1943 *Present:* **Soertsz S.P.J., Keuneman and de Kretser JJ.**

PERERA, Appellant, *and* BOTEJU, Respondent.

16—C. R. Colombo, 86,506.

Principal and agent—Commission to broker to find a purchaser for property—Right to remuneration—Terms of contract—Completion of sale.

Where a contract between principal and 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,—

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.

Luxor, Ltd. v. Cooper, Ltd. (1941) 1 All Eng. Reports p. 33.

THIS was a case referred to a Bench of three Judges. The question was whether a principal, who has commissioned an agent to find a purchaser for a property, at a certain price, promising a remuneration to be paid on the completion of the sale is bound by law, on such a purchaser being found, to complete the sale or in default to pay the promised remuneration or damages.

H. W. Jayewardene (with him *V. Wijetunge*), for the defendant, appellant.—The plaintiff cannot succeed in this action in view of the recent decision of the House of Lords in *Luxor (Eastbourne) Ltd. v. Cooper*[1] which is exactly in point. The right of the agent to recover his commission depends on the terms of his contract with the vendor. Where the payment of the commission is conditional upon the completion of the sale to the purchaser found by the agent then the agent cannot recover his commission until the sale is completed or a binding executory contract is entered into between the vendor and the purchaser. The contract in this case clearly contemplates the payment of the commission on the completion of the sale. The words "negotiate the sale" and "on the amount realized" can have no other meaning. The decision in *Bull v. Price*[2] deals with a case in almost identical terms and it was there held that the parties contemplated a completed sale. Here there was neither a completed sale nor an executory contract. There can be no binding executory contract unless there is a notarially executed agreement—see *Tudawe v. Keppitigala Rubber Estate Co.*[3] In Ceylon the agent has been allowed to recover his commission even where there was no sale, on the basis of the existence in the contract of an implied term, namely, that the vendor would not without reasonable cause prevent the broker from earning his commission. An implied term is read into an express contract only when it is necessary to do so for the purpose of rendering business efficacy to the transaction between the parties—see *French & Co. v. Leeston Shipping Co.*[4] To read such a term

[1] *(1941) 1 A. E. R. 33.*
[2] *7 Bingham 237.*
[3] *(1929) 30 N. L. R. at pp. 391 and 393.*
[4] *(1922) I. A. G. 451.*

into this contract would be to make the contract unworkable because we would be unduly fettering the liberty of the vendor to deal with his property in any manner he pleases—*vide Simpson & Co. Soyza*[1]; *Perera v. Soyza*[2]; *Dissanayake v. Rajapakse*[3] and *Fernando v. Perera Hamine*[4]. The principle enunciated in these cases has no application now in view of the fact that the House of Lords has held that in contracts of this nature one should not read into them the implied term suggested by the plaintiff. This view has also been taken by Akbar J. in *Tudawe v. Keppitigala Rubber Estate Co.*[5]

Plaintiff has not in this action sought to recover anything on the basis of a *quantum meruit*. Even if he had he cannot now recover anything because the House of Lords has clearly laid down the rule that such a remedy is not available to a broker. No doubt our courts have recognized the right of an agent to sue on this basis—see *Dissanayake v. Rajapakse*[6]—but they have in doing so followed the English case of *Prickett v. Badger*[7]. That case has been distinguished by the House of Lords as one turning upon its own peculiar facts.

S. Subramaniam (with him *Tillainathan*), for the plaintiff, respondent.—*Luxor (Eastbourne) Ltd. v. Cooper* (*supra*) has no application to the facts of this case. All that the broker had been employed to do in the present case was to "negotiate" for a sale, *i.e.*, to bring the intending purchaser and the vendor into touch with each other. The meaning of the word "negotiate" is considered in *Macgowan v. Murray*[8]. In the case decided by the House of Lords the commission was to come from the purchase price. There is no such condition in the contract under consideration now. A case which is in point is that of *Mackay v. Dick*[9]. See also *Dissanayake v. Rajapakse*[10] and *Fagan v. Pretorius.*[11] There is no question of reading an implied term into this contract. The contract itself is clear, and the agent has established his right to recover his commission by introducing a purchaser to the vendor.

Cur. adv. vult.

April 5, 1943. SOERTSZ S.P.J.—

The question that has been reserved for our consideration is one that had been discussed here in several earlier cases, and our Law Reports show that a substantially consistent view has been entertained about it. That view appears to be based on certain English cases. But there are other English cases in which a very different view has been taken, and the law on the point seemed so unsettled that Judges in England repeatedly commented on it. Quite recently, Sir Wilfred Greene M.R. in the course of his judgment in *Trollope & Sons v. Clapan*[12], said that the case law with regard to this question was not in a very satisfactory condition, and that it was desirable that the whole position should be reviewed, if opportunity, arose, in the House of Lords. Du Parcq L.J. made a similar comment in the case of *Luxor, Ltd. v. Cooper*.[13]. Fortunately, that case did the needful when it came to the House of Lords, before Viscount Simon L.C., Lord Thankerton, Lord Russell of Killowen, Lord Wright, and Lord Romer.

[1] *(1900) 4 N. L. R. 90.*
[2] *(1910) 13 N. L. R. 85.*
[3] *(1918) 20 N. L. R. 353.*
[4] *(1919) 21 N. L. R. 79.*
[5] *(1929) 30 N. L. R. 389.*
[6] *(1918) 20 N. L. R. 353.*
[7] *26 L. R. C. P. 33.*
[8] *L. R. 1891 Ch. D. 105.*
[9] *(1881) 6 A. C. 251.*
[10] *(1918) 20 N. L. R. 353.*
[11] *S. A. L. R. 1921, C. P. D. 502.*
[12] *(1936) 2 A. E. R. 842.*
[13] *(1936) 4 A. E. R. 841,*

Those Noble Lords, in the speeches they delivered, discussed the question in all its aspects, reviewing the old cases bearing on it, and reached a unanimous conclusion ((*1941*) (*All England Reports, p. 33*)). That conclusion refutes the view that had obtained in our courts, and as the question appertains to the law of Principal and Agent, for which we are under the Law of England, a reconsideration of it has become necessary.

That question, in a few words, is whether a principal who has commissioned an agent to find a purchaser for a property of his, at a certain price, promising a remuneration to be paid on the completion of the sale, is bound by law, on such a purchaser being found, to complete the sale, or in default to pay the agent the promised remuneration or, at least damages on the basis of a *quantum meruit.*

In a long line of cases, this court has answered this question substantially in the affirmative. To name a few of those cases, there are:— *Simpson & Co. v. Soysa*[1]; *Perera v. Soysa*[2]; *Dissanayake v. Rajapakse*[3]; *Fernando v. Perera Hamine*[4].

Then there is the case of *Tudawe v. Keppitigala Rubber Estates Co.*[5], in which Akbar J. (Lyall-Grant J. agreeing) reviewed the earlier cases and also many English cases, and came to the conclusion that the principle resulting from them was that, in order to entitle an agent, who has found the desired purchaser, to the promised remuneration or to compensation on a *quantum meruit,* the negotiations should have resulted in a binding contract between the principal and the proposed vendee or "there should be proof of default on the part of the proposed vendor". It would appear therefore that, in this view of the matter, the agent's claim was entertained despite the fact that the sale had not gone through in some cases, the Court acted on the principle of a *quantum meruit,* and in others on that of an implied term in the contract.

The House of Lords in the case of *Luxor, Ltd. v. Cooper*[6] dealt with both these pleas. In regard to the pleas of a *quantum meruit* Lord Wright, in the course of his speech, made the following observation:—

> "It has been said in some cases that the claim may be based on a *quantum meruit* on the principles expounded in the notes to *Cutter v. Powell*[5] in Smiths' Leading Cases, according to which the special contract is treated as rescinded, and the agent thereupon becomes entitled to claim a partial recompense for what he has done. Such a claim is in the nature of a *quasi*-contractual claim. It is properly made in cases of contract for work and labour and the like, when the employer who has got the benefit of part performance, but before completion has repudiated the contract, may be sued either for damages for breach or for restitution in respect of the value of the part performance which he has received. Such cases are, however, obviously different from the present case . . . . . In the case of the commission agent, to whom payment is dependent on completion or the like condition, the principal does not promise that he will complete the contract. . . . . His only promise is that he will pay the commission if the

[1] (*1909*) *4 N. L. R. p. 90.*
[2] (*1910*) *13 N. L. R. p. 850.*
[3] (*1918*) *20 N. L. R. 353.*
[4] (*1919*) *21 N. L. R. 79.*
[5] (*1921*) *30 N. L. R. 389.*
[6] (*1941*) *1 A. E. R. 33.*

contract is completed. There is no promise to pay a reasonable remuneration if the principal revokes the authority of the agent; moreover, it is a further objection to a claim on a *quantum meruit* that the employer has not obtained any benefit".

Going on to discuss the other view, namely that there is an implied term in these contracts that the principal unless he has a reasonable cause for refusing to complete the contract was obliged to complete it or to pay the agent his commission, their Lordships declared that contracts of this nature are subject to no peculiar rules or principles of their own, and that the presumption is the general presumption that parties have expressed every material term that is to govern their agreement, and that nothing will be read into it unless the law requires that to be done, or unless it is necessary so to do in order to give the transaction such business efficacy as the parties must have intended.

If then the theory of a *quantum meruit* is foreign to these contracts and if, as the irresistible reasoning of the speeches delivered by their Lordships establishes, there is no implied term in them, all that remains to be done is to ascertain and interpret the actual terms of the contract in question. In the case before us, the contract is in writing and only a question of interpretation arises. The relevant terms of this contract are "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". Except for the word "only", somewhat surprising in the context, these are unambiguous words, and if I may adopt the words of Lord Russell, I should say that "I cannot imagine . . . . . a clearer case of the title to the commission being made wholly contingent on the sale being carried to completion and of the agent taking the risk of the sale falling through from any cause whatever". In other words, the title to the commission is not made dependent on the agent finding a purchaser ready and able to purchase at the price, but on the completion of the sale. The claim of the plaintiff here, however, is based on the fact that he found a purchaser ready and able to buy the property at Rs. 11,500, although there is not a word in the agreement to suggest a promise of remuneration in such an event.

The rule enunciated by the House of Lords which must now govern us may, I think, be stated, thus:—Each case must depend on the exact terms of the contract under consideration and upon the construction of those terms, and the right to commission will accrue only when the thing or event which, upon a correct construction of the agreement, the parties contemplated, is done or has happened, and that in cases of this kind there is no obligation imposed by law on the principal to co-operate with the agent to enable him to earn his commission. The principal may for any reason at all, or for no reason whatever other than that he has changed his mind, refuse to sell, except, perhaps when in consequence of negotiations conducted by the agent, a legally binding and enforceable agreement to sell and to buy has come into being between the principal and the proposed vendee.

If commission agents and brokers and others of that class are not disposed to do business on those terms, it is for them to ask for and obtain, if they can, the terms they desire.

The application of this rule to the facts of this case results inevitably in the failure of the plaintiff's claim. The appeal must be allowed and the action dismissed. In view, however, of the fact that the plaintiff was within the old rule, it will, in my opinion, be sufficient to direct him to pay half the costs incurred here and below.

KEUNEMAN J.—I agree.

DE KRETSER J.—I agree.

Appeal allowed.