J A M A I C A

IN THE COURT OF APPEAL

R.M. CIVIL APPEAL NO. 106/69

BEFORE: The Hon. Mr. Justice Luckhoo, J.A.
The Hon. Mr. Justice Fox, J.A.
The Hon. Mr. Justice Smith, J.A. (Ag.)

BETTING & RACING LTD.

vs.

EGBERT BOGUES

Frank Phipps, Q.C. and
J. Cools-Lartigue for Defendant/Appellant
W.B. Brown for Plaintiff/Respondent

10th, 17th, 23rd July, 1970.

FOX, J.A.:

This is an appeal from the judgment of the Resident Magistrate for Kingston, Civil Division, in favour of the plaintiff in an action to recover the sum of £142. 6. 6d, the proceeds of a bet.

At about 10.00 a.m. on the 21st of October, 1967, the plaintiff sent his agent, one Barry Lee, to place an accumulator bet at the defendant's betting shop at Love Lane, Kingston, on horse races to be run at Caymanas Park later that day. The plaintiff wrote on a piece of paper, Exhibit 1, which he gave to Barry Lee, the names of three horses, the number of the races and the amount he wished to stake. These particulars were: first race, St. Patrick; fourth race, Blonde Commander; ninth race, the Pipper's Son. The stake was five shillings to win and five shillings to place.

/"Pipper's" .....

"Pipper's" was a spelling error. The horse running in the ninth race was The Piper's Son and the inference is overwhelming that this was the horse which the plaintiff intended to select in the ninth race.

On the same piece of paper, Exhibit 1, the plaintiff had also written the names of five other horses in specified races for the purpose of making a second accumulator bet. At about 10.25 a.m. Barry Lee returned to the plaintiff and gave him the piece of paper, Exhibit 1, and a voucher, Exhibit 2, signed by one Gibbs. The plaintiff knew Gibbs as the defendant's agent at the Betting Shop. Prior to that date he had placed bets with Gibbs by going to the shop himself or by sending a bearer. He didn't examine the documents, Exhibit 1 and Exhibit 2, at the time they were given to him by Barry Lee, but later that day after he saw the three horses: St. Patrick, Blonde Commander and The Piper's Son won their respective races at Caymanas Park, he noticed that on the voucher, Exhibit 2, what he then thought was "Pipper's" was the name of the horse for the ninth race and not his selection, The Piper's Son.

On Monday, 23rd October, 1967, the plaintiff went to the Betting Shop at Love Lane to collect his winnings from Gibbs. He spoke with Gibbs, but received no money. He went to the Head Office of the Defendant Company at Harbour Street, Kingston, and spoke with one "Miss Iris." She gave him no money. The following day he sent his wife with Exhibits 1 and 2 to the Head Office of the Company; she returned and told him something. They then went with Exhibits 1 and 2 to Gibbs who wrote at the back of Exhibit 1 and signed it. For a second time he took Exhibit 1 to the Head Office of the Defendant Company and showed it to "Miss Iris" but failed to receive his winnings.

This is the second action in this matter. Neither Barry Lee nor Gibbs gave evidence in the first action, and in allowing an appeal from the judgment of the Resident Magistrate in favour of the plaintiff, this Court said that in the absence of information as to what had transpired at the Betting Shop,

/no conclusion......

no conclusion as to the cause of the misdescription of the plaintiff's selection in the ninth race was possible. It could have been the mistake of Gibbs or Barry Lee. The plaintiff was therefore nonsuited. In this, the second action, the plaintiff endeavoured to supply the link in the evidence which was missing in the first action by the testimony of his wife. She said that she was in the defendant's betting shop at Love Lane on 21st October, 1967, when Barry Lee came there between 9.30 a.m. and 10.00 a.m. Barry Lee spoke to Gibbs, gave him the piece of paper, Exhibit 1, and left the shop. About fifteen minutes later, Barry Lee returned to the shop. Gibbs gave him Exhibit 1 and the Voucher, Exhibit 2, and Barry Lee again left the shop. The plaintiff's wife said that she remained at the Betting Shop until her husband called for her and took her home. They then went to the Caymanas Park Race Track. The Magistrate believed this evidence. His decision to do so was commented upon by counsel for the appellant but not seriously challenged.

The substantial ground of appeal was that the piece of paper, Exhibit 1, was wrongly admitted in evidence because, (a), what the plaintiff had written showed only his intention to make an offer of a bet; and, (b), what Gibbs had written at the back of Exhibit 1 was hearsay, and further, an admission made without authority expressed or implied by his principal, the Defendant Company. Counsel's contention was that the plaintiff had not discharged the burden of proving that the offer of the bet which he may have intended to make was communicated to Gibbs and that Gibbs had in fact accepted that offer. Counsel submitted that the evidence showed that the parties were not ad idem and that therefore no agreement between them had been effected.

In my view, the particulars written by the plaintiff constituted an offer of a particular bet which he wished to make. The evidence of the plaintiff's wife showed that this offer was communicated to Gibbs when Exhibit 1 was given to him by Barry Lee. In this situation Exhibit 1 was properly received in

/evidence. .....

evidence. It was suggested that Barry Lee may have said something to Gibbs which varied the bet which the plaintiff intended to make, and that since the plaintiff's wife had seen Barry Lee give Gibbs Exhibit 1 and a second larger piece of paper with the names of horses selected by the plaintiff for other bets which he wished to make, it could not be inferred that Gibbs had accepted the specific offer contained in Exhibit 1. The plaintiff's wife heard Barry Lee say to Gibbs "Jackie says to......" ('Jackie' being the plaintiff), and nothing more. Barry Lee gave Exhibit 1 to Gibbs and left the shop. He returned fifteen minutes later and received from Gibbs Exhibit 1 and Exhibit 2. Now, on Exhibit 2, the voucher, is recorded exactly the particulars of the two accumulator bets which the plaintiff had written on Exhibit 1, except that in the first accumulator bet The Ripper was written on Exhibit 2 for the ninth race and not The Piper's Son. This shows clearly that the voucher, Exhibit 2, is a transcription of the particulars on Exhibit 1, and that since Barry Lee left the shop after he had given Exhibit 1 to Gibbs, this transcription must have been made by Gibbs in the absence of Barry Lee. The suggestion that Barry Lee may have said something which caused Gibbs to change the plaintiff's selection in the ninth race from The Piper's Son to The Ripper is not a reasonable one in the circumstances because if the plaintiff had intended any such change it is unlikely that he would have effected this by word of mouth - by the word of his agent rather than by alteration of Exhibit 1. In addition, it is clear, and indeed at the trial and before us, it was admitted that 'Ripper' is written on Exhibit 2 and not 'Pipper' as the plaintiff thought when he first noticed the difference at Caymanas Park. The Ripper was the name of a horse at the Race Meeting. He was entered not in the ninth race but in the fourth, and in this race the plaintiff had selected Blonde Commander! The possibility of the plaintiff making a mistake of deliberately selecting a horse which was

/not entered......

not entered in a race is extremely unlikely. On the other hand, it is not difficult to appreciate how Gibbs could have come to make the mistake in the course of the routine of transcribing the names of horses from the list on Exhibit 1 to the voucher, Exhibit 2. The reasonable inference is that Gibbs accepted the offer of the two accumulator bets which were written upon Exhibit 1, but that in writing up a record of this acceptance he made an error in transcription and instead of writing The Piper's Son as the name of the horse which the plaintiff had selected in the ninth race, he wrote The Ripper. This is the sort of "unilateral mistake" which as the case of Golden Horse Betting Ltd. vs. Maizie Perkins (R.M. Civil Appeal 54/67 of 22nd February, 1968, unreported) shows, does not invalidate the contract, and the plaintiff was entitled to sue upon it to recover his winnings.

It was suggested by counsel for the appellant that in drawing inferences from the evidence this Court should take account of the circumstances that the word 'Ripper' is written on the face and at the bottom of Exhibit 1. At the trial, HoLung, Managing Director of the Defendant Company, said that it was not a part of the bet. The plaintiff and his wife were asked nothing about it. They were not given an opportunity to explain it. It is very likely that they would have been able to do so if asked. Counsel could not say precisely what inference this Court should draw from the fact. It is not known when, by whom or for what purpose the word was written. In this situation it can be given no significance.

In his reasons for judgment the Resident Magistrate said that the statement which Gibbs signed at the back of Exhibit 1 was, "ample proof that the accumulator bet as detailed on paper, Exhibit 1, was accepted by him in the course of his duties as the Company's Agent, but that he did not record the bet properly on the voucher, Exhibit 2." The statement is as follows:- "In nine race is the Pipper's Son as can be seen by the origin coppie me by J. Bogues (G. Gibbs)."

/I am not......

I am not satisfied that this should be construed as an admission made by Gibbs without the authority of his principal. Gibbs had authority to receive bets and to pay out money to the winners of bets. If he had made a mistake, a clerical mistake, in writing up the voucher, Exhibit 2, it does not seem to me that he is admitting his principal's liability when he acknowledges this mistake to the plaintiff. He is making an honest statement of what in fact transpired when the bet was placed with him. I would like to think that it was his duty to make this statement, and I would be glad to believe that there is nothing in the law which discourages the performance of this duty. I also doubt that the writing necessarily offends against the Hearsay Rule. The plaintiff's wife said that after Gibbs had written on the back of Exhibit 1, she went alone with both Exhibits to the Head Office of the Company and spoke with HoLung, the Managing Director. She asked him why he had not sent the money up to Gibbs. HoLung said that she "must put on the 'Son' on 'The Piper's and he would pay me." The printed record does not definitely state that the Exhibits were shown to HoLung. In all probability they were. In this situation, depending upon the precise nature of the conversation between Mrs. Bogues and HoLung, the writing at the back of Exhibit 1 could have become admissible in evidence. On this aspect of the case the information in the printed record is unsatisfactory.

But even if the plaintiff's contention is correct and the Magistrate did misdirect himself as to the admissibility of this evidence, this is not fatal to the plaintiff's case because there was the other independent evidence of Mrs. Bogues as to what had happened at the Betting Shop when Barry Lee placed the plaintiff's bet with Gibbs. This evidence established the conclusion to which the Magistrate had arrived on the basis of the disputed evidence at the back of Exhibit 1. The fact that the Magistrate may have fallen into error in stating the reasons for his judgment does not necessarily invalidate that judgment if, as in this case, it can be upheld

/on other.....

on other grounds which emerge from the evidence as a whole.

I would dismiss this appeal and affirm the judgment of the Magistrate in favour of the plaintiff.

LUCKHOO, J.A.:

I would also dismiss this appeal. I agree with the reasoning of my Brother Fox and there is nothing that I can usefully add.

I would like to reserve my opinion on the question as to the admissibility of the writing at the back of the paper, Exhibit 1.

SMITH, J.A.:

The crucial question for the learned Resident Magistrate's decision was whether the plaintiff had discharged the burden, which undoubtedly was on him, of showing that a mistake had been made by the defendant company's agent, Gibbs, in writing up the voucher, exhibit 2, from his instructions, or offer, on the paper, exhibit 1. In resolving this question the learned Resident Magistrate relied on, what he called, Gibbs' signed statement which he wrote on the back of the paper, exhibit 1.

Evidence of how Gibbs came to write on the back of the paper was given by the plaintiff. His relevant selections written on the paper, exhibit 1, having won their races on Saturday 21st October, 1967, he went on Monday 23rd October to the betting shop at No.6 Love Lane, Kingston, where the bets had been placed in order to collect his winnings from Gibbs. Gibbs didn't pay him, so he went to the head office of the defendant company at Harbour Street, Kingston, where he spoke to a Miss Iris. He did not then see the company's managing director, Mr. HoLung. Miss Iris did not pay him. On the following day, the 24th, he apparently sent his wife to the company's head office. He said that she returned and told him something and together they went to Gibbs at No.6 Love Lane with the paper, exhibit 1, and the voucher, exhibit 2. He spoke to Gibbs who wrote on the back of the paper, exhibit 1, as follows:-

> "In 9 Race is the Piffer's son as can be seen
> by the origin coppie me by J. Bogues.
>
> E. Gibbs,
> 18 Love Lane."

The plaintiff said that on the following day he went back to the defendant company's head office and showed Gibbs' writing to Miss Iris but still he got no money.

/The plaintiff's......

The plaintiff's wife also gave some evidence about this.. She said that it was on Monday, 23rd October, that Gibbs wrote on the back of exhibit 1 after the plaintiff had spoken to him. She said that on the next day, the 24th, she took exhibits 1 and 2 to the company's head office, where she spoke to Mr. HoLung. She said she asked him why he had not sent the money up to Gibbs and Mr. HoLung replied that she must put on the 'Son' unto 'Piper's' and he would pay her. She said she got vexed and told him that he must do it, that he did not and did not pay her.

At the trial objection was taken on the defendant company's behalf to Gibbs' writing on exhibit 1 being admitted in evidence. The Court held that it was admissible and admitted it. In his reasons for judgment the learned Resident Magistrate said of it:-

> "Gibbs' signed statement is ample proof that the accumulator bet as detailed on paper, exhibit 1, was accepted by him in the course of his duties as the company's agent, but that he did not record the bet properly on the voucher, exhibit 2."

Later he said:-

> "The defendant company's agent admitted in writing on the back of the very paper on which the plaintiff had written his bet that he, the agent, had received the bet as inscribed on the paper."

Before us, it was submitted on behalf of the defendant company that the writing on the back of exhibit 1 ought not to have been admitted in evidence. It was said that the evidence purported to be given by the document was hearsay; that it was tendered in order to prove an admission binding the defendant company but it was not made at the time the contract was entered into and, therefore, not part of the res gestae; that it was not within the scope of Gibbs' authority, which had ceased some seventy-two hours before he wrote on exhibit 1.

/The purpose......

The purpose for putting in evidence what Gibbs had written was clearly to prove that the mistake was made by the defendant company's agent and not by the plaintiff's agent, Lee. Gibbs could have attended the trial and given this evidence and no objection could have been taken. But to seek, in effect, to have Gibbs give evidence without being called into the witness box is, of course, not permissible as it offends against the hearsay rule. The writing was admissible only if it was proved to be an admission by an agent which was legally binding on his principal. Since the plaintiff sought to rely on it to prove his case, the burden was on him to prove that this was such an admission.

In Bowstead on Agency (12th edition), p.239. Art.106, the circumstances in which an admission by an agent binds his principal are stated as follows:-

> "An admission or representation made by an agent is admissible in evidence against the principal in the following cases; namely,
>
> (a) where it was made with the authority, expressed or implied, of the principal;
>
> (b) where it has reference to some matter or transaction upon which the agent was employed on the principal's behalf at the time when the admission or representation was made, and the making thereof was within the actual or apparent authority of the agent;
>
> (c) where it has reference to some matter or transaction respecting which the person to whom the admission or representation was made had been expressly referred by the principal to the agent for information."

There is no evidence in this case to bring Gibbs' admission within (a).

The undisputed evidence in the case is that Gibbs was the defendant company's agent for the purpose of receiving or accepting bets on Saturday 21st October, 1967, and some prior dates. There is, in my view, no evidence that he was agent for any other purpose subsequent to the 21st.

/Though the......

Though the plaintiff went to him on the 23rd October to collect his winnings, there is no evidence that he (Gibbs) had any authority to make any decision regarding the validity of any bet or the amount that should be paid on any bet. On the contrary, the evidence indicates that these decisions were made at the head office and that Gibbs was a mere conduit for the payment of winnings. As stated above, the plaintiff had to go to the head office to have his difficulty resolved when Gibbs did not pay him; and the question which the plaintiff's wife said she asked Mr. HoLung was: why he had not sent the money up to Gibbs.

So, the admission does not fall within (b) above; though it has reference to the transaction upon which Gibbs was employed on the defendant company's behalf, namely, accepting the bet on the 21st, it was not made at the time when he was so employed. Nor does it fall within (c). There is no evidence that either the plaintiff or his wife was expressly sent to Gibbs by anyone in authority in the defendant company for the information which Gibbs wrote on exhibit 1.

Application to the facts of this case of the statement on this topic in Halsbury's Laws of England (3rd edition) Vol.1, p.224, para. 510 shows, further, that this admission could not possibly bind the defendant company. It is put thus in Halsbury's (op cit):-

> "Where a principal gives his agent authority to make admission on his behalf, the principal is bound, as regards third persons, by any admission so made. .... Where, however, the agent makes any admission without, or in excess of his authority, the principal is not bound by it, unless the agent at the time when he made it, was acting on his principal's behalf in the transaction to which the admission referred, and made it in the ordinary course of his duties as such agent."

There can be no doubt that Gibbs was not acting on the defendant company's behalf in writing on the back of the paper (exhibit 1).

/He was......

He was clearly acting in the plaintiff's interest.

Apart from authority, I would think that in any event this admission could not bind the defendant company. Here was a case where the defendant company had clearly taken a decision not to pay the plaintiff. This is why Gibbs did not have the money to pay him and why he was not paid on going to the head office. In these circumstances it would, in my view, offend against commonsense to hold that the plaintiff can rely on the agent's admission when he has knowledge that the principal is disputing his right to be paid.

In my judgment the writing made by Gibbs should not have been admitted in evidence. I agree, however, for the reasons stated by Fox, J.A., that the judgment of the learned Resident Magistrate should stand.

JULY 23, 1970.

LUCKHOO, J.A.:

The appeal is dismissed. The judgment of the learned Resident Magistrate is affirmed with costs of the appeal $40.00 to the respondent.