

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Frederick August Neubauer and another v. Gordon, Grant, & Co., from the Supreme Court of Trinidad and Tobago; delivered the 23th February 1912.

PRESENT AT THE HEARING :

LORD MACNAGHTEN.

LORD SHAW.

LORD MERSEY.

LORD ROBSON.

[DELIVERED BY LORD MERSEY.]

This is an Appeal against a decision of the Supreme Court of Trinidad (the Chief Justice and Mr. Justice Russell, Mr. Acting Justice Wright dissenting) affirming the judgment of the Chief Justice on the trial before him without a jury of an action brought by the Respondents against the Appellants.

The claim was for damages for the breach of alleged contracts to accept three bills of exchange for 900*l.*, 1,550*l.*, and 650*l.* respectively, drawn by one Knox upon the Defendants and discounted by the Plaintiffs. The contracts were said to have been made by a Mr. Scott on behalf and with the authority of the Defendants at the time when the Plaintiffs discounted the bills, and the questions which arose for determination in the action were whether Scott ever in fact made the alleged contracts, and, if so, whether he had either actual or ostensible authority in that behalf.

The facts of the case, except in so far as they relate to the making of the contracts, are not in dispute. They are as follows :

The Defendants Neubauer and Hüttenheim were bankers and merchants carrying on business at Hamburg under the style of F. A. Neubauer. Part of their trade consisted of making advances to planters in Trinidad against shipments of cocoa. These advances were made by means of drafts drawn by the planters on Neubauer in favour of Mr. F. E. Scott, who was Neubauer's agent in Trinidad. The drafts when endorsed by Scott were taken by the planters to bankers in Trinidad with whom they were discounted, the proceeds being handed by the bankers to the planters. The bankers then forwarded the drafts to Hamburg where they were presented to Neubauer for acceptance, accepted, and in due course paid. Neubauer's remuneration consisted of a commission paid by the planters on the amount of the acceptances.

To facilitate this business Neubauer furnished Scott with a number of blank forms of drafts with Neubauer's name printed on the front as drawees. When the amount which a planter required was ascertained, one of these forms was filled up and signed by the planter. It was Scott's business and duty as between himself and Neubauer not to issue these forms to the planters unless and until cover was provided which could be forwarded to Neubauer to put the latter in funds to meet the drafts. The drafts were made payable to Scott's order in order to fix Scott with liability on the bills and so to secure his attention to procuring good and sufficient cover.

Among the customers with whom Neubauer traded in this way was a planter named Knox. By agreement between Neubauer and Knox the advances to be made to the latter were to be limited to 12,000*l.* and Scott was aware of this.

Nevertheless, Scott at times filled up and handed to Knox bills for amounts which in the aggregate exceeded this total, and he also at times filled up bills without first obtaining cover. Neubauer protested against these irregularities. On the 19th October 1905 he wrote to Scott :—

“I now for the last time repeat I do not wish Mr. Knox
 “to owe me at any time more than the sum fixed by agree-
 “ment. . . . Please do not issue any drafts to him on my
 “firm unless you are covered by cocoa in your possession or if
 “he has sold cocoa locally you are covered by a bank draft
 “ If you do not follow my instructions you do
 “so on your own responsibility, and the drafts will
 “certainly not be accepted on presentation.”

But notwithstanding this and other similar remonstrances Scott appears to have continued to issue bills to Knox without first obtaining cover ; and a system of what are called revolving credits was resorted to ; that is to say, a bill would be filled up and discounted, Knox receiving the proceeds, and when the date was approaching for the bill to be presented in Hamburg for acceptance another bill would be created and discounted, and the proceeds of the latter bill telegraphed to Hamburg to serve as cover for the earlier bill. Sometimes the cover thus created would not reach Hamburg in time, and in such cases Neubauer refused to accept : in fact he never did accept unless and until he had cover in his hands against the liability he was incurring, nor did either Scott or Knox expect him to do so. On the 30th April 1907, when acceptance of a draft had been delayed for want of cover, Scott, writing to Neubauer, said, “We
 “cannot expect nor would we ask you to accept
 “without cover.”

Among the bankers in the island to whom Knox took the drafts on Neubauer for discount were the Plaintiffs, Messrs. Gordon, Grant, & Co. This firm had done business in these bills with Knox for several years, and the bills taken had

been invariably accepted by Neubauer and paid at maturity. The delay which at times occurred in the acceptance of the bills by reason of the cover not arriving in Hamburg in time was said by the Plaintiffs never to have been brought to their notice ; and this, though unlikely, is possibly true.

In the summer of 1908 rumours were afloat in Trinidad that Knox was in financial difficulties and that Neubauer was likely to close his account. These rumours, which were well founded, came to the ears of Gordon, Grant, & Co., and when in June Knox brought to them the first of the three bills in respect of which this action is brought (a bill for 900*l.*, dated the 23rd June 1908) they refused on that ground to buy it, and they told both Knox and Scott that they could not purchase any more of Knox's bills. Knox had provided no cover for this bill. A few days later, however, Scott had an interview with Mr. Smith, the Plaintiffs' managing clerk, and it is at this interview that the first of the three contracts sued upon is alleged to have been made. Smith's account of the interview is short. He says : —

“ Scott said he had given Knox a draft for 900*l.* and he understood we had refused to take it. ‘ I have already told ‘ you, Smith, that I have Neubauer's authority to grant ‘ these drafts to Knox, why have you refused it ? ’ I said ‘ as far as Knox goes we intend to take no more drafts from ‘ Knox. He said, ‘ but you are not going to give Knox the ‘ money: Neubauer is going to get the money; I've got ‘ authority to give him that bill, and the money is going ‘ to be cabled to my account.’ I said, very well, I would ‘ see Gordon. I saw Mr. Gordon with the result that we ‘ took the bill . . . and cabled the proceeds, at Scott's ‘ request made to me, to Scott's credit.”

Subsequently, namely, on or about the 30th June 1908, and on or about the 11th July 1908, the Plaintiffs bought of Scott the other two bills for 1,550*l.* and 650*l.* in circumstances similar, as they allege, to those in which they had bought

the first bill for 900*l.* No cover had been provided for either of these bills.

The proceeds of the sale of all three bills were, at Scott's request, telegraphed by the Plaintiffs to Neubauer for Scott's credit, and formed part of three telegraphic remittances of the 24th June, the 30th June, and the 13th July respectively. By virtue of telegrams of the 24th June, the 1st July, and the 14th July from Scott to Neubauer the money so sent to Scott's credit was transferred to the credit of Knox with Neubauer, and it was utilised by Neubauer as cover for earlier bills drawn by Knox which Neubauer then accepted. The Plaintiffs sent the three bills forward by post to their agents in Europe for presentation, but when they were presented Neubauer refused to accept them on the ground that they were not in possession of cover for them. The bills were thus returned to the Plaintiffs dishonoured, and neither Knox nor Scott being able to pay them, this action was begun in which it is sought to make Neubauer responsible. The question is, are they liable?

It is important to note the form of the action. It is not an action on the bills; it could not be, for Neubauer was never a party to the instruments. But it is an action brought on three several contracts said to have been made in respect of the bills, by which, in consideration of the Plaintiffs buying the bills at Scott's request, Scott promised and undertook, on the part of Neubauer and with Neubauer's authority, that Neubauer would accept and pay the bills in due course. In compliance with an order of the Court for particulars, the Plaintiffs stated that the alleged promises and undertaking were made to H. F. Smith, managing clerk to the Plaintiffs, and to William Gordon (the Plaintiff), and were verbal. These allegations were specifically denied in the Statement of Defence, and on the issues so raised the case came on for trial.

It was necessary for the Plaintiffs to shape their action in this form if they were to succeed. The mere fact that the drafts were drawn on Neubauer gave the Plaintiffs no right whatever to call upon Neubauer to accept: nor did the fact that in the past Neubauer had accepted many similar drafts make any difference. In each case, so far as regarded the Plaintiffs, it was in the absolute discretion of Neubauer to accept or not as he thought fit, and a liability to accept could only be established by proving contracts to do so outside the bills themselves. The real question therefore, is, have the Plaintiffs proved such contracts? In their Lordships' opinion they have not.

The contracts if made were of a strange kind. They were contracts to bind Neubauer to accept bills which he had never seen and of which he had not heard. They were made by two persons (Gordon and Scott), both of whom knew of the rumours that Neubauer had determined to close Knox's account. A few days before the first of the three contracts the Plaintiffs had refused to buy the bill for 900*l.* of Knox because they doubted whether Neubauer would accept it. They were contracts of a kind never entered into by the parties before; that is to say, they were contracts for the purchase of the bills not of Knox but of Scott, and the money, instead of being paid to Knox, who *primâ facie* was entitled to receive it, was paid to Scott.

"I can't tell," says Gordon in cross-examination, "why Knox should put his name to bills when Scott was to get the proceeds."

And they were contracts which bound Neubauer to accept and pay the bills whatever the state of Knox's account with them might be.

Yet Smith says:—

"It did not strike me as a peculiar financial transaction. Scott said he had Neubauer's authority to grant this draft, and that was sufficient for me. I did not ask him how this authority came."

And the question arises as to who was to pay Neubauer's commissions in the event of his accepting the drafts. Not Knox, for he was not to have the proceeds ; nor Scott, for he had no contract with Neubauer under which Neubauer could claim a commission from him ; and of course not Gordon. No provision seems to have been made in these contracts for the payment of Neubauer's commission ; and as to the proceeds they were in the first instance carefully placed beyond Neubauer's control.

It is very difficult to believe that Scott purported to enter into so extraordinary a bargain, or that the Plaintiffs thought he had authority to do so. The Plaintiffs' case seems to rest upon the one statement of Smith's to be found in his cross-examination :—

“ Scott said he had Neubauer's authority to grant the “ draft, and that was sufficient for me.”

Scott denies that he said anything of the kind, and certainly if he did say it he was saying that which was not true, for he had issued the bills to Knox without getting cover, and each bill, when taken with the earlier bills already afloat, exceeded the 12,000*l.* limit. It is further to be observed that no trace of or reference to the alleged contracts is to be found in any letter or other document. The real truth of the matter is that the Plaintiffs were anxious to earn the profit attaching to the discounting of the bills and were willing in order to secure it to take the risk of Neubauer refusing to accept the bills on presentation. They did an equivocal act in remitting the proceeds to Scott's credit with Neubauer, but it had not, as they now contend, the effect of earmarking the money so as to make it applicable only as cover for the three bills : the existence of the bills was at that time unknown to Neubauer, and upon the money being released by Scott's telegrams and placed to Knox's credit Neubauer

properly utilised it as cover for earlier bills which were then being presented for acceptance, and some of which, it is to be observed, had been discounted by the Plaintiffs for Knox. The money was probably paid to Scott's credit in the hope that the mere receipt of it would induce Neubauer to accept these earlier drafts. But it is not material to determine the object which the Plaintiffs had in view in remitting the money to Scott, instead of to Neubauer. Scott released the money to Knox and it then became Knox's money.

It was argued at the Bar that although Scott may have had no actual authority to enter into the contracts sued on, he had, nevertheless, ostensible authority. Before, however, such an authority could be set up, it would be necessary to show that contracts similar to those relied on had been made in the past, and had been recognised and acted upon by the Defendants. So far from that being the case, however, no contract of the kind sued on had ever been known to any of the parties.

The conclusion, therefore, to which their Lordships come is that Scott never in fact made the contracts sued on. That disposes of the case, but they also desire to add that even if he did make the contracts, he had neither actual nor ostensible authority to do so.

Their Lordships will humbly advise His Majesty that the judgment at the trial and in the Court below should be set aside, and judgment entered therein for the Defendants with costs. The Plaintiffs will pay the costs of this Appeal.

In the Privy Council.

FREDERICK AUGUST NEUBAUER AND
ANOTHER

v.

GORDON, GRANT, & Co.

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