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JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 50/81

BEFORE: THE HON. MR. JUSTICE KERR, J.A.
THE HON. MR. JUSTICE ROWE, J.A.
THE HON. MR. JUSTICE WHITE, J.A.

BETWEEN JAMAICA NATIONAL BUILDING SOCIETY PLAINTIFF/APPELLANT
AND F. W. LATTIBEAUDIÈRE DEFENDANT/RESPONDENT

R. N. A. Henriques, Q.C., Mrs. Angella Hudson-Phillips
instructed by Livingston. Alexander & Levy for Plaintiff/Appellant.

Mr. Emile George, Q.C., instructed by Motta & Oppenheim for
Defendant/Respondent.

April 11, 1983 & November 7, 1984

ROWE, J.A.:

By a majority (White, J.A. dissenting) the Court allowed the appeal, set aside the judgment of Wright, J., given in the Court below and entered Judgment for the plaintiff/appellant for the sum of \$18,948.13 with interest at the rate of 12% from 1st December, 1978, and ordered that the plaintiff/appellant be paid his costs in this Court and in the Court below to be agreed or taxed. I now honour my promise to reduce my reasons into writing.

A senior, experienced Solicitor of the Supreme Court of Jamaica whose professional nomenclature was changed by the provisions of Act 15/71 the Legal Profession Act to that of "Attorney-at-Law," one H. E. Rickards fraudulently enriched himself at the expense of either the appellant or the respondent. In this litigation, the narrow question which was exclusively one of fact, to be extracted from the pleadings and the evidence, was as Mr. George puts it, in what capacity and on whose behalf did Rickards receive the \$20,000.00 from Barclays Bank, Morant Bay?

The respondent and his wife Amy Louise, who incidentally died before the trial of the action, contracted with Matthew Ken Liu for the purchase of No. 3 Lords Road, Kingston 5 for the sum of \$38,000.00. An agreement for Sale was prepared by Mr. H.E. Rickards, which provided inter alia for payment of \$8,000.00 on the signing of the contract and the balance on the tendering of a registrable transfer. One of the Special Conditions was that the contract was subject to the respondent as purchaser, negotiating a loan of \$15,000.00. This Agreement for Sale was signed by the vendor and Purchasers on May 18, 1973 and it contained this term:

"Carriage of Sale: H.E. Rickards -
64 Laws Street, Kingston."

The respondent consulted Mr. Rickards in his professional capacity and it was with confidence that he sought Rickards' professional services in this transaction. As was envisaged at the time of contract, the respondent went in search of mortgage funds and he approached the Secretary Manager of the St. Thomas Mutual Building Society, Morant Bay, first unofficially and later regularly, by a written application on June 23, 1973 which received expeditious treatment in that by July 13, the respondent was advised by letter that his application for a loan of \$20,000.00 had been granted. He was asked to forward his Certificate of Title to facilitate preparation of the Mortgage. Of course at that time respondent did not have the title deeds in his possession. As the evidence unfolded, there was an extant mortgage on 3 Lords Road held by the Canadian Imperial/^{Life} Assurance Company which would have to be discharged before the Building Society could be registered as first mortgagees.

Mr. Henriques described the next stage of the transaction as a normal business practice known as bridge financing by which a 3rd party would be requested to provide short term money to conclude the contract of sale between vendor and purchaser

and the Building Society as long term lender would give an irrevocable undertaking to the 3rd party to repay the sum advanced at a later date. What actually happened appears partly from the oral evidence of Mr. Lattibeaudiere and partly from documentary evidence tendered at the trial. Mr. Lattibeaudiere said he went to Barclay's Bank along with Mr. Rickards because the Secretary Manager of the Building Society told him that Rickards was their Solicitor and that he should accompany Rickards to the Bank and also that to his knowledge Rickards was the Solicitor for the Society. He said further that he signed an authority dictated by Rickards authorizing the Bank to pay the cheque to Rickards as "I thought that Rickards was doing that on behalf of the Society."

This Court did not have the benefit of the findings of fact of the learned trial judge who summarily disposed of the issues by saying "Having considered the defence which includes an estoppel I find that the justice of the case is that when Rickards received the money he received it as agent for the Building Society". If there was evidence to support that finding then his judgment could not be upset. In my opinion, however, the evidence was all the other way.

On August 21, 1973, the respondent giving his address as 12 Dumbarton Road, Kingston 10, wrote to the Secretary of the St. Thomas Mutual Building Society in these terms:

"Re: Mortgage on Premises 3 Lords Road
St. Andrew

This serves as your irrevocable authority to pay over to my Attorney-at-law Mr. H.E. Rickards the proceeds of the Loan on my Mortgage of the above premises."

This letter appears to have been handed over to Mr. Rickards who on September 18, 1973 sent it to the Building Society under cover of a letter in these terms:

Re: Premises 3 Lords Road, St. Andrew
Transfer Liukwei Ken to Frederick W.
Lattibeaudiere & Mortgage Lattibeaudiere
to the Society - Loan \$20,000.00

As you no doubt are aware Mr. Lattibeaudiere is abroad and the purchase of the above-mentioned premises must be concluded within a few days.

He has executed the Mortgage and I have a Letter of Authority from him to the Society to pay over the proceeds of his Loan to me, dated 21st ultimo which I enclose. The mortgage will be registered shortly. It will be in order for you to pay out the mortgage loan either directly or through the bank."

The Society was prepared to comply with the advice given by Rickards its Solicitor, that a disbursement could be made but it did not have cash in hand to make a direct payment. That was the occasion for it to employ the bridging finance methodology. The Society approached the manager of Barclays Bank Morant Bay by letter of September 24, 1973 for the accommodation. The respondents whole case was built around the terms of this letter which read:

"We have granted F.W. Lattibeaudiere a loan of \$20,000.00 to enable him to purchase premises in Kingston. Our Solicitor is seeing to this transfer. Enclosed please find copy of his letter to that effect dated 18/9/73 also a letter of authority signed by Mr. Lattibeaudiere to pay Mr. Rickards the full proceeds of our loan. Kindly advance him this amount making the cheque payable to our Solicitor, H.E. Rickards and we irrevocably agree to repay you \$20,000.00 by the 19th September. 1974."

It is to be noticed at once that Mr. Rickards is twice referred to in that letter from the Society as "Our Solicitor". The earlier statement that "Our Solicitor is seeing to this Transfer" cannot mean that the Society has retained Mr. Rickards either generally or specially to have the Carriage of Sale of the Property, as that had been agreed upon between Vendor and Purchaser weeks before the first approach to the Society for a loan. The request to make the payment to "Our Solicitor" H. E. Rickards if it stood by itself could probably mean that the Society was making an independent judgment and decision as to the

person to whom the disbursement should be made. However, the Society sent along to the Bank a copy of Mr. Lattibaudiere's letter of authority to pay the full proceeds of the loan to Mr. Rickards. The true interpretation of the terms "Our Solicitor" as used in this letter is that the Society was saying this Solicitor is the one who normally acts for the Society and therefore we do not disapprove of Mr. Lattibaudiere employing him in the way suggested.

Mr. Lattibaudiere signed for the loan at the Bank, he accepted the interest rates and he paid interest direct to the Bank. It was his loan, which he was personally liable to service, but having regard to the arrangement which he had made with the Society the Bank would be looking to the Society for the repayment of the loan in full within twelve months. This promise the Society fulfilled on October 3, 1974.

Problems developed unknown to Mr. Lattibaudiere and unknown to the Society. Mr. Rickards did not discharge the mortgage on No. 3 Lords Road. Apparently he fraudulently converted the \$20,000.00 which Barclays Bank paid to him to his own use and benefit. Anxious to know when payments under the mortgage should commence, Mr. Lattibaudiere wrote to the Society for information on November 12, 1974 and received a reply dated November 19, which advised in part:

"Your payment starts November and the amount is \$231.86 as you will notice in the enclosed passbook."

Acting in good faith, Mr. Lattibaudiere made monthly payments to the Society up to February, 1976. He ceased paying because in January, 1976 there appeared an advertisement in the Daily Gleaner whereby 3 Lords Road was put up for Sale at Public Auction on February 5, 1976. Enquiries which were immediately instituted revealed that Imperial Life Insurance Company Limited was taking steps to foreclose as its mortgage on the premises had not

been discharged. Through a series of complicated transactions the property was eventually transferred to Mr. Lattibeaudiere for substantial consideration. What in effect has happened is that Mr. Lattibeaudiere has had to purchase the same property twice over. That must have been the "justice of the case" which the learned trial judge had in mind when he found on behalf of Mr. Lattibeaudiere, a judgment which would have the effect of throwing the loss upon the Society.

The argument that Mr. Lattibeaudiere received no benefit from the \$20,000.00 paid by Society to the Bank is to oversight the fact that he was indebted to the Bank for the sum of \$20,000.00 and that that debt was extinguished when the Society paid Barclay's Bank. Such negligence as can be laid at the door of the Society in advising Mr. Lattibeaudiere to make monthly payments and itself paying the \$20,000.00 to Barclay's Bank without first satisfying itself that the mortgage in its favour had indeed been registered cannot affect what was perceived as the central and only point on the appeal, viz, for whom did Rickards' act when he received the cheque from the Bank. As I endeavoured to show earlier Mr. Lattibeaudiere had consulted and engaged the services of Mr. Rickards before he applied to the Society. Apart from signing the irrevocable letter of authority addressed to the Society to pay to Mr. Rickards, he went one step further and directed Barclays Bank to make payment to Rickards. This is to be gleaned from Rickards' letter to the Society, dated 17th September, 1974 when Rickards wrote:

"I enclose herein as arranged duplicate Mortgage Frederick Walter Lattibeaudiere to the Society dated the 19th instant the date on which I understand you to say that the mortgage commences. The duplicate Certificate of Title will be sent to you as soon as the original has been registered. It was necessary for me to obtain an authority from Mr. Lattibeaudiere to pay over the proceeds of the loan to me, as he directed Barclay's Bank on the occasion when we attended on this Bank to do so in pursuance of your undertaking to the Bank."

If indeed Mr. Rickards was acting as the Agent of the Society to receive the sum of \$20,000.00 from the Bank the effect would be that the Society would be making a payment to itself and this would defeat the whole purpose of a bridge loan.

An innocent citizen in the position of Mr. Lattibeaudiere should be able to have recourse to an Assurance fund or an Insurance Policy maintained under the auspices of the professional association which controls the registration and discipline of attorneys at law practising in Jamaica. If no such means of compensation exist, the time for its inception is now.

KERR J.A.

I have read the draft reasons for judgment of Rowe, J.A. and I am in agreement with his reasoning and his conclusions

WHITE, J.A.:

My dissent from the judgment of my brethren allowing the appeal by the Jamaica National Building Society (the appellants) from the judgment of Wright, J., in favour of the respondent, F. W. Latibeaudiere is based on the view which I have formed that the appellants at all times held out Mr. H. E. Rickards as their Solicitor. Admittedly, Mr. Rickards acted for both parties consequent on the application by the respondent to the St. Thomas Mutual Building Society for a mortgage on premises, 3 Lords Road, Kingston 5. The appellants took over all the business of the St. Thomas Mutual Building Society and sought to recover from the respondent the sum of \$20,000 which was approved as a loan by the St. Thomas Mutual Building Society to Mr. Latibeaudiere and his wife (since deceased). This approval was conveyed to the respondent by the Society's letter dated the 13th July, 1973. This letter was signed by Mr. Alton McQueen the then Secretary of the St. Thomas Mutual Building Society.

On the 24th September, 1973, Mr. McQueen wrote to the Manager, Barclays Bank, Morant Bay, in the following terms:

"We have granted Mr. F. W. Latibeaudiere a loan of \$20,000 to enable him to purchase premises in Kingston, Our Solicitor is seeing to this transfer. Enclosed please find copy of his letter to that effect dated 18/9/73 also a letter of authority signed by Mr. Latibeaudiere to pay Mr. Rickards the full proceeds of our loan. Kindly advance him this amount making the cheque payable to our Solicitor, H. E. RICKARDS and we irrevocably agree to repay you \$20,000 by the 19th september, 1974."

Earlier, on the 21st August, 1973, the respondent on the advice of Mr. Rickards, gave the latter a Letter of Authority to the Society to pay over to "my attorney-at-law, Mr. H.E. Rickards the proceeds of the loan re my mortgage on the above premises (3 Lord's Road, St. Andrew)." Mr. Rickards' letter to the Secretary of the Building Society dated 18th

September, 1973, confirms that he had obtained this letter of authority. He promised to register the mortgage shortly and further advised "It will be in order for you to pay out the mortgage loan either directly or through the Bank."

It will be observed that up to this letter from Mr. Rickards, there is no indication that any money had been obtained either from the Building Society or from the Bank on the strength of the description by Mr. Latibaudiere of Mr. Rickards as "my attorney-at-law." For all practical purposes therefore, although Mr. Rickards, according to the evidence, was involved in the transfer of the premises from the vendor to the respondent, that transaction could not have been completed without the money being obtained from or through the efforts of the St. Thomas Mutual Building Society. It must be stressed that in Mr. McQueen's letter to Barclays Bank, he stated that "Our solicitor is seeing to the transfer." His request "Kindly advance him (Mr. Latibaudiere) this amount of \$20,000, making the cheque payable to our solicitor, H. E. Rickards" is important as indicating to my mind that the St. Thomas Mutual Building Society was anxious to protect its interests. The instructions to pay their solicitor could not and should not be regarded as anything else but adequately empowering Mr. Rickards to protect their interests. When that \$20,000 was paid by the Bank to Mr. Rickards it is my strong opinion that he received that money on behalf of the St. Thomas Mutual Building Society, and it was his duty to protect the interests of the Society by not paying it over to the vendor until the transfer had been effectuated and the interests of the Society protected by the proper entry of the Certificate of Title entered at Vol. 1020 Folio 698 of the Register Book of Titles.

This interpretation of the facts is underlined by the evidence of Mr. Kenneth A. Fitzroy who gave evidence for the appellants at the trial of the action. In 1973, he was the accountant at the St. Thomas Mutual Building Society and was

aware of the application by Mr. Latibeaudiere to the Building Society. He became manager after the merger with the appellants. According to him, Mr. Rickards had acted on behalf of the Society from time to time and it was the intention that he should act for the Society in the transaction. As soon as the loan was approved, Mr. Rickards was so informed. He did not think that "we told Mr. Latibeaudiere Mr. Rickards would be Society's lawyer." But "I would expect Mr. Rickards would contact Mr. Latibeaudiere re title to protect the Society's interests." And although he gave evidence that "I have never sent borrower to Society's attorney" he could not say whether in fact that advice was given to the respondent at the material time. This has to be set against the evidence by the respondent: "I went to bank because of letter I got from the Society that Rickards and I should go to the bank. I went with Rickards because McQueen told me Rickards was their solicitor, and he said Rickards and I should go to the bank and we did just that." In my reading of the evidence there is nothing to counteract this last quoted piece of evidence by the respondent.

It is clear that on the whole evidence the attorney-at-law fell short in that he never completed the transaction of sale, and, therefore, was unable to carry out his professional undertaking to have the mortgage properly registered.

The difficulties inherent in the case at the particular point at which the arguments were directed, show very clearly the dangers which can arise where one attorney-at-law acts for both parties in a transaction relating to transfer of land. Although the Building Society forwarded to the Bank the letter of authority from the respondent earlier referred to, I am of the view that the effective communication was the covering letter of the Secretary of the Building Society, and was in fact a specific direction to the Bank that the money should be paid to the agent of the Building Society. The cheque on the Secretary's instructions was to be made payable to Mr. Rickards

"our attorney-at-law." I am of the opinion that this later directive did effectively place the Building Society in the position where its own interests were being safeguarded. It is further true to say that if the directive had been to make the cheque payable to the Building Society or its manager, the Building Society could not turn around, having received the cheque for \$20,000 and say that the respondent owed the money. The receipt by Mr. Rickards was, in my view, in the particular circumstances of this case, the receipt for and on behalf of the Building Society. Those circumstances show that in the event which happened the respondent never received any of the \$20,000 from Mr. Rickards or the Society.

In this case, there are two innocent parties who have both been defrauded by one who I regard as being for all practical purposes, and on the analysis of the relevant evidence which I made, the agent of the Building Society to protect its interest. Had the terms of the letter from Mr. McQueen to Barclays Bank been differently worded I would not have hesitated to say that the appeal should succeed. However, on my view of the facts, I hold that judgment should have been given by this Court dismissing the appeal.