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IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL No. 42 of 1975

BEFORE: The Hon. Mr. Justice Luckhoo, P. (Ag.)
The Hon. Mr. Justice Hercules, J.A.
The Hon. Mr. Justice Watkins, J.A. (Ag.)

CLIVE KENSTON TOMLINSON v. ALMAC DEVELOPMENTS LTD.

L.Z. Khan for the appellant.

Derek Jones for the respondent.

February 20, 1976

Luckhoo, P. (Ag.):

On February 20, 1976 we allowed the appeal in this matter and set aside the order made by the learned Master. We ordered that the defence filed by the respondent in the action between the parties be struck out and judgment be entered for the appellant against the respondent on the claim in the sum of $1,000 with interest thereon at the rate of six per centum per annum from September 9, 1974, the respondent to bear the costs in the court below and on appeal to be agreed or taxed.

On September 25, 1974, the appellant Tomlinson entered into an agreement with the respondent Almac Developments Ltd. (hereinafter referred to as "Almac") an estate agent acting as agent for a disclosed principal Finlayson to buy premises owned by Finlayson at 5, Sandhurst Close provided that -

(i) a deposit of $1,000 was paid by Tomlinson;

(ii) Almac succeeded in selling on behalf of Tomlinson premises at Duhaney Park, in the parish of St. Andrew for not less than $15,000 within 6 weeks of September 25, 1974; and

(iii) Almac arranged a mortgage for the balance of the purchase price of 5 Sandhurst Close over and above the sum of $15,000.

In pursuance of that agreement Tomlinson paid to Almac the amount of the deposit $1,000 on September 25, 1974. Almac, however, failed to sell Tomlinson's property at Duhaney Park within the time specified or at all. Tomlinson demanded of Almac the return of the deposit he had paid. According to Tomlinson Almac promised to repay the deposit. Almac denied making such a promise saying that the amount of the deposit had been paid over to Finlayson and that Tomlinson was promised that an attempt would be made to obtain a refund of that amount from Finlayson.

Tomlinson did not succeed in obtaining a refund of the amount of the deposit and accordingly sued Almac to recover that amount. Almac in its defence while admitting the terms of the agreement made on September 25, 1974 and receipt on that date of the amount of the deposit sought to deny liability to repay that amount on the ground that it had received the same in its capacity as agent for the vendor Finlayson. Tomlinson thereupon took out a summons to strike out the defence filed on the ground that it disclosed no reasonable defence and was such as to embarrass and delay the fair trial of the action and was an abuse of the process of the Court. He asked for judgment on the claim. The summons came on for hearing before the Master on October 9, 1975 who dismissed it with costs to be taxed or agreed by Tomlinson to Almac in any event. The learned Master was of the view that the defence filed raised an arguable case as to the capacity in which Almac contracted.

It was from that Order of the learned Master that this appeal was brought. The ground set out on the record of appeal was that the learned Master erred in the exercise of her discretion in not striking out the defence filed

in that the learned Master failed to appreciate that from the terms of contract alleged in the statement of claim and admitted in the defence filed it was clear on the face of the pleadings that -

(a) Almac was an agent for Finlayson and an agent for Tomlinson;

(b) in view of Almac's admission in its defence Almac should not have parted with possession of the amount of the deposit entrusted to it by Tomlinson without fulfilling the other two conditions that formed part of the agreement between them.

The question is - is there a real issue whether Almac was a stakeholder or an agent for the vendor Finlayson. If there is no real issue and it is clear on the pleadings that Almac was a stakeholder, as Mr. Khan submitted Almac was, then the prayer for summary judgment should have been entertained by the Master.

It has not been contended that when Almac received the deposit it was in any way indicated to Tomlinson that the amount was intended to be paid over to Finlayson. Indeed the receipt given by Almac in respect of the deposit was issued in the name of Almac without more. With the permission of Mr. Jones, learned attorney for Tomlinson Mr. Khan produced the receipt for our inspection. The pleading in paragraph 3 of the statement of defence that Almac "received the said sum of $1,000.00 in its capacity as agent for the said Enos Finlayson" must be understood accordingly.

A number of authorities were cited to us by Mr. Khan in support of his submission that the defence as pleaded was in effect a complete admission of the claim. In Burt v. Claude Cousins & Co. Ltd. (1971) 2 All E.R. 611 the question was whether when a pre-contract agreement fell through the deposit paid to and retained by the vendor's agent who had since gone into liquidation could be recovered by the purchaser from the vendor. The agent had given the receipt in his own name. The Court of Appeal by a majority held that the purchaser could recover from the vendor. It is not

necessary for the pruposes of this appeal to state the reasons why the Court so held. The Court was unanimously of the view that the agent would also have been liable having given the receipt for the deposit in its own name (though judgment could not be recovered against both). Lord Denning, M.R. in his dissenting judgment (at pp. 615, 616) said -

> "If an estate agent, before any binding contract is made, asks for and receives a deposit, giving the receipt in his own name without more, the question arises: in what capacity does he receive it? As agent for the vendors? or as stakeholder? I cannot believe that he receives it as 'agent for the vendor', for, if that were so, the estate agent would be bound to pay it over to the vendor forthwith, and the vendor alone would be answerable for its return. That cannot be right. Seeing that no contract has been made, the vendor is not entitled to a penny piece. If the estate agent should pay it over to the vendor, he does wrong; and if the vendor goes bankrupt, the estate agent is answerable for it. That is clearly established by the decision of this court in Rayner v Paskell and Cann (1948) 152 Estates Gazette, and see p. 628, post.
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> Seeing that the estate agent must not, before a contract is made, hand the deposit over to the vendor, what is he to do with it? Clearly he must keep it in his own hands until a contract is made, or the purchaser asks for it back. And what is he then but a 'stakeholder'? It is the very essence of a stakeholder that he is to hold a sum in medio until the event is known. If no contract is made, the estate agent must return the deposit to the purchaser and can be sued if he does not: see Brodard v Pilkington (20th April 1953), see p.630, post. If the purchaser asks for his money back, as he is entitled to do, at any time, the estate agent must give it to him: see Maloney v Hardy and Moorshead (12th February 1970), see p. 630, post, per Russell, L.J. If the estate agent makes off with the money, and is brought before the criminal courts, the proper charge is that he fraudulently converted the money of the purchaser, and not the money of the vendor: see R v. Pilkington (1958) 42 Cr. App. Rep. 233, and see p. 631, post. In all those cases judges of great authority spoke of the estate agent as a 'stakeholder'. To my mind, they fully support the proposition that, when an estate agent receives a deposit, subject to contract, and gives a receipt for it in his own name, the proper inference is that he receives the money as stakeholder and not as agent for the vendor. I cannot agree, therefore, with the decision of Sachs, J. in Goding v Frazer (1966) 3 All E.R. 234 (1967) W.L.R. 286."

Sachs, L.J. (at p. 620) said -

"On reconsidering the matter with the aid of Rayner v Paskell ((1948) 152 Estates Gazette 270, and see p. 628, post), and the other authorities cited to us, I have come to the following conclusion as to the terms on which an estate agent is authorised by a vendor to receive and hold a deposit (subject, of course, to any contrary agreement between them). He is authorised, or perhaps it would be better to say instructed, to hold that deposit in his own possession unless and until an event occurs on which he is authorised to dispose of it. In the event of the purchaser demanding its return before any contract is concluded (i.e. during the 'pre-contract' period) he has to return the deposit to him. In the event of a contract being concluded, it is to be disposed of in accordance with the terms of that contract, be they express or implied. The instruction to hold the deposit in his, the estate agent's possession is one which during the pre-contract period precludes him in the absence of the consent of both the depositor and the vendor from handing it over to the vendor or any person the latter may nominate; but, of course, entitles him to place it in his, the estate agent's, account at a bank of repute."

Megaw, L.J. (at p. 627) said -

"I do not find it necessary to attempt to analyse the various cases in which the word (stakeholder) has been used in the context of transactions involving estate agents. It may be that the word, when it has been used in this context, has been used to indicate that in at least one respect the estate agent, taking a pre-contract deposit, is in a special position, that is, that he may not hand over the deposit even to his principal, the prospective vendor, unless and until the prospective purchaser consents, by the terms of the contract of sale or otherwise."

In Barrington v. Lee (1971) 3 All E.R. 1231, another case dealing with the question of the vendor's liability in circumstances similar to those in Burt's case, save that the vendor's agents expressly received the deposit as stakeholders, Lord Denning, M.R. said (at p. 1238) -

"When the purchaser pays a deposit to an estate agent, in the course of negotiations before any contract is concluded, there is clearly an implied promise by someone to repay it if the negotiations break down. But who is that someone? Who makes the promise to repay it? The estate agent or the vendor? If the estate agent receives the deposit 'as stakeholder', then it is the estate agent who makes the promise to repay, and he alone can be sued for it. If the estate agent receives the deposit 'as agent for the vendor' (having actual authority on that behalf) then it is the vendor who makes the promise to repay. The estate agent must hand it to the vendor on demand; and the vendor alone is liable to return it. If the estate agent receives the deposit, without saying in what capacity he receives it, it is his duty to hold it pending the outcome of the negotiations. He must not hand it over to the vendor. When the negotiations break down, he must return it to the purchaser. The purchaser can sue the estate agent for money had and received which is based on an imputed promise to repay."

Stephenson, L.J. (at p. 1243) said -

> "In 1834 the receipt of a deposit was not thought to be within the authority of an agent employed to sell an estate: Mynn v. Joliffe ((1934) 1 Mood & R 326). In more recent times it has become a recognised practice for estate agents employed by owners who wish to sell their property to take deposits from prospective purchasers before any contract is signed. In 1959 the Court of Appeal decided, in the absence of any evidence as to the practice of estate agents, that to take such deposits before contract was ordinarily incidental to the agent's employment by the owner to promote a contract of purchase and was therefore within his authority, the owner was therefore liable to the prospective purchaser for repayment of the amount of his deposit if no sale materialised: Ryan v Pilkington (1959) 1 All E.R. 689, (1959) 1 W.L.R. 403. Earlier this year the Court of Appeal by a majority decided, on evidence of the practice of estate agents, that this was the position whether or not the agent told the depositor that he was taking the deposit as agent for the owner, and in spite of the fact that the the owner was not entitled to call on the agent to pay the deposit over to him: Burt v. Claude Cousins & Co. Ltd.
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> This may be thought a surprising sort of agency; surprising not because it renders both agent and principal liable, for that is not unique, as Megaw, L.J. pointed out in Burt's case but because the principal is apparently liable to repay money had and received by his agent to the plaintiff's use which he has not only never himself had or received, but of which he may know nothing and had he known of it could not have received it from his agent without the consent of the plaintiff."

It would seem, therefore, that the authorities are to the effect that where, as here, nothing is said in the estate agent's receipt for a deposit pursuant to a pre-contract about the estate agent's capacity the estate agent would be liable to make a refund to the purchaser if the proposed sale falls through. If he fails to make a refund an action would lie against him for moneys had and received. The appellant's claim though not framed specifically in such terms - it is stated to be for money paid on a consideration which has totally failed - is in essence one for moneys had and received based on an implied promise to repay.

For these reasons we allowed the appeal and made the order abovementioned.