1943 Present : Soertsz and Hearne JJ.

DE MEL, Appellant, *and* MARIKAR, Respondent.

40 & 129—D. C. Colombo, 12,458.

Broker—Undisclosed principal—Liability according to custom—Liability remains though inconsistent with general law—Right to indemnity—Extent of damages.

Where, by reason of a custom, a broker is liable to be sued by the seller he is not relieved of liability because it is inconsistent with his position as agent under the general law.

[1] *42 N. L. R. 317.*

Where a broker is bound to take delivery of coupons tendered and to pay the full contract price for them, whether the buyer was prepared to take delivery or not, the broker is entitled upon the default of the buyer to be indemnified against the liabilities he has incurred.

The right of indemnity covers not merely the losses actually sustained by the broker but also the full amount of liabilities incurred by him, even though they may in fact never be enforced.

THE plaintiff-respondent averred that he had requested the appellants, who are a private company of brokers, to buy as well as to sell rubber coupons for him, that in pursuance of his requests the appellants had put through various purchases and sales, details of which appeared in the plaint, and that, on a balance of these transactions, 31,000 lb. of coupons of rubber were deliverable by him to the appellants which they wrongfully refused to accept. In their answer the appellants accepted liability as the brokers employed by the respondent but pleaded that the statement of dealings in the plaint was incomplete.

It was alleged that on May 15, 1940, the respondent instructed them to purchase 1,000,000 lb. coupons and that in consequence so far from there being a liability on their part to take delivery of 31,000 coupons from the respondent, the latter was liable to take delivery of 69,000 lb. coupons from them. The respondent denied that he had given instructions for the purchase of 1,000,000 lb. coupons as alleged by the appellants.

It was agreed that if the appellants failed in regard to the 1,000,000 lb. coupon contract, they would be liable in the sum of Rs. 56,185.68 and that if they succeeded they would be entitled to judgment for Rs. 107,055.81.

The learned District Judge, while holding with the appellant on the facts, was of opinion that his claim was not legally sustainable.

Counsel for the plaintiff-respondent raised a preliminary objection that notice of tender of security was not given "forthwith".

The objection was overruled.

H. V. Perera, K.C. (with him *E. F. N. Gratiaen* and *D. W. Fernando*), for defendant, appellant.—Defendant is a broker for an undisclosed principal. His claim against the plaintiff is on a contract of employment not on a contract of sale. As regards the rights of reimbursement and indemnity of an agent, see *Halsbury (Hailsham Edition), Vol. I., sect. 437.* Once the agent has incurred a liability he can recover even though the liability is in fact never enforced—*Bowstead's Law of Agency (1931 ed.), p. 216.* The agent need not wait till he is sued—*Lacey v. Hill*[1], *British Union and National Insurance Co. v. Rawson*[2]. Evidence of custom in the trade is admissible if such custom is not inconsistent with the contract. If, by reason of a custom, the broker is liable to be sued by the seller, he cannot be relieved of his liability because it is inconsistent with his position as an agent under the general law of agency—*Fleet v. Murton*[3]

N. E. Weerasooriya, K.C. (with him *A. R. H. Canakeratne, K.C., L. A. Rajapakse,* and *J. M. Jayamanne*), for plaintiff, respondent.—The claim in reconvention was made by defendant on a breach of contract

[1] *(1874) 43 L. J. Eq. 182.*
[2] *(1916) 2 Ch. 476.*
[3] *(1871-72) L.R. 7 Q. B. 126.*

with plaintiff not on the ground of an indemnity. A mere allegation of a possible liability is not enough. Unless an averment was made that a liability was in fact incurred there is no cause of action.

Although Mrs. de Mel is named as a contracting party the evidence is that she left the transaction entirely to her husband. The defendant Company therefore had a direct interest in the contract. Where a person, as a broker and acting in a fiduciary capacity, puts through a transaction in which he is interested, such transaction is bad in law—*57 S. A. L. J., p. 32.* There is a conflict of interest and duty. It is immaterial whether loss or damage is incurred by a client. It is purely based on public policy—*Story on Agency (1889 ed.), p. 172.* Agents cannot act so as to bind their principals where they have an adverse interest. They must act with the sole regard of the interests of their principals—*Costa v. Silva* [1], *Hall v. Pelmadulla Valley Tea and Rubber Co., Ltd.* [2]

On the question of liability, the cases cited by the other side can be distinguished on the facts. The prospect of a claim being made is insufficient—*Dyson v. Peat.* [3]. There is a distinction between a real and a prospective liability. One cannot be indemnified for a liability which has not yet resulted in a judgment. There must be a judgment or something equivalent to a judgment.

It is finally submitted that defendant's claim is based on a wagering contract. If in substance the transactions were wagering contracts then it is conceded that both claim and counterclaim must fail—*Bartleet v. Lebbe Marikar* [4]. The trial Judge should have directed his mind to find out the real nature of the transactions.

H. V. Perera, K.C., in reply.—The plaintiff's case was that there never was a contract, defendant's that there was a contract. Defendant's case does not show a wagering contract. It does not show that both parties did not intend delivery but only payment on the happening of an event. A wagering contract is a bet. There must be mutuality. Speculation alone does not make a contract a wagering contract. Having sold coupons the broker covers himself by buying. This is speculation, not wagering. The evidence does not disclose a wagering contract—see the Privy Council's decision in *Bartleet's* case (*supra*). The admissions made during the trial negative a wagering contract, and that is conclusive.

The custom or usage admitted to exist in the rubber coupon market merely regulates the terms of employment. The broker is neither seller nor buyer. He merely undertakes to perform.

There is no evidence led by plaintiff to show unreality of seller. On the contrary, Mrs. de Mel was treated just as any other buyer or seller.

On the question of "interest" it is submitted that defendant is a limited liability company and has its own legal *persona* and its own legal capacity. The company has no "interest" in the contracts of its members. The true test is "whose contract was it?" The case of *Costa v. Silva* (*supra*) can be distinguished.

Cur. adv. vult.

[1] *(1917) 19 N. L. R. 481.*
[2] *(1929) 31 N. L. R. 55.*
[3] *(1917) 1 Ch. 99.*
[4] *(1941) 43 N. L. R. 225.*

January 15, 1943. HEARNE J.—

The plaintiff, who is the respondent to this appeal, No. 129, alleged that he had requested the appellants to buy as well as to sell rubber coupons for him, that in pursuance of his requests the appellants had "put through" various purchases and sales, details of which appear in the plaint, and that, on a balance of these transactions, 310,000 lb. coupons of rubber "were deliverable by him" to the appellants, which they "wrongfully and unlawfully refused to accept". In their answer the appellants accepted liability as the *brokers* employed by the respondent but pleaded that the latter's statement of their dealings was incomplete. It was alleged that on May 15, 1940, the respondent instructed them to purchase 1,000,000 lb. coupons and that, in consequence, so far from there being any liability on their part to take delivery of 310,000 lb. coupons from the respondent, the respondent was liable to take delivery of 690,000 lb. coupons from them. The respondent denied that he had given instructions for the purchase of 1,000,000 lb. coupons as alleged by the appellants.

The appellants are a private Company (Austin de Mel, Ltd.). It is admitted that, when approached by buyers, they had on some occasions issued "bought notes" in which reference was made to undisclosed principals whose existence was entirely mythical. Indeed, in regard to the sales to the respondent, which are set out in the plaint, the sellers were, admittedly, in every case, the appellants themselves. It is, however, not necessary to consider whether, on the authority of *Sharman v. Brandt*[1], the respondent should have been entitled to repudiate these sales; for the respondent in his plaint gave them credit for them and in the course of the trial a clear cut agreement was reached. It was agreed that, if the appellants failed in regard to the 1,000,000 lb. coupon contract, they would be liable in the sum of Rs. 56,185.18 and that, if they succeeded, they would be entitled to judgment for Rs. 107,055.81.

By reason of this agreement it appeared that the decision of the case depended upon the determination of one question of fact. But this was far from being so. Sixteen issues had originally been framed and after Mrs. de Mel, the alleged seller of the 1,000,000 lb. coupons, had been cross-examined at length, further issues were raised. One of the issues suggested that the 1,000,000 lb. coupon contract was unenforceable as it was a wagering contract, and others suggested that the use of Mrs. de Mel's name was a mere cloak to hide the real transaction, namely a sale, not by Mrs. de Mel, the "undisclosed principal", but by the appellants themselves.

The position that obtained from this stage onwards was not free of complications. Apart from the evidence in the case, the agreed course of dealing between the parties negatived the idea that the contracts made by the respondent were wagering contracts. He himself professed to know what these contracts are. He had had experience of them and had carried two or three cases involving the defence of wagering as far as the Privy Council, and yet, while he was maintaining in evidence that his contracts were not wagering contracts and that he did not enter into the

[1] (1871) L. R. 6. Q. B. 720.

1,000,000 lb. coupon contract at all, his Counsel was arguing that the contract which was denied by his client was, *if made,* a wagering contract. Alternative defences are, of course, possible in law but arguments in support of them in circumstances such as these must of necessity lose much of their force. Again, while the respondent's contention was that he was not a party to the 1,000,000 lb. coupon contract his Counsel was, in effect, arguing that he was, and that the other party to the contract was, not Mrs. de Mel, but the appellants themselves.

An examination of documents in the case, *e.g.,* D 50 and P 39, indicates that before and after May 15, 1940, Mrs. de Mel had bought and sold coupons through Austin de Mel, Ltd. The Judge said that " he had no hesitation in accepting the story of the defence that the plaintiff did put through the contract of May 15, 1940, and in rejecting the plaintiff's denial ". He held that " the seller on the 1,000,000 lb., coupon contract was not the defendant company but Mrs. de Mel " and that it was not a wagering contract. Nothing has been said on appeal that, in my opinion, could have the effect of disturbing these findings. No argument was based on the fact that Mrs. de Mel is the holder of one share in Austin de Mel, Ltd.

Notwithstanding the Judge's strong findings of fact in favour of the appellants he held against them as a result of the view he took of the law in England which governs the rights and liabilities of principal and agent in Ceylon.

It had been agreed at the trial that " the brokers' bought note or sold note never discloses the name of the other party to the contract; that the broker is, as far as the seller is concerned, liable to accept delivery of all coupons tendered, and to pay the full contract price of the amount tendered by the seller whether the buyer accepts delivery or not ; that, as far as the buyer is concerned, the broker is liable to tender and deliver the coupons irrespective of whether the seller has tendered or not ".

The Judge held that " there was nothing in the local usage by which the defendant Company (the appellants), who acted merely as agents for an undisclosed principal, can claim to act as a principal and sue on the contract of the undisclosed principal ".

I agree that in accordance with the general law of agency the appellants could not sue on the contract of the undisclosed principal (Mrs. de Mel). But, before it can be said that the local usage did not affect the general law, it is necessary to consider the legal implications of the local usage subject to which the contract was made.

It will be noted at once that the appellants undertook, as far as the seller is concerned, to accept delivery of all coupons and to pay the full contract price, whether the buyer accepts delivery or not. If, in the event of the buyer refusing to accept delivery, as in this case he did, the seller is entitled to sue the appellants, then the general law of agency *is* affected by the local usage ; for, under the general law, the brokers would not be liable to be sued by the seller.

Now, there is authority for saying that, where by reason of a custom the brokers are liable to be sued by the sellers, they are not relieved of their liability because it is inconsistent with their position as mere agents under the general law.

In *Fleet v. Murton (supra)*, the defendants, M. & W., fruit brokers in London, being employed by the plaintiffs, merchants in London, to sell for them, gave them the following contract note addressed to the plaintiffs— "We have this day sold for your account to our principal" so many tons of raisins. (Signed) "M. & W., brokers". The defendants' principal having accepted part of the raisins, and not having accepted the rest, the plaintiffs brought an action against the defendants, and they sought to make them personally liable by giving evidence that, in the London fruit trade, if the brokers did not give the names of their principals in the contract, they were held personally liable, although they contracted as brokers for a principal. The brokers were held to be liable.

Cockburn C.J. said "If the custom attaches, the non-liability, which would under ordinary circumstances *prima facie* exist in a contract made by a person purporting to contract as broker, ceases, and the contract assumes a different form and character, and carries with it different legal consequences, by reason of the customs of the trade . . . ."

In his judgment Blackburn J. said "If the matter were *res integra,* I should have felt great difficulty indeed, as some of the Judges in the Exchequer Chamber did in *Humfrey v. Dale,* in making out how the custom could make the broker, who is, in fact, not contracting as purchaser, liable in the terms of the count in that case which charged the defendant as purchaser". But after considering in this connection the case of *Couturier v. Hastie,* he said: "It seems to me, therefore, as Mr. Cohen said, that this custom must be taken as merely regulating the terms of the employment" of the brokers.

It will be seen that, in the case cited, the custom, either because of the legal consequences which flowed from it, or because it was held to attach, not to the contract of sale, but to the terms of employment, was enforced although it conflicted with the general law of agency. Similarly, in the present case, if, by reason of the local usage, an action by the appellants (or rather a claim in reconvention) is maintainable by them against the respondent, they would not lose their right of action because it is inconsistent with their position under the general law. This, I think, disposes of the difficulty which the learned Judge felt.

The next question is what rights, if any, have the appellants against the respondent? They became liable to tender and deliver to the respondent the coupons contracted for irrespective of whether the seller tendered or not, and also to take delivery from the seller of all coupons tendered and to pay the full contract price for them whether the respondent was prepared to take delivery or not; and, upon the default of the respondent, they are entitled to be indemnified against the liabilities they have incurred. "The right of indemnity covers not merely the losses actually sustained by the agent, but also the full amount of the liabilities incurred by him, even though they may in fact never be enforced"—*Halsbury (Hailsham Edition), Vol. I., Article 437.* The authority for this proposition is *Lacey v. Hill (supra).* See also *British Union and National Insurance Co. v. Rawson (supra).*

In this state of the law, and having regard to the term of the agreement to which I have referred, the appeal of the appellants must be allowed with costs and judgment must be entered in their favour for Rs. 107,055.81, with interest as claimed and costs.

A preliminary objection had been taken that the notice of tender of security was not given "forthwith". It is, however, clear from the record that notice was given on the very day that the petition of appeal was received by the Court. The objection fails.

It was agreed that if this appeal was allowed, the appeal by the plaintiff in *S. C. No. 40* would not arise for consideration. It must be put aside. I make no other order.

SOERTSZ J.—I agree.

Appeal allowed.