IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No. 43 of 1983

Between:

RAM CHANDRA NAIDU s/o Chandar Naidu — Appellant

and

HARI KUAR SINGH s/o Kuar Singh — Respondent

Mr. G.P. Shankar and Mr. S.R. Shankar for the Appellant

Mr. J.R. Reddy and Mr. V. Kalyan for the Respondent

Date of Hearing: 25th July, 1984

Delivery of Judgment:

JUDGMENT OF THE COURT

Mishra, J.A.

This is an appeal from the judgment of Williams J, Lautoka, in favour of the respondent, an estate agent, allowing his claim for $14,000 as his commission on a sale of the appellant's property for the sum of $125,000. Interest at the rate of 4% was also allowed.

The respondent's claim was based on a written agreement of 16th February, 1981, under which he was to receive out of the purchase price, $14,000 by way of

commission if the property in question were sold for the sum of $125,000. The agreement was to remain in force for two months. Almost all the particulars on the agreement form are typed, the original typed figure for commission being $15,000. This was crossed out and $14,000 substituted in its place. Certain initials appear alongside. On the copy of the agreement handed to the appellant, however, the handwritten figure is $1,400. The respondent stated that the alteration was made by him after he had agreed to reduce his commission by $1,000 and that the missing zero on the appellant's copy was the result of inadvertence. The appellant claimed that the additional zero was placed on the respondent's copy afterwards and that the initials alongside alleged to be his were a piece of forgery. The appellant also contended at the trial that the property was not sold within the period of two months specified in the agreement and that the sale had in fact resulted from his own efforts.

The purchaser, Williams & Gosling Ltd, was attracted to the property because of an advertisement inserted in the local dailies by the respondent and a Mr. Pickering, a director of the Company, based at Nadi, approached the respondent and inspected the building. He also obtained from the respondent some photographs for despatch to their Head Office at Suva. According to Mr. Pickering's evidence, Mr. Donald Aidney, their main executive from Suva inspected the property early in April 1981 and on his return to Suva advised him of the firm's intention to buy which he had communicated to the respondent. He could not be sure of dates but was certain this would have been before Easter i.e. before 17.4.1981.

Mr. Aidney, called by the appellant, thought the decision to buy would have been made after Easter but he was generally less sure of dates than Mr. Pickering.

Both Counsel, however, agree that nothing amounting to a firm offer to buy was made until 27th April, 1981, some 11 days after the agreement of 16th February, 1981 had expired. Agreement to purchase was made on 1.6.81.

Issues arising from the grounds of appeal were argued under two main heads :-

(1) Whether the respondent was entitled to his commission under the terms of the agreement.

(2) Whether his commission under the agreement was $14,000 or $1,400.

As a preliminary matter the appellant sought leave to adduce additional evidence in support of head (2) above. The evidence in question was in support of the appellant's contention at the trial that the last zero in the hand-written figure in the appellant's copy of the agreement (P. 2) was added afterwards and that the appellant's initials alongside had been forged. The application was refused as it did not fulfil the conditions necessary for such leave (see Dragicevich v. Martinovich 1969 N.Z.L.R. 306). The appellant must have been well aware, long before the commencement of the trial, of the discrepancy between the figure of $14,000 in the appellant's copy of the agreement and that of $1,400 in his, and exercise of a little diligence would have enabled him to ascertain what evidence was required in this regard and to adduce it at the trial. Even if he became aware, as he claims, of the possible need of this evidence after the plaintiff, who was the first witness, concluded his evidence, it was a protracted trial with two long adjournments and it would, in our view, have been a simple matter to adduce the evidence before the conclusion of the trial. We do not accept his contention that his right to call evidence at the trial was in any way curtailed.

The first question raised by the appeal is: Was the respondent, under the terms of the agreement, entitled to his commission upon completion of the sale?

The relevant part of the contract, which used a cyclostyled form, was as follows :-

"LAND LORD/OWNER R.C. NAIDU (FURNITURE & JOINERS) BOX 220 PH. 60380

TYPE OF PREMISES SEMI COMMERCIAL 2 BLOCKS EACH 149' x 50' DETAILS BELOW

LOCATION OF PREMISES LOTS 2 & 3 BOUWALU STR LAUTOKA

PRICE & TERMS OF SALE $125000.00 INCLUDING AGENTS COMMISSION

BUYER/TENANT .....

TERMS OF THIS CONTRACT TWO MONTHS

RATE OF COMM TO BE PAID BY OWNER/LAND LORD $14000.00 INCLUDED IN ABOVE

REMARKS AMOUNT FOR AGENT IF SOLD AT ABOVE PRICE

THIS CONTRACT ONCE MADE SHALL BE IN FORCE FOR TWO MONTHS FROM DATE HERE OF AND IF EVER WHILE THIS CONTRACT STILL BE IN FORCE AND THE LAND LORD/OWNER MAKES A PRIVATE DEAL WITH THE BUYER, HE OR SHE STILL BE LIABLE TO PAY OUR COMMISSION IN FULL, FAILING WHICH A LEGAL ACTION MAY BE INSTITUTED FOR WHICH I AGREE AND SIGN HEREUNDER. "

Paragraphs 2 and 3 of the statement of claim are :-

"2. BY an Agreement in writing dated 16th February, 1981 made between the Plaintiff and the Defendant the Plaintiff had agreed to act as the Defendant's agent in regard to introducing a buyer for the sale of the Defendant's Native Lease No.12608 at a price of $125,000.00 (One Hundred and Twenty Five Thousand Dollars).

3. IT was a term of the said Agreement that in the event of the Plaintiff effecting an introduction either directly or indirectly of a person ready, willing and able to purchase the said Native Lease No. 12608 at a price of $125,000.00 the Defendant would pay the Plaintiff a commission of $14,000.00 (Fourteen Thousand Dollars). "

The contract, as we see it, says nothing about "introducing a buyer" or "effecting an introduction either directly or indirectly of a person ready willing and able to purchase". It merely gives the term of the contract as two months and requires a sum of $14,000 to be paid by way of commission if the property is "sold" for $125,000.

The plaintiff in his evidence said that the terms of the contract meant,

"If I get a person in two months who had completed after two months I get my commission. "

He, however, also said :-

"I asked that I should get my $14,000 if I sold for $125,000 after the two months. He agreed. "

If by this second assertion the respondent meant that there was a collateral oral agreement to that effect, no such agreement was pleaded. The appellant denied that there was any such oral agreement.

This appeal has to, in our view, be decided on the basis that the claim must stand or fall on the construction of the written agreement of 16.2.1981 specifically referred to in the particulars of claim and the statement of claim.

The respondent had just started business as an estate agent and this was his first contract. His Counsel concedes that the contract is inadequately worded but contends that it should be construed liberally giving consideration to circumstances prevailing in the business community. We are unable to agree. It was the respondent's own contract and the terms were stipulated by himself. It is not for us to decide if the terms were fair or unfair, wise or foolish. As Salmon L.J. said in Wilkinson Ltd v. Brown (1966 1 All E.R. 509 at 514) :

> " The courts usually construe a contract so as to give it ordinary business efficacy. This is because the courts recognise that people do not normally enter into a contract with the intention that it shall make no business sense. There are, however, contracts, although I think very few, in which the parties use clear and unambiguous language which plainly means that the parties intend to enter into a ridiculous bargain. In such cases the courts will give effect to the expressed intention of the parties, however absurd the consequences may be. "

In this case the respondent, possibly without realising the full consequences, made a bad bargain and we see no reason why the appellant should not be allowed to hold him to it.

The learned Judge in his judgment said :-

> "I have always understood that the estate agent obtains a prospective customer(s). Unless one of them completes by way of purchase the agent is not entitled to any commission. However, the agent is seldom able to guarantee the actual date of the sale and transfer of title. Although his right to commission is based on introducing a buyer he can seldom go beyond that stage because the transaction is usually completed by the legal advisers to the vendor and purchaser. The right to commission generally crystallises after transfer of title and payment of purchase money.

Of course the terms can by precise wording alter that general pattern. "

We consider the terms of the contract in this case reasonably unambiguous. The property, clearly identified, was to be sold at a stipulated price within a specified time in order to entitle the agent to his commission. The term "sold" would not mean a transfer of title, which in this case did not occur until months later. It might not even mean a formal, legally drawn, agreement which in this case was not entered into until 1st June, 1981. But it would certainly mean a firm commitment to purchase, or a closing of the deal in a manner which could be enforced at law. In the present case, there is no evidence to suggest that such a commitment was made by Williams and Gosling before Easter i.e. 16th April, 1981. Mr. Pickering had advised the respondent by telephone of the firm's intention to buy but that was all. Either party was at that stage free to back out. If the purchaser was "ready" to buy, it was for the respondent to take steps to close the deal. He did not, in fact he could not, do it. He was asked by Mr. Pickering to have the time of the contract extended. The property had been inspected and valued but other matters were still being considered by their head office when the time specified in the contract expired. There is clear evidence that the respondent saw a good thing slipping through his fingers and tried to remedy matters by obtaining an extension of time. He did not get it.

Subject to confirmation by the Head Office, Suva, Mr. Aidney had agreed with Mr. Pickering at Lautoka that they should buy the property. The confirmation came by telex on 23.4.1981, a week after the expiry of the contract between the appellant and the respondent. There is no dispute as to that.

The learned Judge, however, considered that to be immaterial. He said :-

> "Following the judgments above quoted and authorities which I do not quote I construe the agreement Ex.p.2(D.4) as requiring the plaintiff to find within two months a prospective buyer who within a responsible time pays the purchase price and completes the contract of sale. "

In Jaques v. Lloyd George & Partners (1968 1 W.L.R. 625), relied upon by the learned Judge, the Court was construing a contract prepared by an estate agent, as in this case. An ambiguous and unconscionable term there was construed contra proferentem against the estate agent. Lord Denning said :-

> "Can an estate agent insert such a clause and get away with it? I think not. " (at p.629)

In the present case the appellant, the estate agent, asks the court to construe his own contract so as to imply in his favour terms which are not there. In a case such as this the principle laid down by Harman L.J. in Wilkinson Ltd. v. Brown (supra at 510) must, in our view, apply :-

> " It comes to this in the end, that before you find the commission payable, you must be satisfied that the condition on which it is payable has been fulfilled. There is nothing more in it than that. There is no question of construing the document pro or contra the estate agent. It is a question of what, in the events which happened, can be said as to the fulfilment of the vital condition. "

The contract gave the appellant an exclusive right to sell within two months. It said :-

> " This contract once made shall be in force for two months from date hereof and if ever while this contract still be in force and the landlord/owner makes a private deal with the buyer he or she still be liable to pay our commission in full failing which a legal action may be instituted ....."

There is no suggestion that the appellant made any deal with the buyer during the terms of the contract. The clause, however, shows the exclusive nature of the contract and the significance the parties intended to attach to the element of time which they themselves, by agreement, reduced from three to two months. The appellant, in our view, set himself a time limit within which to sell the property, not merely to find a person interested in it who might become a "buyer" within a reasonable time after the expiry of the time limit.

Numerous cases were cited to us by Counsel where contracts, invariably prepared by the estate agent, used expressions, such as, "effecting an introduction either directly or indirectly of a person ready, able and willing to purchase" or "instrumental in introducing a person willing to sign a document capable of becoming a contract" or "finding someone to purchase" and in each case it fell to the court to construe the meaning of the term.

In the present case no such expression is used. Words used by the estate agent himself are "if sold" and the contract under which the claim could arise was to remain in force only for two months.

There can, in our view, be no doubt as to the plain meaning of these words.

The appeal, therefore, succeeds and the judgment of the Supreme Court set aside. The money deposited in court, will be returned to the appellant. He will also have the costs here as well as in the court below.

In view of the decision we have arrived at, the second head i.e. the amount payable under the contract does not require to be considered in any detail. Indeed, not much argument was directed by Counsel to that issue. Suffice it to say, that, on the evidence before him at the trial, the learned Judge was entitled, in our view, to make his finding in favour of $14,000 contended for by the respondent. As matters stand, that finding now makes little difference to the eventual outcome.

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VICE PRESIDENT

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JUDGE OF APPEAL

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JUDGE OF APPEAL