

*Privy Council Appeal No. 68 of 1929.*

Hugh Francis Hoole and others - - - - - *Appellants*

*v.*

The Royal Trust Company and another - - - - - *Respondents*

FROM

THE SUPREME COURT OF NEWFOUNDLAND.

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL, DELIVERED THE 22ND JULY, 1930.

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*Present at the Hearing.*

THE LORD CHANCELLOR.

LORD BLANESBURGH.

LORD DARLING.

LORD TOMLIN.

LORD RUSSELL OF KILLOWEN.

*(Delivered by THE LORD CHANCELLOR.)*

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This is an appeal from a judgment of the Supreme Court of Newfoundland (Chief Justice Horwood and Mr. Justice Higgins) dated the 1st March, 1929, affirming a judgment of Mr. Justice Kent dated the 5th December, 1927. These judgments were pronounced in an action of account brought by the plaintiffs (appellants) against the firm of C. F. Bennett & Co., now represented by the defendants (respondents) and the issue in the action with which the present appeal is concerned is as to the alleged liability of the plaintiffs to account to the defendants for the balance of the proceeds of 720 casks of Labrador codfish consigned by the defendants to Genoa in November, 1921, for sale. With regard to this consignment which was made by the steamship "Kriton," the defendants' case is that it was sent to Genoa to be sold by the plaintiffs' sub-agents there. These sub-agents, Messrs. Zurlo & Co. by name, in fact disposed of the fish and acknowledged to the plaintiffs that they had received in respect thereof 38s. a hundredweight. For this sum at the least (for the actual sum

received by Zurlo & Co. at the most) the plaintiffs are, the defendants say, responsible to them. To this the plaintiffs reply that Messrs. Zurlo & Co. were not their sub-agents and that they, the plaintiffs, are not liable to account to the defendants for the moneys received by that firm on a true construction of the letters passing between the parties which formed the basis of the contract. Messrs. Zurlo & Co., they say, were the direct consignees of the defendants and the plaintiffs are not liable for any receipts by Messrs. Zurlo & Co. which have not in fact reached their hands.

The Court of first instance and the Court of Appeal in Newfoundland both held that Messrs. Zurlo & Co. were the sub-agents of the plaintiffs, Mr. Justice Kent saying :—

“ on the whole evidence and correspondence I have come to the conclusion that Zurlo & Co. were in this transaction sub-agents at Genoa of the Plaintiffs, and that the Plaintiffs are responsible to the Defendants for moneys received by Zurlo & Co.”

The Chief Justice said :—

“ The rights and liabilities of the parties have to be determined in accordance with the contract contained in the proposal to the Appellants beginning with their telegram and letter of 21st October 1921, and including their telegrams of the 7th and 15th November and the acceptance of C. F. Bennett & Co. in their telegraphed reply of 16th November. Nothing in the correspondence or conduct of the parties is effective to vary the terms of this contract or capable of being construed as an abandonment or waiver of rights acquired under it. No privity was created between C. F. Bennett & Co. and Zurlo & Co. They were unknown to one another. They knew only the Appellants. The account rendered by Zurlo & Co. to the Appellants acknowledges that Zurlo & Co. held to the credit of the Appellants the proceeds of the fish sold by them. The appellants as agents for the respondents have therefore to account to them for the money received by their agents, Zurlo & Co., for the sale of respondents' fish and credited by Zurlo & Co. to Appellants' account.”

Mr. Justice Higgins said, after setting out the correspondence and the facts, “ In these circumstances the plaintiffs became at once liable to respondents for this sum which their sub-agents held to their credit.”

At the trial the plaintiffs endeavoured to make out a further case, namely, that the defendants had elected to accept Messrs. Zurlo & Co. as their debtors in the transaction and to look to them for payment. Both the Trial Judge and the Court of Appeal rejected this contention. It was not pressed at the hearing before this Board ; if it had been their Lordships, with reference to it, would have been of the same opinion as the Courts in Newfoundland and for the same reasons.

The short question, therefore, upon this appeal is, “ Were Messrs. Zurlo & Co. the plaintiffs' sub-agents as the defendants contend, or were the defendants and Messrs. Zurlo & Co. bound by contract to each other as principals, as the plaintiffs contend ? ” If Messrs. Zurlo & Co. were sub-agents of the plaintiffs, the latter would be liable for the proceeds of the fish actually received by

Messrs. Zurlo & Co. As to this it is clear from document 148, an account of Messrs Zurlo & Co. to the plaintiffs, dated the 23rd June, 1922, that the receipt of 38s. per hundredweight for the fish in question is acknowledged by them. Of that amount the sum of £2,700 has been paid in advance by Zurlo & Co. to the plaintiffs, who in turn have given credit for it to the defendants and no question now arises with reference to that sum. The balance of admitted receipts, amounting to a sum of £4,054 10s., remains to be accounted for by Zurlo & Co. and it is in substance and effect, this sum with appropriate interest thereon which, on this issue, is in dispute between the plaintiffs and the defendants.

If Messrs. Zurlo & Co. were sub-agents to the plaintiffs, the plaintiffs must account to the defendants for the proceeds of the sale. The law on this seems clear.

“ Every agent who employs a sub-agent is liable to the principal for money received by the sub-agent to the principal's use, and is responsible to the principal for the negligence and other breaches of duty of the sub-agent in the course of his employment.”

This statement, which is taken from Article 61, “ Bowstead on Agency,” 7th edition, 1924, is a correct summary of the case of *Mackersy v. Ramsays*, 1843, 9 C. & F., 818, which has been repeatedly followed on many occasions and in many cases, some of which were cited to their Lordships, as for example *Meyerstein v. Eastern Agency Co.*, 1885, 1 T.L.R., 595.

The doctrine is one of the first and most settled principles of the law of agency. Some confusion was caused during the argument before the Board by the suggestion of learned Counsel for the plaintiffs that it was sought to make his clients liable for Messrs. Zurlo's acts because they were *del credere*, and he showed that the rate of commission which the plaintiffs were being paid was such as to make it clear that they could not have accepted the obligations of a *del credere* agent. In truth, however, no such burden was sought to be imposed upon the plaintiffs. The principles involved in *del credere* transactions have nothing to do with the claim against them which, as above pointed out, depends solely upon the legal principles involved in the relationship between the principal, the agent, and the sub-agent.

The respondents, to whom their Lordships refer throughout as the defendants, are the legal representatives of the late Robert G. Rendell, who traded as C. F. Bennett & Co., and in the course of the proceedings they were substituted for C. F. Bennett & Co. as defendants, Rendell having died while they were pending.

During the years 1921, 1922, and 1923 the plaintiffs acted as agents for Messrs. C. F. Bennett & Co. for sale of their fish in South European countries. The remuneration payable to the plaintiffs for their services in selling the fish consisted of a commission of 2 per centum and a discount of 1¼ per centum on the proceeds of sales.

The correspondence, to which their Lordships now turn, must be read with this basic arrangement in view. It will be necessary, however, only to set forth so much of it as is material to the issue before the Board.

*Plaintiffs to defendants.* October 21, 1921 : cable :

"Kriton early November sailing if you will consign Genoa five hundred casks Labrador consignees will guarantee not less than thirty eight shillings c.i.f. and will advance twenty shillings against documents would try arrange twenty five shillings advance."

*Plaintiffs to defendants.* October 21, 1921 : letter :

"We have cabled you this morning that if you would consign 500 casks of Labrador to Genoa, our agents will guarantee a minimum price of 38s. c.i.f. Genoa and will make an advance of 20s. per qtl. against the documents. This proposal is subject to the steamer sailing early in November and if you could entertain the same, we would try and arrange an advance of 25s. instead of 20s. A proposal like this is undoubtedly worth considering in view of the weakness for Labrador fish and also the uncertainty regarding the Italian exchange. If prices should be maintained you are still in a position to get the market price at time of arrival, but if between now and the arrival of the steamer there should be a bad break in the price for Labrador, or the exchange rates should show further adverse movement, then you are protected to the extent of receiving 38s. for your fish. We await your reply and hope we may be able to arrange this business with you."

*Defendants to plaintiffs.* November 2, 1921 : cable :

"Kriton arrived. Can ship the following 800 casks regular Labrador and 60 large if quite suitable advance ; also try for minimum guarantee."

*Plaintiffs to Zurlo & Co. :* 3 November, 1921 : cable :

"Direct steamer Kriton now loading we can probably arrange consign 800 casks usual Labrador 60 casks Large Labrador if you will guarantee minimum price 38s. c.i.f. Genoa minus 1½ per cent. discount only and will advance 30s. cash documents London this consignment from very reliable shippers do your utmost arrange reply urgent."

*Zurlo & Co. to plaintiffs.* 5 November, 1921 : letter :

"We beg to confirm our precedent letters and having received your telegrams of the 3rd and 4th instant we have answered as per enclosed copy.

70 casks Labrador.—We have to-day opened the credit for this parcel.

1,500 casks Labrador.—We have cabled you that we will accept the 1,200 casks per s.s. 'Genzina' and for the other 300 if they cannot be shipped at once, the shipper can cancel them.

800 casks Labrador 60 casks Large s.s. 'Kriton.'—We have cabled that we can guarantee 38s. as minimum but we cannot advance you the 30s. per cwt. asked for, while we can assure you that the account sale will be remitted to you promptly. We are certain that the shippers will accept this proposal and consequently we are awaiting your confirmation about."

*Plaintiffs to defendants.* November 7, 1921 : cable.

"Eight hundred sixty Labrador Genoa are trying to arrange advance expect consignees will agree twenty-five shillings."

*Defendants to plaintiffs.* November 7, 1921 : cable :

"Kriton sails to-day wire quickly Genoa agents our Labrador six hundred fifty two regular sixty-eight Large."

*Defendants to plaintiffs.* November 8, 1921 : letter :

"As mail closes very shortly we cannot wait your advice as to what to draw for against Genoa consignment so now make draft at 3 days sight for £1 per qtl. Feeling sure you will approve. Quantity is 720 casks of 5 qtls. ea."

*Plaintiffs to defendants.* November 15, 1921 : cable :

"Labrador Kriton if consigned Genoa with minimum guarantee thirty-eight shillings c.i.f. consignees will advance fifteen shillings against documents cannot get bigger advance will you agree."

*Defendants to plaintiffs.* November 16, 1921 : cable :

"Labrador minimum guarantee approved have drawn twenty shillings suppose account good for difference."

*Plaintiffs to defendants.* November 21, 1921 : letter :

"With reference to your shipment of Labrador fish of usual size and large by the s.s. 'Kriton' to Genoa, we cabled you that if you could consign your fish to Genoa with a minimum guarantee of 38s. c.i.f. Genoa the consignees were prepared to advance 15s. per quintal against the documents. We have done our very utmost to get the consignees to make their advance up to 20s. but without success.

We note from your reply that you agree to the minimum guarantee of 38s. and that you suppose the consignees are good for the difference in value.

We have been doing a very big business with these consignees and they have opened the credit in London without delay in each instance and we feel quite confident that everything will come through all right.

We note you have drawn on us to the value of 20s. per quintal, which is quite satisfactory, as we will ourselves advance the other 5s."

*Defendants to plaintiffs.* March 16, 1923 :

"We beg to acknowledge yours of February 1st enclosing account sales of 720 casks ex s.s. 'Kriton' consigned to Messrs. Zurlo & Co., together with your account and request for a remittance of £3,500.

If you will look at the correspondence in reference to the 'Kriton' shipment you will see that on October 21st, 1921, you assured us that your agent would guarantee 38s. as a minimum price c.i.f. Genoa and it was on the assumption that this guarantee would be implemented that we put the shipment through your hands.

As the matter stands at present your agents have not carried out their contract although they have forwarded their account sales.

To our mind therefore your request for £3,500 is not only premature but the proper re-statement of the accounts as submitted by you shews a balance in our favour of something over £500—the exact amount to be determined when the fish now in your hands is realised and you have received the £4,054 10s. from your agents. Under the circumstances we do not press for an immediate remittance, but think the whole of our accounting and settling can rest for a short while in the hope that the Zurlo affair will shortly come to a satisfactory conclusion."

What is the effect of this correspondence? The plaintiffs seek to treat it as constituting a contract negotiated by them between the defendants and Messrs. Zurlo & Co. direct, under which Messrs. Zurlo & Co. guaranteed 38s. minimum per cwt.

Their strongest argument in support of this view was based upon the construction placed by their letter of November 21, 1921, upon the words "Suppose account good for difference" in the defendants' cable of November 16, 1921—a construction which they say was never repudiated by the defendants and which showed that both they and the defendants were relying on the responsibility of the consignees at Genoa, and on that alone.

In their Lordships' view that argument is unsubstantial. Not only was the construction placed by the plaintiffs upon the words quoted quite unwarranted, but their Lordships note that not even then in their letter do the plaintiffs give to the defendants the name of these consignees with whom, as is now suggested, a direct contract had been concluded.

The real position indeed as now disclosed appears to be that the only contract negotiated by the plaintiffs with Messrs. Zurlo & Co. entitled Messrs. Zurlo & Co. to  $1\frac{1}{4}$  per cent. discount. By the terms of Messrs. Zurlo & Co.'s obligations, however, as set forth in the plaintiffs' cable of November 7, 1921, that firm guaranteed 38s. minimum per cwt. with no right to any discount at all. Therefore, either the defendants and Messrs. Zurlo were never in contract *ad idem* or there must, on the plaintiffs' submission, have been as a result of their cable of November 3, 1921, two contracts concluded first, a contract between Messrs. Zurlo & Co. and the defendants, under which Messrs. Zurlo guaranteed 38s. minimum per cwt. with no right to any discount, and secondly, a contract by the plaintiffs with Messrs. Zurlo to pay or account personally for  $1\frac{1}{4}$  per cent. discount, with over and above all a contract between the defendants and the plaintiffs for payment to the plaintiffs in respect of the shipment of their commission of 2 per centum and their discount of  $1\frac{1}{4}$  per centum. But if between the plaintiffs and Messrs. Zurlo there was ever a personal contract for anything it seems almost inevitable that the contract was a personal one for everything, and it may be observed in passing that it was so regarded by Messrs. Zurlo & Co. Indeed in order to give effect to the plaintiffs' contention it is necessary to find in one and the same cable proposals which on acceptance constituted a contract between the defendants and Messrs. Zurlo & Co., in respect of one part of an entire transaction and a contract between the plaintiffs and Messrs. Zurlo in respect of the rest of it. Now in writing to the defendants the plaintiffs described them as "our friends" or "our agents." Moreover, it might plainly be to the business detriment of the plaintiffs that the names of their correspondents on either side should be disclosed to the other, and these names were not in this instance as has already been indicated at any relevant time so disclosed, and looking at the correspondence as a whole their Lordships think that the proper result is that no contractual relation between the defendants and Messrs. Zurlo was ever constituted and that Messrs. Zurlo & Co. were merely sub-agents of the plaintiffs.

In the letter of October 21st the plaintiffs say, " We have cabled you this morning that if you would consign 500 casks of Labrador to Genoa our agents will guarantee a minimum price of 38s. c.i.f. Genoa . . . We await your reply and hope we may be able to arrange this business with you." In the last of the letters dated March 16th. 1923, the defendants say, " If you will look at the correspondence in reference to the s.s. ' Kriton ' shipment, you will see that on October 21st, 1921, you assured us that your agents would guarantee 38s. as a minimum price c.i.f. Genoa, and it was on the assumption that guarantee would be implemented that we put the shipment through your hands." Their Lordships think this to be true, and in all the circumstances they have come to the conclusion that the judgment appealed from was correct, and they will humbly advise His Majesty to affirm it and to dismiss the appeal with costs.

In the Privy Council.

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HUGH FRANCIS HOOLE AND OTHERS

vs.

THE ROYAL TRUST COMPANY AND ANOTHER.

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DELIVERED BY THE LORD CHANCELLOR.

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