Privy Council Appeal No. 9 of 1978

Stanley Yeung Kai Yung and another – – – *Appellants*

v.

The Hong Kong and Shanghai Banking Corporation – *Respondent*

FROM

THE COURT OF APPEAL OF HONG KONG

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 17TH MARCH 1980

Present at the Hearing:

VISCOUNT DILHORNE
LORD SALMON
LORD ELWYN-JONES
LORD SCARMAN
LORD LANE

[*Delivered by* LORD SCARMAN]

The two appellants were the first two third parties in a suit instituted in the Supreme Court of Hong Kong by the Administrator in Hong Kong of the Catholic Mission of Macao against the Hong Kong and Shanghai Banking Corporation. The Administrator (effectively the Bishop of Macao) claimed against the Bank:—

1. an order that his name be restored to the register of shareholders in the Bank, and

2. an order that he be paid all dividends which have accrued, and be given all bonus shares issued, in respect of certain shares transferred by the Bank from his name into the name of another.

The case for the Bishop was that the Bank had accepted and acted upon four forged instruments of transfer in respect of 12,557 shares registered in his name. The Bank delivered a Defence putting the Bishop to proof of the forgeries. The issue with which the Board is concerned arises in the third party proccedings begun by the Bank in an attempt to secure an indemnity against the Bishop's claim. The Bank took proceedings against five third parties: but this appeal concerns only the first two, Stanley Yeung Kai Yung, a stockbroker, and the company which he formed, Stanley Yeung & Co. Ltd. In its Statement of Claim the Bank alleged a request by them to effect the transfers and to send to the company the new share certificates, and submitted that in the circumstances the two third parties impliedly or expressly warranted that the Bishop's signature on the transfers was genuine and that the transfers were genuine instruments, whereas in truth they were forgeries.

By their amended Defence the two third parties admitted the request but denied any warranty. They also raised other defences, of which only two remain as live issues. They alleged that the Bank knew or ought to have known that the signatures of the Bishop as transferor had not been attested or verified by the third parties. The relevance of this allegation is, presumably, that it tends to negative the existence of a warranty. They also put forward a plea of contributory negligence based on the failure of the Bank to check adequately or at all the signatures on the transfers against the specimen signatures of the Bishop held by the Bank amongst its records. The Bishop proved the forgeries and obtained judgment against the Bank. The Bank obtained judgment against the third parties for an indemnity in respect of the sums expended to meet its obligations to the Bishop. The first two third parties, having appealed unsuccessfully to the Court of Appeal, were granted leave to appeal to Her Majesty in Council.

The Bishop, as administrator of the mission, was a substantial shareholder in the Bank. His registered holdings included 12,557 shares represented by four certificates. The Bank held a specimen signature of the Bishop. Some time prior to the 3rd May 1973 the four certificates were stolen from the Bishop, who remained in ignorance of the theft. In May 1973 the four certificates together with completed share transfer deeds were presented to the Bank by the appellants. Stanley Yeung & Co., the second appellant, carried on business as stockbrokers, the first-named appellant being at that time one of its principals. Each presentation was made under cover of a standard form of letter addressed by Stanley Yeung & Co. to the Registrar of the Bank in the following terms (only the figures being different in each case). The first letter was as follows:—

"Dear Sir,

We beg to enclose herewith the undermentioned Certificate(s) for 1418 shares in your Company with duly completed transfer deed(s) attached in favour of

Mr. Wong Kwan Man
2, Lee Yuen Street East, 4/F1.,
Hong Kong

and shall be glad if you will kindly effect the transfer and send to us Thirty-six new Certificate(s) when ready as follows:—

Thirty-five certificates of Forty each. (35 × 40) One certificate of Eighteen each. (1 × 18)

Thanking you for your kind attention to this matter.

We are,

Yours faithfully,

STANLEY YEUNG STOCK BROKERS CO."

There were, in fact, two letters: the one set out above and dated the 3rd May 1973, and a second dated the 9th May 1973. Each letter was headed "Stanley Yeung Stock Brokers Co. (Member of Far East Exchange Limited)" and signed and stamped with the firm's stamp (or "chop"). There was no qualification to the signature. The first letter was accompanied by one certificate for 1,418 shares and requested the issue of 36 new certificates (35 × 40 and 1 × 18). The second was accompanied by three certificates for 11,139 shares and requested the issue of 279 new certificates (278 × 40 and 1 × 19). Strange transactions one may think; but nobody queried them.

The "duly completed transfer deeds" were in favour of Mr. Wong Kwan-man (Mr. Wong) as transferee. It is now known that Mr. Wong had forged, or procured to be forged, the Bishop's signature and the Mission's stamp to the four deeds of transfer. It is also known that, after the issue by the Bank of the new certificates and their despatch to Stanley Yeung & Co., Mr. Wong, between the 6th June and the 19th July 1973, sold the shares for a price of $3,941,962·50.

Neither Mr. Yeung nor his company acted for Mr. Wong in the "transfer" of the shares from the Bishop to him. Their stamp was not on any of the transfer deeds: and the evidence is clear that the officials of the Bank who handled the request for registration and issue of new certificates would have realised from its omission that they had not acted in the transfer transaction. Having considered the evidence, the Board is satisfied, as was the Court of Appeal, that the presentation of these documents to the Bank for registration and the request for new certificates was the first business transaction the two appellants had conducted for Mr. Wong, who had been introduced to them by a "runner". They took no payment for the transaction. Nevertheless it was neither a favour nor a menial service, as counsel for the appellants sought to suggest, but a normal business transaction, the first of several which they conducted for Mr. Wong. The presentation was an ordinary stockbroking transaction, conducted in all good faith by the two appellants on behalf of a customer in ignorance of the forgeries of the signature and stamp of the transferor.

In presenting the documents the appellants were acting upon the instructions of the transferee. They neither acted nor held themselves out as acting for the transferor. When the officials of the Bank received the transfer deeds and the four certificates, they failed to check the signatures of the transferor against the specimen held by the Bank. Had they done so, they would (according to the finding of the courts below) have immediately realised that the signatures were forged. It was also in evidence, and not contradicted, that the officers concerned with the registration of transfers attached no importance to the personality or identity of those who submitted requests for transfer. In the event they registered the transfers and despatched the certificates as requested.

The trial judge and the Court of Appeal held that by making the request contained in their two letters the appellants impliedly warranted that the documents they were presenting were genuine, and that the Bank was entitled to the indemnity it was seeking. The judgment of the Court of Appeal was delivered by Leonard J. who, after reviewing in depth the relevant case law, concluded that the principle of the law had been formulated authoritatively by the House of Lords in *Sheffield Corporation* v. *Barclay* [1905] A.C.392 and thereafter applied in a number of cases, notably *Bank of England* v. *Cutler* [1908] 2 K.B.208. Neither the trial judge nor the Court of Appeal believed that there was any possibility in this case of giving effect against the Bank to a plea of contributory negligence, or to a claim for contribution. As to the possibility of the first plea, they held that the Bank owed no duty of care to the transferee or his stockbroker: their duty was owed to the person whose name was on the register. And in respect of both pleas, they made the point that the Bank's claim was in contract for an indemnity, and not in tort.

The argument before their Lordships' Board was mainly directed to three questions:—

(1) Was there an express warranty? Neither of the courts below positively held that there was, but were content to decide the

case on the basis of an implied warranty. The respondents maintain, however, that there was an express warranty.

(2) Was there an implied warranty and/or a contract of indemnity?

(3) Can the appellants rely on the failure of the Bank to detect the forgery as a defence to the contract claim (warranty and/or indemnity)? And the point remains open, though not strongly pressed: can the appellants claim contribution as between joint tortfeasors?

Before considering these questions, their Lordships think it convenient to deal with one preliminary matter. Counsel for the appellants urged upon the Board that "the true requester" was not the appellants but Mr. Wong, on whose behalf they wrote. The appellants acted, it was submitted, "as a mere conduit pipe". Their Lordships reject this view of the letters. The letters were the letters of the appellants, notwithstanding the fact that they were written on behalf of Mr. Wong. The appellants (as they have admitted in their pleading) made the request to the Bank; and they requested the Bank not only to effect the transfer but to send the new certificates, when prepared, to them. The fact that the request, by the law of agency, was also Mr. Wong's request in the sense that it was made with his authority does not necessarily prevent it from being a request made by the appellants. There is nothing in the letters or in the signature, which in each case was unqualified, to suggest that the request being made was exclusively Mr. Wong's and not theirs. On the contrary, the terms of the letters convey irresistibly the message that Stanley Yeung & Co., stockbrokers and members of the Far East Exchange, were making the request. The courts below were fully justified in so construing the letters. When, therefore, Mr. Leggatt Q.C. for the appellants opened the appeal by asking the question, "Is it I, or my broker, who should be liable?", he was either misconstruing the letters, or basing himself on an incorrect view of the law. It is not the law that, if a principal is liable, his agent cannot be. The true principle of the law is that a person is liable for his engagements (as for his torts) even though he is acting for another, unless he can show that by the law of agency he is to be held to have expressly or impliedly negatived his personal liability. But, upon the view of the letters, which the courts below accepted and this Board believes to be correct, the appellants cannot avoid personal responsibility for whatever consequences the law attaches to the making of the request and the Bank's compliance with it. It was their request—even though made on Mr. Wong's behalf.

Mr. Neill Q.C. for the respondents suggested that the existence of the appellants' engagement could be tested by asking whether, if they had failed to pay the scrip fees due on issue of the requested share certificates, the Bank could have claimed the fees from the appellants. There can be no doubt that it could have done so: and it is to be noted that, when the certificates were ready, the Bank wrote to the appellants informing them that they could obtain them upon payment of the fees, and that apparently the appellants paid the fees when they collected the certificates.

Questions (1) and (2).

The Contract

With the two letters the appellants forwarded "duly completed transfer deeds . . . in favour of Mr. Wong"; and they requested the Bank to effect the transfers and to send to them the new certificates when ready. It was submitted on behalf of the Bank that the letters contained an express warranty that the transfer deeds were genuine. When the Bank acted as requested, there came into existence, it was submitted, a contract

to which the stockbrokers by making their request were a party. The term of the contract, indeed its basis, was that the transfer deeds had been duly completed—or, in other words, that they had been rightly, properly completed. Counsel for the appellants, however, suggested that the words "duly completed" referred only to the form of the deeds. Their Lordships accept the respondent Bank's submission. The formal correctness of the deeds could be determined by looking at them, which the Bank officers no doubt did. Their substantive validity, or invalidity, was concealed by their forged formal correctness. The case, therefore, for construing the words of the letters as an express warranty that the transfer deeds had been properly completed and were genuine instruments of transfer is a strong one. Were it necessary to do so, their Lordships would so construe them.

But it is not necessary. For the reasons which will be developed later, their Lordships agree with the Court of Appeal that the request acted upon by the Bank brought into existence an implied, if not express, warranty that the deeds were genuine as well as an enforceable contract of indemnity.

The relevant case law is confusing at first sight because there lie entangled in it three distinct rules of the common law. There is the rule, established in *Collen* v. *Wright* (1857) 8 E. and B. 647, that one who warrants that he has authority to act for another is liable in damages if he has not the authority—the well-known breach of warranty of authority. This rule has no application to the present case. The appellants never did warrant that they were acting for the transferor. They did act for the transferee when with his consent and upon his instructions they made their request to the Bank to register the transfers. Breach of warranty of authority does not, therefore, arise for consideration.

The two other rules to be found in the case law do arise for consideration: they indicate the circumstances which will give rise to the implication of an indemnity, and the implication of a warranty of genuineness. Very naturally, both the indemnity and the warranty are in many cases found to co-exist. Nevertheless the scope of the indemnity is wider than that of the warranty of genuineness: and it is also possible that a right to an indemnity can arise where the circumstances would not support the implication of the warranty. Finally, neither an indemnity nor the warranty will be implied unless the circumstances are such as to establish the existence of an intention to create legal relations.

Indemnity

The general principle was established by the House of Lords in *Sheffield* v. *Barclay*, supra, the facts of which, save in one respect (which the appellants submit is crucial), bear a close resemblance to the present case. The Earl of Halsbury L.C. laid down the principle at p.397 in these words:—

> "In *Dugdale* v. *Lovering* ((1875) L.R.10 C.P.196) Mr. Cave, arguing for the plaintiff, put the position thus: 'It is a general principle of law when an act is done by one person at the request of another which act is not in itself manifestly tortious to the knowledge of the person doing it, and such act turns out to be injurious to the rights of a third party, the person doing it is entitled to an indemnity from him who requested that it should be done.' This though only the argument of counsel was adopted and acted upon by the Court, and I believe it accurately expresses the law."

In his speech Lord Davey expressed the principle in terms applicable to a case such as the present where the request is addressed to a company having a statutory duty to register valid share transfers. He said at p.399:

> "I think that the appellants have a statutory duty to register all valid transfers, and on the demand of the transferee to issue to him a fresh certificate of title to the stock comprised therein. But, of course, it is a breach of their duty and a wrong to the existing holders of stock for the appellants to remove their names and register the stock in the name of the supposed transferee if the latter has, in fact, no title to require the appellants to do so. I am further of opinion that where a person invested with a statutory or common law duty of a ministerial character is called upon to exercise that duty on the request, direction, or demand of another (it does not seem to me to matter which word you use), and without any default on his own part acts in a manner which is apparently legal but is, in fact, illegal and a breach of the duty, and thereby incurs liability to third parties, there is implied by law a contract by the person making the request to keep indemnified the person having the duty against any liability which may result from such exercise of the supposed duty. And it makes no difference that the person making the request is not aware of the invalidity in his title to make the request, or could not with reasonable diligence have discovered it."

This "broad principle", as Lord Davey called it, has been consistently followed, and Mr. Leggatt for the appellants disclaimed any intention to invite their Lordships' Board to review it. Their Lordships are satisfied that it is now firmly embedded in the law: see *Bank of England* v. *Cutler* [1908] 2 K.B. 208, *Secretary of State* v. *Bank of India* [1938] 2 All E.R. 797 and *Welch* v. *Bank of England* [1955] Ch.508 (per Harman J. at pp.548–9).

Their Lordships' attention was drawn to the relevant Hong Kong and Shanghai Bank regulations, the effect of which is, as Mr. Leggatt recognised in the course of his able argument, that the Bank has a statutory duty of a ministerial character to register valid transfers upon the request, direction or demand of another. Mr. Leggatt's contention was twofold. He submitted first that the principle had no application to a request by an agent: and secondly, that it had no application where the party requested was guilty of "default on his own part."

The principle as formulated by Lord Halsbury in the *Sheffield* case is not limited in the way Mr. Leggatt submits it should be, *i.e.* to a request made by a party for his own benefit. It is a "broad principle." Nevertheless Mr. Leggatt was able to point to a passage in Lord Davey's speech (p.401) where he said:

> "In some cases it is a question of fact whether the circumstances are such as to raise the implication of a contract for indemnity; but in cases like the one now before your Lordships, when a person is requested to exercise a statutory duty for the benefit of the person making the request, I think that the contract ought to be implied."

Lord Davey, like all good judges, was addressing himself to the facts of the case before him, one of which was that the person making the request did so for his own benefit. His words are not to be construed as though they were the words of a statute, nor as in any way limiting the breadth of the principle formulated by Lord Halsbury and, in the earlier passage of his speech already quoted, adopted by him. Moreover, there is one case (described by Leonard J. in the Court of Appeal as "almost on all fours with the present case") in which the request was made by

a stockbroker on behalf of another and was held to import a promise by him to indemnify the Bank whose ministerial duty it was to register valid share transfers, namely *Bank of England* v. *Cutler* [1908] 2 K.B. 208. The critical issue in that case was whether upon the facts the stockbroker could be said to have requested, directed, or demanded that the Bank should act (see Farwell L.J. at the turn of pp.231–2). If he had made such a request (and it was held that he had), he (*i.e.* the stockbroker) came, the Lord Justice said, within the well-established doctrine laid down in the *Sheffield* case. Vaughan Williams L.J., who dissented only on the facts, summarised succinctly the effect of the case law, saying (p.221) that:

> "the warranty or promise of indemnity is based on a request made."

Their Lordships believe this brief sentence to be an accurate statement of the law more fully formulated in the *Sheffield* case. They, therefore, reject the submission that the principle has no application to a request made by an agent. Once it is shown to be his request, it matters not that it be made for the benefit of another.

Mr. Leggatt's second submission is in their Lordships' view misconceived. The "default" to which Lord Davey refers in the passage quoted from his speech in the *Sheffield* case (p.399), he explains at p.401, where he quotes with approval a passage from the old case of *Toplis* v. *Grane* (1839) 5 Bing. (N.C.) 636, where the judge said:

> ". . . . where an act has been done by the plaintiff under the express directions of the defendant which occasions an injury to third parties, yet, if such act is not apparently illegal in itself but is done honestly and bona fide in compliance with the defendant's directions, he shall be bound to indemnify the plaintiff against the consequences thereof."

Default only arises in the event of dishonesty, lack of good faith, or failure to comply with "the request, direction, or demand" which has been made. No such default was proved on the part of the Bank in this case.

For these reasons their Lordships find themselves in agreement with the Court of Appeal in holding that there was in the circumstances of this request a promise by the stockbroker to indemnify the Bank if, by acting on the request, it caused actionable injury or damage to a third party. The promise was accepted by the Bank acting on the request and became a contractual indemnity.

Warranty

It is strictly unnecessary for the Board to consider whether the circumstances of the appellants' request were such that it imported a warranty by them of the genuineness of the documents submitted. But their Lordships have no doubt, for the reasons given by the Court of Appeal, that the warranty is to be implied. Lord Davey dealt at length with the point in the *Sheffield* case. Having considered two earlier cases in which the implication of a warranty had been negatived, he said at p.402:

> "My Lords, I am of opinion that the case of *Anglo-American Telegraph Co.* v. *Spurling* ((1879) 5 Q.B.D. 188) was also wrongly decided by Lindley J., and I respectfully dissent from both the propositions laid down by him and adopted by the Court of Appeal in the present case. I dissent from the proposition that a person who brings a transfer to the registering authority and requests him to register it makes no representation that it is a genuine

document, and I am disposed to think (though it is not necessary to decide it in the present case) that he not only affirms it is genuine, but warrants that it is so."

The same view was expressed and adopted by Stirling L.J. in *A.G.* v. *Odell* [1906] 2 Ch. 47 at p.81. Their Lordships believe it to be correct. Whether or not a warranty is to be implied where none is expressed must always be a question of fact dependent upon all the circumstances of the transaction. Where, however, as in the present case, a stockbroker himself requests, albeit upon the instructions and for the benefit of another, the registration of a share transfer which the company is under a ministerial duty to effect if the documents forwarded by the stockbroker are genuine documents, the sound and expeditious conduct of business requires that the company should be entitled to rely on the documents submitted in support of his request.

Question (3).

The Banker's "Negligence"

Independently of contract, the Bank owed no duty of care to the appellants: see Lord Davey in the *Sheffield* case at p.403. In the contract constituted by the Bank acting on the appellants' request, the Bank came under a duty to comply honestly and in good faith with the request. The Bank did comply with the request, and there is no suggestion of dishonesty or bad faith on its part. The Bank was, therefore, not guilty of any breach of duty or default in its dealings with the appellants. It is, of course, possible that the Bank and the appellants were joint tortfeasors responsible for the damage done to the plaintiff (the Bishop). But the Court of Appeal was plainly right in holding that a contract of indemnity, if established, precludes a claim of contribution by the appellants, even if both the appellants and the Bank were jointly liable as tortfeasors to the plaintiff: see the Law Amendment and Reform (Consolidation) Ordinance, Cap. 23, s.19(1)(*c*).

Had this case arisen in England, it might have been necessary to consider whether in the light of the Civil Liability (Contribution) Act 1978 the rule in *Sheffield's* case, which establishes the implication of an indemnity from a request acted on by the party requested, should be reviewed. The failure of the Bank (by its officials) to check the signatures on the transfer deeds against the specimen signatures held by them, could, in the absence of an implied indemnity, give rise to a claim for contribution so far as "just and equitable having regard to the extent of that person's responsibility for the damage in question": s.2(1) of the Act. But the point cannot arise under the Hong Kong Ordinance, and the Board expresses no opinion on it.

For these reasons their Lordships will humbly advise Her Majesty that the appeal be dismissed with costs.

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