Privy Council Appeal No. 26 of 1981

Kooragang Investments Pty. Limited – – – – *Appellant*

v.

Richardson & Wrench Limited – – – – – *Respondents*

FROM

THE SUPREME COURT OF NEW SOUTH WALES

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 27TH JULY 1981

Present at the Hearing:

LORD WILBERFORCE

LORD SIMON OF GLAISDALE

LORD ELWYN-JONES

LORD EDMUND-DAVIES

LORD BRIDGE OF HARWICH

[*Delivered by* LORD WILBERFORCE]

This is an appeal from a judgment of Rogers J. in the Supreme Court of New South Wales, Common Law Division, Commercial List, whereby he dismissed the appellant's action with costs.

The appellant company is a finance or moneylending company which (*inter alia*) lends money on mortgage. In March and June 1973 it made two advances on mortgage of real property in suburbs of Sydney, one of property in Glebe, the other of property at McMahons Point. Both of these advances were made in reliance on valuations made by Thomas George Rathborne ("Rathborne") and it is not now disputed that they were made negligently. They resulted in a loss to the appellant. The respondents, Richardson & Wrench Ltd. ("R. & W.") are real estate agents and valuers. They employed valuers, of whom Rathborne was one. The issues in this action now remaining for decision are (*a*) whether R. & W. are vicariously responsible for Rathborne's negligence, (*b*) whether R. & W. owed a duty of care to the appellant in respect of either or both of the two valuations. Both issues were decided in favour of the respondents at the trial.

The first issue depends upon whether the valuations in question were made by Rathborne in the course of his employment by R. & W. Evidence as to the authority of valuers employed by R. & W. was given by a director, Mr. Hodgson. Rathborne himself was not called by either side.

When R. & W. received instructions to value property, the work was allocated by Mr. Hodgson to one of five valuers of whom Rathborne was one; a Mr. Rowan was another. Usually work was allotted on a geographical basis, but in some cases where a particular client called for a number of valuations the same valuer would deal with those valuations, irrespective of location. One such instance was work done for the Giles Bourke Group of Companies (" G.B. Group ") which played a critical role in this matter: valuations for them were carried out by Mr. Rowan and Rathborne.

There was a definite and strict internal procedure within R. & W. which valuers had to follow. All documentation including instructions, field-notes and other material was kept in a file. When the valuer was ready to make his valuation, it was typed by one of three secretaries. In relation to valuations exceeding $100,000, Mr. Hodgson was to be informed. All valuations were prepared in one original, one carbon copy on white paper and one on pink. The latter copy was bound in a valuation book—which was kept as a permanent record. The client was given the original and the white carbon and, unless he paid immediately, he was sent at the same time an invoice. Copies of this invoice were retained by R. & W. and used to give reminders to the client. The paper on which the valuations were made was headed with the respondents' name and address, and the names of the five valuers appeared in the left hand margin. In a box on the right there would normally appear the initials of the valuer concerned, in Rathborne's case " TGR ", followed by the initials of the typist. There was a cover sheet in front of the valuation, stating the name of the client and the property; it bore at the foot the name of the respondents. The valuation itself was signed in the name of the respondents—i.e. " Richardson & Wrench Ltd.", without indicating who had actually signed. Rathborne had authority so to sign valuations made by him for clients of R. & W.

As regards the appellant, relations between it and R. & W. started in 1972. The appellant was a dormant subsidiary of a large public company, Australian Fertilizers Ltd. (" A.F.L."). A.F.L. caused the appellant to change its name to its present designation and to obtain a moneylending licence: it was to lend money made available by A.F.L., under directions from that Company. R. & W. had a long established relationship with A.F.L. and was naturally consulted by the appellant when it entered the moneylending business.

On 21 February 1972 the appellant wrote a letter to Mr. Hodgson, of R. & W., setting out the procedure to be followed: this was to apply " in all applications which appear suitable to us ". The procedure involved a preliminary inspection of the property to be charged, followed by a general comment by R. & W. on its suitability: a fee of about $25. then became payable. The letter continued that thereafter " we (sc. the appellant) will advise you by letter when an applicant may seek a valuation on a property. It is expected that you will provide your normal valuation which will show land and buildings separately ". There was to be a separate letter in which R. & W. were to supply information under a number of listed headings.

It is now necessary to turn to the G.B. Group. This was a group of companies which, as stated, was a client of R. & W. A Mr. John Bourke seems to have handled the matters relevant to this case.

In 1972, before 20 November, there were approximately 20 valuations done by R. & W. for the G.B. Group: all of these were done by Rathborne or Mr. Rowan. On 20 November 1972 Mr. Hodgson issued a memorandum to all R. & W. valuers, expressed as referring to " Giles Bourke Holdings, Fidelity Acceptance Corporation, Feutron Interiors,

Group Unity Securities (sic) and Associated Companies" (i.e. members of the G.B. Group), instructing them that as substantial sums of money remained unpaid for completed valuations, further valuation work from this client was refused until payment was made. Rathborne signed this memorandum in acknowledgment. This instruction was not revoked during the critical period—November 1972 to September 1973. What happened thereafter was the subject of some contention before their Lordships which involved careful examination of a number of valuations and correspondence. Their Lordships will not set this out in detail. They are satisfied, and this is the vital conclusion, that, with the exception of two valuations made in December 1972, themselves not paid for during the period, no genuine valuations were made for the G.B. Group during the critical period. By "genuine valuations" are meant valuations carried out in a regular manner for R. & W., entered in R. & W.'s books, and paid for.

On the other hand, there were some 30 valuations, including the two now in issue, which were carried out by Rathborne for the G.B. Group which were not "genuine" in the sense just referred to. The circumstances of these were as follows.

In November 1972 Rathborne had become a Director of Group Unity Syndications Pty. Ltd. -a company of the G.B. Group. In 1973, on instructions from companies in the group, he prepared valuations- two of which were those the subject of the present proceedings. All these valuations were prepared by Rathborne at the offices of the G.B. Group. They were dictated by Rathborne to a secretary of the Group put at Rathborne's disposal by Mr. J. Bourke and typed by her on headed paper of R. & W. (see above) provided by Rathborne. Rathborne then signed R. & W.'s corporate name. In the case of the Glebe valuation the identifying box was left blank: in the McMahons Point valuation it was filled in with TGR/SC. The initials SC, not those of the typist, were inserted on Rathborne's instructions. Only one version of the valuation was made. This was then photocopied; the result of the photocopying in the case of the Glebe and McMahons Point valuations was to cut off the left hand margin, including, whether by accident or design, the names of the valuers. The ultimate client, i.e. the appellant, who received a photocopy, thus had no knowledge of the identity of R. & W. valuers and no knowledge that the valuation had been done by Rathborne. This is obviously crucial in relation to a possible contention of "holding out".

Furthermore, as to the "non-genuine" valuations:

(1) No instructions to carry them out were recorded with R. & W.;

(2) Neither Mr. Hodgson, nor any other director of R. & W., knew that Rathborne was being instructed to make these valuations, nor did Mr. Hodgson allocate the valuers or supervise them;

(3) No file was opened, or documentation prepared, in relation to the valuations;

(4) No fee was charged by or paid to R. & W. for these valuations.

These circumstances, taken together, establish a high degree of irregularity and, to understate, of suspicious behaviour. The learned judge did not characterise them, as their Lordships might be tempted to do. He confined himself to a consideration whether these valuations were made by Rathborne in the course of his employment by the respondents and found that they were not.

It is clear from what has been stated above that no question of ostensible authority or of "holding out" arises. The appellant did not deal with Rathborne, or know of his existence, or rely upon his authority as a valuer. Reliance on any ostensible authority of Rathborne was in

fact disclaimed by leading counsel for the appellant at the trial. The issue is one of actual authority, or nothing. An issue of actual authority includes one of action within the course of employment.

The manner in which the common law has dealt with the liability of employers for acts of employees (masters for servants, principals for agents) has been progressive: the tendency has been toward more liberal protection of innocent third parties. At the same time recognition has been given by the law to the movement which has taken place from a relationship—akin to that of slavery—in which all actions of the servant were dictated by the master, to one in which the servant claimed and was given some liberty of action. In recent times it is common knowledge that many employees supplement their wages by independent use in their own interests of the skills, and sometimes the tools, which they use in their employment. These activities may be above-board and legitimate: or they may be surreptitious. Problems of authority and the course of employment must be approached in the light of these realities.

Beyond cases of actual authority to commit a wrongful act, of which only rare instances appear, to hold the employer liable for negligent acts was simple and uncontroversial. Negligence is a method of performing an act: instead of it being done carefully, it is done negligently. So liability for negligent acts in the course of employment is clear. Cases of fraud present at first sight more difficulty: for if fraudulent acts are not directly forbidden, most relationships would carry an implied prohibition against them. If committed for the benefit of the employer and while doing his business, principle and logic demand that the employer should be held liable, and for some time the law rested at this point. The classic judgment of Willes J. in *Barwick v. English Joint Stock Bank* (1867) L.R.2 Ex. 259 stated the principle thus (at page 266):

> "In all these cases it may be said . . . . that the master has not authorized the act. It is true, he has not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in."

That was a case where the wrong was committed for the master's (viz. the bank's) benefit, and Willes J. stated this as an ingredient of liability:

> "The master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved" (page 265).

This judgment (*a*) did not cover the case where the wrongful act was committed solely for the servant's benefit, and (*b*) is no authority as regards acts done by the servant outside the scope of his employment.

What then if the wrong was committed solely for the benefit of the employee? Although Willes J. did not so state, or even imply, it took the decision of the House of Lords in *Lloyd v. Grace, Smith & Co.* [1912] A.C. 716 to dispel the suggestion that there was no liability of the employer for frauds or wrongs committed for the benefit of the employee. Earl Loreburn said (at page 725):

> "Willes J. cannot have meant that the principal is absolved whenever his agent intended to appropriate for himself the proceeds of his fraud. Nearly every rogue intends to do that."

and this point was elaborated in the classic opinion of Lord Macnaghten. Since then it has never been held, or contended, that for liability to exist, the act must be done for the benefit of the master. If the act

was in fact done for the master's benefit, that is a valuable indication that it was done in the course of employment: the converse was thenceforth not true.

So the fact, here, that Rathborne was acting exclusively for himself and the G.B. Group does not determine the case.

The second point remains for examination. The appellant's contention, indeed its main argument, was that based on the words (see above) " he has put the agent in his place to do that class of acts ": so, R. & W., it argued, set Rathborne up as a valuer to prepare valuations which would be placed before intending lenders and to sign them in the name of R. & W.: this is enough to fix R. & W. with liability.

Emphasising, once again, that there is no question in this case of any " holding out " of Rathborne by R. & W. (if there were, the case would be wholly different), the appellant's argument involves the proposition that, so long as a servant is doing the acts of the same kind as those which it was within his authority to do, the master is liable, and that he is not entitled to show that in fact the servant had no authority to do them. This is an extreme proposition and carries the principle of vicarious liability further than it has been carried hitherto. It is necessary, first, to consider whether it is supported by authority.

There is no doubt that the proposition contended for is contradicted, as a matter of principle, by that group of cases which is concerned with the use of motor vehicles. These are cases (i) where a servant has, without authority, permitted another person to drive the master's vehicle, (ii) where a servant has, without authority, invited another person on to the vehicle, who suffers injury, (iii) where a servant has embarked on an unauthorised detour, or, as lawyers like to call it, a " frolic of his own ".

These cases have given rise to a number of fine distinctions, the courts in some cases struggling to find liability, in others to avoid it, which it is not profitable here to examine. It remains true to say that, whatever exceptions or qualifications may be introduced, the underlying principle remains that a servant, even while performing acts of the class which he was authorised, or employed, to do, may so clearly depart from the scope of his employment that his master will not be liable for his wrongful acts.

In the present case, their Lordships are admittedly in a different factual area: the appellant says so different that a fresh approach must be made. A number of authorities have been invoked. Their Lordships consider it profitable to confine their attention to five.

It has already been pointed out that *Barwick's* case itself does not support the appellant's argument: the bank manager there was clearly acting within the scope of his employment, and the contrary was not examined or discussed. *Swift v. Winterbotham and Goddard* (1873) L.R.8 Q.B. 244 too did not raise any issue as to the course of employment: the bank manager was clearly so acting and the issue was whether the enquiry as to credit made by one bank of another bank was to be taken as having been made for a customer of the enquiring bank. *Mackay v. Commercial Bank of New Brunswick* (1874) L.R. 5 P.C.394 was relied on as a parallel to the present case in that there, as here, the third party and ultimate plaintiff did not know of the existence or identity of the (fraudulent) agent: but the parallel stops there. There was no question but that Sancton, the agent in question, was doing the bank's business for the benefit of the bank and that the bank benefited by his fraudulent act. It was a clear case of actual authority to do the act in question, albeit honestly—so that it was plainly in the course of Sancton's employment by the bank.

In *Swire v. Francis* (1877) 3 App. Cas. 106 Shaw, the fraudulent agent, was in charge of the respondent's business at Kiukiang, with authority to make advances and to enter them when made in the account. He had a general authority to draw bills on behalf of the respondents: he did so, and the respondents received the money, which Shaw then misappropriated. It was as clear as could be that Shaw was throughout acting in the course of his employment.

The authority most relied upon by the appellant was *Uxbridge Permanent Benefit Building Society v. Pickard* [1939] 2 K.B. 248. The case itself decides no more than that it is not necessary, in order to enable a third party to hold a solicitor liable for the fraud of his clerk, that the third party should be, as in *Lloyd v. Grace, Smith & Co.* she was, a client of the firm. The third party there was an intending mortgagee. That the clerk Conway was acting in the course of his employment was clear—all that could be suggested to the contrary was that he acted fraudulently and did not comply with some internal requirements of his master's business. In the course of his judgment the Master of the Rolls (Sir Wilfrid Greene) said this (at pages 254–5):—

> "In the case of the servant who goes off on a frolic of his own, no question arises of any actual or ostensible authority upon the faith of which some third person is going to change his position. The very essence of the present case is that the actual authority and the ostensible authority . . . were of a kind which, in the ordinary course of an everyday transaction, were going to lead third persons, on the faith of them to change their position, just as a purchaser from an apparent client or a mortgagee lending money to a client is going to change his position by being brought into contact with that client. That is within the actual and ostensible authority of the clerk. It is totally different in the case of a servant driving a motor-car or cases of that kind where there is no question of the action of third parties being affected in the least degree by any apparent authority on the part of the servant."

The distinction thus drawn between the "driving" cases, to which reference has been made, and cases where a third party deals with an agent is no doubt valid and useful: it is so because it enables, in the latter cases, an argument to be based upon ostensible or apparent authority. In the *Uxbridge* case the third party (the Building Society) was dealing with the (fraudulent) servant: that was the essence of the case: to quote again the Master of the Rolls "the authority of a clerk occupying the position of the principal to deal with third parties . . . . cannot be denied" (page 253).

But where, as here, there was no dealing with the servant or agent, and where the issue is one of actual authority or total absence of authority, the case gives no support for an argument that authority need not be proved but is to be inferred from the fact that the acts done are of a class which the master could himself have done or have entrusted to the servant.

In the present case, R. & W. did carry out valuations. Valuations were a class of acts which Rathborne could perform on their behalf. To argue from this that any valuation done by Rathborne, without any authority from R. & W., not on behalf of R. & W. but in his own interest, without any connection with R. & W.'s business, is a valuation for which R. & W. must assume responsibility, is not one which principle or authority can support. To endorse it would strain the doctrine of vicarious responsibility beyond the breaking point and in effect introduce into the law of agency a new principle equivalent to one of strict liability.

If one then enquires, as their Lordships think it correct to do, whether Rathborne had any authority to make the valuations in question, the

answer is clear: it is given in clear and convincing terms by the learned judge. Rathborne was not authorised to make them: he made them during a period when the G.B. Group were not in a client relationship with R. & W., when valuers were ordered not to do business with them. Rathborne did them, not as an employee of R. & W., but as an employee, or associate, in the G.B. Group and on their instructions. They were done at the premises of the G.B. Group, and using the staff of the G.B. Group: they were not processed through R. & W. and no payment in respect of them was made to R. & W. Mr. Hodgson, the responsible director, knew nothing of them. They had no connection with R. & W. except through the use, totally unauthorised—to say nothing more—of R. & W. stationery. A clearer case of departure from the course or scope of Rathborne's employment cannot be imagined: it was total. The judge's conclusion on this part of the case was, in their Lordships' opinion, entirely correct.

If the conclusion had been reached (contrary to what has been said) that R. & W. were responsible for Rathborne's negligence in connection with the valuations, it would have been necessary to consider whether they owed a duty of care in respect of them to the appellant. This would be upon the principle established by the House of Lords in *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] A.C. 465—a case followed in Australia.

It was not disputed by the respondents that as a matter of principle that case was capable of invocation here, but reliance was placed upon certain special circumstances affecting the valuations in question, including the letter written by the appellant to the respondents on 21 February 1972 (see above), as excluding liability. In view of their decision on the first and main question of the authority of Rathborne, and since, moreover, no question of principle arises, their Lordships do not think it necessary to express any opinion as to the correctness of the learned judge's opinion—in favour of the respondents—on this point. Nor is any conclusion necessary upon the cross-appeal of the respondents raising a case of contributory negligence.

Their Lordships will humbly advise Her Majesty that the appeal be dismissed. The appellant must pay the costs of the appeal, and the costs (if any) of the cross-appeal.

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Printed by HER MAJESTY'S STATIONERY OFFICE
1981