

J A M A I C A

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 28 of 1973

Before: The Hon. Mr. Justice Watkins, J.A.
The Hon. Mr. Justice Melville, J.A. (Ag.)
The Hon. Mr. Justice Rowe, J.A. (Ag.)

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Chrysler (U.K.) Limited - Defendant/Appellant

A N D

Robinson & Company Limited - Plaintiff/Respondent

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Richard Mahfood, Q.C.
David Muirhead, Q.C. for Defendant/Appellant

H.D. Carberry,
R.N.A. Henriques for Plaintiff/Respondent

MARCH 14, 15, 16, 17 '73
APRIL 1, 1973

ROWE, J.A. (Ag.):

The Appellant, a company registered in England, manufactures and distributes throughout the world motor vehicles and parts therefor. In 1966, Rootes Motors Overseas Limited was a wholly owned subsidiary of Rootes Motors Limited and in 1970 this latter company changed its name to Chrysler (U.K.) Limited. Under its previous name of Rootes Motors Overseas Limited, the appellant entered into an agreement with the respondent dated 1st September, 1966, whereby the respondent was appointed exclusive distributor of the appellant's vehicles in Jamaica and the non-exclusive distributor for service parts for the appellant's vehicles. Provisions were made in that agreement whereby either party could terminate that agreement by Notice in writing in conformity with certain special conditions. On the 25th August, 1969 a representative of the appellant left at the office of the respondent a letter purporting to terminate the distributorship agreement. This letter was signed.

"Yours faithfully
Chrysler International S.A. on behalf
of Rootes Motors Limited, Under Power of
Attorney dated July 1, 1968"

This Power of Attorney was not recorded in the Record Office of Jamaica.

The respondent brought an action against the appellant claiming damages, inter alia, for breach of the distributorship agreement. It was

agreed between the appellant and the respondent that certain points of law arose in the action which could conveniently be disposed of as preliminary points of law under section 236 of the Civil Procedure Code, prior to the trial of the action. Neither side took the trouble to formulate these points of law with any precision. Nevertheless, the Master ordered that the points of law raised in some 6 paragraphs of the Statement of Claim be tried as preliminary points of law.

At the hearing of the preliminary points before Mrs. Justice Allen (Ag.) two broad questions of law were argued:-

(a) Did the distributorship agreement of 1st September, 1966 itself provide the only methods in which a notice of termination could be given?

The learned Judge applied the principle enunciated in Manchester Diocesan Council v. Commercial and General Investment Limited - (1969) 3 A.E.R. 1593, and held that "provided the method of communication used is no less advantageous to the other party than the prescribed modes, the method selected by the party serving the notice is good and effective service, the object being communication of the notice." From this part of her judgment there has been no appeal.

(b) Assuming that the notice was in fact signed by an existing legal person or by persons authorised to sign on behalf of Chrysler International S.A. and that Chrysler International S.A. in fact had a Power of Attorney from the defendant, is the Power of Attorney effective in Jamaica it not having been recorded in accordance with Section 51 of the Conveyancing Law Cap. 73 or proved in accordance with the provisions of The Probate of Deeds Law Cap. 308? The learned Judge held that the Power of Attorney must comply with the formal requirements of the law of Jamaica to be complete and decided the question in favour of the respondent.

By its notice of appeal, the appellant asks that this Court order,

"that the notice of termination of the agreement dated 4th August, 1969 was a valid and effective notice", After some argument Mr. Mahfood, conceded that having due regard to the preliminary points ^{of} law submitted for the Court's determination, the very farthest the Court could go in his favour would be to determine that the notice of termination was not invalid by virtue of the Power of Attorney not having been recorded.

Two broad questions arise for determination on this appeal. Firstly, whether Section 51 of the Conveyancing Act applies to all Powers of Attorney or whether it is limited to Powers of Attorney involving the execution of conveyances; and secondly, assuming that Section 51 does apply to all Powers of Attorney, what is the consequence of a failure to record the Power.

It is convenient to set out the terms of Section 51 of the Conveyancing Act.

"An instrument creating a power of attorney must be duly proved and recorded in the Record Office. The recording of such instrument shall be necessary for its completion and no person whose rights depend upon an exercise of the power shall be required to recognize the existence of such power until the same is so duly recorded."

The present Section 51 of the Conveyancing Act found its way into the laws of Jamaica as Section 40 of the Conveyancing Act of 1889. The researches of Counsel have shown no provision of exact parallel in English or Australian law and one is led to conclude that the Jamaican legislators boldly adopted a provision to suit the particular needs of Jamaica.

To arrive at its true construction Section 51 must be read as a whole and in its context as a section of the Conveyancing Act. A prime purpose of the Conveyancing Act was to simplify instruments of conveyance by implying a bundle of rights, privileges, and obligations which hitherto had to be laborously reproduced in each conveyance. Section 10 of the Act deals with implied covenants for title and is of the first importance to conveyancers.

These implied covenants provide in summary that the vendor has a good right to convey the whole property and interest agreed to be sold; that the purchaser shall have quiet enjoyment of the land; that the land shall be enjoyed free from incumbrances other than those subject to which

the conveyance is expressly made; ^{and} that the vendor shall execute such assurances and do such things as are necessary to cure any defect in the conveyance.

With what description of property does the Conveyancing Act deal?

Property is defined in Section 3 of the Act to mean:-

"Property unless a contrary intention appears, included real and personal property, and any estate or interest in any property, real or personal, and any debt, and anything in action, and any other right or interest in the nature of property, whether in possession or not".

Any reading of this definition quickly reveals its comprehensive nature and renders it impossible to argue that choses in action or moveables may not be transferred under the Conveyancing Act.

The term "Conveyance" is defined as follows:

"Conveyance" unless a contrary intention appears, includes assignment, appointment, lease, settlement and any other assurance, and covenant to surrender, made by deed (underlining mine) on a sale, mortgage, demise or settlement, of any property, or on any other dealing with or for any property, and convey, unless a contrary intention appears, has a meaning corresponding with that of Conveyance".

The argument, attractively put forward by Mr. Mahfood, is that the Conveyancing Act is wholly concerned with transactions in property which for their efficacy in law ought to be made by or to be contained in a deed. He argued further that where it is not legally necessary to pass rights and or obligations in property by having recourse to a deed, the provisions of the Conveyancing Law are irrelevant. He says that in the instant case, the agent was attempting to terminate a distributorship agreement in respect of which a deed is not made necessary by the agreement itself or by operation of the law of contract.

When one speaks of a power of attorney one is in a strict sense referring to a formal grant of a power by deed or a formal grant of a power contained in a deed. Bowstead on Agency, 13th Edition page 66.

The relationship of Agency may be created by word of mouth, by instrument in writing, by conduct of the parties, from necessity, and by deed. Where it is intended to confer power upon an agent to execute a deed, and only is such a case, is it legally necessary for the appointment of the agent to be by deed.

In the early stages of his argument Mr. Mahfood endeavoured to show that it does not matter so far as the appellant's case is concerned whether

the Power of Attorney given to the appellant's agent is effective as a deed, as the appellant is still entitled to rely on the document as an instrument in writing. In support of this proposition he relied on three cases:-

Hunter v. Parker (1840) 7 M. & W. Reports 322

re Tabiti Cotton Co. (1873) L.R. Equity 273

Windsor Refrigerator Co. v. Branch Nominees Ltd. - (1961) Ch.375

In all those cases, a prima facie deed failed to have efficacy as such, either because the agent executing the deed had no authority by deed so to act, or one or other of the formalities of signing, sealing and delivering was not complied with. In those cases, the common law rule as to the formalities were requisite for the completion of a deed \angle not affected by any statutory provision similar to Section 51 of the Conveyancing Act rendering an otherwise good deed incomplete, for want of recording. In the end Mr. Mahfood placed no reliance on this submission, conceding that Section 51 cannot be bypassed or driven through. His path to success, if at all, lies in a favourable construction of Section 51.

The legislature has made provision for the recording of deeds, which by definition includes powers of attorney, in a number of statutes. An Act was passed in 1681 entitled - The Record of Deeds, Wills and Letters Patent Act, which provided that a deed made in due form, properly proved and registered at length in the Record Office shall be valid to pass certain property without the old formalities of handing over, e.g. livery, seisin, or attornment. A further provision of that Act is to the effect that after 1681 a deed not acknowledged or proved and recorded shall not be effective to pass away any freehold or inheritance or to grant a lease for more than three years.

The Probate of Deeds Act (1863) defines "deed" to include power or letter of attorney, and provides the methods of proving the same wherever executed. The present statute which prescribes the process by which a deed, including a power of attorney, may be recorded is the Record Office Act, first passed in 1879.

There was such occasion for the use of powers of attorney in Jamaica during the years of the sugar revolution and after when absentee owners of the sugar plantations lived in some luxury in England leaving the

management of their estates in Jamaica to attorneys, acting under powers of attorney. Frequent recourse to the original powers of attorney for day to day transactions as well as for use in Courts in the pursuit of actions, proved burdensome to both absentee owners and attorneys and the practice developed whereby those powers of attorney would be recorded in the Island Secretary's Office. It appears that in reliance upon the record in the Island Secretary's Office, the donees of these powers of attorney became careless as to the custody, care and preservation of the originals. It is recited in the preamble of an Act of 1844 that the Supreme Court decided that originals and not recorded powers of attorney were the best evidence in proof of such authority and as a consequence, an "Act to make recorded powers of attorney evidence in all Courts of law and equity in the island" was passed.

This Act was passed to facilitate proof of powers of attorney and not in any way to confer special benefits on those dealing with donees of the powers.

It can be fairly said that the several legislative provisions made for the recording of deeds including powers of attorney, were aimed at encouraging the makers of such deeds to use the facilities for permanent recording which in time would make for certainty in the identification and content of the instruments, give notice thereof to the world at large, and effectively prevent or restrict fraudulent transactions. There are instances in which the legislature provides a sanction for non-recording as in the Record of Deeds, Wills and Letters Patent Act, where it is provided in section 2(2)-

"No deed made after the year 1681 without such acknowledgement or proof or recording, shall be sufficient to pass away any freehold or inheritance, or to grant any lease for above the space of three years".

It is significant, however, that the statute makes it abundantly clear for what specific purposes the deed shall be invalid due to non-recording, and does not expressly or by inference say that a non-recorded deed is ineffectual for all purposes.

The Conveyancing Act is primarily concerned with interests in land. Section 6(1)(3) deals with leases, section 9 with conveyance of land or buildings, section 10 with implied covenants for title referable

to land or interest in land. Part III of the Act containing sections 12-16 deals with leases, Parts IV and V containing sections 18-33 deal with mortgages. Parts VII, VIII and IX are concerned with trustees, Executors, Married Woman and Infants. Some of these provisions are identical to those in the Trustee Act viz, Section 34 of Conveyancing Act identical to Section 11 of Trustee Act; Section 35 of Conveyancing Act identical with Section 10(3) of Trustee Act; Section 36 of Conveyancing Act is contained in Section 12 of Trustee Act; Section 37 of Conveyancing Act with 13 of Trustee Act; Section 38 of Conveyancing Act with 20 of Trustee Act; Section 39 of Conveyancing Act with 21 of Trustee Act.

Part XI of the Conveyancing Act contains 5 sections numbered 47-51 and is headed Powers of Attorney. Section 47 is of the most general nature and it is agreed by Counsel on both sides, that that section can apply to all powers of attorney. By virtue of section 47 the donee of a power of attorney may act in his own name and under his own signature. Sections 48 and 49 are dealing with a special class of persons, viz, purchaser for value. Section 50, like section 47 is of general application and protects the donee of a power who act in good faith in the exercise of the power in ignorance of the revocation of the power or the death, bankruptcy, lunacy or unsoundness of mind of the donor.

Finally, Sections 52 to the end of the Act deal with the construction and effect of deeds and other instruments; the enlargement of long terms (reissue unexpired of not less than 100 years of a term originally not less than 300 years) into fee simple, and some miscellaneous provisions.

By definition, whether the property transaction be by way of sale, mortgage, demise, or settlement, or any other dealing, it is not a conveyance unless made by deed. The conveyance may take the form of an assignment, an appointment, a lease, a settlement or other assurance or covenant to surrender but in each case it must be contained in a deed.

When one looks at the types of property with which the Conveyancing Act is primarily concerned, it clearly appears that the only transactions comprehended by that Act are those made by deed and for which deeds are requisite in law. It can never be argued that every

contract for the sale of goods which is governed by the provisions of the Sale of Goods Act must be made by deed. Section 4 of the Sale of Goods Act provides:-

"Subject to the provisions of this law and of any statute in that behalf, a contract of sale may be made in writing (either with or without seal), or by word of mouth, or partly in writing and partly by word of mouth, or may be implied from the conduct of the parties. Provided that nothing in this section shall affect the Law relating to corporations".

In construing section 51 of the Conveyancing Act within the context of that Act it appears sensible and logical to hold that the section applies to powers of attorney which authorise acts which can only be performed through the instrumentality of a deed. If what the donee of a power proposes to accomplish does not require a deed to be effective in law such a power of attorney does not fall to be construed under Section 51 of the Conveyancing Act.

Clause 31(B) of the Distributorship Agreement of 1st September, 1966 provided that,

"Either party may without assigning any reason or incurring any liability to compensate the other, terminate this agreement by giving to the other 60 days notice expiring at any time."

That is the Clause under which Chrysler International S.A. purported to act in terminating the distributorship agreement. Clause 30 of the agreement which made detailed provisions for the service of notices as between the parties, clearly implies that a notice under clause 31(B) should be in writing.

Neither Clause 30 nor Clause 31(B) of the distributorship agreement expressly or by implication provides that a notice terminating the agreement should be made by deed or be contained in a deed. There is no rule at common law, nor is there a rule under any statutory provision which requires that for validity in law, a notice terminating an agreement such as this distributorship agreement, should be made by deed.

The Conveyancing Act by definition applies only to instruments made by deed. As the power of attorney in the instant case may be validly exercised to determine the distributorship agreement other than through the instrumentality of a deed, it follows, and I so hold, that the power of

attorney granted to Chrysler International S.A. by the appellant is not such a power as is required to be recorded under Section 51 of the Conveyancing Act.

The determination of this question in favour of the appellant makes it somewhat un-necessary to go on to consider the second question argued before us, viz, assuming that the instant power of attorney is one to which Section 51 of the Conveyancing Act applies, what is the effect in law of its non-recording? but in deference to the arguments of Counsel, I will deal with the point quite shortly.

Non-recording does not render the power ineffectual for all purposes. To arrive at any other conclusion would require the reading into the section of some such words as "failure to record shall make the power of attorney void". The section when read as a whole shows that the effect of non-recording is merely to suspend the effectiveness of the power while at the same time permitting persons whose rights depend upon the exercise of the power to recognize the existence of the power if those persons so wish notwithstanding the failure of the donee to record the power of attorney.

The world at large is not empowered by Section 51 to decline to recognize a non-recorded power of attorney. Only a special class of persons is so privileged and this class is limited to persons whose rights depend upon an exercise of the power.

A wary and prudent purchaser taking a conveyance from the donee of a power will be careful to ensure that the bundle of rights which appertain to the property are passed on to him. Such rights as the purchaser will obtain will flow directly from the exercise of the donee's power. In that sense the purchaser's rights will depend upon the exercise of the donee's power. It has been argued that "depend" in the sense used in Section 51 has a meaning which extends to and includes the expression "affected by". It seems to me that this contention would give an unnatural meaning to the word 'depend' and if so interpreted could include anyone however remotely affected.

I am of the view the persons who are permitted to refuse to

recognise a non-recorded power of attorney are those whose rights flow from or arise out of the exercise of that power. Can it be said that the respondent's rights flow from or arise out of the letter terminating its distributorship agreement? I answer No. Such rights as the respondent has, arise out of his contract with the appellant, the contract which is pleaded in the Statement of Claim, and for breach of which damages are claimed.

For these reasons I am of the view that this second question must also be determined in favour of the appellant.

I would allow the appeal.

Watkins, J.A.

I agree

Melville, J.A.

I agree

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