

IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF
THE EASTERN CARIBBEAN SUPREME COURT (Dominica)

CCJ Appeal No DMCV2018/003
DOMHCVAP 33 of 2011

BETWEEN

GLORIA SHILLINGFORD

APPELLANT

AND

ANGEL ANDREW

RESPONDENT

Before the Honourables:

Mr. Justice A Saunders, President CCJ
Mr. Justice J. Wit, JCCJ
Mr. Justice D. Hayton, JCCJ
Mme. Justice M. Rajnauth-Lee, JCCJ
Mr. Justice D. Barrow, JCCJ

Appearances

Mr. Lennox Lawrence with Ms. Jodie Jodian Luke for the Appellant

Mr. Michael E. Bruney and Ms. Lisa deFreitas for the Respondent

JUDGMENT

of

The Honourable Justice Saunders, President and the Honourable
Justices Wit, Hayton, Rajnauth-Lee and Barrow

Delivered by

The Honourable Mr Justice Barrow

on the 6th day of February 2019

JUDGMENT OF THE HONOURABLE MR JUSTICE BARROW, JCCJ

Introduction

- [1] This appeal is necessarily against concurrent findings of fact by the trial judge (Cottle J), although it purports to be otherwise. The Court of Appeal, in dismissing the appeal against the determinative findings of fact, fully considered why such an appeal cannot readily succeed and specified why the appeal failed in this case. On the appeal to this Court, the Appellant no longer sought to reverse the findings, but she sought otherwise to bypass them.

No appeal against the findings of facts

- [2] Angel Andrews, the Respondent (“Angel”), succeeded in the High Court in his claims against his sister, Gloria Shillingford, the Appellant (“Gloria”), that Gloria, having sold Angel’s lands pursuant to a power of attorney, made unauthorised payments to herself, her daughter and Hilary Shillingford (“Hilary”), their cousin, to whom Gloria paid a commission. Gloria failed in her defence to those claims but succeeded in her ancillary indemnity claim against Hilary to refund the commission. Hilary was not a party to this appeal to this Court, nor was the daughter, but Gloria asserts by this appeal that she properly paid the commission to Hilary.
- [3] In the High Court, Cottle J made clear and direct findings of fact adverse to Gloria in a number of areas. The judge rejected her testimony as to sums she alleged Angel owed to her and to others, that Angel knew of and authorised her agreement with Hilary, that Angel had authorised payments of various sums to Hilary and others, and that Angel had ratified her actions and payments.
- [4] On her appeal to the Court of Appeal, Gloria challenged the adverse findings of fact and sought to persuade that court to make findings of fact to the contrary. The appellate court fully examined Gloria’s arguments and rejected them, holding that Cottle J had good reason for deciding as he did. As stated, Gloria no longer appeals against the findings of fact; instead, she argues that the things Cottle J found Angel did not authorise her to do, were things Angel ratified, and this made them binding on him.

The central conclusion

- [5] The briefest summary of the facts will suffice because they lead to one central conclusion. Gloria sold Angel's lands to a purchaser introduced by two agents, to each of whom Gloria paid a commission of \$225,000.00, representing 5% of the purchase price of \$4,500,000.00. Gloria received the proceeds of sale and paid out various sums, including the sum of \$420,7000.00 as part payment of a "commission" to Hilary. Gloria and Hilary claimed that not long before she entered into the agreement with the agents who actually found the purchaser, she had entered into an agreement with Hilary, giving him the exclusive right, for six months, to sell the property. The alleged agreement, which was produced in evidence, set a minimum purchase price of \$3 million and gave Hilary as his commission any sum in excess of that amount, which the judge found incredible in view of the fact that there had been an earlier contract of purchase for \$4.4 million that had fallen through and Angel had indicated to Gloria that he expected a higher price. As Gloria presented it, because the sale occurred during the period of Hilary's exclusive right to sell, Hilary became entitled to the commission and she paid him on that basis.
- [6] The statements of fact to which Gloria (and Hilary) testified were in flat opposition to all the crucial facts on which Angel based his claim. Angel testified that he: was told by Gloria she had sold the land for \$3 million; did not know Gloria had received more than that amount and; did not know of the agreement with Hilary or the payment of commission to him. For her case, Gloria did not simply deny these statements; she testified that the opposite had occurred. She testified that Angel knew the purchase price was \$4.5 million; that he knew of and authorised the making of the agreement with Hilary; and that he authorised and ratified the payments to Hilary.
- [7] Clearly, one side or the other was lying, and the duty of the judge was to decide this conflict to arrive at the outcome of the case. Cottle J came down firmly in favour of believing Angel and rejecting Gloria's testimony. At the end of his judgment, the trial judge stated this central conclusion:
- "[50] ... The payments to Hilary were made without authority... The exclusive agreement is no more than a fiction concocted by Hilary and

Gloria in an effort to withhold from Angel a substantial part of the proceeds of his property ...”¹

- [8] The Court of Appeal expressed full appreciation of the impact of the judge’s finding. Baptiste JA remarked at [56] that the judge was “scathing” with respect to the credibility and honesty of Hilary and went on to cite the judge’s conclusion that the exclusive agreement was a fiction concocted by Gloria and Hilary. His lordship determined that

“The judge’s conclusions with respect to the central factual issues in this appeal present a formidable, if not a complete impediment to the success of the appeal on the factual issues.”²

Baptiste JA concluded that the findings made by Cottle J were clearly open to him on the evidence and were not against the weight of the evidence.

The scope of this appeal

- [9] The verdict of Baptiste JA, that the appeal to the Court of Appeal could not succeed on the facts, becomes irrefutable in this Court, as there has been no appeal against the findings of fact. It is an undisturbed fact that the exclusive agreement was concocted and a fiction; therefore, this appeal can go nowhere on the merits. The finding that there was, as a matter of fact, no genuine agency agreement between Gloria and Hilary, and that the physical document purporting to constitute such agreement was a fiction, means there can be no discussing its validity. There can be no discussing whether Gloria had power to make it, because she did not make it. There can be no discussing whether Angel should be bound by it, because it was not made.
- [10] The discussion of these matters in the judgment of the Court of Appeal, where there was an appeal against the findings of fact, was necessary since that court’s decision on the facts would have been helpful on an appeal to this Court against those findings. The rejection by that court of the appeal against the trial judge’s findings of fact finds full support in the jurisprudence of this Court, which confirms how difficult (although not impossible) would have been a further appeal against the findings of fact. As this Court stated, it is only in exceptional

¹ *Andrew v Gloria Shillingford and Ors* DOMHCV2008

² *Hilary Shillingford v Peter Angel and Gloria Shillingford* DOMHCVAP2011/0032 and *Gloria Shillingford and Rashida Pierre v Angel Andrew* DOMHCHAP2011/33

circumstances that the CCJ will review concurrent findings of fact by lower courts. In *Ramdehol v Ramdehol*,³ the Court found that exceptional circumstances included instances “where the Court was satisfied that:

- a. there was a miscarriage of justice;
- b. any advantage enjoyed by the trial judge, by reason of having seen and heard the witnesses could not be sufficient to explain or justify the judge’s conclusion;
- c. the reasons of the lower courts are not satisfactory;
- d. there is a lack of clarity and conflicting findings of fact; or
- e. there is a lack of any evidential basis.”⁴

Since, however, there is no appeal against the determination that the agreement was pure fiction, there is no need to consider whether there were any exceptional circumstances raised on this appeal to disturb those findings. And so, that completely disposes of the appeal on the merits.

Ratification

[11] The conclusion that the appeal must fail on the merits was not detained by Gloria having switched from seeking to uphold the agreement as valid and, instead, now arguing in her written submissions that Angel ratified her appointment of Hilary to sell the property and her payments to Hilary. As noted, Cottle J rejected the claims that Angel had orally appointed Hilary to sell the property and that he knew of the agreement with Hilary. The Court of Appeal held there was no evidence of express ratification by Angel or of ratification by conduct. The court relied in particular on the evidence which:

“indicated that the impugned delegated authority and acts performed thereunder only came to Angel’s knowledge a few months after the delegation and the commission of those acts. As soon as Angel became aware, he took immediate action to recover the sums which had been unlawfully diverted and withheld from him.”⁵

Before this Court, counsel for Gloria has not pointed to any evidence or factor that can support the argument of ratification, and it must be dismissed.

³ [2017] CCJ 14 (AJ)

⁴ Ibid, [45]

⁵ Ibid, (n.2), [44]

The issue of law

[12] There is no need to consider the issues of law that engaged the courts below, because they do not arise, now that it is settled that there was no agreement from which such issues can arise. The dominant issue of law in the courts below was that Gloria had no authority to engage Hilary and grant him “the exclusive right to sell” the lands for a period of six months. It was decided that Gloria’s alleged action violated the basic rule of agency that a person who was given a power could not give away that power to a third person. The courts discussed the principles that have developed around the Latin maxim *delegatus non potest delegare* (a delegate cannot delegate) and applied them to hold that the power of attorney given to Gloria gave her no authority to make the exclusive agreement with Hilary.

[13] Gloria’s case to this court is that she was entitled on normal principles of agency to engage a sub-agent and that it was normal and expected in the real estate market to engage a broker or agent. On the settled basis that Gloria did not, in truth, engage a sub-agent, it would be entirely academic to discuss the fictional agreement.

Procedural breaches

[14] A far-reaching contention of Gloria’s, which she presented as the leading ground on the hearing before this Court, was that the trial was a nullity because the judge allowed the trial to proceed despite violations of procedural rules. The alleged violations were that the witness statements for Angel were delivered late and that the trial bundles were delivered the night before the trial was to start. Counsel for Gloria argued to this Court that because the judge did not grant relief from sanctions but simply allowed the trial to proceed, he acted in clear breach of the rule⁶ which says that the trial may not proceed unless the judge grants relief from that sanction.

[15] There was substantially no impact from the violations of which counsel for Gloria complains. The transcript shows that counsel for Angel opened the trial by

⁶ Civil Procedure Rules 2000 Part 26. 8

disclosing and apologising to the court for the late filing of the trial bundles and explained the reason for the delay. Counsel for the defendants, other than Gloria, was fully and successively heard on the matter. He indicated the inconvenience and disadvantages he could suffer. He obtained, with the assistance of the court, clarification of what new documents were now included in the bundle; and, ultimately, he took no objection to the trial proceeding. Strikingly, counsel for Gloria uttered not a single word of protest or even mild complaint. It appeared that the vast majority of the documents in the trial bundle were submitted by Gloria so there was no basis for her counsel to complain.

[16] It is clear that what took place upon the opening of the trial does not expose a case of a judge carelessly or perversely acquiescing in or ignoring breaches of the rules. While there was no formal application and no expressed order for relief from sanctions, clearly the judge considered the violation or alleged violation as fully as if there had been an application. His decision to allow the trial to proceed was no less a decision to grant relief than a formally drawn up order.

[17] In the circumstances of this case, there is no need to discuss the familiar cases counsel cited on the matter of relief from sanction because no objection was taken by Gloria, either as to the late filing of the trial bundles or the alleged late delivery of any witness statement. The relevant cases cited were *David Goldgar v Wycliffe Baird*⁷, *Ferdinand Frampton v Ian Pinard et al*⁸, *Michael Vinos v Marks and Spencer*⁹, *Nevis Island Administration v La Copproprete Du Navire*¹⁰ and *Dominica AID Bank v Mavis Williams*,¹¹ each of which was an appeal from a decision to grant or refuse relief from sanctions for non-compliance. In each of them the objection to non-compliance was taken and upheld and the trial or purported appeal was stopped. That is the major difference with the instant case; Gloria did not object but manifestly acquiesced in the trial proceeding. It is decisive that Gloria suffered no prejudice or hardship, far less, injustice, from the breaches of the rules.

⁷ Civil Appeal No.13 of 2007

⁸ Civil Appeal No. 15 of 2005

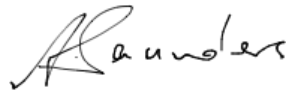
⁹ [2001] 3 ALL E.R.,784

¹⁰ Civil Appeal No. 7 of 2005

¹¹ DOMHCVAP No.20 of 2005

Order

- [18] The appeal is dismissed, and the judgments of the courts below are affirmed, in relation to the parties to this appeal. Basic costs in the sum of \$34,020.00¹² must be paid by Gloria to Angel. The stay of execution pending appeal, granted by the Court of Appeal, is removed.



The Hon Mr Justice A Saunders (President)



The Hon Mr Justice J Wit



The Hon Mr Justice D Hayton



The Hon. Mme Justice M Rajnauth-Lee



The Hon. Mr. Justice D. Barrow

¹² See: Schedule 2, Part D of the Caribbean Court of Justice (Appellate Jurisdiction) Rules 2017