

1944

*Present: Howard C.J. and Wijeyewardene J.*

WICKREMASINGHE, Appellant, and WILLIAM, Respondent.

70—D. C. Colombo, 14,645.

*Broker—Agreement to sell a land—Right to commission—Completion of sale.*

Where the plaintiff, a broker, entered into an agreement with the defendant in the form of a letter signed by the defendant in the following terms:—

“ I do hereby authorise you to sell my property—for the sum of Rupees twenty thousand five hundred. I agree to pay you by way of remuneration rupees five hundred. This holds good for two weeks. ”

the plaintiff found a buyer, who was willing to pay the stipulated price, but the defendant when called upon, refused to execute the transfer.

*Held*, that the right to commission was dependent upon the completion of the sale.

**A** PPEAL from a judgment of the District Judge of Colombo.

N. Nadarajah, K.C. (with him E. B. Wickremanayake), for the defendant, appellant.

J. M. Jayamanne, for the plaintiff, respondent.

*Cur. adv. vult.*

September 27, 1944. HOWARD C.J.—

This is an appeal from an order of the Additional District Judge of Colombo ordering the defendant to pay to the plaintiff the sum of Rs. 500 with costs. The plaintiff claimed this sum by virtue of an agreement dated December 22, 1942 (P 1). This agreement in the form of a letter signed by the defendant was worded as follows:—

“ I do hereby authorise you to sell my property bearing assessment No. 44 at Kotta road, Borella, for the sum of Rupees Twenty thousand five hundred (Rs. 20,500).

I, agree to pay you by way of remuneration Rupees five hundred (Rs. 500). This holds good for 2 weeks.”

The plaintiff found a buyer who was willing to pay the stipulated price, but the defendant when called upon, refused to execute the transfer. In finding in favour of the plaintiff the learned Judge distinguished the present case from *Perera v. Boteju*<sup>1</sup>. In the latter case the contract between a principal and his agent was expressed in the following terms: “ I have authorised B . . . . to negotiate the sale of my house and property for the sum of Rs. 11,500 only. I further promise to remunerate B . . . . with 2 per cent. on the amount realized.” The Full Bench held that the right to the commission was dependent not on the agent finding a purchaser ready and able to purchase at the price but on the completion of the sale. In his judgment Soertsz J. referred to and followed the rule enunciated by Viscount Simon in *Luxor Ltd. v. Cooper*<sup>2</sup>. This rule, also cited by the learned Judge in this case, is as follows:—

“ It may be useful to point out that contracts under which an agent may be occupied in endeavouring to dispose of the property of a principal fall into several obvious classes. There is the class in which the agent is promised a commission by his principal if he succeeds in introducing to his principal a person who makes an adequate offer, usually an offer of not less than the stipulated amount. If that is all that is needed in order to earn his reward, it is obvious that he is entitled to be paid when this has been done whether his principal accepts the offer and carries through the bargain or not. No implied term is needed to secure this result. There is another class of case in which the property is put into the hands of the agent to dispose of for the owner, and the agent accepts the employment and, it may be, expends money and time in endeavouring to carry it out. Such a form of contract may well imply the term that the principal will not withdraw the authority he has given after the agent has incurred substantial outlay, or, at any rate, after he has succeeded in finding a possible purchaser. Each case turns on its own facts and the phrase finding a purchaser is itself not without ambiguity. *Inchbald's case*<sup>3</sup> might, I think, be regarded as falling within this second class. But there is a third class of case (to which the present instance belongs) where, by the

<sup>1</sup> 44 N. L. R. 313.

<sup>3</sup> 17 C. B. (N. S. ) 733.

<sup>2</sup> (1941) A. C. 108.

express language of the contract, the agent is promised his commission only upon completion of the transaction which he is endeavouring to bring about between the offeror and his principal. As I have already said, there seems to me to be no room for the suggested implied term in such a case. The agent is promised a reward in return for an event, and the event has not happened. He runs the risk of disappointment, but if he is not willing to run the risk he should introduce into the express terms of the contract the clause which protects him."

The learned Judge then proceeded to hold that the express language of the contract does not contemplate the completion of the sale. The question arises as to whether this interpretation of P 1 is correct. P 1 is an authorisation to sell the property for a certain sum. The sale is not complete until both vendor and purchaser have agreed. It seems to me that the plaintiff's right to commission under the terms of P 1 depends on a particular event, namely, the completion of the sale. The claim to commission becoming due when the sale is not completed involves the contention that the principal by virtue of the contract has surrendered the freedom to dispose of or retain his own property which he unquestionably enjoys *vis-à-vis* the other negotiating party. The commission agreement is, however, subordinate to the hoped for principal agreement for sale. The only interpretation that can be given to P 1 is that the commission is payable on sale, that is to say on completion of the sale. This event has not happened. The further question arises as to whether the law permits the introduction of an implied term making the commission payable on the plaintiff finding a person ready to purchase the property at the defendant's price.

Their Lordships in *Luxor Ltd. v. Cooper (supra)* deal in a comprehensive manner with the power of the Court to imply particular terms in contracts. In this connection Lord Wright at page 137 stated that it is agreed on all sides that the presumption is against the adding to contracts of terms which the parties have not expressed. The general presumption is that the parties have expressed every material term which they intended should govern their agreement, whether oral, or in writing. But it is well recognized that there may be cases where obviously some term must be implied if the intention of the parties is not to be defeated, some term of which it can be predicted that "it goes without saying", some term not expressed but necessary to give to the transaction such business efficiency as the parties must have intended. This does not mean that the Court can embark on a reconstruction of the agreement on equitable principles, or on a view of what the parties should, in the opinion of the Court, reasonably have contemplated. The implication must arise inevitably to give effect to the intention of the parties. I do not think there is any room for the introduction into the contract of an implied agreement making the commission payable on the plaintiff finding a person ready to purchase the property at the defendant's price. To hold that such a term must be implied would, to use the words of Lord Wright, mean that the Court was embarking on a reconstruction of the agreement on equitable principles, or on a view of what the parties should, in the opinion of the Court, reasonably have contemplated. It cannot be argued that the

implication arises inevitably to give effect to the intention of the parties. To use the words of Viscount Simon, if the plaintiff was not willing to run the risk of disappointment he should have introduced into the express terms of the contract the clause which protects him.

In these circumstances the appeal must be allowed and judgment entered for the defendant with costs in this Court and the Court below.

WIJEYWARDENE J.—I agree.

*Appeal allowed.*

