium.

The letter of 20th December, 1996 stated that the insurance companies on whose behalf the cover note was issued on 21st October 1996, agreed to go on risk on 25th October 1996, and that they subsequently denied liability. That letter amounted to an admission that at the time the cover note was issued the alleged principals had not consented to be bound. Not unsurprisingly the appellant chose not to proceed against the alleged principals. The respondent did not file any affidavit or other evidence.

Subsequently, the respondent obtained leave of the Court on 10th June 1998 to join the alleged principals as third parties claiming from them an indemnity or contribution to the extent of the whole of the appellant=s claim. The proceedings seem plagued with delay because even now the summons for 3rd party directions is still to be heard.

The Judgment

The learned trial judge dismissed the application on the rationale that the material before him revealed three triable issues namely -

1. whether the defendant as a mere broker could be sued successfully for losses as if he were the principal insurer;
2. whether the defendant as a broker can be sued as an agent for an undisclosed or nonexistent principal;
3. whether in the absence of a claim in negligence or fraudulent or negligent misrepresentation or breach of warranty of authority, the plaintiff has any cause of action against the defendant.

The Appeal

The appellant simply challenged the finding that there were

any triable issues of fact or of law.

The Preliminary Procedural Point

The respondent contended that Order 14 procedure was not available to the appellant after the defence had been filed and that accordingly the court should not have considered the affidavit evidence and exhibits. The Rules of Court state the position quite unequivocally as follows -

Order 14 rule 1[1]

> "Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has given notice of intention to defend the action, the plaintiff may, on the ground that the defendant has no defence to a claim included in the writ, or to a particular part of such claim, or has no defence to such claim or part except as to the amount of damages claimed, apply to the court for judgment against that defendant."

The plain meaning of the rule, indicates that the application for judgment is made on the basis that there is no defence, and not on the basis that no defence has been filed or served. From a purposive view the filing of a document of defence may reveal that there is no defence. However interpretation of the rule is assisted by *stare decisis* and I daresay that it is now well settled.

The submission of counsel on which we are now called to adjudicate had been rejected long ago in the case of McLardy v Slateum [1890] 24 Q.B.D. 504. in which Pollock B. explained the position quite clearly as follows -

> "The view taken by other judges and masters, is that the intention of Order XIV., R.1, was that the plaintiff should apply within a reasonable time after appearance of the defendant, but that it very often happens that a defence, which has been delivered, itself discloses facts which

> make an application under Order XIV right and proper. We think that this is the proper construction of the rule.
>
> Although the primary intention of the rule may be that an application should be made before a defence has been delivered in the ordinary course, yet we think that it is not in all cases compulsory. Therefore in our judgment upon this point of law and practice is that a plaintiff is not necessarily too late in making his application under Order XIV R.1 because a defence has been delivered".

The respondent was therefore entitled to make an application for summary dismissal under Order 14. The issue of reliance on the affidavit evidence becomes trite because in compliance with rule 2 of the Order the application must be accompanied by an affidavit verifying the facts and containing a statement of the deponent's belief that there is no defence to the claim. The court was required to consider the affidavit evidence.

The procedural objective is therefore rejected.

The Legal Principles

The legal principles which apply in this case are well settled.

There can be no agency or relationship of principal and agent in regard to an act unless the alleged principal actually or ostensibly authorised or appointed the alleged agent to perform the act for or on behalf of the alleged principal or unless the alleged principal subsequently ratified the act purported to have been performed on his behalf. See Halsbury's Laws of England Vol.1[2] para 19. The essential, logical and reasonable principle that there can be no agency without the consent of the principal was succinctly expressed

by Lord Pearson in the House of Lords case of Garnac Grain Co. Inc. v H.M.F. Faure & Fairclough Ltd. (1968) A.C. 1130 at 1137 -

> "There was not in the argument any dispute as to the law, and I think that so much as is required for the purposes

> of the present case can be shortly stated. The relationship of principal and agent can only be established by the consent of the principal and the agent. They will be held to have consented if they have agreed to what amounts in law to such a relationship, even if they do not recognise it themselves and even if they have professed to disclaim it..."

In such a case where there is no agency because the alleged principal has not consented to the relationship, any person acting without the authority of an alleged disclosed or undisclosed principal who performs or purports to perform an act for or on behalf of the alleged principal, thereby represents and warrants that he has the alleged principal's authority to do so and is liable to be sued for breach of warranty of authority by any third party who has acted upon and relied on the existence of such authority. See Halsbury's 4th Edition Vol 1[2] para 172.

In Starkey v Bank of England [1903] A.C. 114 the House of Lords held that a broker who applied to the Bank of England for a power of attorney for the sale of Consols wrongly believing himself to be instructed by the stockholder was liable to indemnify the Bank against the claim of the stockholder on the ground that he must have been taken to have given an implied warranty that he had authority.

The agent's liability is strict and is not fault based. MacGilvray & Parkington on Insurance Law eighth edition at para 372 to 373 explains -

> "...a person purporting to contract on behalf of another impliedly warrants that he has the authority of that other to make the contract, and, if he has not, he must compensate the other contracting party for any damage resulting from the breach of warranty.
>
> An Agent's liability under this warranty is strict and not dependent on negligence."

The Facts

The pleadings and affidavit evidence revealed that there were no disputes on any fact which could affect the liability of the respondent.

There was no challenge to the allegation that the respondent contracted as insurance broker or agent before obtaining the consent of the alleged insurance principals to do so, and that the appellant acted on and suffered from the warranty that authority to contract existed.

Triable Issues

The matters that the learned judge described as triable issues are in reality questions of law. In each of the three matters there was a factual premise based on non-controversial allegations and evidence. There is no issue or dispute on the facts which could affect the legal questions one way or the other. It is possible therefore to answer these legal questions unequivocally on the facts which are not in dispute between the parties, at least in so far as the pleadings and affidavit evidence in this case disclose.

The three questions of law raised by the learned trial judge are easily answered as follows.

[1] The statement of claim alleged that the respondent contracted as a broker for an undisclosed insurer when he did not have the consent of any such insurer to do so and that the appellant is entitled to compensation. The defence did not contest that allegation, and the documents exhibited with the application for summary judgment established a concrete basis for the allegation. The legal answer is that the respondent can be sued for breach of the warranty that he had authority to make the contract. See Halsbury's para 172, and **Starkey v Bank of England** [*Supra*].

[2] The answer to the second question is the same. A broker to a non-existent principal is liable for the breach of warranty that there was a principal, and is equally liable where an undisclosed principal has not consented or authorised the contract to be made on his behalf. The pleadings and supporting exhibits fall under this principal. See Halsbury's para 19 [*Supra*].

[3] And the third question is answered by the quotation from MacGilvray and Parkington because the agent's liability is strict and does not depend on negligence or fraud.

In my judgment, therefore, the respondent does not have any defence to the statement of claim. The learned trial judge was consequently in error, when he dismissed the application for summary judgment.

The Amendment

During argument on appeal the respondent applied for an amendment to the defence to add a sentence at the end of paragraph 2 in the following terms

> "The defendant at the time of issuing the cover slip was acting on behalf of three principals, namely; New India Insurance Co., Barbados Fire and General, and Caribbean Commercial Insurance Co."

The factual rationale given by counsel was that the respondent should be given an opportunity to prove that there was a typographical error in the letter of 20th December 1996, and that the respondent had authority at the time it issued the cover note.

The entire proceedings, [the issue of the summons on 23rd October 1997, the defence, the application for summary judgment] were conducted on the basis of the letter and the absence of any

allegation that the respondent was acting on behalf of principals who had authorised him to issue the cover note. The proposed amendment does not relate to any new circumstance. There is no allegation of prior notice having been given to the appellant of this alleged error. This is an issue which could and should have been dealt with at an earlier stage in the proceedings. The unavoidable conclusion is, that it was an after thought. In my view it would be unfair at this stage of the proceedings to put the appellant to the expense of seeking to disprove that the respondent did have authority when for the last two and a half years the respondent has allowed the appellant to function on the basis of a letter which acknowledged that the respondent did not have authority at the time the Cover Slip was issued.

I would not allow the amendment.

The liability of third parties

During argument the Respondent applied for a stay of judgment until the completion of the third party proceedings.

In my view, this judgment is not binding on the dispute between the respondent and the insurance companies against whom third party proceedings have been commenced. It is clear that on the information before the court the appellant did not have the factual basis to justify instituting proceedings against these insurance companies and it would be unreasonable and unfair for the Court to make an Order requiring that the expenses of such proceedings should be incurred. Those third party proceedings have a life of their own quite independent of the action between the appellant and the respondent. Third party proceedings already begun as well as the issue of contribution between co-defendants can proceed after the main action has been settled and ended. See Stott v West Yorkshire Road Car Co. Ltd [1971] 3 All E.R. 534. It is therefore still open to the respondent to litigate the issue of the authority and its entitlement to indemnity against the insurance companies. This is quite independent of the claim made by the appellant against the respondent and in my

judgment does not disentitle his right to the immediate entry of judgment in these proceedings.

Quantification of Damages

In this case the particulars of damage although specified and particularised are too complex to be treated as a liquidated debt, and require to be judicially assessed.

Order

I would therefore order that the appeal be allowed; that the judgment of the court below be set aside; that the appellant be at liberty to enter judgment for damages to be assessed; and that the appellant have its costs of appeal to be taxed if not agreed.

DENNIS BYRON
Chief Justice

SATROHAN SINGH
Justice of Appeal

ALBERT REDHEAD
Justice of Appeal