

Q1.

Dollar & Sense Finance Ltd. (D & S) is finance company based out of Auckland, New Zealand. D & S registered the property interest of a residential property at Kerikeri belonging to Rodney Nathan's parents. The jointly held property of Rodney Nathan's parents was considered by D & S as a security against the loan provided to Rodney for an amount of \$245,000. Since, the residential property was jointly owned by Rodney's parent, Mr. and Mrs. Nathan, to execute a memorandum of mortgage to D & S over that property, Mrs. Nathan signature of approval was needed for disbursement of the loan.

To legally bind Mr. and Mrs. Nathan in the mortgage of their residential property in exchange for loan disbursement of Rodney Nathan, the D & S solicitor, Mr. Thomas arranged for the requisite documents to be delivered to Rodney Nathan for Mr. and Mrs. Nathan's signature. Not knowing that Mr. and Mrs. Nathan have been separated for years and Mrs. Nathan at that point of time resides in Gisborne, Mr. Thomas delivered the documents with a belief that both of them resides in Kerikeri.

Rodney obtained his father's signature and predicting his mother is unlikely to sign in the mortgage, forged her signature. However, after the disbursement was effected by D & S to Rodney and his venture failed with the money he invested in share market, D & S sought to acquire the property for sale. At that point of time, Mr. and Mrs. Nathan resisted and Mr. Nathan expired¹ before the matter was taken in the court for trial. After, Mr. Nathan's death, the interest in the property was transferred to Mrs. Nathan who inherited the property as the sole owner and any dispute in the interest involved Mrs. Nathan as the owner of the property, mortgaged against the loan disbursed by D & S to Rodney Nathan.

The appeal was countered by Mrs. Nathan with a separate defense against D & S who tried to enforce the mortgage, by Rodney's forged signature, which he did as an agent of D & S. The defense of Mrs. Nathan sought to overturn the indefeasibility provisions of the Land Transfer Act and appealed for the mortgage to be removed from the register (*see Wright v Gibbons*).

¹ *Wright v Gibbons* (1949) 78 CLR 313 at p 328 and Hinde, McMorland & Sim, *Land Law in New Zealand*, (looseleaf), para [13.005].

Q2.

The first issue to be addressed by the Court is whether D & S used Rodney's service, either expressly or impliedly, in a manner resembling that of its agent in obtaining the execution of the documentation of the loan which includes documentation of the mortgage². The second issue is whether D & S entrusted Rodney in procuring the execution, and in the process created an agency with Rodney by stipulating its scope.

The court held the fact that D & S solicitor Mr. Thomas delivered the documents of mortgage to Rodney so that he can have those documents signed by his parents, were insufficient ground for considering Rodney as D & S' agent. However, the reference of the following principles of law deserves mentioning to support the view that Rodney acted as an agent of D & S.

- A. Rodney decided to ensure that disclosure was made
- B. Rodney decided to procure his parents' signatures to the "statement by covenantors"
- C. Rodney decided to procure his parents' signatures to the loan contractors
- D. Rodney sent the documents to the D & S solicitor incorrectly witnessed and they were returned back to him for the purpose of getting the document correctly witnessed
- E. Rodney was required to procure the title and insurance details
- F. It was apparent, by this point of time, to Mr. Thomas that Mr. and Mrs. Thomas has no solicitor for them.
- G. D & S did not enter any dealings with Mr. and Mrs. Nathan, in spite of the fact that they were the borrowers
- H. It was obvious to realize that the person in charge of the execution of the documents was Rodney

The Rodney's role with respect to the Statement by Covenantors had been most influencing factor behind the claim that Rodney Nathan was an agent of D & S in procuring the signature

² (1931) 46 CLR 41 at pp 48 – 49.

from his parents to execute the mortgage. This reinstates the claim of Rodney's agency, the fact that no one from D & S contacted the borrowers (Mr. & Mrs. Nathan) indicates that it was natural to expect Rodney would suggest them the need to seek independent advice and would also explain the documents to them³. It points towards (as argued in the Court) a body of case law, where the lender entrusted a third party to procure signatures for a security document to a loan. For this purpose, the third party can be called an agent of the lender (*see Contractors Bonding Ltd v Snee & Barclays Bank Plc v O'Brien*).

The argument of Mr. Thomas being an agent of D & S had no power of appointing Rodney as a sub-agent had been rejected by the majority. The evidences gathered also could not suggest that D & S had prohibited Rodney to play a role of its agent by functioning as per Mr. Thomas' delegation. It was also sensible for Mr. Thomas to arrange a Kerikeri solicitor to handle the execution of mortgage documentation with the Nathans.

Q3.

Under the conclusion that Rodney was a D & S agent, his task of procuring the signed documents from his parents with appropriate witnesses was within the scope of his agency. The scope of the task of appointing an agent to execute documentation must be in sync with the commercially realistic way of doing it. The limitation of the function is reinstated as there is no general agency, limiting the function of an agent.

In considering whether the agent's conduct was within the scope Rodney's authority, the Rodney's task on behalf of D & S had different magnitude of specificity. The charge that brought against Rodney was obtaining registrable mortgage. Notwithstanding with the suggestion that D & S authorized Rodney to commit the forgery, does not take away the fact forgery was not beyond the scope of his authority (*see Schultz v Corwill Properties Pty Ltd 4 & Cricklewood Holdings 5 Ltd v C V Quigley & Sons Nominees Ltd*).

3 At paras [82] – [83].

4 [1969] 2 NSW 576.

5 [1992] 1 NZLR 463

In the seminal treatise on *Vicarious Liability in the Law of Torts*⁶, it has been pointed out of the two stages of enquiry. Firstly, the act was authorized principally, and the secondly, whether the agent's act in connection with those act can be looked upon as the mode of performing them.

In the case *Credit Lyonnais Bank Netherland NV v Export Credits Guarantee Department*⁷, it was agreed in principle of explicit liability of the wrong committed by a servant or by an agent:

“It is that the wrong of the servant or agent for which the master or principal is liable is one committed in the case of a servant in the course of his employment, and in the case of an agent in the course of his authority. It is fundamental to the whole approach to vicarious liability that an employer or principal should not be liable for acts of the servant or agent which are not performed within this limitation. In many cases particularly cases of fraud, the question arises as to whether the particular conduct complained of is an unauthorised mode of performing what the servant or agent is engaged to do.”

However, the “unauthorized mode of performing”, initially articulated by Sir John Salmond , does not really fit in this situation considering the recent decision reaffirmed in the House of Lords.

In considering whether Rodney's act of forgery, falls within the scope of his authority, two propositions must be kept in mind. Firstly, the fraudulent intent of the agent can have a close connection despite its criminal character and the fraudulent intent by the agent. Secondly, the impact of the fraudulent act on the third party with respect to the third party is looked upon as an act within the scope of the authority of the agency even if done exclusively for agent's benefit. The fortiori can be construed to act within the authority of the agency if executed for the principle's benefit as well as the agent's benefit (*see Lister v Hesley Hall Ltd.*)

The principle is entitled to impeach the functions of its agent(s) by declaring it as unauthorized, which however, has no impact on the principle's liability for the act of its agent.

6 (1967), p 178.

7 [2000] 1 AC 486 at p 494.

Q4.

The case stands similarities to *Ex parte Batham*, where New Zealand Court of Appeal had determined the forged mortgage being executed by the agent of an (innocent) mortgagee, leading to the removal of the mortgage from the register. The agency in an attempt to procure signature while registering the transfer can't possibly be looked upon of not being engaged while the forgery was made. The case of *Ex parte Batham*, the discussion has to discern between signature by misrepresentation (within agency) and forgery of the other (not within). The same distinction is applicable to Mr. Nathan Senior's defense, if it had gone to trial, with regards to his assertion of unconscionability.

For appellant, it was suggested, making principle legally responsible for a concealed fraud committed by its agent related to the document naively registered by the principle, contradictory to the policy of the Torrens system. It was further pointed out that if the liability featured in this case is imposed, it will set a precedence to preclude financiers and others to rely on the register by forcing those taking precautions which hitherto have not been necessary. However, such criticism is void of any substance.

The conclusion of the fraud being committed in the course of Rodney's agency for D & S was an act of forgery. The fraud committed by Rodney renders D & S registration of mortgage vulnerable as it is without an indefeasible title to the mortgage.

The Privy Council as accepted in *Assets Co* and in *Frazer v Walker*, a registered proprietor must be held liable with respect to the documentation by or on behalf of the principle. Professor Watts, has this to say about agency and the Torrens system:

“[t]he odds against the plaintiff are stacked too high if purchasers can use agents to do the work of acquisition but then disavow their proven dishonesty”⁸

Q5.

⁸ “Imputed Knowledge in Agency Law – Knowledge Acquired Outside Mandate” [2005] NZ Law Rev 307, p 334.

The vicarious liability arises when one party is held legally accountable for the tort of another. The virtue of a relationship between tortfeasor and the one making it vicariously liable with respect to the principle (master) and the agent (servant) is the vicarious liability in agency law⁹. Vicarious liability is a form of strict liability of a principal related to the misconduct of the agent.

In this case, the principle (master) is the D & S that has been legally accountable under Torrens system. The agent (servant) is the Rodney Nathal who committed fraud in relation to the mortgage document by forgery of Mrs. Nathan (joint owner of the property mortgaged) signature. However, in the time of execution of the mortgage agreement, Mrs. Nathan resisted and charged Rodney Nathan as the agent of D & S. Thus, D & S, because of the forgery by Rodney Nathan (agent) were liable to be the principle of the fraud, assumed in the court to be legally accountable to the fraudulent act.

The relationship was created between Rodney Nathan and D & S in the court on the ground that the misconduct of Rodney Nathan was in relation and in interest of D & S, making the latter liable in the form of strict liability.

Q6.

The case in question has bearings of similarity to *Ex parte Batham*, where the New Zealand Court of Appeal easily determined the forgery of the mortgage by the agent of an innocent mortgagee to have been removed from the register. Hall, the forger and land broker had been engaged in a firm for the service as an agent by McKeown. The engagement as an agent was in relation to McKeown's purchase of mortgage from a few trustees, with whom Hall was also acting. The Hall was expected to get transfer of the mortgage with signature and registration as engaged by McKeown. Hall forged one mortgage by procuring a signature with a misrepresentation of the nature of the document and forging the co-trustee's signature. The

Registrar sought the cancellation of endorsement to memorial of transfer on the ground of fraudulence in obtaining the registration.

The acknowledgment by the Court of Appeal referring Hall's awareness of his own forgery when the registration was enacted, as also Hall acting as an agent of McKeown related to the matter of registration and his misrepresentation to the Registrar, the distinction drawn by William P with reasons of dissent in the context of the present case (*Dollars & Sense Finance v Nathan* [2008]) between forgery and the fraudulent registration cannot be accepted. The forgery was related to procuring the documentation of the mortgage duly signed and registering the transfer, operating with fraudulent product for registration.

The case discussed above (*Ex parte Batham*) has been distinguished by obtaining one signature by misrepresentation, which is within the scope of an agency and forging the other, not within the scope of an agency. The same distinction, albeit with discomfort, have had to been made in the case in question (*Dollars & Sense Finance v Nathan* [2008]).

If someone creates an agency leading to an improper behavior by an agent (sub-agent in this case) should be responsible to bear the risk in eventuating a loss caused by the agent to a third party. In this case, the risk related to the borrower's temptation to deceive his guarantors by exercising undue influence over them or to engage in forging their signatures. This avoidable forgery was created by Mr. Thomas by putting Rodney in a position to procure the necessary signatures. The act of forgery by Rodney can be reasonably looked upon as done in the course of the agency. Moreover, D & S, as fact of the matter, benefitted from the fraud. It is needless to say that D & S had, at least, a material part to be played in enabling the registration as a mortgagee.

Q7

Mrs. Nathan succeeded in removing the mortgage from the register, as per the Court's ruling under Torrens system. This means Mrs. Nathan's property can't be sold by D & S. This is fair, as Mrs. Nathan never agreed to mortgage her property; neither had she signed the document of mortgage. It indicates, the loss had to be borne by D & S. Since, D & S did not orchestrate the situation, nor there is any evidence of D & S engineering the fraud for its own benefit. therefore,

to enable D & S to bear the loss is something which is unfair. The one and only culprit in this case was Rodney Nathan, who did the forgery for his own gain and by keeping both D & S and Mrs. Nathan in the dark. He didn't forge for the benefit of D & S, but for his own. Neither, D & S had directly or impliedly asked Rodney with any direct or indirect hints to carry out the forgery. The D & S was not even aware of fraud perpetrated by Rodney Nathan. Therefore, Rodney should be held accountable for the fraud and be liable to compensate the loss to D & S. In case of declaring himself a bankrupt, Rodney Nathan must be prosecuted and punished for undergoing deliberately a fraudulent activity with a potential of bearing a loss either to the principle or to the third party.

D & S on its part made the mistake of not interacting directly to the mortgager. However, the mistake was because of naiveté rather than deliberate ploy to fraud the mortgager. Most importantly, from the moral point of view, Rodney Nathan was never meant to be an agent of fraud for D & S and it is implied by the intricacies of law under Torrens system.

Australia, like New Zealand follows similar Torrens system and had the case been filed in Australia, keeping other factors as constant, would have fetched the same verdict.

