

J A M A I C A

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IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CIVIL APPEAL No. 7/73

BEFORE: The Hon. Mr. Justice Luckhoo, P. (Ag.)
The Hon. Mr. Justice Graham-Perkins
The Hon. Mr. Justice Swaby

BETWEEN - STANLEY JOHNSON - APPELLANT
AND - R. OLIVER TERRIER
and
MRS. B.I. TERRIER - RESPONDENTS

Emil George, Q.C., and Norman Wright for the appellant.
Ramon Alberga, Q.C., and S. Fyffe for first-named respondent.
R. Pershadsingh, Q.C., and S. Fyffe for the second-named respondent.

October 23, 24; December 11, 1974

GRAHAM-PERKINS, J.A.:

The appellant sought to obtain a decree for the specific performance of a contract entered into on December 29, 1969 whereby the first-named respondent (hereinafter called "Mr. Terrier") purporting to act on behalf of himself and the second-named respondent (hereinafter called "Mrs. Terrier") agreed to sell to him a parcel of land in Clarendon for \$900.

At the trial of the action before His Honour Mr. L.L. Cousins in the Resident Magistrate's Court for the parish of Clarendon the appellant gave evidence to the following effect. Being Desirous of acquiring a lot of land in or near May Pen he called at the office of Mr. Terrier whom he knew to be a dealer in real estate. Mr. Terrier told him that there was a parcel of land on Manchester Avenue for sale, and that this

parcel was owned jointly by him and his wife, Mrs. Terrier. The appellant asked to be shown the title to this land whereupon Mr. Terrier sent his chauffeur to his home to get it from his wife, having first spoken to her on the phone and advised her that he needed it. The chauffeur returned with the title which Mr. Terrier allowed the appellant to examine. Thereafter the appellant inspected the parcel of land and on his return to Mr. Terrier's office an agreement was concluded for the sale of the land to him for £900. Mr. Terrier then instructed his secretary, a Miss Young, to issue to the appellant a receipt for £300 being the sum he was required to pay, and did pay, by way of deposit in pursuance of the agreement. Miss Young prepared a receipt worded thus:

"

LAND SALES

MAY PEN P.O.

29.12.1969

Received from Mr. Stanley Livingston
Johnson of Milk River the sum of
Three Hundred Pounds on account of deposit
on one lot of land amounting to 2 roods,
24.1 perches located at
Regd. at 1004 - Fol. 555 Sold for the
sum of £900. Balance of £600 payable on
presentation of Regd. Title

R. OLIVIER TERRIER;
Proprietor

for Mrs. B.I. Terrier

Per F. Young

Agent. "

Later that day or the following day the appellant received a telegram, and a letter signed by Mr. Terrier. Mr. Terrier's signature purported to be on behalf of Mrs. Terrier. The telegram and letter were to the effect that the price of the land was £9,000 and not £900 and that the contract should be regarded as having been cancelled. By letter dated January 2, 1970 the appellant advised Mr. Terrier - not, be it noted, Mr. and Mrs. Terrier -

that if he did not carry out the terms of the agreement he would institute proceedings against him.

At the commencement of the trial Mr. Terrier, in answer to the appellant's claim, alleged, inter alia, that there was no concluded contract between him and the appellant, and, in the alternative, assuming a contract, that neither the receipt issued to the appellant by Miss Young nor the letter he had signed on behalf of Mrs. Terrier constituted a sufficient memorandum in writing. Mrs. Terrier, in her defence, adopted the foregoing and added that "there was no legal agency between Mr. Terrier and herself".

During the trial an abundance of evidence was led by the respondents in support of their respective defences. More particularly Mr. Terrier sought to show that the receipt prepared by Miss Young and which he did not examine before she handed it to the appellant did not reflect the true nature of the agreement reached between him and the appellant. Mrs. Terrier was concerned to show only that Mr. Terrier had no authority to bind her, as he was not her agent for any purpose connected with her interest in the land. She had been the sole proprietor of the land and, indeed, both Mr. Terrier and herself regarded the land as still hers. Mr. Terrier knew, she said, that she would sell if she had an offer of £9,000.

In the end the learned resident magistrate awarded judgment in favour of the respondents. In his reasons for judgment the magistrate said, inter alia:

- "(1) I believed and found that the (appellant) and (Mr. Terrier) agreed on a purchase price of £900 for this piece of land, and that the receipt accurately records the contract made.
- (4) I believed and found that (Mrs. Terrier) retained final approval of any negotiation entered into by (Mr. Terrier) in selling the land. Both regarded the land as if (Mrs. Terrier) were the sole owner. I held however as a matter of law that by virtue of the Statute of Frauds the receipt was not a sufficient memorandum in writing to bind (Mrs. Terrier) as it is not signed by her nor anyone by her lawfully authorized."

The appellant challenges the award in favour of the respondents on two grounds:

- (1) That having found on the facts that the negotiated contract was as stated in the receipt, the learned resident magistrate was wrong in law in finding that there was no sufficient memorandum in writing to satisfy the requirements of the Statute of Frauds.
- (2) Alternatively, if there was no sufficient memorandum in writing, the magistrate should have found none to be necessary as the absence of the requirements of the Statute of Frauds cannot be relied on to perpetuate a fraud upon the plaintiff (appellant)."

Before the resident magistrate, and before this Court wide-ranging submissions were advanced on behalf of the appellant in an attempt to show, in relation to the first ground of appeal, that the receipt issued by Miss Young, and the letter expressed to be signed on behalf of Mrs. Terrier, constituted a sufficient memorandum. Those submissions, in so far as they related to the complaint in that ground appeared to ignore, as indeed the complaint ignores, the fundamental consideration that before there can arise the question whether, in a given case, a memorandum is to be regarded as sufficient in relation to a relevant signature, there must, logically, be evidence capable of sustaining a conclusion that the signature appearing on the memorandum was there by the authority of the party whom it is sought to fix with liability. As to the receipt it is at least clear, from the magistrate's reasons, that Miss Young did not have any authority to sign that document for or on behalf of Mrs. Terrier. Any authority in her would have had to derive from the delegation to her by Mr. Terrier of any authority in him to sign on behalf of Mrs. Terrier. That he could have delegated such authority is, perhaps, open to question, unless the maxim delegatus non potest delegare is held not to apply, in the circumstances, to a purely ministerial act not involving some confidence or a discretion. See, for example, St. Margaret's Burial Board v. Thompson (1871) L.R. 6 C.P. 445. I think, however, that a fair reading of the finding at the first part of (4) above leads to the conclusion that Mr. Terrier had no authority to sign any

memorandum on behalf of Mrs. Terrier, nor indeed to act on her behalf in any way so as to bind her contractually with respect to her interest. The same consideration applies, of course, to the letter.

The question, therefore, that now requires an answer is whether the magistrate's finding at (4) was fairly open to him. Mr. George was driven to argue that there was material from which it could be reasonably inferred that this was a case of agency by estoppel. In my view, in so doing Mr. George undertook an impossible task. There had been, he argued a clear holding out by Mrs. Terrier of Mr. Terrier as her agent for the purpose of concluding a binding contract for the sale of her interest. This holding out was committed by Mrs. Terrier when, in compliance with the request made by Mr. Terrier, she sent the title to him by the chauffeur. What other reason, Mr. George asked, could she possibly have had for complying with her husband's request than that she desired the sale of the land? In her evidence she said that Mr. Terrier had not told her why he wanted the title. It should be noticed here that Mr. Terrier phoned his wife in the presence of the appellant. He was unable to say in his evidence that Mr. Terrier had mentioned anything to his wife concerning the possible sale of the land to him. Mrs. Terrier said that she did not conclude that the only reason why Mr. Terrier had sent for the title was because "he was hoping to do business with someone". She did think, however, that some boundary or other needed to be checked. If the resident magistrate chose to reject Mrs. Terrier's evidence as to her state of mind when she handed the title to the chauffeur there would have been no evidence before him on that point. He could not, in that circumstance, attribute to Mrs. Terrier some other state of mind not disclosed by the evidence. But Mrs. Terrier's knowledge, assuming such knowledge, that Mr. Terrier needed the title in connection with a possible sale of the land would, by no means, be conclusive on the question of agency by estoppel. In any event it should not be overlooked that Mr. Terrier, as joint proprietor, would in the ordinary course of things, be entitled to be shown the

title from time to time.

What then is the basis on which a conclusion that Mrs. Terrier held out Mr. Terrier as her agent could have been reached? She was emphatic, throughout her evidence, that she had never authorized her husband to sell her interest in the land. Did she, nevertheless, by words or conduct, represent, or permit it to be represented, to the appellant that Mr. Terrier was authorized to act on her behalf? Clearly, if the answer to this question is in the affirmative, Mrs. Terrier would be bound by any act done by Mr. Terrier in relation to the appellant if the appellant dealt with him, qua agent in relation to her interest, on the faith of that representation.

The essence of "holding out" or, as it is sometimes called, ostensible or apparent authority, is that it involves a kind of estoppel, the essential elements of which are:

- (i) a representation by words or conduct by the person holding out that the person held out is invested with authority to act;
- (ii) a reliance on that representation by the person to whom it is made; and (iii) an alteration, as a consequence of that reliance, in the position of the person by whom the representation is acted upon. See Rama Corporation v. Proved Tin (1952) 2 Q.B. 147.

In my opinion there was not a scintilla of evidence in this case that Mrs. Terrier, either by word or conduct, held out her husband as having any authority to act for her. It cannot, therefore, be said that the appellant treated with Mr. Terrier, in so far as her interest was concerned, on the faith of any representation held out by Mrs. Terrier. This ground of appeal accordingly fails.

I would hold too, that there is no merit in the second ground. This ground clearly involves a misunderstanding of the findings of the resident magistrate. He found, inter alia, that there was a contract concluded between the appellant and Mr. Terrier.

But he also found that the appellant's action against Mrs. Terrier failed because there was no memorandum evidencing a contract to which she was a party. In any event it was never suggested, nor was it pleaded that Mrs. Terrier was guilty of any fraudulent act.

I would dismiss the appeal.

LUCKHOO, P. (Ag.):

I agree.

SWABY, J.A.:

I agree.