

30/81

IN THE PRIVY COUNCIL

No. 26 of 1981

ON APPEAL

FROM THE SUPREME COURT OF NEW SOUTH WALES

COMMON LAW DIVISION COMMERCIAL LIST

BETWEEN:

KOORAGANG INVESTMENTS PTY. LIMITED

Appellant (Plaintiff)

AND:

RICHARDSON & WRENCH LIMITED

Respondent (Defendant)

CASE FOR THE RESPONDENT

SOLICITORS FOR THE APPELLANT

Clayton Utz & Company,
Australia Square,
SYDNEY. N.S.W.

By their Agents:

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SOLICITORS FOR THE RESPONDENT

Freehill, Hollingdale & Page,
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ON APPEAL

FROM THE SUPREME COURT OF NEW SOUTH WALES

COMMON LAW DIVISION COMMERCIAL LIST

IN ACTION NO.3568 of 1976.

BETWEEN:

KOORAGANG INVESTMENTS PTY. LIMITED

Appellant (Plaintiff)

AND:

RICHARDSON & WRENCH LIMITED

Respondent (Defendant)

CASE FOR THE RESPONDENT

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ON APPEAL

FROM THE SUPREME COURT OF NEW SOUTH WALES

COMMON LAW DIVISION - COMMERCIAL LIST

ACTION NO. 3568 of 1976

BETWEEN:

KOORAGANG INVESTMENTS PTY. LIMITED

Appellant (Plaintiff)

AND:

RICHARDSON & WRENCH LIMITED

Respondent (Defendant)

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CASE FOR THE RESPONDENT

Record

1. This is an appeal from a decision of Rogers J. in the Supreme Court of New South Wales, Common Law Division, Commercial List, given on 4 July 1980 whereby his Honour dismissed the appellant's action and entered judgment for the respondent with costs. pp.881 to 917

THE ISSUES

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2. The appellant claimed damages from the respondent for loss sustained by lending money on the faith of two valuations prepared by Thomas George Rathborne (hereinafter called "Rathborne") who was employed by the respondent as a valuer. The valuations were prepared on instructions given to Rathborne by companies within the Giles Bourke Group and these

companies used the valuations to obtain loans on the security of mortgages of property. The learned Judge found that the valuations were made negligently. The issues which arise on this appeal, both of which were decided by the Judge in favour of the respondent, are whether the valuations were made by Rathborne in the course of his employment and, if so, whether the respondent owed the appellant a duty of care in respect of such valuations.

p.910 11.1-4
& p.911
11.20-24

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p.901 1.30
to p.902
1.2

p.908
11.10-13

Both cases involve the application of settled principles of law to the primary facts found by the learned Judge.

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FACTS

3. The respondent company is a real estate agent and valuer. The company had at the material time an established procedure for carrying out valuations for clients which is described on p.892 1.17 to p.894 1.25 of the Record. In essence, work which the company was instructed to carry out was allocated by a Director, Mr. Hodgson, to one of five valuers who included Rathborne. A file was kept containing all the documentation relating to an item of work. This would include instructions, field notes and other necessary preparatory material. When valuations exceeded \$100,000, Mr. Hodgson was

p.882
11.7-8

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informed of the progress of the work. The valuations would be prepared by the valuer and typed at head office by a secretary employed by the company. There would be an original and two copies of each valuation. One copy would be bound into a valuation book when the work was completed. The original together with the other copy would be given to the client. Valuers would sign such valuations in the corporate name of the respondent. Valuations were delivered to a client either against payment or with an invoice, and copy invoices became part of the respondent's accounting business records.

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4. In 1972 the respondent commenced a regular relationship with the appellant as a client. The appellant p.884
11.1-3
loaned money on the security of property, and prior to making loans obtained valuations from the respondent. The ambit of the relationship between the appellant and the respondent is set out in detail on p.882 1.2 to p.883 1.15 of the Record. In summary, the respondent was approached to advise the appellant and became its only approved valuers. The procedures agreed for all valuations involved a two stage process. First, the appellant would give instructions to the respondent for a preliminary inspection so that a general comment could be made as to the suitability of the property as a mortgage

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prospect. For this work a fee of \$25.00 was payable. Secondly, when thereafter an applicant sought a loan from the appellant on the security of the property, the respondent would be advised by the appellant, and a full valuation, together with a letter covering certain detailed items of information, would be prepared. This agreed procedure essentially was adhered to in all valuations conducted by the respondent for the appellant, although there were from time to time minor differences.

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5. Rathborne was not a valuer who was known to the appellant. He was known to the Giles Bourke Group of companies for whom he prepared valuations when that group was a client of the respondent. In November 1972 the respondent instructed its valuers no longer to accept further valuation work for the group until outstanding accounts were paid.

p.904
11.4-12

In 1973 Rathborne, who had become a Director of a company within the Giles Bourke Group, prepared valuations on the instructions of companies within that group. One such valuation was of a property called the Glebe property, and the other was of a property called the McMahons Point property. The details of the Glebe valuation are set out on p.885 1.14 to p.886 1.17 of the Record and those

p.899
1.24

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p.885
11.10-13
p.899
1.31-
p.900 1.1

p.899
11.24-29

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of the McMahons Point valuation on p.889 1.25 to p. 890 1.20 of the Record.

Both valuations were prepared on headed paper of the

respondent and Rathborne signed the documents in handwriting in the corporate name of the respondent.

p.894
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ent.

p.894
1.23

Applications on behalf of the Giles Bourke Group

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for a loan were in each case made to the appellant by letter which enclosed a photostat copy of the

p.885 1.19
& p.889
1.25

purported valuation report. The appellant was

p.885 1.24
& p.890 1.1

unaware by whom the documents had been prepared and signed.

p.904 11.9
& 10

6. In each case a percentage of the valuation was advanced, but the mortgagor defaulted and the properties were sold by the appellant under its power of sale as mortgagee. The appellant claimed

p.887 1.2
p.891 1.5 20

damages from the respondent for loss allegedly suffered because the valuation was too high.

p.889 1.11
& p.892 1.15

p.8 1.9 &
p.11 1.8

7. The circumstances in which Rathborne prepared these valuations are of crucial importance to the first issue in the appeal. They were as follows:-

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(a) The valuations were prepared by Rathborne at the offices of the Giles Bourke Group of companies, of one of which Rathborne was a director. They were dictated to a secretary of those companies, who typed them on paper of the respondent provided by

p.895
11.4-5

- | | <u>Record</u> |
|--|--|
| Rathborne who then signed the corporate name of the respondent. | p.895
11.9-10
p.895
1.15-16 |
| (b) No instructions to carry out the valuations were ever recorded with the respondent and thereby Rathborne departed from the established procedure. | p.894
1.15
p.892
1.18 to 10
p.894 1.15 |
| (c) Neither Mr. Hodgson nor any other director of the respondent ever knew of the instructions given to Rathborne, nor did they allocate or supervise the work. | |
| (d) No file was opened by the respondent in connection with the valuations, and none of the usual documents or records were kept by the respondent. There were no records of any kind in the office of the respondent in relation to the valuations. | 20

p.894
1.15 |
| (e) No fee was charged by, or paid to, the respondent for the valuations. The Judge said: "Whatever payment or reward was given for the work done by Rathborne, did not come to the hands of the defendant". | p.900
1.3-4 |

Thus the Judge stated:-

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"There is no record of any kind in the office of the defendant" (respondent) "relating to the receipt of instructions to carry out the valuations in 1973 of the Glebe property or the McMahon's Point property, no field notes or other material leading to a valuation, no pink copy of

the valuation, no invoice and no record of any payment being made to the defendant. In other words, except for the fact that the defendant's stationery was used in respect of the valuations and the defendant's corporate name signed to the valuation, there is nothing to connect the two valuations with any activity carried out by or on behalf of the defendant".

p.894 10
11.15-25

8. The respondent does not anticipate, having regard to the evidence, a challenge to the findings of primary fact. All such findings were fully justified by the evidence to which, if necessary, the respondent can refer.

THE JUDGMENT

9. The learned Judge considered that the first essential issue was whether the valuations were carried out by Rathborne in the course of his employment with the respondent. He considered that there was no doubt as to the applicable principles of law. The question was, in his judgment, whether the act done by Rathborne was either authorised by the respondent or a wrongful and unauthorised mode of doing some act which the respondent had authorised. If so, the act would be within the course of Rathborne's employment. By contrast, the respondent would not be liable merely because the employment of Rathborne gave the occasion and the opportunity for the latter to carry on some activity on his own behalf. If the circumstances were such that the work was an

p.896 20
11.20-24

p.898
1.2

p.898 30
11.7-12

independent activity of Rathborne, then the respondent was not liable. The Judge concluded that on the whole of the evidence the Giles Bourke Group of companies was obtaining the valuations from Rathborne personally to the total exclusion of the respondent. He stated an alternative way of looking at the position: "Indeed bearing in mind that Rathborne had become a director of Group Unity Syndications Pty. Limited (a Giles Bourke subsidiary) in November, 1972, it could be said that all work was done by officers and employees of the Group." The mere fact that Rathborne was enabled, or afforded the opportunity, by his employment, to obtain the respondent's note paper, and that he signed the corporate name of the respondent, was not enough to fix the respondent with liability for his own business venture.

p.901 1.30-
902 1.2

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p.899 1.31-
p.900 1.3

p.900 1.19

p.895
11.15-16 20
p.900
11.20-24

10. Whilst this decision concluded the case in favour of the respondent, the Judge also considered the separate issue of whether the respondent would be liable to the appellant in the event that the document was to be regarded as having been prepared in the course of Rathborne's employment. He held that, because the parties anticipated that all loan applications to the appellant would

p.904
11.13-15

p.904 30
11.15-18

be dealt with in accordance with the agreed arrangements for valuations, the respondent did not owe the appellant a duty of care in respect of valuations prepared in a different way. He concluded that there was no ground for finding that the respondent ought to have known that the appellant would rely on a valuation prepared otherwise than in accordance with the agreed arrangements.

p.907
11.16-21

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p.907
1.26 -
p.908 1.9

11. The learned Judge dealt with three further issues:-

(a) He found that although the valuations were made negligently by Rathborne, the appellant had not established that they were fraudulent.

p.914
11.1 & 2

(b) He rejected a contention of the respondent that, there was contributory negligence on the part of the appellant.

p.912
11.12 & 13

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(c) He held that damages which the appellant would have recovered were not limited to the difference between the amount advanced and the amount which they would have been willing to advance against a valuation prepared without negligence, but extended to the entirety of the loss sustained by entering into the loan transactions.

p.917
1.11

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SUBMISSIONS OF THE RESPONDENT

12. The respondent submits that the question of whether the valuations were prepared in the course of Rathborne's employment depends upon the application of well settled principles of law to the facts of this case. It is essential to the appellant's case to establish that the valuations must be regarded as documents of the respondent. The valuations could only be so regarded if their preparation was either authorised by the respondent or was a wrongful and unauthorised method of doing some act which was so authorised. The valuations would only have been authorised if either the respondent had actually instructed Rathborne to prepare them or had held Rathborne out to the appellant as having such authority. Such holding out must be by the employer himself and not by the employee: See Freeman & Lockyer -v- Buckhurst Park Properties (1964) 2 Q.B. 480, per Diplock L.J. at page 503. The appellant knew nothing of Rathborne who was never held out to them by the respondent as having authority to make valuations, and it was accordingly correctly conceded by the appellant at the trial that he had no ostensible authority. Thus the issue

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p.904
11.4-12

p.904
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is whether Rathborne was engaged in an act which was a mode of performing his employment, or whether his acts were independent of such employment. The relevant test is stated in Salmond on Torts, 17th edition at page 465 as follows:-

"It is clear that the master is responsible for acts actually authorised by him; for liability would exist in this case, even if the relation between the parties was merely one of agency and not one of service at all. But a master, as contractor, is liable even for acts which he has not authorised provided they are so connected with acts which he has authorised that they may rightly be regarded as modes - although improper modes - of doing them. ... On the other hand, if the unauthorised and wrongful act of the servant is not so connected with the authorised act as to be a mode of doing it, but is an independent act, the master is not responsible, for in such case, the servant is not acting in the course of his employment and has gone outside of it ..."

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This test has been applied on numerous occasions: See the authorities cited on pages 13-17 of the judgment, and see also Canadian Pacific Railway Company -v- Lockhart (1942) A.C. 591. It is thus in each case an issue of fact from all the circumstances whether the employee was acting in, or outside, the course of his employment.

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13. The respondent submits that the decision of the learned Judge upon this issue was correct. This is not a case in which Rathborne committed a tort in the course of performing acts which he was authorised to do on behalf of the respondent: Compare Lloyd -v- Grace Smith

(1912) A.C. 716; United Africa Co. Ltd. -v- Saka

Owade (1955) A.C. 130. By contrast, Rathborne accepted instructions on his own behalf. He carried out work with which his employers had no connection, but used the fact that he had access to the note paper of the respondent in an attempt to clothe his own valuations with authenticity.

The fact that he was on other occasions employed as a valuer by the respondent is not of assistance to the appellant, since this fact was unknown to the

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appellant. This case is a typical example of the employee using the opportunity afforded by his

p.904
11.4-12

employment to commit a tort. The respondent respectfully adopts the reasoning of the learned

p.903
11.9-33

Judge on p.900 11.8-24 of the Record:-

"There was no connection or relationship of any kind between the work which Rathborne did, for whatever reward Rathborne received or anticipated from the Giles Bourke Group in respect of these valuations, and the work with which Rathborne, the employee of the defendant, engaged on his employer's work was entrusted. It is true that as a matter of coincidence, and coincidence only, Rathborne performed somewhat the same duties for Richardson & Wrench Limited when carrying out his normal work as he carried out in preparing the two valuations in issue. Nonetheless, his employment with the defendant merely provided the occasion for coming into contact with the Giles Bourke Group of companies and for obtaining the defendant's stationery and no more. The fact that Rathborne was entitled to sign the defendant's corporate name to the valuations on which he was engaged on behalf of the defendant does

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not make valuations so signed by him in the course of his separate private business, valuations of the defendant".

In essence, the case for the appellant is that because the respondent employed Rathborne as a valuer who could, when authorised, sign valuations, it was liable for these independant valuations solely because Rathborne made them on its notepaper and signed its corporate name. This argument is fallacious. The mere fact that employment gives an unscrupulous employee the opportunity to commit a tort does not make the employer liable. See Morris -v- C.W. Martin & Sons Ltd (1966) 1 Q.B. 716 at 737 per Diplock L.J. and at 741 per Salmon L.J.

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14. The second issue of whether the respondent owed a duty of care arises only in the event that the valuations are found to have been prepared by Rathborne in the course of his employment. It was conceded on behalf of the respondent at trial that, but for the special arrangements between the appellant and the respondent, a duty of care would have arisen in respect to the Glebe property. This concession was not made in respect of the McMahons Point property. The reason for the distinction arises from a difference in the purported valuations. The valuation of the Glebe property was stated to have been prepared under instructions from the relevant Giles Bourke company

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p.904
l.22 to
p.905 l.1

"for and on behalf of an intending mortgagee". By p.886
l.1

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By contrast the wording of the McMahons Point valuation stated that it was prepared under instructions from the Giles Bourke company "for and on behalf of Cobden Pty. Limited, 80 Perry Street, Matraville as mortgagee". Thus in the former case the document was potentially to be shown to any intended mortgagee, but in the latter case only to a specific, named mortgagee.

p.890
11.10 & 11

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15. The respondent submits that, having regard to the wording of the valuation, no duty of care could ever have been owed to the appellant in respect of the McMahons Point valuation.

16. In respect of the Glebe valuation, the respondent submits that the nature of the relationship between the appellant and the respondent had been defined

p.882 1.2-
p.884 1.22

by the arrangements, which had in essence been adhered to, under which the respondent made valuations for the plaintiff. The duty of care owed by the respondent to the appellant related solely to valuations prepared in accordance with these arrangements which defined the "special relationship" between the appellant and the respondent: See Hedley Byrne & Co. Limited -v- Heller and Partners (1964) A.C. 465; Mutual Life & Citizens' Assurance Co. Limited -v- Evatt (1968) 122 C.L.R. 556. Thus there was no ground

p.908
11.4-6

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upon which the respondent ought to have known that the appellant would rely upon these valuations prepared for the Giles Bourke Group of companies. The respondent would reasonably have expected that the appellant would only rely upon valuations prepared in accordance with the usual arrangements.

p.907 1.14-
p.908 1.6

CONTRIBUTORY NEGLIGENCE

17. If, contrary to the conclusions of the Judge, the valuations are the documents of the respondent, and it owed a duty of care in connection therewith, the respondent submits that the appellant wholly caused or contributed to its loss by its own negligence. The parties had an agreed procedure whereby the appellant would obtain valuations from the respondent. These two valuations were received otherwise than in accordance with the agreed procedures. Despite this, and the other factors to which we refer below, which, it is submitted, should have put the appellant on enquiry, the appellant did not communicate with the respondent about either valuation.

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p.882 1.2-
p.884 1.22
p.885 11.14
-21 & p.889
1.25 to 20
p.890 1.7

18. The matters which demonstrate that this failure was negligent are that the appellant was a money lender staffed by experienced commercial personnel and its personnel were at the time in

p.881
11.15-16 30
p.907 1.27

frequent communication with the respondent about a number of other valuations which came into being, and which were received by the appellant, pursuant to the usual arrangements which the appellant knew were to be followed in all cases.

p.884
11.1-9

19. (a) Further, the McMahons Point valuation was on the face of it one which should have caused the appellant to make enquiries of the respondent for the following reasons:-

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(i) It was addressed to Cobden Pty. Limited - a company unknown to the appellant;

(ii) Mr. Satchwell had a specific query as to the zoning of the land and was directed by the Board to check that matter; and such check (which was never done) would have been made with the respondent.

p.890 1.25 20
to p.890
1.1

(iii) It was a photocopy, rather than an original or a carbon copy.

p.890 1.1

(b) The Glebe valuation on the face of it should have caused the appellant to make enquiries of the respondent for the following reasons:-

(i) It contained no rental information

- in circumstances where that information was a specific requirement of the appellant;
- (ii) It was at least five (5) months old; p.887
11.9-10
p.886 1.2
& p.888
1.19
 - (iii) It bore no initials of the valuer who purportedly made the valuation; p.886 10
11.2-5
 - (iv) It was also a photocopy, rather than an original or a carbon copy. p.885
11.24-25

Wherefore the respondent submits that the appeal should be dismissed for the following among other reasons:-

1. Because the valuations were not prepared by Rathborne in the course of his employment, but were prepared by him outside the course of his employment and the respondent is not liable for such valuations. 20
2. Alternatively because the respondent did not owe the appellant a duty of care in respect of such valuations.
3. Because the decision of the learned Judge was right and ought to be affirmed.

Alternatively, the Appeal should be dismissed or allowed in part only, because of the contributory negligence of the appellant.

Robert Alexander Q.C.
J.M.N. Rolfe Q.C.
S.B. Austin.