37/74

SUPREME COURT OF VICTORIA

CRABTREE VICKERS PTY LTD v AUSTRALIAN DIRECT MAIL ADVERTISING & ADDRESSING PTY LTD

Lush J

19-23, 26, 28 August, 19 September 1974 — [1975] VicRp 59; [1975] VR 607

CIVIL PROCEEDINGS – CONTRACT – ENTERED INTO BY AN EMPLOYEE OF THE COMPANY – DEPOSIT REQUIRED TO BE PAID – DEPOSIT NOT PAID – CONTRACT BREACHED – WHETHER BINDING CONTRACT MADE – OSTENSIBLE AUTHORITY – WHETHER ESTOPPEL MADE OUT – WHETHER RATIFICATION OF CONTRACT OCCURRED.

HELD: Claim failed. Judgment for the defendant.
1. That a binding contract had been entered into.

2. In relation to whether the contract sued upon was made without the authority of the defendant company, it was held that the plaintiff had not established that the person who entered into the contract had actual authority to make the contract.

3. In relation to the question of ostensible authority, the plaintiff failed to prove that the manager of the defendant company knew what was being done by the employee.

4. In relation to the question whether the contract had been ratified, the authorities dealing with ratification stress the importance of considering the whole of the circumstances surrounding the acts said to constitute ratification. Otherwise, the cases tend to stress varying aspects of that situation. Some emphasize the aspect of detriment to the party alleging the contract.

5. Upon a consideration of these aspects and of the circumstances surrounding the writing of the letter, there was no ratification of the contract as alleged by the plaintiff.

6. In relation to the submission that the defendant's conduct estopped it from denying the existence of the contract, to support this argument the plaintiff had to establish either that a representation was made to it or that the defendant company remained silent in conditions where it should have spoken, and in which silence would induce in the plaintiff a belief that the contract existed. This argument had aspects in common with the arguments relating to ostensible authority. If a representation could be found, made by a person having authority to make representations on the defendant's behalf, it was not relevant that that person did not have authority to make the contract himself.

7. The Court was unable on the evidence to find that the employee Bruce nor the Director knew sufficient of the facts to see that the plaintiff must be committing itself or otherwise changing its position if the defendant's position was not stated to it. Further, there was neither documentary nor parole evidence that the plaintiff changed its position after 14 January 1971 or that it would have changed its position or extricated itself from its commitment if it had been warned of the defendant's rejection of the contract. There was no indication of the time at which action would have had to be taken or whether the plaintiff would have considered it useful to take any action in relation to this shipment.

8. Accordingly, estoppel was not made out and the plaintiff failed. Judgment for the defendant, with costs to be taxed, including pleadings, interrogatories, discovery, any reserved costs and transcript.

LUSH J: This is an action for damages for breach of contract. The plaintiff alleges that it agreed to sell to the defendant a printing press and related equipment for $214,915. It alleges that the defendant failed to make the first payment due under the contract, that for this breach it rescinded the contract and that accordingly it is entitled to damages.

The documents in evidence would, if they stood alone, prove the existence of the contract sued upon. Under cover of a letter dated 16 November 1970 addressed to Paramac Printing Pty Ltd, a company whose connection with the defendant company I shall describe later, the plaintiff forwarded a quotation dated 13 November and also addressed to Paramac Printing for a Solna offset press made by A. B. Printing Equipment in Sweden and a dryer and 4 items of the related equipment. In the paragraph in the quotation under the heading "Terms of Payment" there appeared the words:

> "In accordance with the requirements of our Swedish principals, the following payments are to be remitted: 20% with order; 70% on arrival at Sydney Port; Balance—60 days thereafter."

By Order No. 0795, undated but in fact drawn up and handed to the plaintiff's representative on 11 January 1971, the defendant company ordered from the plaintiff the press and dryer quoted for and 2 of the items of related equipment. The order refers, in each case, to quotation No. 20801, which was the designating number of the document forwarded with the letter of 16 November 1970. The order form is signed "Peter McWilliam".

By a letter from the plaintiff to the defendant dated 15 January 1971, Order No. 0795 "in accordance with our quotation No. 20801" was acknowledged. Verbal instructions for the supply of an additional item for a price of $220 were also acknowledged, and a payment of the deposit of 20% of the total price of the items comprised in the written order and the verbal instructions, namely $42,983, was requested.

Despite the fact that the company named in the original quotation and its covering letter was not the defendant, these documents on their face establish a contract between the plaintiff and the defendant for the goods the subject of Order No. 0795, and it was not denied that if there was a firm contract for those goods that contract extended to the additional goods priced at $220.

The defendant, however, says that no contract was made. Its case was based on two distinct propositions. In the first place, it was said that Peter McWilliam had no authority to enter into the alleged contract on the defendant's behalf, and no person who had authority had authorized the contract. In the second place, it said that in the period covered by the documents the defendant, through Peter McWilliam, had insisted that it was not in a position to commit itself to the purchase of the goods, and that it was placing an order only for the purpose of obtaining priority in delivery. In broad terms, the allegation was that Peter McWilliam and the plaintiff's sales manager, John Anthony Bates, had agreed that an order should be placed so that production and delivery of the machinery included in it, if the defendant finally decided to purchase it, would receive priority in accordance with the date of the placing of the order.

It was common ground that if it were held that an effective contract had been made, the 20 per cent deposit had not been paid and the defendant was therefore in breach. In that event the contract had been cancelled on the ground of the defendant's breach by a notice dated 14 April 1971 forwarded under cover of a letter to the defendant from the plaintiff's solicitors dated 16 April 1971. The amount of the damages finally claimed, approximately $45,000, was not disputed at trial.

The history of the defendant company and 2 related companies is relevant to both defences. All these companies are ultimately owned by the McWilliam family—Bruce McWilliam senior, his wife, his sons Peter Bruce McWilliam and Bruce Scott McWilliam and his daughter Jan Marian Wilkinson. Peter McWilliam is now 34 years of age. Bruce junior is a few years younger. I shall from time to time refer to the two sons by their first names.

The 2 related companies were Paramac Printing Co Pty Ltd and Paramac Promotions Pty Ltd. The date of incorporation of Paramac Printing was 29 December 1955, that of Paramac Promotions 24 March 1958 and that of the defendant company 16 March 1960. Subject to what I shall say concerning Paramac Printing, all 3 at the times relevant to this case conducted their affairs in the same building, a combination of printing house and office, at Alexandria, near Sydney.

The defendant company's business was advertising through the medium of letters and

circulars dispatched by mail. Paramac Printing was a printing company serving the defendant and other customers. Paramac Promotions' function was to provide management and sales services for the defendant. It was set up to be the employer of the sales staff and "some of" the management staff of the defendant. It also employed artists and platemakers engaged in the defendant's business.

The original directors of all 3 companies were Mr McWilliam senior and his wife. In the course of time the 2 sons and the daughter also became directors of all 3 companies. Jan Wilkinson became a director of Paramac Printing and Paramac Promotions on 22 April 1960 and of the defendant company on 17 February 1961. The precise date on which Bruce became a director of Paramac Printing was not proved in evidence, but he became managing director of Paramac Promotions and the defendant on 3 November 1965. Peter became a director of Paramac Printing and Paramac Promotions on 22 April 1960 and of the defendant on 17 February 1961. Returns filed by the defendant company in 1961 and 1962 described Peter as general manager. Similar returns of 1966 and 1967 list him as manager. The return filed on 24 January 1969 lists him only as a director, and in the next return, which apparently was not filed until October 1971, he is not mentioned. The minutes of Paramac Promotions show that his appointment as assistant manager was terminated on 7 May 1969. The minute book of the defendant does not indicate that he was assistant manager of that company.

In 1967 Mr McWilliam senior had a major operation and in terms of working hours took thereafter a reduced part in the running of the companies. At that time Peter was engaged full time in the companies' affairs. Bruce was in London attending the College of Printing there, and he remained there until late 1968. In 1968 Mr McWilliam senior and his wife went abroad for some 4 months, during which Peter and Jan Wilkinson, who lived at Goulburn, were the only directors in Australia. Mr McWilliam would not accept the proposition that at this time Peter was running the companies, but it seems to me that both in fact and in outward appearance this must have been the case.

Early in 1969 the position was that the 2 full-time directors of the companies were Peter, who had some years experience, and Bruce, who was the appointed managing director. In 1968 and 1969 Paramac Printing suffered 2 severe reverses. A large embezzlement occurred and a major client heavily indebted to the company went into liquidation. As a result a scheme of arrangement was prepared which received the approval of the Supreme Court of New South Wales on 23 June 1969. Independently of this, Peter had incurred a debt which he could not pay. He was made bankrupt and this resulted in the resignations of May 1969 to which I have referred. Litigation developed between the trustee of the scheme of arrangement and Paramac Promotions. The trustee terminated the trading of Paramac Printing on 6 November 1969 and on 29 April 1971 a winding up order was made on a creditor's petition. The defendant company is now carrying on a printing business, but the relationship of this business to Paramac Printing's business was not the subject of evidence.

Peter's salary was paid by Paramac Promotions up to the time of the scheme of arrangement. That company then for the time being ceased to function and he was paid by Paramac Printing. On 7 November 1969, when Paramac Printing ceased trading, he was placed on the defendant's payroll. In October 1970 Paramac Promotions was re-activated and he was transferred to its payroll. He is still paid as an employee of Paramac Promotions and is not paid by the defendant.

Mr McWilliam senior's evidence was that Peter has been since October 1970, and still is, a sales and technical man employed by Paramac Promotions whose services are included in those provided for the defendant by Paramac Promotions. His function in the business is and was the same after his resignation of his directorships and the termination of his assistant managership as before.

I think it is fair to say, and I find, that outwardly there was one business carried on at the premises at Alexandria and that ostensibly the 2 full-time executives of this were Bruce and Peter. Bruce was and is managing director of the defendant. Peter's position was and is as I have described it. Mr McWilliam senior, his wife, Peter and Bruce drew salaries from the business which were paid by Paramac Promotions.

As a result of Paramac Printing's difficulties of 1968-9 and of the fact that litigation

developed between the trustee of the scheme and Paramac Promotions, the credit standing of the group, including the defendant, was poor and at the times relevant to this case the defendant company was dealing with trade suppliers on a cash-on-delivery basis.

The articles of the defendant company contain the usual provision that the management of the business and the control of the company shall be vested in the directors: (article 116). They also contain a provision that the directors may appoint any person to be agent of the company with such powers as may be thought fit: (article 117(c)). There was no evidence of any formal appointment under this power. The Articles also provide for the appointment of a managing director with such powers as the directors see fit to delegate to him: (article 104).

The events which in the end produced the documents to which I referred at the start of this judgment began in about July or August 1970. At that time Peter McWilliam formed the opinion, which his father shared, that the company could have for the asking a larger share of the printing of magazines published by a business called Modern Magazines and of another Sydney-published periodical than it already had. To take advantage of these opportunities, however, it had to add to its press equipment a Web offset press capable of production in both colour and monochrome. Peter McWilliam was authorized or expected to gather information, including quotations relevant to the purchase of such a press. He obtained quotations from at least four suppliers other than the plaintiff, ranging in price from $230,000 to $500,000.

His first contact with the plaintiff in this context was on 1 October 1970, when he was called on by Bates and the plaintiff's Sydney representative Peter Davis. The subsequent sequence of events was that Bates called again about a week later and was briefly introduced to Bruce junior. Bates prepared the quotation dated 13 November 1970 and the covering letter dated 16 November 1970. He delivered these personally, in company with Davis, on 19 November 1970. He telephoned a few days later to inform Peter that if the order were placed before Christmas shipment could be effected within 3 months. This telephone conversation was disputed.

Bates and Davis called again on 3 and 15 December. On 23 December a telephone conversation occurred in which Peter McWilliam gave to Bates the number of the Order 0795. On 4 January 1971 Davis called on Peter McWilliam, and on learning of the order enquired about payment of the deposit. On the same day a letter was written from Melbourne asking for the deposit. On 11 January Bates went to Sydney; the order was filled in and handed over. It is on a form bearing the defendant's name and is expressed as a request to supply the press, dryer and 2 other items in accordance with the quotation. Thereafter there were various conversations and letters relating to the payment of the deposit, ending in a letter by the plaintiff cancelling the contract. *[His Honour then considered the conflicting evidence as to what happened and the meetings. His Honour held that a binding contract had been entered and that the second proposition of defence failed. His Honour then considered the other defence taken, that the contract sued upon was made without the authority of the defendant company. His Honour then referred to the pleadings and other matters and continued:]* … Peter McWilliam had been a director of the defendant up to May 1969. I have referred to the records of his managerial appointments. The duties which he performed for the company had not changed or diminished since his resignation of his directorship and the ending of the practice of describing him as the holder of a managerial appointment. The fact that he was, at the relevant times, paid by another company in the group was a matter which could only be known within the group itself, and is, I think, of no significance. I am concerned with the functions he carried out for the defendant. He had an office at the premises to which I have referred, as did his father, who was not continuously in attendance, and his Brother Bruce. His name was one of the 3 McWilliam names displayed on a board at the premises. It did not give any description of him at all, notably, by comparison with the others, omitting the description "Director". A regular visitor to the offices would have been aware that Peter and Bruce McWilliam were the 2 senior persons constantly present there and would have inferred that they constituted the active management from day to day of the business. There might have been some reason for supposing, from the nature of his office in the premises and his age, that Peter ranked above Bruce if there were any distinction between them. Against that, Bruce was described on the board to which I have referred as "Managing Director".

I am satisfied that Mr McWilliam senior took the view that no purchase of a major capital item such as this press could be authorized unless he authorized it. This produced the consequence

that the board of directors had not informally delegated the authority to make such a purchase, and it had not done so formally, to anyone.

There was an introductory contact between the parties 1 or 2 days before the visit of Bates to the premises on 1 October 1970. It appears that Davis, the plaintiff's Sydney salesman, spoke to Bruce by telephone saying that he had heard that the company proposed to purchase a web offset press. Bruce's account of this conversation was that he said that it was unlikely that the defendant would purchase because finance would be almost impossible to get. He said that there was, however, a chance and that he would therefore refer to Davis Peter "who is enquiring into the different web offset machines". In cross-examination he gave a similar account of the conversation, reporting his own words as "Peter is looking at the different machines available and wanting to know the approximate price. I suggest you talk to Peter on that matter". Davis, as I have said, was not called.

The interview of 1 October 1970 followed, and a few days later Bates, in the company of Peter McWilliam, apparently encountered Bruce in a lobby of the offices. Peter introduced Bates as a man who had been at the London College of Printing with him, and according to Bates said, "Bruce won't be in these discussions because he is non-technical, I am handling the machinery negotiations". Bates did not say expressly that Bruce was present when this was said and he was not further questioned on that point. The natural meaning of his evidence seems to be, though it is not decisive, that the words were spoken in Bruce's presence. Bruce gave evidence that all he remembered was that he was introduced to some person as a former student of the London College.

Apart from a suggestion that Bates was briefly introduced to Mr McWilliam senior at the latter's home, there was no contact between Bates or anyone else representing the plaintiff with any person representing the defendant other than Peter McWilliam until March 1971. All the subsequent conversations to which I have referred were between one or both of Bates and Davis on the one hand and Peter McWilliam on the other up to 16 February 1971 when Worthington and Bates spoke with Peter.

As I have already indicated, I accept the plaintiff's evidence that from November the attitude expressed by Peter was that the ordering of the machine was urgent, and that on 15 December Peter informed Bates that it had been decided to purchase the Solna machine. I find also that Bates and Davis knew that the group of companies, including the defendant, was on cash terms in its Sydney trading.

I find that Mr McWilliam senior and Bruce knew of and approved Peter's proposal to enquire into the possible purchase of a Web offset press; that they knew that it was at least highly desirable that it should be functioning by mid-1971; and that they accepted, during December 1970, Peter's opinion that the Solna press was the one which, if it purchased any, the company should purchase.

Letters were written to Paramac Printing on 23 December 1970 and 4 January 1971 referring to the receipt of an order. These were not answered. The first letter specifically addressed to the defendant dated 15 January 1971 also went unanswered. All 3 of these letters in fact reached the offices of the group. Peter said that he kept them on his table until March; Mr McWilliam senior and Bruce said that they did not see them until March. On 14 January 1971 the plaintiff company placed its own order for the machine with the Swedish manufacturers.

As I have said, between December 1970 and March 1971 contacts between the plaintiff and the defendant consisted of calls by Davis and Bates on Peter and the call by Mr D.S. Worthington on Peter on 16 February 1971. The first approach by the plaintiff which drew a response from anyone other than Peter was a letter written to the defendant on 11 March 1971. This letter contained a strong demand for payment of the deposit and indicated that cancellation of the contract might follow if the deposit was not paid. A reply dated 16 March 1971 over the signature of Mr McWilliam senior was received. In this letter it is stated that Peter was not a director of the company and that Bates had told Peter by telephone in December that Peter could reserve the press for delivery in May if the order were placed. The letter states that no mention of a deposit was made at that time. It goes on to speak of certain matters about the obtaining of finance and

complains of slowness in the handling of the litigation which had been brought against the trustee of Paramac Printing. It ends with the following paragraph:—

> "Under these circumstances it can be seen we have been deprived of the opportunity to procure finance for a machine capable of meeting our client's requirements and it seems we have to suffer more damage with the possible loss of the client's orders and the loss of the investment allowance."

Although the first shadows of the 2 defences now taken in the action may be detected in this letter, it will be seen that it does not deny the existence of a contract on either of the grounds taken at trial.

On 16 April 1971 the plaintiff's solicitors wrote to the defendant enclosing a formal notice described in the letter as a notice of cancellation. Mr McWilliam senior was again the author of the reply to this letter. His reply, dated 20 April 1971, appears to assert that there was no contract because the quotation was addressed to Paramac Printing and not to the defendant and because a contract would only come into existence in the terms of the quotation if the deposit was paid with the order. The letter ends with the paragraph:

> "I think this trouble could have been avoided if your client's representative had dealt with me or the Managing Director of this company. He dealt only with Peter McWilliam who is employed as a Sales Representative of this company."

A comment may be made about this letter similar to the comment which I have made about the letter of 16 March. *[His Honour then held that the plaintiff had not established that Peter McWilliam had actual authority to make the contract upon which it sued and then continued:]* ... I turn then to the question of ostensible authority. Any consideration of this problem in relation to limited companies leads to a reference to *Royal British Bank v Turquand* [1856] EngR 470; 119 ER 886; (1856) 6 E & B 327; [1843-60] All ER Rep 435. I think, if I may say so with respect, that the effect of that case is briefly and correctly stated in a passage quoted from a later authority by Willmer LJ in *Freeman and Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480; [1964] 1 All ER 630 at (QB) pp491-2; [1964] 2 WLR 618.

> "By the rule in *Royal British Bank v Turquand*, re-affirmed in *Mahoney's Case*, it was also established, in the words of Lord Hatherley in the latter case 'that, when there are persons conducting the affairs of the company in a manner which appears to be perfectly consonant with the Articles of Association, then those so dealing with them externally are not to be affected by any irregularities which may take place in the internal management of the company.'"

This quotation gives the rule a negative effect appropriate to a rule of estoppel. Other authorities have stated the rule in a form which tends to give it a positive effect. Counsel in the present case, while keeping their positions open, argued this aspect of the case before me upon the basis that the law relating to ostensible authority as it affects limited companies is correctly stated in *Freeman and Lockyer's Case*, a contention with which, again respectfully, I agree.

The principles emerging from the cases, as they are defined in that decision, are set out in the judgment of Diplock LJ at (QB) pp505-6 in the following terms:

> "It must be shown:
>
> (1) that a representation that the agent had authority to enter on behalf of the company into a contract of the kind sought to be enforced was made to the contractor;
>
> (2) that such representation was made by a person or persons who had 'actual' authority to manage the business of the company either generally or in respect of those matters to which the contract relates;
> (3) that he (the contractor) was induced by such representation to enter into the contract, that is, that he in fact relied upon it; and
>
> (4) that under its memorandum or articles of association the company was not deprived of the capacity either to enter into a contract of the kind sought to be enforced or to delegate authority to enter into a contract of that kind.
>
> "The confusion which, I venture to think, has sometimes crept into the cases is in my view due to a

> failure to distinguish between these four separate conditions, and in particular to keep steadfastly in mind (a) that the only 'actual' authority which is relevant is that of the persons making the representation relied upon, and (b) that the memorandum and articles of association of the company are always relevant (whether they are in fact known to the contractor or not) to the questions (i) whether condition (2) is fulfilled, and (ii) whether condition (4) is fulfilled, and (but only if they are in fact known to the contractor) may be relevant (iii) as part of the representation on which the contractor relied".

In relation to the present case it is material to note:

(a) That the representation that the agent had authority need not be made by a person who had himself authority to do the act concerned. It is necessary only that it should come from someone "having authority to manage the business of the company generally". This is brought out also by a passage at (QB) pp504-5, where his Lordship, in dealing with the special position of corporations in relation to ostensible authority, said:

> "The representation as to the authority of the agent which creates his 'apparent' authority must be made by some person or persons who have 'actual' authority from the corporation to make the representation. Such 'actual' authority may be conferred by the constitution of the corporation itself, as, for example, in the case of a company, upon the Board of Directors, or it may be conferred by those who under its constitution have the powers of management upon some other person to whom the constitution permits them to delegate authority to make representations of this kind." At (QB) p505 his Lordship, after saying that the commonest form of representation was by permitting the agent to act in the conduct of the principal's business, said "the making of such a representation is itself an act of management of the company's business".

At (QB) p506, referring to the decided cases, he said,

> "As they" (the Board of Directors) "had in each case, by the articles of association of the company full 'actual' authority to manage its business, they had 'actual' authority to make representations in connection with the management of its business, including representations as to who were agents authorised to enter into contracts on the company's behalf".

(b) That the representation cannot be made by the agent himself. What the agent says may constitute a warranty of authority, but that avails against the agent only. To constitute ostensible authority there must be a representation by the principal (see pp503 and 505). Mr McGarvie submitted that this was too narrow a statement of the law, and referred to *International Paper Company v Spicer* [1906] HCA 75; (1906) 4 CLR 739; 13 ALR 481 particularly per Griffith CJ at (CLR) p747. His Honour there said that the question to be answered was whether the alleged principals "so conducted themselves as to enable" the agents "to hold themselves out to be their agents for the purpose of making such contracts as that sued upon". The word "enable" in this sentence is important. It has the significance of "making possible", and is not to be regarded as simply meaning "did not prevent". I do not think there is any real difference between this case and the *Freeman and Lockyer Case*. Mr McGarvie also referred to 2 cases on the admissibility of statements by employees in prosecutions of their principals—*Harris v Macquarie Distributors Pty Ltd* [1967] VicRp 29; [1967] VR 257; (1966) 13 LGRA 264 and *Chappell v A Ross and Sons Pty Ltd* [1969] VicRp 48; [1969] VR 376. In these cases it was held that statements of the employee as to his relationship to the defendant principal were not by themselves evidence of that relationship, though *Harris' Case* suggests that they may be received in evidence in combination with other materials. If there is any qualification in this of the general rules of evidence, which I doubt, the reasons for the admission of the evidence of the servant's statement given in *Harris' Case* do not call for an extension of that qualification to cases like the present.

The relevance of these two observations in the present case is that the representation as to Peter's authority must be found outside the evidence of Peter's own statements to Bates and others. If, however, it were made to appear that Bruce, the managing director, was aware of what was being done, a finding that the company held Peter out as having authority would be open on the basis that Bruce had the right to control the making of such representations by agents of the company. At this point, therefore, the question of Bruce's knowledge of the events of 23 December and 11 January assumes importance.

After taking an order number from Bruce on 23 December Peter said that he, on the

same day, wrote on the order bearing the nominated number the name of the plaintiff company but nothing else. An examination of the order book showed that the next 2 orders, 796 and 797, were also dated 23 December and were signed by Bruce. There is, however, no foundation in the evidence for finding that when Bruce signed these the plaintiff's name already appeared on 795. Order No. 798 was signed on 24 December and 799 and 800, the last in the book, on 4 January 1971, all by Bruce. Bruce initially said that he was on holiday on 4 January. Again, I do not think that there is a foundation for finding that Bruce became aware that 795 bore the plaintiff's name. He may not have looked, and it may have been that by 24 December the position of the carbons in the book was such as to cause him to turn directly to the new page which he needed.

The whole of Order 795 is in Peter's writing. It is common ground that the body of it was written in the presence of Bates on 11 January 1971. The only evidence that the plaintiff's name was written on it on 23 December is Peter's. Bates said only that the order was written out on 11 January and was not asked to deal with the address and the body of the order separately. I had accepted Peter's statement that he wrote the plaintiff's name on the order because it seemed likely and indeed almost certain that the reservation of that particular order form would have to be indicated in the book to prevent its use for some other purpose. In Mr McGarvie's final address it was pointed out that the digit "O" in the number 0795 was not printed but handwritten and that it appeared on the top copy and not on the lower copies of the order. No witness had had his attention directed to this. The "O" could have been a mark identifying a reserved order form, or it could have had other significances. It must have been on the form at the time of the communication of the number by Peter to Bates, because it is repeated in the plaintiff's letter of the same day. Having regard to the course of the evidence I think that I must find that Peter put the plaintiff's name on the order on 23 December, but in the light of these last unexplained considerations and of the fact that in the end I have rejected most of Peter's evidence concerning that date, I do so with hesitation.

Mr McGarvie submitted that when the events of 23 December were understood in detail and then looked at in the light of Bruce's successive admissions in cross-examination as to the date when he was first told of the "reservation" steps, culminating in an admission that he knew of these in January 1971, the conclusion should be that he knew between 23 December 1970 and 11 January 1971 that Peter was or might well be about to commit the defendant to the purchase of the press.

I think that the matter is clouded with suspicion. The onus rests on the plaintiff, but as the matter to be proved is entirely within the knowledge of the McWilliams I would not regard it as a heavy onus. I have expressed opinions in various degrees adverse to all the McWilliams, but despite these matters I am unable to feel satisfied that Bruce had on the relevant dates the knowledge imputed to him.

Mr McGarvie submitted that such a finding would imply an incredible lack of co-operation between Peter and Bruce. It does imply a great lack of co-operation, but having seen them I do not find it incredible. He also pointed out that from a date in the later part of January steps were being taken to obtain finance for the purchase and that it is clear that Peter knew of these. I have taken this matter into consideration, but I am still unable to feel satisfied that Bruce knew what was being done by Peter.

It was further argued on behalf of the plaintiff that the contract had been ratified. The argument for ratification depended on the letter written on 16 March 1971 which I have already summarized and from which I have quoted. The question of ratification only becomes significant after it is decided that Peter did not have authority to purchase the press. A ratification of the apparent contract could only be effected by those who themselves had actual authority to purchase. It is not possible that a contract made by one person without authority can be ratified by another or others similarly lacking authority. The authorities dealing with ratification stress the importance of considering the whole of the circumstances surrounding the acts said to constitute ratification. Otherwise, the cases tend to stress varying aspects of that situation. Some emphasize the aspect of detriment to the party alleging the contract. Thus, in *City Bank of Sydney v McLaughlin* [1909] HCA 78; (1909) 9 CLR 615; 16 ALR 353 at (CLR) p625 Griffith CJ and Barton J said:

"In general a man is not bound actively to repudiate or disaffirm an act done in his name but without

> his authority. But this is not the universal rule. The circumstances may be such that a man is bound by all rules of honesty not to be quiescent, but actively to dissent, when he knows that others have for his benefit put themselves in a position of disadvantage, from which if he speaks or acts at once, they can extricate themselves, but from which, after a lapse of time, they can no longer escape."

The same concept appears in *Lamshed v Lamshed* [1963] HCA 60; (1963) 109 CLR 440; [1964] ALR 321. In other cases the taking of a benefit by the party alleged to have ratified is stressed. Such a case is *Australian Blue Metal Ltd v Hughes* (1961) 79 WN (NSW) 498; [1962] NSWR 904 at p925. In others, an intention to adopt has been treated as important. See *Bowstead on Agency* 12th ed., p42, *Barrett v Irvine* [1907] 3 IR 462. This requirement has an objective aspect, see, e.g. *Lamshed v Lamshed* at (CLR) p448, where Kitto J recited the finding of the trial judge, which he said supported a finding of ratification, that "he so conducted himself in dealing with the respondents that any reasonable person in their position would have inferred that he was accepting the situation that the altered document constituted a contract binding upon him".

The letter of 16 March 1971 contains none of these features. The defendant derived no benefit from it. The plaintiff did not act to its detriment upon it. The author of it, even if he had authority to commit the defendant to the contract, had no intention of committing it to any engagement by which it was not already bound. The letter might well have struck the plaintiff as consistent with the existence of a contract, but the plaintiff cannot say that the letter induced a reasonable belief that the defendant was admitting itself bound. The plaintiff had this belief, but it had always had it, and its belief was derived from other sources. The letter allowed that belief to continue, but there is no evidence that the plaintiff's position was adversely affected by the continuation of the belief caused or permitted by the letter.

Upon a consideration of these aspects and of the circumstances surrounding the writing of the letter, I am unable to regard it as a ratification of the contract alleged by the plaintiff. In *Australian Blue Metal v Hughes*, *supra*, at (NSWR) p925, Jacobs J distinguished between ratification and estoppel, saying,

> "In the latter case it must be shown that the other party has acted to his detriment. This is not necessary in the case of ratification".

This statement does not say and does not mean that detriment is irrelevant in a consideration of ratification, as other cases which I have cited show. I do not think that ratification can be spelled out of Bruce's silence during January and February and the early part of March 1971. Bruce himself did not have authority to make the contract.

The final argument was that the defendant's conduct in 1971 estopped it from denying the existence of the contract. To support this argument the plaintiff would first have to establish either that a representation was made to it or that the defendant company remained silent in conditions where it should have spoken, and in which silence would induce in the plaintiff a belief that the contract existed. This argument has aspects in common with the arguments relating to ostensible authority. If a representation can be found, made by a person having authority to make representations on the defendant's behalf, it is not relevant that that person did not have authority to make the contract himself.

The only direct communication between any person other than Peter on behalf of the defendant and the plaintiff which can be relevant to this argument is the letter of 16 March. For the reasons which I have already discussed in dealing with the ratification argument, I think that this letter is incapable of supporting an estoppel. Further, as Jacobs J pointed out, detriment is an essential part of estoppel, and there is no evidence that the plaintiff company took or abstained from taking any action as the result of receiving that letter.

The last point is pertinent also to a consideration of estoppel by standing by. It may be that the deficiency is a result of the state of the pleadings, but in fact no witness called by the plaintiff gave the opinion that the plaintiff's conduct would have been affected by an earlier knowledge of the defendant's attitude to the contract upon which the plaintiff was relying. However that may be, estoppel by acquiescence or standing by depends upon the possession by the person acquiescing of knowledge of the facts. I am unable on the evidence to find that Bruce knew sufficient of the facts, and I find that Mr McWilliam senior did not know sufficient of the facts, to see that the

plaintiff must be committing itself or otherwise changing its position if the defendant's position was not stated to it. Further, there is neither documentary nor parole evidence that the plaintiff changed its position after 14 January 1971 or that it would have changed its position or extricated itself from its commitment if it had been warned of the defendant's rejection of the contract. It was suggested that the shipment of parts for the press under an invoice of 18 February 1971, which were entered for Australian customs duty on 8 April 1971, could have been avoided or postponed. There is, however, no indication of the time at which action would have had to be taken or whether the plaintiff would have considered it useful to take any action in relation to this shipment.

I therefore think that estoppel is not made out. Accordingly the plaintiff fails. There will be judgment for the defendant, with costs to be taxed, including pleadings, interrogatories, discovery, any reserved costs and transcript. Judgment accordingly.

Solicitors for the plaintiff: Mallesons.
Solicitors for the defendant: Oakley Thompson and Co.
