P.A. MANAGEMENT -v- GOVERNMENT SHAREHOLDING AGENCY & ATTORNEY GENERAL

High Court of Solomon Islands
(Muria ACJ)
Civil Case No. 20 of 1987
Hearing: 18, 19 and 20 May 1992
Judgment: 6 July 1992

F. Waleilia for the Plaintiff
G. Martin with J. Corrin for the First Defendant
P. Afeau for the Second Defendant

MURIA ACJ: The plaintiff in this case issues a Writ on 11 February 1987 claiming against each of the defendants the sum of SI$63,600.00 as commission alleged to be due under a written contract which comprises of a letter of 24 February 1982 written by the plaintiff to the first defendant and three telexes, all dated 27 January 1983, two of which were sent by the first defendant to the plaintiff and one sent by the plaintiff to the first defendant. Alternatively the plaintiff claims the sum of NZ$21,293.00 for work done.

The plaintiff is a New Zealand registered company carrying on the business of Management Consultants. The First Defendant is a government statutory body established under the Government Shareholding Agency Act, 1977. The second defendant, represented by the Attorney General, is a Board constituted under section 3 of the Foreign Investment Act, 1984. ("**FIB**")

By the letter of 24 February 1982 and the three telexes of 27 January 1983 a contract was entered into between the plaintiff and first defendant ("**commission contract**") whereby the plaintiff was appointed a commissioned agent of the first defendant for the purpose of finding an investor to purchase the first defendant's 400,000 shares in Mendana Hotel Ltd ("**MHL**") at SI$3.40 each for a total value of SI$1,360,000.00. The plaintiff proceeded under the said contract and in 1984 assisted the first defendant in negotiating with the Phillip Leonard Andrews ("**Andrews**") as a potential buyer of the first defendant's shares in MHL.

Following the negotiation with Andrews a Memorandum of Understanding was entered into on 29 November 1984 between the first defendant, Andrews and MHL for the sale by the first defendant and purchase by Andrews of the first defendant's 400,000 shares in MHL. Unfortunately Andrews' investment proposal had been rejected by the FIB of the Prime Minister's Office on 6 May 1985. The first defendant thereafter refused to pay any commission fee to the plaintiff.

The evidence for the plaintiff was that under the commission contract with the first defendant, the plaintiff was to find a suitable investor to purchase 49% of the shares in MHL. In the course of its initial search for potential investors, the plaintiff received a number of offers, although they were not firm offers, and advised the first defendant.

On 11 November 1983, by telex, the plaintiff were given one month's notice of the termination of their contract effective as from 12 November 1983 to 12 December 1983. However that termination notice was revoked and on 20 January 1984 the first defendant advised the plaintiff that the contract of 27 January 1983 was extended to 27 January 1985 for the purpose of "***final negotiation only, if and when a purchaser is agreed.***" and that the plaintiff was "***to cease active search for a purchaser and any work concerning outstanding issues, the examination and evaluation of further responses and reporting thereon, other than the forwarding of relevant correspondence.***"

The plaintiff by their letter of 8 February 1984 to the first defendant confirmed that it will not take any further initiatives to find potential investors. The plaintiff also indicated that its retainer of SI$7830.00 would be absorbed in the **commission payable if a sale is completed**. In the same letter the plaintiff informed the first defendant that "***If by 27 January 1985 no commission has been earned, we will review the time spent in response to any future requests for assistance and render our invoice for time worked or SI$1,630.00 whichever is the lesser.***"

Mr Bernard Ivory gave evidence in Court for the plaintiff and said that after receiving the letter of 20 January 1984 from the first defendant revoking their termination notice, he wrote on 8 February 1984 to the first defendant. He further stated in evidence that because of the low turnout of interested investors on the proposed sale, they (the plaintiff) lowered their retainer but did not change their position on their commission.

All proposals received by the first defendant prior to 10 May 1984 were rejected.

It was not until mid July 1984 when P. Andrews & Associates put in their proposal to invest in MHL. The first defendant took some time to consider Andrews' proposal and on 11 October 1984, sought approval from the Minister of Finance to commence negotiation with Andrews. On 17 October 1984, the Minister of Finance gave his approval to the first defendant to commence negotiation with Andrews.

On 18 October 1984 the first defendant wrote to Mr Ivory of the plaintiff company with the view of obtaining his opinion and to assist the first defendant in the negotiations, hopefully leading to an agreement. A copy of the proposal together with a draft lease were sent to the plaintiff. Mr Ivory in his evidence stated that after receiving the papers, he wrote to the defendant, undertaking to appraise the proposals and advising the first defendant that it was their (first defendant) responsibility to find out the background of interested investors who responded to the offer. On 9 November 1984 the plaintiff sent their analysis of Andrews' offer to the first defendant.

The evidence shows that after the first defendant received the analysis from the plaintiff of Andrews' proposals the actual negotiation took place on 28 November 1984 for the sale of the first defendant's shares in MHL to Andrews. Present at the negotiation were Mr Kwanairara (Chairman of Board of Directors of MHL), Mr Panjuboe (Chairman of the first defendant), Mr Mason (Manager of the first defendant), Mr Ivory (of the plaintiff company) and Mr Andrews. According to Mr Mason's evidence in Court, Mr Ivory was retained by the first defendant to assist them in the negotiation and that Mr Ivory did assist them during the negotiation. The final result of the negotiation was the signing of the Memorandum of Understanding on 29 November 1984.

The Memorandum of Understanding was signed by P.L Andrews, F.P. Panjuboe (for GAS), B.O. Kwanairara (for MHL) and B.JE. Ivory (P.A. Management Consultants) as witness.

At the conclusion of the negotiation on 28 November 1984, Mr Ivory then made a memorandum of the plaintiff's fee for SI$57,900.00 which was subsequently submitted to the First Defendant in a letter of 28 February 1985. On 13 March 1985 the first defendant responded and stated that approval by FIB of the sale to Andrews had been delayed, the question of the plaintiff's fee was still being considered as it was based on completion of a sale by 27 January 1985.

After some delay, the FIB met on 6 May 1985 and rejected the proposal sale to Andrews. The plaintiff was officially informed of the FIB's rejection of the sale by the first defendant's letter of 6 June 1985. The first defendant in the same letter informed the plaintiff that the question of fees in connection with the sale of the hotel no longer apply and would not be paid.

The question is whether or not the defendants are liable to pay to the plaintiff their commission fee of SI$57,900.00 as claimed. The amount sued for was SI$63,600.00 but the plaintiff has agreed that the amount claimed is only SI$57,900.00. Basically the plaintiff claims a contractual right to commission for the work they did and this depends in turn on the proper construction of the contract between the plaintiff and the defendants.

There is no dispute that there was a contract entered into between the first defendant and the plaintiff whereby the plaintiff was to assist the first defendant in the sale of its shares in MHL to a suitable investor. The terms of the contract can be found in the plaintiff's letter of 24 February 1982 to the Manager of the first defendant **(Document No. 1 in Bundle 1)**, telex of 14 October 1982 from Hughes to the plaintiff **(Document No. 2 in Bundle 1)**, telex of 27 January 1983 from first defendant to Mr Ivory of the plaintiff **(Document No. 6 in Bundle 1)**, telex of 27 January 1983 from Mr Ivory to Mr Cornish, Manager of first defendant **(Document No. 7 in Bundle 1)**, telex of 27 January 1983 from Cornish to Mr Ivory **(Document No. 8 in Bundle 1)**, letter of 15 November 1983 from plaintiff to Mr Mason, manager of the first defendant **(Document No. 26 in Bundle 1)**, letter of 20 January 1984 from the first defendant to Mr Ivory **(Document No. 33 in Bundle 1)** and letter of 8 February 1984 from plaintiff to Mr Mason **(Document No. 34 in Bundle 1)**. It is worth noting what Documents 6, 7 and 8 say.

In Document No. 6, Mr Cornish stated among other things:

"2. *Government Shareholding Agency would like to engage you to act on our behalf in the sale of shares in Mendana Hotel Ltd.*

3. *Members of Agency suggested performance based fee, but questioned method of calculating incentive percentages. They proposed:*

Three per cent on first DLRS 500,00
Five percent on next DLRS 250,000
Six percent above DLRS 750,000".

In response the plaintiff sent Document No. 7 which says:

"..... Please to learn GAS decision to retain P.A. Your point, re sliding scale is taken and accepted if non-refundable retainer raised to SID 7,830 (Being firm estimate for steps 1, 3 and 3 adjusted for SID devaluation) payable SID 5,000 on engagement and balance on completion of step 4. I can be available for visit to prepare prospectus and profile during next two weeks."

The first defendant replied by Document No. 8 and stated that, ***"Your terms accepted. Please proceed as soon as possible."***

In order to further ascertain clearly the terms of the plaintiff's engagement it is also necessary to consider the contents of Document No. 26 in Bundle 1 which is a letter written by the plaintiff to the first defendant in response to the plaintiff's telex 909/83 of 11 November 1983. I consider both the telex and the letter are of importance in this respect and I shall set them out in full.

The telex 909/83 of 11 November 1983 reads:

"For Bernard Ivory

Thank you for your letters of 25 and 29 October. Also Telex of 8 November. GAS is anxious finalise the selection of a partner or Mendana Hotel and is examining firm offers received direct plus those contained in your progress report and subsequent telexes. If you have nothing further from your end GAS will proceed with material in hand. Aye will keep you informed of the outcome and if and when negotiations commence. Meanwhile aye have been instructed to give you one months notice of the termination of the contract as stipulated in your letter of 24 February 1982. The notice to take effect from 12 November 1983. Grateful you confirm that the contract started 27 January 1983. My telex 43/83 refers. Yes - acceptance of our amended terms.

Draft annual accounts and balance sheet will be ready by 15 November and will be included with copies of all offers received direct.

GAS is not prepared to sell total ownership of the Hotel but wishes to retain up to forty nine percent of the shareholding.

Regards
Eric Mason
GOVERNMENT SHAREHOLDING AGENCY".

The plaintiff's response in a letter of 15 November 1983 to Mr E.S. Mason **(Document No. 26, Bundle 1)** is as follows:

"Dear Mr Mason

Our engagement: Your telex 909/83.

I note that the GAS wishes to terminate PA's engagement to find an investor in MHL as from 12th December 1983.

We interpret this as ceasing active search for an investor and trying to complete all outstanding issues by that date. However, since the terms of

engagement provide for a period of two calendar years in which to complete a sale on which a commission is payable and the GAS still wishes to sell, I presume you wish us to continue to assist in any practical way.

Please confirm that you expect us to carry out Step 4 in our proposal, viz to examine and evaluate all responses and report to you in due course.

I confirm that the date of our engagement was 27 January 1983 and that our commission arrangements therefore expire if a sale does not take place on or before 27 January 1985.

If the GAS decides to abandon efforts to sell now and instead to concentrate on improving the company's profit record (as suggested in my letter concerning Mr Fisher's queries) we would be pleased to assist in that endeavour and later to enter into a new contract to find a purchaser.

Our invoice for out of pocket expenses incurred from the date of our last invoice up to close of business this year will be mailed early in January.

Yours truly,

B JE Ivory
Senior Consultant".

My conclusion on those evidence is that the plaintiff were engaged to find suitable investor who would buy the first defendant's shares in MHL. The period of engagement was two years and within that period, if the sale was completed, the plaintiff would be paid their commission.

The legal position on commission contracts had been well stated by Lord Russell of Killowen in the leading case of ***Luxor (Eastbourne) Ltd -v- Cooper*** *[1941] A.C. 108 at p. 124; [1941] 1 All E.R. 33 at p. 43* where he said:

> "*(1) Commission contracts are subject to no peculiar rules or principles of their own; the law which governs them is the law which governs all contracts and all questions of agency. (2) No general rule can be laid down by which the rights of the agent or the liability of the principal under commission contracts are to be determined. In each case these must depend upon the exact terms of the contract in question, and upon the true construction of those terms. And (3) contracts by which owners of property, desiring to dispose of it, put it in the hands of agents on commission terms, are not (in default of specific provisions) contracts of employment in the ordinary meaning of those words. No obligation is imposed on the agent to do anything. The contracts are merely promises binding on the principal to pay a sum of money upon the happening of a specified event, which involves the rendering of some service by the agent. There is no real analogy between such contracts, and contracts of employment by which one party binds himself to do certain work, and the other binds himself to pay remuneration the doing of it.*"

In the present case now before the Court, the second observation of Lord Russell is of most importance. The learned Law Lord had effectively stated that the liability of the principal to pay commission depends on whether, on the proper construction of the contract between him and the agent, the event has happened upon which the

commission is to be paid. The event upon which the commission would be paid in the present case is, on the evidence before the Court, **the completion of the sale**. This can be clearly seen from the various correspondence mentioned earlier particularly, the plaintiff's letter of 15 November 1983 (**Document No. 26, Bundle 1**) in which the plaintiff clearly stated that:

> "..... *the terms of engagement provide for a period of two calendar years in which to complete a sale on which a commission is payable* ..... "

Thus the Court must consider whether the sale of the first defendant's shares in this case has been completed. If it did, the plaintiff would be entitled to their commission. If the sale had not been completed, then the stipulated event upon which the plaintiff's commission was payable did not happen and so commission therefore should be paid. Was the sale completed in the present case?

In ***Luxor (Eastbourne) Ltd -v- Cooper*** (above), the two companies, Luxor (Eastbourne) Ltd and Regal (Hastings), Ltd agreed to contract to negotiate and promised to pay commission of £10,000 to Mr Cooper for the sale of two freehold cinemas at Hastings and Eastbourne. That commission was to be paid "***on completion of the sale***", at a net purchase price of £175,000. The respondent Mr Cooper obtained an offer from London and Southern Super Cinemas, Ltd which offered to purchase the appellants' properties at the price of £175,000. The appellants accepted the offer. Both the offer and acceptance were made "***subject to contract***". After a board meeting of the directors of the Regal (Hastings) Ltd, the sale was not proceeded with and no draft contract was ever submitted. The appellants refused to proceed further with the transaction. Mr Cooper sued for his commission alleging that he produced ready and willing purchasers who were prepared to buy on the terms on which the appellants were prepared to sell. The House of Lords restoring Branson J's decision found there had been no completion of the sale which was the stipulated event that was to convert the appellants' promise into an obligation, and refused Mr Cooper's claim for £10,000 commission.

In the present case, the first defendant agreed to engage the plaintiff in the sale of shares in MHL at a Performance Base Fee which the plaintiff claimed to be SI$57,900.00. After submitting some proposed investors to the first defendant, the plaintiff was given notice of termination of their contract on 11 November 1983 but that notice was revoked by the Board of the first defendant. The plaintiff's contract was then extended to 27 January 1983 for the purpose of "***final negotiation only***" as stated in Document No. 33 (Bundle 1) and confirmed by Mr Ivory in Court. The first defendant then agreed that the plaintiff should assist in negotiating with Andrews for the sale of the first defendant's shares in MHL. As a result of the negotiation Andrews agreed to initially take a lease over the Hotel and after three years, to purchase 400,000

shares in the capital of MHL. The first defendant, Andrews and MHL signed a Memorandum of Understanding signifying their agreement. The lease over the Hotel was to take place as from 1 March 1985 with the shares to be delivered on 29 February 1988. As approval by FIB was required for any foreign investment in Solomon Islands the proposed purchase by Andrews of the first defendant's shares together with the Memorandum of Understanding and the draft lease were put to the FIB for approval. After some delay, the FIB rejected Andrews' application to lease the Hotel and to purchase the first defendant's shares in MHL. The result was that no sale had taken place between the first defendant and Andrews.

As in ***Luxor (Eastbourne) Ltd***, the stipulated event that was to convert the first defendant's promise into an obligation to pay commission in the present case was the ***"completion of the sale"***. This is clearly shown by the letter of 24 February 1982 where the plaintiff stated that the performance based fee "..... ***which covers all work necessary to ensure a sale, is related to the value of the consideration received*** ..... ". That consideration was the purchase price and the fee was based on that purchase price received. No purchase price had been received as the sale of the first defendant's shares in MHL had not been completed following the rejection by FIB of Andrews proposal.

Further, when one turns to Mr Ivory's letters of 15 November 1983 (quoted above) and 8 February 1984 (**Document 34 in Bundle 1**) the plaintiff accepted that commission was payable only on **completion of a sale**. In his letter of 8 February 1984, Mr Ivory stated that:

> *"Our terms of engagement provided for a retainer of S.I.$7,830 which will be absorbed in **the commission payable if a sale is completed** within the contract period of two years. Of this sum, $5,000 was paid on commencement of our work. The balance, $2,830, is payable on completion of our examination and evaluation of prospective purchasers' proposals. A report on proposals was submitted in December and, in view of the GAS's request to cease active search for investors, we are entitled to claim this sum.*
>
> .....
>
> *We suggest therefore that we bill the GAS now only for the time spend in preparing our report dated 20 December 1983 ($SI 1200) and for unrecovered expenses incurred to 12 January 1984. If by 27 January 1985 no commission has been earned, we will review the time spent in response to any future requests for assistance and render our invoice for time worked or $SI 1630, whichever is the lesser. Expenses incidental to any future requests for assistance will be billed at the same time."*

The evidence thus is undoubtedly clear that the parties had agreed and made it plain to each other that the commission would be paid when the sale was completed. Mr Ivory had clearly stated that if by 27 January 1985 no commission had been earned, the

plaintiff will review the time spent in response to any future requests for assistance. This shows that the plaintiff was aware that the commission had to be earned by 27 January 1985 and that it knew what it would do in the event the commission had not been earned. The ***"commission earned"*** in this case can only mean ***"commission actually earned upon the happening of the event"***, that is to say, on the ***completion of a sale***.

This sort of contract requires the Court to look very carefully and precisely at the definition of the event upon which the fee will be earned. If the event upon which the commission is payable is stipulated in the contract then the agent will only be paid his commission on the happening of that event. *See* ***Luxor (Eastbourne) Ltd -v- Cooper*** *(above) and* ***Ackroyd & Sons -v-Hasan*** *[1960] 2 All E.R. 254.*

In the present case the parties had clearly stipulated that the commission was payable on ***completion of a sale***, an event that did not happen.

Mr Waleilia for the plaintiff submitted that the plaintiff introduced a ready and willing purchaser and the first defendant's failure to proceed with the sale due to FIB's rejection of Andrews' proposal was an act entitling the plaintiff to sue for its commission. Mr Waleilia further argued that following the signing of the Memorandum of Understanding, the plaintiff was entitled to its commission.

In ***Dellafiora -v- Lester*** *[1962] 1 WLR 1208* the Court of Appeal consider the meaning of ***"willing and able to purchase"***. At page 1213, Lord Denning said:

> *"A purchaser must be able, in the case of a leasehold, to satisfy the lessor that he is a suitable tenant so that the lessor is willing to accept him as a tenant and to give his consent to the assignment. Otherwise he is not an* ***"able"*** *purchaser: for he is not able to complete the purchase. I think* ***"able"*** *means* ***'able not only to sign a contract but also to go on and complete the purchase.'***"

The proposed investor, Andrews, in the present case had been said to be a ***"ready and willing"*** purchaser. But the commission was not payable upon introducing a ***"ready and willing"*** purchaser. The commission was payable upon completion of a sale. That being the case, the investor must be more than ***"ready and willing"***. He must also be ***"able"*** to purchase; able not only to enter into a contract but also to complete the purchase. The expression ***"able to purchase"***, as stated by the Court of Appeal in ***Dellafiora -v-Lester*** *(above)* is not confined to financial ability alone. It embraces other aspects of ability to purchase. One such other aspect of Andrews' ability to purchase was the approval of FIB. Without that approval neither the first defendant could sell nor Andrews could purchase the shares from the first defendant. The FIB's rejection of Andrews' investment proposal in this case meant that Andrews had become unable to purchase the shares resulting in the sale not being completed. Approval by FIB not

having been granted, the event, therefore, did not happen which would have entitled the plaintiff to their commission.

In any case, there was no evidence to support the claim that the plaintiff introduced Andrews as a potential investor as claimed in paragraph 8 of the Statement of Claim. The plaintiff only assisted in the negotiation between the first defendant and Andrews.

The argument that the signing of the Memorandum of Understanding entitled the plaintiff to their commission is,I think, misconceived. Firstly, the contract upon which the plaintiff's claim is based, was not to be found in the Memorandum of Understanding but in the contract of 27 January 1983 between the first defendant and the plaintiff. Secondly, in the contract between the first defendant and the plaintiff, it was clearly agreed that commission was payable on ***completion of a sale***. There is no suggestion that the plaintiff would be entitled to their commission in a manner other than upon completion of a sale. Thirdly, as a result of the FIB not approving Andrews' investment proposal, the sale was not completed. Fourthly, for the sale to be completed, FIB approval was necessary as the proposed takeover by Andrews was a foreign investment. The FIB would necessarily have before it all the necessary documents on the proposed investment and the documents submitted included the Memorandum of Understanding, and the Draft Lease which were among the matters required before the ***Board shall satisfy itself*** under section 5 of the Foreign Investment Act, 1984. The evidence shows that the FIB was not satisfied and so, rejected the proposed sale of the shares in MHL.

If, as counsel for the plaintiff suggested, that the Memorandum of Understanding is a binding contract for the sale of the shares in MHL between the parties, then approval of FIB was required. Unless that approval was granted the sale could not be completed, the event upon which the plaintiff's commission was payable. However, I for my part, do not accept that the Memorandum of Understanding is a binding contract between the first defendant and Andrews for the sale of the shares in MHL. It is simply, in my view, a firm understanding between the parties, containing terms promised on the part of each of them which terms were to be included in a binding contract to be entered into at a later stage. This view is supported by the evidence of Mr Ivory, Mr Mason and Panjuboe who all gave evidence to the effect that FIB approval was required but that there would seem to be no difficulty in obtaining it. The parties then proceeded and signed the Memorandum of Understanding. Approval spoken of by the witnesses must therefore be for the contract for the sale of the shares of MHL.

When one turns to the Clause 13 of the Memorandum of Understanding, the position is made clear. Clause 13(a) requires the first defendant to prepare a "***formal contract***" to incorporate the terms agreed between the parties in the Memorandum of Understanding. Thus it is clear that a binding contract has yet to be made between the parties to the Memorandum of Understanding and until that is done, there is nothing to prevent the first defendant from saying to the plaintiff that there was no binding contract between the parties concerned which would give rise to any claim for commission by the plaintiff. The terms of the Memorandum of Understanding are "***subject to contract***", a formular which postponed the creation of a binding contract as occurred in ***Luxor (Eastbourne) Ltd -v- Cooper***.

The plaintiff also claimed that the second defendant induced the first defendant to break its commission contract with the plaintiff by refusing to grant a certificate of approval under section 6 of the Foreign Investment Act. The evidence before the Court do not support the plaintiff's claim of inducement on the part of the second defendant. The rejection of Andrews' investment proposal was a decision of the FIB and the refusal by the first defendant to pay the plaintiff's commission followed the rejection by the FIB of Andrews' application. It cannot, be said to be as a result of an inducement by the second defendant.

In the alternative the plaintiff claim the sum of NZ$21,293.00 on a quantum meruit. This the plaintiff says is for work carried out in and about finding buyer for the purchase of the first defendant's shares in MHL. The terms of the contract between the first defendant and the plaintiff were for the plaintiff to assist in negotiation for the sale of the first defendant's shares in MHL and that commission would be paid to the plaintiff upon "***completion of a sale***". The plaintiff confirmed in Document No. 26 (Bundle 1) that "***our commission arrangements therefore expire if a sale does not take place on or before 27 January 1985***". Upon the terms of the contract between the first defendant and plaintiff there can be no reading into their contract any suggestion or implication that the plaintiff is entitled to any remuneration for work done. The plaintiff's claim for remuneration for work done may succeed if the plaintiff is under a contract of employment to do a specific work for the first defendant. In such contracts a term must, if not expressed, necessarily be implied that the principal will not do anything which will prevent the agent from doing the work which the contract binds him to do. But in a commission contract, such as the present case where the terms are expressed clearly, the right to the commission is made entirely contingent on the sale being completed, and that the plaintiff must take the risk of the sale not materialising for any cause whatever. There was no room for implying any other terms into the contract. To do so would be a case of implying a term in variation of the express contract: ***Luxor (Eastbourne) Ltd -v- Cooper*** *(supra)*.

On the evidence before the Court, I am unable to see how the plaintiff's claim on quantum meruit can be sustained in the light of the express terms for the payment of remuneration as contained in the contract. This claim must also fail.

The plaintiff's claim is dismissed with costs.

(G.J.B. Muria)
ACTING CHIEF JUSTICE