[2013] UKPC 5
Privy Council Appeal No 0001 of 2012

JUDGMENT

American Jewellery Company Limited & others (Appellants) *v* Commercial Corporation Jamaica Limited & others (Respondents)

From the Court of Appeal of Jamaica

before

Lord Neuberger
Lady Hale
Lord Kerr
Lord Wilson
Lord Sumption

JUDGMENT DELIVERED BY LORD WILSON ON

7 February 2013

Heard on 28 November 2012

Appellant
Denise E. Kitson
Suzanne Risden-Foster
Mark Reynolds

(Instructed by M A Law (Solicitors) LLP)

Respondent
Carol Davis
Symone Mayhew

(Instructed by St. John Law)

LORD WILSON:

Background

1. This appeal, which unfortunately must bring the costs of the proceedings well above the sums effectively at stake, relates to a contract for the sale of a retail property, comprising two shops, at 3 Tropical Plaza, Constant Spring Road, St. Andrew, Kingston, dated 16 August 1999; and to a collateral contract of the same date for the sale of certain chattels there. It will simplify the presentation of this judgment for the terms of the collateral contract to be expressed as part of those of the main contract.

2. The vendor was American Jewellery Company Ltd ("American Jewellery"), which is the first appellant. Mr Indru Khemlani, who is the second appellant, is the majority shareholder in American Jewellery; and the third, fourth and fifth appellants are Mr Khemlani's sons.

3. The purchaser was Mr Gordon Tewani, the third respondent. Via the second respondent (Tewani Ltd), Mr Tewani has a controlling interest in the first respondent, Commercial Corporation Jamaica Ltd ("Commercial"); and it was into the name of Commercial that Mr Tewani directed that the property be conveyed.

4. In the contract American Jewellery was recorded as having instructed Mr Clough of Clough Long and Co, attorneys, of 81 Harbour Street, to represent it; and Mr Tewani as having instructed Mrs Messado of Jennifer Messado and Co, attorneys, of 6 Dominica Drive, to represent him. It will be convenient to refer to Mr Clough and Mrs Messado rather than to their respective firms.

5. The background to the contract, being the feature which has given rise to the aspect of the litigation now most relevant, is that, at its date, American Jewellery was in occupation of one of the two shops and that, by the contract, Mr Tewani agreed to lease the shop back to it for three years from the date of the completion of sale at a monthly rental of $125k, payable monthly. In this judgment a reference to dollars is of course a reference to Jamaican dollars.

6. Under the contract the price payable for the property was $20m; and completion was to take place on 30 September 1999. A deposit of 20% of the price (i.e. $4m) was to be paid at once and to be held by Mr Clough as stakeholder. As it

happens, it had been paid five days earlier, namely on 11 August. The contract provided that American Jewellery should duly pay the stamp duty and the transfer tax referable to the contract and necessary for its completion; that Mr Clough should be entitled to make such payments on its behalf out of the deposit; that American Jewellery should also pay the fee required for registration of the transfer of title to Mr Tewani or his nominee; and that Mr Tewani; should reimburse American Jewellery as to one half of the stamp duty and of the registration fee thus paid.

7. On 30 November 2004, in the Supreme Court, Beswick J embarked on the hearing of no less than five consolidated actions generated by the contract of sale of the property and by a contract of sale of a second property which is now irrelevant. The actions were between those associated with Mr Khemlani (including American Jewellery) and those associated with Mr Tewani (including Commercial). But in the first action American Jewellery and Mr Khemlani made Mrs Messado a fourth defendant; and in the fourth and fifth actions Mr Khemlani made her a defendant to his counterclaim.

8. On 4 December 2006, following a hearing of 27 days spread over 20 months, Beswick J delivered judgment. American Jewellery, Mr Khemlani and his sons appealed to the Court of Appeal against some of her orders. By its orders dated 1 October 2010 , which followed a hearing over five days in 2009, the court (Cooke, Harrison and Dukharan JJA) allowed their appeal in two limited respects, to only one of which need reference be made. But in substance the court dismissed the appeal and indeed in one respect, as the Board will explain, it varied the judge's order in a manner favourable to Mr Tewani. It is against some of the court's orders that American Jewellery, Mr Khemlani and his sons therefore bring this further appeal.

9. The numerous issues between the parties raised before Beswick J, became narrowed before the Court of Appeal and have now narrowed further. Before the Board the major issue is whether American Jewellery invested Mr Clough with ostensible authority to agree with Mr Tewani, acting through Mrs Messado, that certain deductions should be made from the price payable to it upon completion of the sale. This issue and a subsidiary issue can be explained only following recital of the facts in greater detail.

Facts

10. American Jewellery was unable to complete the sale by 30 September 1999. The initial impediment was an injunction, obtained by some of its minority shareholders, which prohibited the sale; the injunction was discharged on 21 October 1999. The next impediment was a mortgage on the property on which American Jewellery had defaulted and which it was at that stage unable to redeem. By

agreement with American Jewellery, reached through their respective solicitors, Mr Tewani caused it to be redeemed in a sum equivalent to $6,397,313 on 8 December 1999 by way of an advance payment of the balance of the price; so, with the consent of American Jewellery, the mortgagee released the duplicate certificate of title to Mrs Messado. But even thereafter there were extensive delays, in particular because American Jewellery failed to pay, whether out of the deposit or otherwise, the transfer tax and stamp duty referable to the contract and necessary for its completion.

11. In January 2000, in the light of the delay, the parties reached agreement for variation of the contract to the effect that, in return for a further part payment of the price by Commercial of $4m (paid, in the event, by two cheques in January and March 2000), American Jewellery would give it possession of the vacant shop; and the keys of it were delivered to Commercial on 8 February 2000. It was apparently as part of this arrangement that, by letter dated 15 March 2000, Mrs Messado irrevocably undertook to Mr Clough to pay what then appeared to be the balance of the price, namely $6,120,898, in exchange for the instrument of transfer in a form which would enable Commercial's title to be registered.

12. But American Jewellery, by Mr Clough, continued to fail to pay the stamp duty and the transfer tax. In the event, in May 2000, Commercial, by Mrs Messado, paid the tax on American Jewellery's behalf. There has never been an issue about Commercial's subsequent deduction from the balance of the price of the full amount of the tax and also, in the light of the terms of the contract, of one half of the duty and of the registration fee, both of which Commercial also later paid.

13. On 16 June 2000, by virtue of the above disbursements, Commercial succeeded in registering its title to the property.

14. Dispute then continued as to the terms of the lease-back of the shop which American Jewellery had continued to occupy.

15. On 23 June 2000 Mrs Messado sent to Mr Clough a statement of the balance of the price allegedly payable to American Jewellery. The present appeal requires attention only to one entry on it, namely a proposed deduction from the price of $575k, inclusive of GCT, by way of rent allegedly payable by American Jewellery from 1 March to 30 June 2000 referable to the shop.

16. On 18 July 2000 Mrs Messado sent to Mr Clough a cheque for $2m on account of the balance payable but she expressed it to be in consideration of agreement by American Jewellery that it would suffer not only the deduction, already proposed, of $575k by way of rent from March to June 2000 but also a deduction of $862,500 in respect of the rent due for the six months from July to December 2000. The cheque

was made payable to Mr Clough's firm; and he cashed it. Three days later Mrs Messado sent to Mr Clough a statement of the balance payable, revised so as to allow for the further payment and for the further deduction: the balance was $388,402.

17. Under cover of a letter dated 29 August 2000, Mrs Messado duly sent to Mr Clough a cheque for $388,402. She requested him to sign, and to return to her, a copy of the letter "in acknowledgment of receipt and in discharge of our client's obligations herein". He did so.

Orders made below

18. Only two of the orders made by Beswick J are relevant to this appeal. The first related to the deduction of $575,000 from the price. The judge held that, under the terms of the contract, the lease-back of the shop and therefore the obligation to pay rent were to commence only on completion of the sale, which she held had occurred on 16 June 2000, and thus that Mr Tewani had not been entitled to deduct rent for the four months from February. She ordered him to pay it. The second related to Mrs Messado's undertaking dated 15 March 2000. The judge held that she had undertaken to pay the price upon (and certainly no later than seven days after) completion and that, since the final payment had been made only on 29 August 2000, she should pay interest thereon in respect of the two months of delay.

19. But the Court of Appeal held that the judge had failed to apply to the deduction of $575k her general conclusion, which it upheld, that, as agent of American Jewellery, Mr Clough had had authority, by his encashment of the cheque for $2m dated 18 July 2000 and by his indorsement of the letter dated 29 August 2000, to agree to the stipulated deductions (including of the $575k) on its behalf. So, although it had refused Mr Tewani permission to file a counter notice of appeal out of time, it set aside the order for his payment of that sum. As drawn, its order provided that "there shall be no award to [American Jewellery] for the sum of $575k". The Court of Appeal, however, enlarged the liability of Mrs Messado to American Jewellery pursuant to her undertaking. It held that there had been a second late payment, namely of $2m on 18 July 2000, in respect of which she should pay interest; and that she should also pay interest on the $575k "to the date of payment".

20. The Court of Appeal's provision for payment by Mrs Messado to American Jewellery of interest in respect of the $575k (being a sum which to date has never been paid) is the subject of the subsidiary issue in this appeal. Why (asks American Jewellery) is interest to be paid to it when the order for payment by Mr Tewani of the principal sum has been set aside and, according to the order as drawn, "there shall be no award" for payment of it? This question, which at first sight seems reasonable, places the Board in some difficulty. Mrs Messado is not a respondent to American

Jewellery's appeal; she has not cross-appealed; and so she is not before the Board. But passages in the leading judgment of Cooke JA in the Court of Appeal, in which he proposed orders with which the other two judges expressed their agreement, suggest that the court may perhaps have concluded that Mrs Messado was also obliged by her undertaking to pay the principal sum of $575k to American Jewellery; and therefore that the actual orders of the court that there should be "no award" for payment of it and that Mrs Messado should pay only interest referable to it are incorrectly drawn. Thus Cooke JA said, at para 15, that "there is a breach of undertaking in respect of the payment of this amount" and, at para 23(1), that it had been "wrongly deducted [and] ought properly to be considered in the claim in respect of the breach of professional undertaking". Perhaps Mrs Messado would be able to put a different slant on the meaning of the judge's words. But the Board observes that it is unfortunate that those representing American Jewellery have for two years apparently failed to notice this possible inconsistency between the judgments of the Court of Appeal and its orders as drawn, still less, if so advised, to apply to that court, on notice to Mrs Messado, for amendment of its orders under the slip rule, namely Rule 42.10 of the Civil Procedure Rules.

Ostensible Authority

21. The Board turns to the major issue raised by American Jewellery in this appeal. It is that, irrespective of whether it intended to order Mrs Messado to pay the $575k to it, the Court of Appeal was wrong to relieve Mr Tewani of the obligation to pay it; that, on the contrary, the court should have enlarged Mr Tewani's liability to it so as to encompass payment of the $862,500, which is likewise said wrongly to have been deducted from the balance payable; that the latter deduction was wrong because, even if, which American Jewellery does not admit, completion of the sale occurred on 16 June 2000, which would therefore have been the contractual date for the commencement of the lease, the rent was to be payable monthly and not six monthly in advance; crucially, that Mr Clough had no authority to accept the two deductions on behalf of American Jewellery; and that therefore his purported acceptance of them on its behalf, by cashing the cheque dated 18 July 2000 and indorsing the letter dated 29 August 2000, was of no legal effect.

22. Inquiry into whether American Jewellery invested Mr Clough with ostensible authority to agree the deductions from the price presupposes that it invested him with no actual authority to do so. The Board will accept the presupposition; but strictly speaking, and as the Court of Appeal appears to have concluded, the foundation for it is shaky. It was certainly the evidence of Mr Khemlani to Beswick J that he and his company knew nothing about the proposed deductions and had never authorised Mr Clough, whether expressly or impliedly, to accept them. Mr Clough asserted, however unconvincingly, that, notwithstanding his encashment of the cheque and his indorsement of the letter, he had not even purported to accept the deductions; and, to that assertion he added that Mr Khemlani had never authorised him to do so. But

Beswick J never stated whether she accepted or rejected the evidence of Mr Khemlani and Mr Clough that the latter lacked the former's actual authority. She observed only that, "if" Mr Clough had exceeded his authority, the issue would be between him and Mr. Khemlani. In his judgment in the Court of Appeal Cooke JA cited *Thompson v Cartwright* [1863] 33 Beav 178, [55] ER 335, which established that the burden of proof lay upon a principal to establish that his agent in a transaction had failed to acquaint him with all such facts within the agent's own knowledge as were relevant to it. It seems to the Board, just as it seemed to Cooke JA, that Mr Khemlani should probably be taken to have failed to discharge the burden of proof in this regard and that on the hypothesis, therefore, that Mr Clough had acquainted him with the deductions proposed by Mrs Messado, there was no evidence to suggest that he had declined to authorise Mr Clough to accept them.

23. In *Freeman and Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480, Diplock LJ said, at p503:

> "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...
>
> The representation which creates 'apparent' authority may take a variety of forms of which the commonest is representation by conduct, that is, by permitting the agent to act in some way in the conduct of the principal's business with other persons."

24. The parties referred the Board to a number of authorities said to elucidate the sort of contract into which, in the words of Diplock LJ, entry would be "of a kind within the scope" of the apparent authority invested in a solicitor whom a principal had appointed to represent him.

25. Thus the appellants rely on the decision of the Supreme Court of Queensland in *IVI Pty Ltd v Baycrown Pty Ltd*, [2004] QSC 430, upheld by the Court of Appeal, [2005] QCA 205. Following an offer to sell land to it, the proposed purchaser represented to the proposed vendor that a firm of solicitors would represent it in the proposed sale. The court held that the vendor's withdrawal of the offer, notified only to the solicitors, was ineffective to preclude the purchaser's acceptance of it on the following day. For the purchaser had not invested the solicitors with ostensible authority to receive such a notice on its behalf. In particular the appellants rely on the

statement of the trial judge, Philippides J, at para 42, that, prima facie, solicitors lack ostensible authority not only to enter into a contract on behalf of their principal but also to vary it.

26. The appellants also rely on the decision of the Court of Appeal of England and Wales in *Evans v James* [1999] EWCA Civ 1759. Negotiations for the grant of a tenancy of a farm were far advanced but the owner died before signing his part of the agreement. The proposed tenant contended that, in various ways, the owner's solicitor had so acted as to estop the owner, and thus the administratrix of his estate, from denying the existence of the tenancy. But the court held that a solicitor had no ostensible authority either to enter into a contract on behalf of his client or to act in such a way as to bind him analogously by an estoppel.

27. The respondents, by contrast, rely on *Thompson v Alexander* (1964) 6 WIR 538. It was a term of a contract of sale of a property in Gold Street, Kingston, that the vendors would confer registered title on the purchaser within four months. The vendors instructed a solicitor who realised that, since their own title was not yet registered, it would be impossible to confer it on the purchaser within four months. Without their actual authority he agreed with the purchaser to vary that term. The Court of Appeal held that he had had ostensible authority to do so and that the vendors were obliged to confer title on the purchaser at a much later date.

28. The respondents also rely on *Waugh v HB Clifford and Sons Ltd* [1982] Ch 374. Builders sold houses to two purchasers who sued them in respect of allegedly negligent construction of the houses. Discussions ensued between solicitors for both sides about a possible compromise under which the builders would repurchase the houses from the purchasers at a valuation. Without actual authority to do so, the solicitors for the builders purported to enter into contracts of repurchase on their behalf. The English Court of Appeal held that the builders were bound by the contracts because they had invested the solicitors with ostensible authority to enter into a compromise of the litigation even in the form of entry into contracts for the purchase of land. Brightman LJ said, at p387:

> "All that the opposing litigant need ask himself when testing the ostensible authority of the solicitor or counsel, is the question whether the compromise contains matters 'collateral to the suit'."

The judge added, at p388:

> "I think it would be regrettable if this court were to place too restrictive a limitation on the *ostensible* authority of solicitors to bind their clients to a compromise. I do not think we should decide that matter is

> 'collateral' to the action unless it really involves extraneous subject matter... So many compromises are made in court, or in counsel's chambers, in the presence of the solicitor but not the client. This is almost inevitable so where a corporation is involved. It is highly undesirable that the court should place any unnecessary impediments in the way of that convenient procedure. A party on one side of the record and his solicitor ought usually to be able to rely without question on the existence of the authority of the solicitor on the other side of the record, without demanding that the seal of the corporation be affixed; or that a director should sign who can show that the articles confer the requisite power on him; or that the solicitor's correspondence with his client be produced to prove the authority of the solicitor."

29. In the light of these authorities the Board turns to consider whether Mr Clough's acceptance of the two deductions from the price, which the appellants are clearly correct to describe as variations of the contract, were, in the words of Diplock LJ, "of a kind within the scope" of the authority which American Jewellery had invested in him or were, in the words of Brightman LJ, "collateral" or "extraneous" to the matter in which it had instructed him. In *Solicitors' Negligence and Liability*, 2nd ed, (2008), Flenley and Leech, at para 5.09, paraphrase the requisite inquiry in attractively straightforward terms, namely whether "the action of the solicitor was within the range of actions for which a third party would usually expect the solicitor to have authority on behalf of a client".

30. In this regard the facts disclose four relevant features.

31. The first is that, in the contract, American Jewellery expressly declared that Mr Clough's firm would have carriage of the sale on its behalf and would hold the deposit as stakeholder. It thereby represented to Mr Tewani that Mr Clough had the usual authority of a solicitor instructed to act in the carrying out of the terms of a contract for the sale of land.

32. The second is that, in about November 1999, Mr Clough negotiated with Mrs Messado, on behalf of their respective principals, a significant variation of the terms of the contract. It was that, in advance of completion, Mr Tewani should redeem American Jewellery's mortgage on its behalf and should receive a corresponding credit against the balance payable on completion and that the mortgagee should release the duplicate certificate of title to Mrs Messado rather than to Mr Clough. Prior to the redemption of the mortgage Mr Clough never suggested to Mrs Messado that such was a variation to which American Jewellery needed to agree other than by himself; and, following its redemption, American Jewellery never contended that it had not agreed to the variation.

33. The third is that in January 2000 Mr Clough negotiated with Mrs Messado, on behalf of their respective principals, a further, more substantial, variation of the terms of the contract. It was that, again in advance of completion, Mr Tewani should pay a further $4m towards the balance ultimately payable in consideration of the delivery to him of possession of the vacant shop. The appellants lay stress on letters from Mrs Messado to Mr Clough, dated 17 and 25 January 2000, in which she invited Mr Clough to obtain Mr Khemlani's countersignature on copies of her letters by way of agreement of the terms of variation. Her invitation, submit the appellants, betrays her understanding that Mr Clough's authority did not extend to his agreement of such terms on American Jewellery's behalf. In fact the countersignature was never provided. The appellants' submission would have had greater force if Mr Clough had either obtained the countersignature or indicated that, without it, he could not agree the terms; or if, following his agreement of them, American Jewellery had claimed not to be bound by them. In fact the evidence is clear that it had conferred actual authority upon Mr Clough to agree them on its behalf. But the perspective of Mr Tewani was no more than that, apparently or ostensibly, Mr Clough had had authority to agree terms of variation of the contract on behalf of American Jewellery.

34. The fourth is that, by 23 June 2000, a substantial issue between the parties had arisen as a result of the following facts. Commercial had succeeded in registering its title only one week earlier, namely almost nine months after the contractual completion date. American Jewellery had broken its covenant to pay the stamp duty, the transfer tax and the registration fee; indeed Beswick J was later to indorse Mrs Messado's repeated contentions that Mr Clough had been largely responsible for the delay in completion. The lease of the shop back to American Jewellery, and thus its payment of rent, should therefore have begun much earlier than June 2000. Meanwhile, of course, American Jewellery had remained in possession of the shop; yet, apart from the deposit, Mr Tewani had paid sums totalling $10,397,313, i.e. over 50% of the price, in advance of completion. Such was the background to Mr Tewani's demand, through Mrs Messado, that, by deductions from the balance of the price, American Jewellery should pay rent for the shop both backdated to February 2000 and in advance until December 2000.

35. The Board is in no doubt that, in the light of the above four features, Beswick J and the Court of Appeal were correct to hold that Mr Clough had ostensible authority to enter on behalf of American Jewellery into the agreement with Mrs Messado (into which, on any view, he did indeed enter) to the effect that American Jewellery would accept the two deductions.

Result

36. The Board will therefore humbly advise Her Majesty that the appeal should be dismissed and that, in the absence of reasoned objection received in the Registry

within fourteen days of the date of this judgment, the appellants should be ordered to pay the respondent’s costs of and incidental to the appeal.