

SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

CLAIM NO SLUHCV 2009/0693

BETWEEN:

REMBERT THOMAS

Claimant

And

1. QUARRY PRODUCTS LIMITED
2. KERNIE EMMANUEL

Defendants

Appearances:

Ms. Maureen John for the Claimant
Mr. David Moyston for the Defendant

2010: November 24
2011: June 15

JUDGMENT

- [1] **Belle, J:** In this matter the claimant Rembert Thomas based his claim on the fact that he had to do remedial work on a floor slab because the Second Named defendant Kernie Emmanuel completed a floor slab with hand mixed concrete rather than ready-mixed concrete. Rembert Thomas had contracted with the First Named defendant Quarry Products Limited, a company which supplied concrete, to supply ready-mixed concrete for the floor slab and the company had not performed this contract but returned the funds tendered for the said contract to Kernie Emmanuel without his knowledge.
- [2] Mr. Thomas claimed that the result of laying the floor slab with the hand mixed concrete was that the completed work on the floor slab was generally poor and there

were "several cases of poorly consolidated and mixed concrete, cracking in particular areas of the concrete slab, failed formwork to the soffit of the concrete slab, and poorly constructed stair foundations. According to Rembert Thomas the concrete slab has failed to meet minimum compressive strength of concrete required, (3000 psi) and several readings of the floor slab fell below 1500 psi.

[3] Mr. Thomas further claims that as a result of the aforesaid circumstances the concrete floor slab, in its current state, is unsafe and requires immediate remedial works. Consequently he has suffered loss and damage as a result of which the company and Kerner Emmanuel are jointly liable.

[4] According to Mr. Thomas the remedial work involves the demolition of the entire floor slab, the beam structure, and stairs. The sub-standard work is to be replaced with concrete which has a minimum compressive strength of 3500 psi at a total of Forty – Two Thousand Seven Hundred and Eighty-Seven Dollars and Fifty Cents (\$42,787.50).

[5] It is evident that Mr. Thomas' claim is based on breach of contractual terms expressed or implied for the laying of the concrete slab.

[6] I observe at this point that Kerner Emmanuel failed to file a Defence or play any part in the proceedings. In the circumstances Mr. Thomas had no difficulty proving his case against Mr. Emmanuel.

[7] Quarry Products Limited replied to the claim in terms that Mr. Thomas was a party to a principal agent relationship with Kerner Emmanuel. In other words Mr. Emmanuel was Mr. Thomas' agent as far as the Quarry Products Limited was concerned.

[8] The company goes on to explain the mishap in the following terms in paragraphs 8 and 9 of its defence:

"Paragraph 5 of the Statement of Claim is admitted save and except that the Second Named defendant was present when the delay in the delivery of the concrete was discussed by the First Named defendant and the claimant

There were further delays due to rain and the said delays were discussed with the second named defendant acting in his capacity as the claimant's agent."

- [9] According to the company, Mr. Emmanuel acting as Mr. Thomas' agent terminated the agreement between the company and Mr. Thomas on the 14th day of October 2008. On the termination of the agreement the company reimbursed the sum of \$17, 075.00 paid by Mr. Thomas in respect of the agreement by virtue of a cheque made payable to Kernie Emanuel acting as Rembert Thomas' agent.
- [10] The company also claims that on Rembert Thomas' return to the island the claimant contacted the company's Elsworth Liburd and it was agreed orally between Mr. Thomas and the said Mr. Liburd that Thomas would not and could not hold the company responsible for any loss and /or damage he suffered in respect of the agreement.
- [11] In his witness statement Mr. Thomas said that in the early part of the year 2008 he commenced a single family house ("my home") at Saltibus in the Quarter of Laborie in Saint Lucia. He employed Kernie Emmanuel as a mason to assist with the building of his home. Throughout Emmanuel's employment with him, he always held the position of a mason engaging in labour services only. He (Rembert Thomas), always supervised the construction of his home from its commencement.
- [12] Mr. Thomas said around September of 2008, since he was returning to the United States of America ("US"), and wanted no mistakes made, he told Kernie Emmanuel that as a result of his absence he would prefer ready-mixed concrete instead of hand mixed concrete to avoid any problems, structural or otherwise.
- [13] Mr. Emmanuel recommended Quarry Products Limited and put the Rembert Thomas in touch with them. Thomas said that he discussed the requirement of the job with Mr. Elsworth Liburd. Mr Liburd informed him that the concrete could not be poured on the decking until there were several dry days. Indeed it had been raining for some time.
- [14] The meaning and effect of the next part of the conversation between the claimant and Mr. Liburd are pivotal in my view. In that exchange the Mr. Thomas informed Mr Liburd that he should liaise and contact Kernie Emmanuel when he is ready to pour the concrete so that Emmanuel could supervise the pouring of the concrete and spread it on the deck as necessary, as he (Rembert Thomas) would be out of the country at the time. Mr. Liburd then agreed.

- [15] Mr. Thomas said that he subsequently went to Quarry Products' business place and paid the said company \$17,075.00 with a Scotia Bank Cheque drawn in his name. The company produced a receipt for the said amount dated 26th September 2008.
- [16] The way Mr. Thomas saw it was that the company was paid to do a job and was to contact Kernie Emmanuel when he was ready to execute the job, thereby completing the performance of the agreement.
- [17] However he was informed some days later that the company never came to pour the concrete and instead the Kernie Emmanuel was hand-mixing concrete to build the floor slab. On calling the company for an explanation Mr. Liburd informed Mr Thomas that the company returned the cheque to Kernie Emmanuel because of their inability to pour the concrete because of the heavy rains.
- [18] Mr Liburd also informed Mr. Thomas that the Mr. Emmanuel requested the return of the monies from the company and said he would hand-mix the concrete instead because of their delay in delivering the concrete.
- [19] On these premises Mr. Thomas expressed the view that the company had unlawfully handed over the cheque to the Kernie Emmanuel. He thought that this varied the contract without any reference to him, and the company should have contacted him before entering into any arrangement with Kernie Emmanuel. He believed that this was in breach of their agreement and the said breach, along with Emmanuel's poor judgement in using the hand-mixed concrete, resulted in the damage suffered by Mr. Thomas.
- [20] It is important to quote part of the company's evidence in chief in paragraphs 8-15 of Mr. Liburd's witness statement.

"8. The claimant in the presence of the second named defendant was told by me that due to the condition of the road leading to the said site due to heavy rainfall that the contract could only be completed when the road was dry.

9. The claimant then introduced me to the second named defendant who the claimant described as the person in charge of the site.

10. *The claimant subsequently told the first named defendant through me that he was leaving the island and would be leaving the second named defendant in charge of the site in his absence.*

11. *The claimant further told me that I would have to communicate with the second named defendant as to the date the concrete could be poured and our contract in respect of such complete.*

12.. *The second named defendant acting as the claimant's agent or ostensible agent in respect of the site did communicate with me in respect of the matters mentioned in paragraph 11 herein.*

13. *Subsequently the second named defendant contacted me in my capacity as the First named defendant's Manager and told me that the claimant was very upset that the concrete has not yet been poured and the claimant has asked the second named defendant to collect the sum paid under the contract so that the second named defendant could do the contract himself.*

14. *The First named defendant through me paid the Second named defendant acting as the claimant's agent or ostensible agent the sum of \$17,075.00 by way of a cheque dated the 14th day of October 2008 on the said date as refund for the payment to the claimant was made by the First named defendant.*
XXXXXX

15. *The claimant telephoned me 3 days later denying that he had asked the Second named defendant to collect the refund referred to in paragraph 14 herein."*

[21] I should note here that Mr. Thomas lawyer did not object to any aspect of this evidence. The evidence of the conversation between Mr Liburd and Kernie Emmanuel was given on the basis that there was a presumption that the principal was aware of his agent's actions consistent with his agency. Mr. Emmanuel's words are also essential to an understanding of the basis on which the company agreed to the termination of the contract to supply ready-mix concrete for the floor slab. However the court does not accept that Kernie Emmanuel's words are truthful.

[22] But although the said instruction to return the money to Kernie Emmanuel is denied, the fact that there was such a conversation is not denied by Emanuel nor refuted by Mr. Thomas.

[23] Indeed it would appear that Mr. Liburd of Quarry Products Limited and Mr. Thomas continued to have cordial relations even after the incident and Mr. Liburd visited the work site on Mr. Thomas' invitation and pointed out deficiencies in the slab work.

- [24] In my view the following legal issues arise on these facts:
1. Whether Quarry Products Limited and Kernie Emmanuel are in breach of contract with Rembert Thomas.
 2. Whether the Quarry Products Limited unlawfully varied the terms of the agreement with Mr. Thomas or breached the agreement when he returned the sum of \$17,075.00 to Kernie Emmanuel.
 3. Was Kernie Emmanuel the agent or apparent agent of the claimant with respect to all matters related to the work site and pouring the concrete?
 4. Was Kernie Emmanuel the agent of the claimant with respect to financial matters?
 5. Was the return of the said sum of \$17,075.00 to Kernie Emmanuel lawful?
 6. Did Kernie Emmanuel's authority with the claimant extend only to the supervision of the pouring of concrete?

[25] I answer questions 3, 4 and 5 in the affirmative and 6 in the negative. My understanding of the law of agency is that if the agent is being held out as such, the agent is responsible to his principal for his acts. Kernie Emmanuel would have had the duty to account to Mr Thomas for his use of the cheque which was given to him by the company. He would have the right to use it only in the service of Mr. Thomas. If he did not do so he would be liable for losses due to his failure to perform his agency properly.

[26] In this context the handing over of the cheque to the person being held out as an agent would not be unlawful. It is debateable whether there was a breach of the contractual terms between Mr Thomas and Quarry Products Limited. Quarry Products had reason to believe that the contract was being legally terminate, Kernie Emmanuel may have known that his recovery of the cheque was in breach of the contract but this in itself did not make the act of handing the cheque to Emmanuel unlawful.

[27] The legal concept of agency is defined as the relationship which arises whenever one person (the agent) acts on behalf of another person (the principal) and has power to affect the principal's legal position with regard to a third party. See **Dowrick** (1954) 17 M.L.R 24. It is also said that the two most important functions of an agent are (a) making contracts on his principal's behalf and (b) disposition of the property.

- [28] A more modern definition contained in the eighteenth edition of Bowstead & Reynolds on Agency para. 1-0003, page 2 is as follows:

"The word "agency", to a common lawyer, refers in general to a branch of the law under which one person, the agent, may directly affect the legal relations of another person, the principal, as regards yet other persons, called third parties, by acts which the agent is said to have the principal's authority to perform on his behalf and which when done are in some respects treated as the principal's acts. These acts are probably thought of as most likely to occur in connection with the formation and discharge of contracts and in disposition of property, but the same idea appears, sometimes in modified form, in many other parts of the law."

- [29] Ms. John Counsel for Mr Thomas argued that the matter turns on the issue of ostensible agency. She relied on the reference to Lord Diplock's dictum in **Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd** [1964] 2 QB 480

"An 'apparent' or 'ostensible' authority... is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the 'apparent' authority, so as to render the principal liable to perform any obligations imposed upon him by such contract. To the relationship so created the agent is a stranger. He need not be (although he generally is) aware of the existence of the representation but he must not purport to make the agreement as principal himself. The representation, when acted upon by the contractor by entering into a contract with the agent, operates as an estoppel, preventing the principal from asserting that he is not bound by the contract. It is irrelevant whether the agent had actual authority to enter into the contract."

- [30] **Freeman & Lockyer** was applied in the ECSC Court of Appeal decision of **Village Cay Marina Limited v John Acland et al** [1996] ECLR 161, page 168 where Floissac CJ stated after quoting another passage from **Freeman & Lockyer** :

*"The doctrine is further explained in **Armagos Ltd v Mundogas**, S.A (1986) 2 AER 385. There Lord Keith (delivering the judgment of the House) said pp.389 &390*

'Ostensible authority comes about where the principal, by words or conduct, has represented that the agent has the requisite actual authority, and the party dealing with the agent has entered into a contract with him in reliance on that representation. The principal in these circumstances is estopped from denying that actual authority existed. In the commonly encountered case, the ostensible authority is general in character, arising when the principal has placed the agent in a position which in the outside world is generally regarded as carrying authority to enter into transactions of the kind in question.'

- [31] The submission is further supported by **Chitty on Contract**, 26th Edition, para. 2530:
“The basis of the doctrine of apparent authority is that the third party is entitled to assume that an agent has such authority as he appears to have or would normally have, whether or not the principal has in fact granted such authority.”
- [32] Mr. Thomas counsel’s submissions are based largely on the premise that Thomas had orally informed the company on or about the date of the payment of \$17,075.00 for the ready-mix concrete, that Kernie Emmanuel was representing him with respect to the supervision of the pouring of the concrete on the decking only. Further, counsel submits that Mr. Thomas did not authorize or consent to the company dealing with Kernie Emmanuel on his behalf in respect of financial or other matters.
- [33] Indeed Rembert Thomas pleaded in paragraph 7 of his statement of claim that:
...“The claimant had orally informed the First Named defendant on/ or about the date of payment of the said sum, that the Second Named defendant was representing him in respect of the supervision of the pouring of the concrete on the decking only. At no time did the claimant authorize or consent to the First Named defendant dealing with the Second Named defendant on his behalf in respect of financial or other matters.”
- [34] However under cross-examination by Mr. Moyston counsel for the company stated that Mr. Thomas said words to the effect that he *never told Mr. Liburd that Mr. Emmanuel was employed on a labour only basis.*
- [35] Later, under cross examination Mr. Thomas admitted that he *did not tell Mr. Liburd that Mr. Emmanuel was not to deal with any financial matters in respect of Quarry Products.*
- [36] Counsel for the company argued that his client relied upon an oral contract and that contract included the conversation recalled by Mr. Liburd and his witness Mr. Benoit in which Mr. Thomas represented that Kernie Emmanuel was in charge of the work site in his absence.
- [37] Counsel submitted that based on this representation Quarry Products reasonably assumed that during Mr. Thomas’ absence from the island Kernie Emmanuel was in charge of the project and that in that respect Kernie Emmanuel would act as Rembert Thomas’ agent.

- [38] Counsel submitted that it was during Mr Thomas' absence from the island that Kerner Emmanuel demanded that the Quarry Products pay him the sum paid by Thomas to the said company in respect of the contract. Based on the contract and Emmanuel's apparent authority, the company paid over the sum paid to it by Mr. Thomas, the sum of \$17,075.00 to Kerner Emmanuel by cheque.
- [39] Mr. Moyston referred to Mr. Thomas' evidence under cross-examination to the effect that he never told Quarry Products that Kerner Emmanuel had a "labour only contract" nor that Emmanuel had no authority to deal with financial matters on Thomas' behalf.
- [40] Counsel also argued there was no evidence before the court to indicate that the company and Mr Emmanuel colluded with each other, either to defraud Mr. Thomas nor to use hand mixed concrete instead of ready-mix concrete as per the contract to which the claim relates.
- [41] Counsel was in agreement on the statement of the law of agency cited by Ms. John, counsel for Mr. Thomas. He therefore argued that in this case it is estopped from denying the fact of Kerner Emmanuel's agency under the general law of estoppel and, and it is immaterial whether the ostensible agent had no authority whatsoever in fact.
- [42] The issue that would arise on this argument is whether the claimant would be entitled to limit Kerner Emmanuel's authority. Mr. Thomas argued that he could, since the company was never told that Kerner Emmanuel had any authority beyond assisting with the pouring of the ready –mixed concrete.
- [43] But counsel for the company argued that this was not possible since the third party would rely on the ostensible or apparent authority. In this regard I think that the circumstances of the case are very important. In this case the principal was out of state. He had never exchanged information to enable him to communicate with Thomas overseas or with any other agent resident in or outside of Saint Lucia. It is therefore reasonable to conclude that Kerner Emmanuel appeared to the company's representative to be the only agent Mr. Thomas in Saint Lucia in his absence.
- [44] The issue of an agent's apparent authority is not new to the law. Cases older than **Freeman & Lockyer v Buckhurst** laid down the prerequisites for the application of the

principle. For example In **Rama Corporation v Proved Tin and General Investments Ltd.** [1952] 2 Q.B. 147, 149-150 Slade J held,

“Ostensible or apparent authority which negatives the existence of actual authority is merely a form of estoppel and a party cannot call in aid an estoppel unless three ingredients are present (1) representation, (2) a reliance on that representation and (3) an alteration of his position resulting from such reliance.”

[45] An illustration of the first condition occurred in **Colonial Bank v Cady** (1890) 15 Appeal Cases 267 a decision of the House of Lords. In this case the deceased, in a probate matter, owned shares which could be transferred by using a transfer form on the back of the share certificates. On his death the executors, wishing to get themselves registered in the books of the company, signed the transfer in blank and sent it to a broker. The broker fraudulently pledged them with a bank who made no inquiry as to his authority. On discovering the fraud the executors sued the bank to recover the shares. In this case it was held the executors were entitled to recover the shares. The decision is explained on the basis that the House of Lords was of the view that the manner of execution of the share certificates cast upon the Bank the duty of inquiry.

[46] In confirming the legal doctrine of estoppel based on the representation, Lord Halsbury stated:

“But the doctrine that a person shall not be permitted to represent or permit to be represented a state of facts at one time and afterwards, when such representation has induced another person to change his position, seek to shew that such his representation was erroneous is a doctrine too well established now to be shaken, and whether it is called “estoppel” or not the principle is perfectly intelligible.

[47] It has been argued that the company ought to have inquired with Mr. Thomas whether he had terminated the contract and authorised the tendering of the cheque to Mr. Emmanuel. But unlike the situation in **Colonial Bank v Cady**, in the case at Bar Mr. Emmanuel was integrally connected to both Mr Thomas and the pouring of the concrete for the floor slab. Those facts, plus the fact that the rain had prevented the company from delivering the ready-mixed concrete, made Kernie Emmanuel's act less suspicious than that of the brokers in **Colonial Bank** case.

[48] Furthermore I believe Mr. Liburd of Quarry Products when he says that Mr. Thomas told him that Mr. Emmanuel was in charge of the project in his absence. His assertion is supported by the witness Mr. Benoit. Even if Emmanuel's authority was restricted to the laying of the slab, the point is that no distinction was made in the communication as to the authority for the laying of the slab, and the authority for paying the cost of mixing the cement and laying the slab. Although Mr. Thomas never said that Emmanuel had authority to deal with financial matters, he never asserted that Emmanuel did not have such authority.

[49] It is therefore entirely plausible that this was an honest mistake by the company in presuming that Kernie Emmanuel had authority to ask for the refund and proceed to complete the slab-laying project by some other means.

[50] It is important to note that this contract was completely oral except for the cheque tendered, nothing else was written. There was therefore no chance of the written terms contradicting the company's assumptions, or putting them on their inquiry.

Conclusion

[51] Mr. Thomas has presented sufficient evidence to prove the method calculation of the loss of \$42,787.00 and \$5,510.00 in expenses, but the nexus between the cause of the loss and the defendants must be clear to prove the case against them. In this case the loss was caused by Kernie Emmanuel's deliberate step to do what he was not authorised to do. Indeed even if he acted in the positive spirit of attempting to complete the project, he acted negligently and in breach of his contract with Mr. Thomas and is entirely liable for his acts.

[52] On a matter of procedure, Counsel for Mr Thomas has submitted that Quarry Products Limited was in breach of CPR 10.7 © because the company failed to address the allegation that Mr. Thomas had told the company's Mr Liburd that Mr. Emmanuel's contract was a labour contract only and never said that Emmanuel had any authority to deal with financial matters. The result of this, she argued, was that the company was presumed to have admitted this allegation, and should not be permitted to state otherwise at trial or amend its defence at this stage.

- [53] However this assertion is false. The company addresses the issues raised in paragraph 7 of the Statement of claimant in a number of ways and not just in the paragraph in which it states that it denies paragraph 7 of the claimant's claim and puts the claimant to specific proof.
- [54] In paragraph 4 of the Defence the company states that Mr. Thomas (the claimant) orally told the First named defendant, in his language, that the Second named defendant would be in charge of the project during his absence from the island thereby notifying the First Named defendant that the Second Named defendant was the claimant's agent or at the very least the claimant's ostensible agent in respect of the project during the claimant's absence from the island.
- [55] By way of further explanation the company stated in paragraph 11 of the Defence:
- "That the Second Named defendant acting as the claimant's agent terminated the agreement on the 14th day of October 2008 as referred for the sum of \$17,050.00 paid by the claimant to the First Named defendant in respect of the agreement and which sum was reimbursed by virtue of a cheque made payable to the Second Named defendant acting as the claimant's agent."*
- [56] Mr. Thomas' other problem was that under cross examination he stated that he never told the 1st defendant that the 2nd defendant's contract was a "labour only contract". The statement that Kernie Emmanuel was representing him in respect of the pouring of the concrete on the decking only could be interpreted in the context of Emmanuel being in charge of the project. Secondly Mr. Thomas admitted that he did not tell Mr. Liburd that Emmanuel had no authority in financial matters.
- [57] I therefore agree with counsel for the company that the Civil Procedure Rules do not require that defendants refute all averments made against them by the claimant in the order laid out in the Claim as long as the pertinent issues are addressed. Counsel had set out the company's understanding of the contractual terms by which it was bound. This was sufficient to answer the Mr. Thomas assertions in paragraph 7. of his statement of claim.
- [58] I therefore find that the claimant Mr. Rembert Thomas has failed to prove his case against Quarry Products Limited and I therefore dismiss the Claim against the First Named defendant Quarry Products Limited, with costs awarded to the company pursuant to Part 65 of the CPR 2000.

[59] The Claim against the Second defendant Kerner Emmanuel who has never participated in the case is successfully proved in all respects and Kerner Emmanuel is held liable to pay the claimant the sum of \$42,787.00 in damages plus expenses of \$5,510.00 and costs pursuant to Part 65 of the CPR 2000.

Francis H V Belle
High Court Judge