SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

SUIT NO.: 790 of 1993

BETWEEN

PHILLIPS A. MINSON LIMITED (A company incorporated in the United Kingdom acting by its duly appointed Attorney MICHAEL GORDON Solicitor of No. 4 Bridge Street, Castries)

Plaintiff

and

J. Q. CHARLES LIMITED (A company incorporated in St. Lucia having its registered office at Castries)

Defendant

Appearances

Mr. M. Gordon for the Plaintiff

Mrs. B. Fleming and Ms. S. Greer for the Defendant

2001: September 27

October 8

JUDGMENT

[1] Saunders J: This suit was tried on paper. No oral evidence was given. The parties adopted a Statement of Agreed Facts and Issues. Witnesses on either side presented their version of the dispute in the form of unchallenged witness statements that were accompanied by supporting documents. A trial that may have lasted a couple days was thus completed in less than one half of a day.

[2] The facts can briefly be summarised in this manner. The plaintiff ("the sellers") is a United Kingdom company suing to recover the price of goods sold and delivered. The defendant ("the buyers") is a well known Saint Lucian company. The buyers ordered the goods from the sellers through The Star Agency, the St. Lucian agents of the sellers. The buyers employed agents of their own. Crighton International

Limited ("Crighton"), a Confirming House in the United Kingdom, acted as agents for the buyers.

[3] Crighton confirmed the sale and undertook to effect payment for the goods to the sellers. There is no dispute that the buyers placed Crighton in funds sufficient to enable Crighton to perform its obligation to pay the sellers. In due course the sellers delivered the Bill of Lading to Crighton. Unfortunately, Crighton has failed to remit the purchase price of the goods to the sellers. It seems as though at the time it should have so done, Crighton experienced financial difficulties. Crighton has since gone out of business.

[4] The unpaid sellers, having parted with the goods, now seek to recoup the purchase price directly from the buyers. The buyers naturally resist having to pay for the goods a second time. The amount involved is £13,261.07 sterling. This court must therefore decide which of two innocent parties must pay for the insolvency of a third party.

[5] Before examining the law I believe I should delve more deeply into the facts of this matter. Due to the way in which the case came on for trial, there are certain areas of fact that were unfortunately not explored. So for example, I have no evidence of the previous history of dealing between the parties. Specifically, the reason why the buyers saw it fit to retain Crighton was not addressed. Was Crighton regularly employed by the buyers? Did the sellers particularly require the buyers to obtain the services of a confirming house in the United Kingdom? Was that mode of doing the transaction in lieu of providing an irrevocable letter of credit? These issues were not pursued. What is clear is that throughout the transaction, Crighton left the sellers in no doubt that they were acting as agents for the buyers. On the face of the Crighton Confirmation document it is clearly stated that Crighton were "agents for JQ Charles Ltd. St. Lucia" and that "Payment will be effected by us as agents". Further, at the back of that document, Crighton placed a number of "Conditions" attaching to the transaction.

[6] Later in this judgment I shall refer specifically to Conditions 1 and 4. It is appropriate that I should therefore set them out here in full:

> "1. This Contract is entered into by us as agents for the person named overleaf ("the Principal") and accordingly we shall not be liable for
> (a) any breach by the Principal of the terms and conditions of the Contract stated herein and printed on the attachments hereto; or
> (b) any other act or default whatsoever of our Principal…
>
> 4. This Contract is concluded on the terms and conditions herein specified and printed on the attachments hereto and the exclusion of all other conditions whether comprised in correspondence or documents between you and our Principal or your agent or any agent of our Principal or otherwise."

[7] The contractual documentation between the parties seemed to have proceeded in this manner. It appears that first of all, the buyers placed their order for the goods with the St. Lucian agents of the sellers. The order forms, Nos. 04368 and 04369, are dated 17th January, 1992. These forms bear a stamp "Confirmation and Payment through Crighton International Ltd…." We do not know who affixed that stamp to the order forms and when that was done but I am prepared to draw the inference that a representative of Crighton's did so some time in January, 1992.

[8] The next documents were the sellers' indents numbered 2923 – 2925(inclusive) along with certain Conditions of Sale attached thereto. The Conditions of Sale, it must be noted, make no reference to the interposition of a confirming house in the transaction. There then followed the Export Order from Crighton dated 27th January, 1992. It is that Export Order that was backed with Conditions 1 and 4 (inter alia) mentioned above. As previously indicated, the Export Order states that Crighton is acting "as agents for J.Q. Charles Ltd. St. Lucia". The request to the sellers is "Please supply the items specified (on attached Export Order sheet), in accordance with these instructions and the conditions overleaf…." Later down, the document states, "Please apply to Crighton International Ltd. for despatch instructions when goods packed ready – we need to know numbers of cartons,

size and weight". Just below that, in capital letters, appears the following: "WE CONFIRM ORDER PLACED BY J.Q. CHARLES LTD OF ST. LUCIA AS DETAILED ON YOUR AGENTS INDENT 04368/9 DATED 17.1.92 (2 PAGES) HEREWITH". Further down the page, the document speaks to payment and states, "Payment will be effected by us as agents subject to the fulfillment by you of the terms, conditions and instructions stated herein and printed on attachments hereto".

[9] There followed two letters from Crighton, dated respectively 26th February, 1992 and 11th March, 1992, to the sellers. The former refers to certain modifications to the shipping and payment dates. In the latter, Crighton reiterates to the sellers, "As you are aware, payment will be made by us from London in two halves as agreed – 60 days apart".

[10] The goods were delivered by the sellers and ultimately consigned to the buyers by Crighton. On 5th August, 1992, Crighton invoiced the buyers for the goods and, on or shortly after that date, to the knowledge of the sellers, the buyers paid that invoice in full. It is not clear as to precisely when the sellers were made aware that the buyers had paid Crighton in full.

[11] Between 4th September, 1992 and 7th October, 1992 Crighton advised the sellers that, owing to problems with its bankers, it was unable to remit the price of the goods to the sellers. On the 7th October, 1992, the sellers sent a facsimile message to the St. Lucian agents of the sellers advising that,

> "Payment of the ….order is now overdue…….On application to Crighton International Limited, who confirmed the order and undertook payment as agents for J.Q. Charles, we learn that Crighton's bankers have withdrawn banking facilities as from 31st August, 1992, that Crighton have requested the bank to appoint a receiver but none has been appointed as yet. We cannot obtain payment from Crighton on behalf of J.Q. Charles. Please will you urgently speak to J.Q. Charles and establish the position clearly. We now have to look to Charles for payment in full without delay……."

The following day, the sellers wrote to the buyers stating, inter alia, "As your agents have indicated that they will not be paying us, we must ask you to arrange payment to ourselves."

[12] On the strength of these facts, Counsel for the sellers argued that there was one contract, that between the buyers and the sellers. The sellers, he contended, must therefore look to the buyers for payment. Counsel quoted from a passage in Bowstead on Agency, 15th Edition, at page 424. It is there stated that:

> "There is no doubt whatever as to the general rule as regards an agent, that where a person contracts as agent for a principal, the contract is the contract of the principal and not that of the agent; and prima facie, at common law the only person who may sue is the principal and the only person who can be sued is the principal".

The authority cited by Bowstead for this proposition is *Montgomerie vs. U.K. Mutual S.S. Ltd. (1891) 1 Q.B. 370.*

[13] Counsel likened the role of Crighton, the Confirming House, to that of a guarantor and submitted that in law, the sellers could choose whether they desired to pursue either Crighton or the buyers. The principal debtor, the buyers, could not be relieved of their obligation to satisfy the unpaid creditor. The buyers could not, without the consent of the sellers, transfer their liability to discharge the original contract from themselves to their own agents. There was nothing here to establish that the sellers had at any time agreed to such a transfer of liability.

[14] These appear to be compelling arguments on behalf of the plaintiff. One cannot adequately respond to them without examining the nature and scope of the functions of a confirming house in international sales. Surprisingly, there is a dearth of high authority on the subject. Counsel for the sellers referred me to two English decisions. They are both first instance judgments delivered within a year of each other.

[15] The first of these cases is *Rusholme, Ltd. vs. SG. Read, Ltd. (1955) 1 A.E.R. 180*. In that case, certain Australian buyers cancelled their purchase order prior to delivery. The sellers brought an action for damages against the confirming house that had acted for the buyers. The trial judge was satisfied by the evidence given by a director of the sellers that the only reason why his firm accepted the orders was because of the interposition of the English confirming house. Pearce, J. accepted this director's view that "where a confirming house confirms a contract…….[one] is entitled to look to the confirming house personally to see that the contract is carried out". The court also found as a fact that the confirming house had itself assured the sellers in writing that, in respect of the orders,

> "……..they have been confirmed on our official order sheet which, of course, creates a liability as far as we are concerned, and the manufacturers can, of course, hold us responsible……"

[16] As the learned trial judge pointed out, the view of the parties themselves as to what liability they were incurring is not determinative as to that issue. In cases of ambiguity, however, the judge felt that some weight might properly be given to those views. The learned judge sought also to rest his decision on legal principles.

[17] After examining a number of authorities, he held that:

> "The fact that a person is agent and is so known to be does not itself prevent his incurring personal liability. Whether he does so is to be determined by the nature and terms of the contract and the surrounding circumstances. Where he contracts on behalf of a foreign principal there is a presumption that he is incurring a personal liability, unless a contrary intention appears.……..
>
> In my opinion the words "confirmation and payment by …[the defendants]" meant that a confirmation such as the order now sued on was to be issued by the defendants and that financial liability was to be assumed by the defendants……...
>
> I see no reason to doubt that the document means what it says, namely, that the defendants are assuming the liability of a principal buyer as between themselves and the plaintiffs……."

The learned trial judge in that case found nothing to counteract the presumption that the confirming house had incurred personal liability and accordingly, judgment was entered for the sellers against the confirming house.

[18] *Sobell Industries Ltd. vs. Cory Brothers & Co. Ltd. (1955) 2 Lloyd's Rep. 82* was another case where sellers in England sought to make a confirming house in that country liable for the default of a foreign buyer. The defence was that the confirming house had acted solely as agents for a disclosed principal. The court examined the manner in which the confirming house had executed the order forms with their confirmation slips. The learned judge found that the confirming house, in not qualifying the capacity in which they were signing the documents, had clearly rendered itself personally liable.

[19] The trial judge, McNair, J., gave his opinion as to the effect of the confirmation of the contract by the confirming house. He reasoned that:

> "In the case of a confirmation given by a confirming house, it is the contract as a whole that is confirmed, and it seems to me that the whole purpose of the arrangement …….. is that the seller shall have a responsible person in this country to perform the contract as a whole".

Responding to the argument that a person could not simultaneously be an agent and a principal, the judge stated:

> "In my judgment, there is nothing at all unusual in one party being both a principal in one capacity and an agent; he may have those two functions arising out of the same transaction".

[20] The judgment of the Court of Appeal of New Zealand in *Bolus & Co. Ltd. vs. Inglis Bros. Ltd. (1924) N.Z.L.R. 164* sheds much light on the relationship between foreign buying houses and suppliers. I hope I can be forgiven for quoting extensively from the judgment of Salmond, J. at pages 174 – 175 of the report. He states:

> “When a New Zealand merchant procures the goods of an English manufacturer through an intermediary in England the

relation so established between the New Zealand merchant and the English intermediary may be of any one of three kinds,

In the first place, it may be that of vendor and purchaser – that is to say, the intermediary may purchase the goods from the English manufacturer and resell them to the New Zealand merchant.

In the second place, the relation may be that of agency, whereby the English agent is authorized to purchase the goods in his own name and on his own responsibility from the English manufacturer, and to send them to his principal, the New Zealand merchant, but is not authorized to make in the name or on behalf of that principal any contract between him and the English manufacturer, or to impose on the principal any contractual liability towards the manufacturer. In such a case the only contract of purchase and sale is that which is made between the English agent and the English manufacturer, and the only liability of the New Zealand merchant is towards his own agent. The relation between the English agent and the New Zealand merchant in such a case is merely one of agency, and not one of vendor and purchaser, though in respect to the right of stoppage *in transitu* and possibly in some other respects, it is analogous to a contract of sale and purchase and possesses similar incidents……..

In the third place, the relation between the New Zealand merchant and the English intermediary may be one of agency in the strict sense, the agent being authorized not merely to buy goods from the English manufacturer, but to buy them in the name of the New Zealand principal, so as to establish privity of contract between the manufacturer and that principal, and make him responsible to the manufacturer for the price of the goods.

Which of these three essentially different relations is established is a question of fact depending on the intention of the parties as inferred from their words and conduct in the particular case. Where, however, the case is not one of vendor and purchaser, but one of agency, there is a presumption that the agency is of the kind which I have mentioned, and not of the second. The presumption is that the English agent of a foreign principal has no authority to establish any contractual relation between that principal and the English manufacturer, but is employed merely to buy the goods in his own name and on his own responsibility and to forward them to his foreign principal. An agency of the other kind – an agency which authorizes the English intermediary to establish privity of contract between the foreign principal and the British vendor – must be proved in the particular case by evidence

> sufficient to rebut the *prima facie* presumption that the agency was merely an authority to the agent to purchase the goods in his own name without making the foreign principal a party to the contract."

[21] It goes without saying that the commercial value, to both buyer and seller, of the functions of a confirming house, in a transaction involving confirmation, would be substantially reduced if the court were to hold that no privity of contract exists between the confirming house and the sellers. In such a transaction, the seller wishes to assure himself that some responsible entity in his own country has made itself liable for the performance of the contract. On the other hand, the buyer desires to satisfy himself that as long as he performs his obligations to the confirming house the latter will secure the goods for him.

[21] The Conditions laid down by Crighton do suggest to me that within the scope of those Conditions they were entering into an arrangement in which they were principals in their own right. In those Conditions they were careful to circumscribe the limits of their liability to the sellers. If the buyers were in breach of or had defaulted on their obligations, then Crighton had refused to assume liability. Beyond that, it seems to me that Crighton was assuming liability for the payment to the sellers. Nothing in Condition 1 absolved Crighton from liability to the sellers where Crighton itself was in breach.

[22] The sellers here appear to take the view that because Crighton had declared themselves to be the buyers' agents, then there was necessarily only one contract in existence i.e. the contract between the buyers and the sellers. On the contrary, the authorities I have mentioned suggest that there is a presumption that there are in fact two contracts. An onus would therefore rest on the sellers, the plaintiffs in this case, to persuade the court that there are special facts and circumstances in this case sufficient to displace that presumption. The mere fact of an agency arrangement between Crighton and the buyers would not suffice in this regard. There must be some special contract between the buyers and the sellers. See: *Bolus & Co. Ltd. vs. Inglis Bros. Ltd(supra).* Failing this, it seems to me that in

order to make the buyers liable for the breach or default of the confirming house, the sellers should have, at the outset, to the knowledge and with the concurrence of the buyers, expressly reserved a right to pursue the buyers directly in that event.

[23] The buyers have also pleaded several equitable defences. They have submitted that the sellers are estopped both by convention and by election from making this claim. A number of cases including *Amalgamated Investment vs. Texas Commerce (1981) 3 A.E.R. 577; The August Leonhardt (1985) 2 Lloyd's Rep. 28; The Vistafjord (1988) 2 Lloyd's Rep. 343* and *China National Foreign Trade Trasportation Corp. vs. Evlogia Shipping Co. (1979) 2 A.E.R. 1044* have been cited in support of this proposition.

[24] In *Amalgamated Investment* Lord Denning stated as a general principle:

> "When the parties to a transaction proceed on the basis of an underlying assumption (either of fact or law, and whether due to misrepresentation or mistake, makes no difference), on which they have conducted the dealings between them, neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands."

[25] I agree that this principle can be applied to these proceedings. The sellers had all along acquiesced in the express representations by Crighton that the latter would make payment for the goods. From the letters written by them it is clear that, until Crighton became insolvent, they had always looked to Crighton for payment. By acquiescing in Crighton's undertaking to make payment, they had thereby led the buyers to believe that they had waived any right they might have had to treat the buyers as being responsible for payment in the event of Crighton's default. The buyers having acted on this assumption it would now be unconscionable for the sellers to go back on it and seek to collect from the buyers.

[26] In all the circumstances I would give judgment for the defendants with costs which I fix at EC$7,000.00.

Adrian D. Saunders
High Court Judge