IN THE FIJI COURT OF APPEAL
Civil Jurisdiction
Civil Appeal No. 38 of 1976

Between:

ALEXANDER HERBERT SHAH
s/o Alim Shah — Appellant
(Original Plaintiff)

- and -

1. STARDUST CRUISES LIMITED
2. REAL ESTATE OF FIJI LIMITED

Respondents
(Original Defendants)

D.R. Sahu Khan for the Appellant
C.L. Jamnadas for the First Respondent
K. Chauhan for the Second Respondent

Date of Hearing: 15th March, 1977
Date of Judgment: 25th March, 1977

JUDGMENT

Gould V.P.

This is an appeal against a judgment of the Supreme Court of Fiji dated the 24th June, 1976. The action was brought by the appellant as plaintiff against the two respondent companies, the claim against the first being for specific performance of a contract for sale of freehold land or alternatively damages. The claim against the second respondent was framed in the same way although the part alleged to have been played by the second respondent in the transaction was that of an agent for the first respondent.

In his judgment of the 24th June, 1976, the learned Judge dismissed the action against the first respondent, who had elected not to give or call any evidence. The action against the second respondent, who made the same election, was dismissed on the 9th July, 1976. The appeal is limited to the judgment affecting the first respondent, and although the second respondent was made a respondent to the appeal, the Court is not concerned with the judgment dismissing the action against him.

A bare outline of the facts is that on the 26th January, 1970, the appellant claims to have paid to the second respondent, as agent for the first respondent, the sum of $2,000 as deposit on two blocks of freehold land. On that date he claims to have made an oral agreement for the purchase of that land with Mr. F. MacManus a member of the second respondent acting on behalf of the first respondent. The agreement was not reduced to writing. A receipt for the $2,000 was made out in the name of "Maud Amputch per A.H. Shah" (the appellant) and contained the words, "being deposit on blocks 8 and 9 Wainadoi CT 10384"; the appellant explained in evidence that Mrs. Amputch had provided him with the $2,000 paid. It is not in dispute that this receipt could not by itself be regarded as a memorandum of the terms of the contract fulfilling the requirements of section 59 of the Indemnity, Guarantee and Bailment Ordinance (Cap.208) but the

appellant also relied, both in the Supreme Court and on the appeal, upon certain letters written in the most part by Mr. MacManus on behalf of the second respondent. The question for the Court was therefore whether an oral contract for sale had been established and whether it was evidenced by a memorandum under the section above mentioned. In his judgment the learned Judge found that the receipt for the sum of $2,000 constituted a receipt and not a contract, and that the correspondence, so far as it was admissible, was insufficient to remedy the deficiency. He held that there was no memorandum signed by the first respondent or on its behalf and there was nothing in the documentary evidence to indicate that the second respondent was the agent of the first. He found that the appellant had failed to establish a binding contract.

The grounds of appeal against this judgment read:-

"1. That the Learned Trial Judge erred in law and in fact in holding that there was not enough evidence of memorandum in writing to satisfy the requirements of Section 59 of the Indemnity, Guarantee and Bailment Ordinance (Cap.208).

2. That the Learned Trial Judge erred in law and in fact in holding that the Appellant failed to establish that there was a binding Contract by the First Respondent to sell Lots 8 and 9 on Scheme Plan or Lots 2 and 3 on D.P. 3672 part of Certificate of Title No. 10382 to the Appellant.

3. That the Learned Trial Judge erred in law and in fact in not holding that there was the relationship of principal and agent between the First and the Second Respondents in relation to the Contract of sale of the land in question to the appellant.

4. That the Learned Trial Judge erred in law and in fact in not awarding damages to the Appellant.

5. That the finding and judgment of the Learned Trial Judge is unreasonable and cannot be supported having regard to the evidence as a whole."

We will not discuss these individually, as it seems plain that in order to succeed in his action the appellant had to establish that he had entered into an oral contract as pleaded and that there was a sufficient note or memorandum of that contract to satisfy section 59 of the Ordinance abovementioned. In order to prove either of these matters, he had to be able to point to evidence that the second respondent (for convenience we will refer to that company as "Mr. MacManus") was the agent of the first respondent with authority to make the contract; that question goes not only to the actual making of the oral contract but also to the provision of material alleged to constitute the note or memorandum. We think the appeal can best be considered with reference to these topics and we will begin with the paramount question of agency.

Paragraph 1 of the Statement of Claim averred that the sale had been made by the first respondent through the second named defendant as its agent. The first respondent in its Statement of Defence specifically denied that Mr. MacManus was the agent for the purpose of the sale of the two blocks of land in question. The pleading continued in a rather wordy style to say (paragraph 4) that "in January 1970 the lots could not be sold and the First Defendant had not approved them for sale": then, in paragraph 6, that in July, 1971, it was advised for the first time by Mr. MacManus that the appellant had paid the latter $2,000 -

> "allegedly in connection with the sale of two lots of the First Defendant's land which land the Second Defendant had no authority to sell. The First Defendant further states that upon being acquainted with the position it ordered the Second Defendant to refund the said $2,000 to the Plaintiff."

Paragraph 9 of the Statement of Defence admitted that by a letter dated the 28th January, 1972, the first respondent's solicitors, Messrs Grahame & Company, wrote to the appellant advising him that Mr. MacManus had no authority to sell the said lots to the plaintiff. We think that on this state of the pleadings the onus remained with the appellant to establish the authority of the agent. When the appellant pleaded that the sale was through an agent he could only mean an authorised agent - otherwise the word has no meaning. The first respondent denied this authority and the

affirmative of the issue was with the appellant.

The only witness called was the appellant. It is hard to see why he did not call Mr. MacManus, whose pleading showed him to be entirely favourable to the appellant's case, but he did not, and can now only rely upon his own evidence and upon the letters which he tendered in evidence. These were admitted subject to objection, but on the appeal no point has been made of this and they are open for consideration.

The appellant said that before he paid the deposit to the office of Mr. MacManus he inspected the property at Wainadoi, where the land was on the right side of the road at 15 mile post. The land belonged to the first respondent. He was taken to see the land by a Mr. Kennard who worked for Mr. MacManus' company. He was shown a scheme plan. His intention to purchase was the result of an advertisement in the Fiji Times, which was produced. It mentions only Mr. MacManus' company. When discussing terms with Mr. MacManus the latter had said he was acting for Stardust Cruises, who owned the land. The appellant went on to say that he knew that Mr. MacManus was acting for the first respondent, but as he had given evidence that Mr. MacManus had told him so, it would not appear that his knowledge had any other source. He did go on to say, however, that he knew Dick Smith who was the "owner" of Stardust Cruises. Some rather disjointed evidence is recorded, the purport of which appears to be that an agreement was to have been signed but it never eventuated.

All that can be gathered from this is that Mr. MacManus told the appellant he was acting as agent for the first respondent. The receipt for $2,000 is on a form which bears the printed heading of Mr. MacManus' company. As to the letter there are five from Mr. MacManus to the appellant dated respectively the 8th October, 1970 (Ex.2), 16th February, 1971 (Ex.8), 8th June, 1971 (Ex.3), 24th September, 1971 (Ex.4) and 14th December, 1971 (Ex.5). They are all from Mr. MacManus to the appellant, and all written on the basis that there was a subsisting contract for sale; the vendor's name was not mentioned. These letters do not take the matter of the authority of Mr. MacManus any further. It is worthy of note that the last three were written after the date of a letter of the 18th January, 1971, from Mr. R.S. Smith to Mr. Finton MacManus, McManus Bradley, Surveyors, Victoria Parade, Suva. It would appear that Mr. MacManus was involved in more than one capacity, as the appellant's evidence includes the statement that Mr. MacManus told him he was doing the survey. The text of this letter, which was produced by the appellant, is as follows -

"RICHARD S. SMITH 2 Wentworth Place
Point Piper, 2027.

Castaway Island,
P.O. Box 269,
Lautoka,
Fiji Islands.

18th January, 1971.

Mr. Fintan McManus,
McManus, Bradley,
Surveyors,
Victoria Parade,
SUVA.

Dear Fintan,

RE: WAIDAI

A short note to confirm our discussion in Sydney on 13th January, 1971.

1. Mr. Amputch to be refunded his deposit on land north of Main Road on river as shown or an alternative site found for him.

2. Land south of Main Road not to be sold and deposits returned as this was apparently taken with the understanding that the sale had to be negotiated with the owner.

3. All future areas to be sold for cash only including that signed today (Part C+10382) close to 15 mile peg.

4. You will furnish to us a list of costs in respect of (a) surveying (b) sales commission as at 31st December, 1970.

5. Survey cost for work due up to date and sales commissions on all sales that are completed.

Trusting this is in accordance with our discussions,

Yours sincerely,

(Sgd.)
R.S. SMITH."

One thing that can be deduced with reasonable certainty from this letter, read with the admission in the Statement of Defence concerning the letter from Grahame & Company of the 28th January, 1972, is that it does refer in paragraph 1 to the transaction with the appellant. Though a Mr. Amputch is mentioned it is clear that the appellant was the real purchaser, as was well known to Mr. MacManus. The problem is what

meaning is to be attached to the remainder of the letter. Is it an admission that at the date of signing of the receipt about a year earlier, Mr. MacManus had been vested with authority to bind the first respondent to a sale. On the whole it is more consistent with a suggestion that Mr. MacManus had been going ahead without authority and even that the parties had fallen out over the matter. The requests in paragraph 4 indicate that there had been authority to sell in some areas. Paragraph 1 indicates strongly that the sale to Mr. Amputch was not in an authorised area. It would not assist the appellant to show that Mr. MacManus had made a mistake unless conduct by the first respondent company estopped it from relying upon the error. There is no evidence of that.

The matter at the stage it had reached was not one of evidential onus. When the first respondent elected not to call evidence the Court had to decide upon the evidence before it whether or not it was more probable that Mr. MacManus was duly authorised to make and complete a sale. Very little evidence would suffice in the circumstances but the overall onus remained on the appellant and all he did to discharge it was to produce this most ambiguous letter. It was surely a case in which interrogatories might have been administered or the evidence of Mr. MacManus obtained. The learned Judge dismissed this letter as not helping the appellant to establish the alleged

contract. For ourselves, dealing specifically with the question of authority, we regard it as a denial rather than an admission, and are satisfied that it is insufficient to show, on a balance of probabilities, that Mr. MacManus had authority to bind the first respondent to a sale of the particular land on the 26th January, 1970. It was not enough to present the Court with a guess.

That disposes of the appeal. The question of a memorandum does not arise, and certainly none could be proved unless it was by virtue of an authorised agency vested in Mr. MacManus. In case, however, we should be wrong in the views expressed above, we would add a word on the subject of the oral contract which it was alleged was made with Mr. MacManus, and was required to be evidenced by a memorandum. In his examination in chief the appellant gave no evidence of any agreement, but in cross-examination he said - "I discussed the mode and terms of payment with Mr. MacManus - same as advertised." This was hopelessly inadequate, particularly when it is realised that the advertised terms, which were in evidence, were $220 per acre and the deposit 10%. The deposit actually paid greatly exceeded 10% and the contract pleaded by the appellant was at $200 per acre. Mr. Sahu Khan made a belated application at the hearing of the appeal to amend the Statement of Claim to $220 per acre, and we reserved our decision on that in case the interests of justice required

that the application be granted. On our view of the case it now becomes immaterial; it would have been a difficult application to grant in any event as the first respondent had made its election to call no evidence on the then existing state of the pleadings. In our opinion the appellant failed to establish his case as against the first respondent in this respect also.

For the reasons we have given the appeal is dismissed with costs.

(Sgd.) T.J. Gould
Vice-President

(Sgd.) C.C. Marsack
Judge of Appeal

(Sgd.) T. Henry
Judge of Appeal