

1931

Present : Macdonell C.J. and Garvin S.P.J.

DE SILVA v. FORBES, WALKER & CO.

291—D. C. Colombo, 32,238

Broker—Offer to purchase property—Agreement to share commission—Acceptance of offer subject to ratification—Completion of transaction—Payment of purchase price—Cause of action.

The plaintiff, on behalf of an undisclosed principal, asked the defendants to make an offer for the purchase of certain estates to H. & Co., as agents of the owners, the Negombo Estate Company, Ltd. The plaintiff at the same time obtained from the defendants the promise of a commission, if the purchase was completed, to be divided equally between them, and also obtained from H. & Co. and undertaking to pay the commission, subject to the approval of the company.

The offer was accepted, subject to certain other conditions, one of which was ratification at a general meeting of the company. Eventually, the company accepted a higher offer and the transaction fell through.

Held (in an action by the plaintiff for the recovery of a half share of the commission), that the plaintiff had no cause of action against the defendants till the transaction was complete, viz., by confirmation of sale and payment of purchase price, and the defendant had received his commission.

THE plaintiff sued the defendants for the recovery of a half share of a commission alleged to have been earned by the defendants on a transaction relating to the sale of certain estates belonging to the Negombo Estate Company. The plaintiff on behalf of a client asked the defendants to make an offer for the purchase of two estates for a sum of £72,500 belonging to the company through their agents, Messrs. Harrisons & Crosfield, Ltd. The plaintiff stipulated for the payment of a commission to be divided equally between the defendants and himself, and also obtained a promise from Harrisons & Crosfield, Ltd., to pay the same subject to the approval of the company

The offer was communicated to the company, who accepted it, subject to other conditions, viz., notarial agreement to be entered into forthwith and the sale to be subject to confirmation at a general meeting of the company. Eventually the company accepted a higher offer and the transaction fell through. The plaintiff's case was that he had found a purchaser willing to buy at the figure named and on the conditions of the vendors, and that having done so, the transaction was complete and he had earned the commission.

The learned District Judge gave judgment for the plaintiff.

Hayley, K.C. (with him *Ferdinands*), for defendant, appellant.—The evidence discloses no cause of action against the defendant. At the most the plaintiff could only sue the Negombo Estates Co., Ltd., as an undisclosed principal of the defendants. No commission was earned as the deal was not completed. There was only a tentative offer, and this offer had to be ratified subsequently by the shareholders. "Until the deal has been completed" means until the purchase price has been paid in full. The conditions further provided that the offer should be ratified by the company. Moreover, the defendants were never employed by the vendors as brokers.

De Zoysa, K.C. (with him *E. G. P. Jayatileke*), for plaintiff, respondent.—The question of tentative offer was never adopted in the lower Court. As to the point of there being no cause of action, my learned friend conceded that if a commission had been paid to the defendant, he was liable to pay half to the plaintiff. We submit that the defendant was liable to pay not only if he received the commission, but also if he had earned it and chose to forego it perhaps for some business reason which is no concern of ours. The plaintiff found a purchaser willing to accept the terms of the company's counter offer and did all he was bound to do, but the company refused to abide by their counter offer. There was no notarial

agreement through the default of the company. To put it on a stronger footing—through the fault of Forbes, the purchase fell through. Therefore Forbes was liable in damages, and the measure of damages is the amount of the commission.

There was a counter offer of £72,500 by the company and the whole case has been fought on the basis that our client never accepted that offer. In appeal the defendants are adopting quite a different attitude. Ratification is a mere formality. If the purchaser had entered into a binding agreement then the broker has done all that he is required to do.

Hayley, K.C., in reply.

February 13, 1931. MACDONELL C.J.—

In this case the plaintiff sued the defendants for a half share of commission, and his plaint, omitting unimportant words, was as follows:—

“1. The plaintiff and the defendants are brokers carrying on business in Colombo.

2. The coconut estates Badalgama and Indiwinne belonging to the Negombo Estates, Ltd., being in the market, and the plaintiff having found a likely purchaser for the same it was in or about October, 1927, at Colombo agreed by and between the plaintiff and defendants as follows:—

- (a) that the defendants should negotiate with the Negombo Estates, Ltd., through their Colombo agents, Harrisons & Crosfield, Ltd., for the purchase by the plaintiff's client of the said estates;
- (b) that the defendants should stipulate for a commission of 2½ per cent. on the purchase price in the event of their negotiations being successful;
- (c) that the defendants should pay to the plaintiff one-half of such commission.

3. On or about November 14, 1927, as a result of such negotiations by the defendants as aforesaid the offer of the plaintiff's client for the purchase of the said estates for £72,500 was accepted by the

said Negombo Estates, Ltd., through their agents the said Harrisons & Crosfield, Ltd., and the defendants thereby earned and became entitled to be paid a commission of 2½ per cent. on the said sum of £72,500.

4. The defendants though thereto often requested failed and neglected to recover the said commission and pay the plaintiff the half share due to him amounting to Rs. 12,500.

Wherefore the plaintiff prays for judgment against the defendants for the said sum of Rs. 12,500, with interest, and costs.”

The gist of the claim is, then, that the defendants were as agents of the plaintiff to induce the Negombo Estates, Ltd., to sell to the plaintiff's client and were as such agents to stipulate for a commission of 2½ per cent. on the purchase price “in the event of the negotiations being successful” half of which commission the defendants should pay to the plaintiff; that “the offer of the plaintiff's client as purchaser was accepted” by the Negombo Estates, Ltd., and that “the defendants thereby earned and became entitled to be paid” this commission, which however they have “failed and neglected” to recover”. The words in quotation marks contain the essentials of plaintiff's claim, but seem to lack precision.

The case coming on for trial, the learned District Judge gave judgment for the plaintiff as prayed, and from this judgment the defendants appeal.

The facts were these. In October, 1927, the plaintiff saw Mr. Forbes, a partner in the defendants' firm, and suggested that the defendants, as brokers, should make an offer to Messrs. Harrisons & Crosfield as agents for the owners for the purchase of these estates for £65,000. Mr. Forbes, for the defendants, saw Mr. Thompson, the Manager of Harrisons & Crosfield, who rejected the offer. Later plaintiff again requested Mr. Forbes to ask Harrisons & Crosfield if they would accept an offer of £72,500, and this offer Mr. Forbes duly

communicated to Harrisons & Crosfield. Their answer is to be found in P2, a letter in which Mr. Forbes, for the defendants, communicated to plaintiff what Harrisons & Crosfield had told him. "26th October, 1927. Dear Mr. de Silva—Negombo Ceylon Coconuts—I yesterday bid Messrs. Harrisons & Crosfield £72,500 for this on following terms :—Offer open for 14 days. If accepted Rs. 50,000 earnest money to be paid within one month. Rs. 150,000 to be paid within three months, the balance to be paid within one year. Purchaser to pay interest at 7 per cent. until the purchase is completed. Harrisons & Crosfield to retain the agency and control of the estate until the purchase is completed. As (I) advised you, they were unwilling to cable this offer to London as they are of opinion that their London people are not interested except at a considerably higher figure. On condition, however, that we pay the cost of the cable, they have however cabled the offer to-day. I will advise you as soon as there is any reply." On the same day, October 26, 1927, Mr. Forbes, for defendants, wrote a further letter, P3, to the plaintiff. "Further to my letter of date I am arranging for a commission of 2½ per cent. to be split between us—the only stipulation being by Messrs. Harrisons & Crosfield that this will not be paid until the deal has been completed." It seems admitted that Mr. Forbes, for defendants, had accurately transmitted plaintiff's offer to Harrisons & Crosfield, and that he had accurately transmitted their reply to plaintiff, and in his evidence in this case, the plaintiff says "There was nothing more discussed between Forbes and myself beyond what was put down in writing, that was the only agreement".

What now was the relationship between the parties? The plaintiff, who was in fact agent for an undisclosed principal, had desired the defendants, as his agents, to make an offer for the purchase of these estates to Harrisons & Crosfield as agents

for the Negombo Estates, Ltd., and the defendants had done so, as agents, but not disclosing the name of their principal, the plaintiff. But the plaintiff had also, himself as principal, employed the defendants as his agents to obtain from Harrisons & Crosfield as agents for the Negombo Estates, Ltd., the promise of a commission, if the purchase in question was completed, such commission to be divided equally between plaintiff and the defendants, and the defendants, his agents, had done as plaintiff had desired, and had obtained from Harrisons & Crosfield, in their capacity as aforesaid, the promise of this commission, subject of course to approval by their principals, the Negombo Estates, Ltd. Up to the present, then, the defendants had done everything the plaintiff had requested of them. Suppose now that the commission had become due and demandable by reason of the sale being completed, then plaintiff's remedy to enforce payment of the commission would have been to bring an action for it against the Negombo Estates, Ltd., suing as the hitherto undisclosed principal of the present defendants. Alternatively, since the plaintiff and the defendants were jointly interested in the payment of this commission and might be regarded, possibly, as partners for that purpose, the plaintiff might have brought his action against the Negombo Estates, Ltd., suing as the undisclosed partner of the defendants, and, if defendants had refused to join in the action, might then have asked for an order under section 18 of the Civil Procedure Code to have them joined as plaintiffs in the action. The defendants had a similar remedy in the event of commission becoming due and not being paid; they were the persons to whom the promise of a commission had been made, and could sue the Negombo Estates, Ltd., for it, and, on their filing action, the plaintiff could have applied to be joined as co-plaintiff under section 18.

The contractual relation, then, which these negotiations, if successful, would

establish, would be one between the plaintiff and the defendants on the one side, and the Negombo Estates, Ltd., on the other: the one side would have stipulated for, the other would have promised, a commission in certain contingencies. But, save to divide the commission when received, the defendants had not promised the plaintiff anything. The letter P3 is perfectly clear on this. The defendants do not themselves promise to pay the plaintiff a commission, still less do they guarantee that the Negombo Estates, Ltd., will pay the commission when due and demandable; all they do is to pass on to plaintiff the information that *Harrisons & Crosfield*, subject to the approval of their principals, *Negombo Estates, Ltd.*, have promised defendants a commission which defendants agree to share equally with the plaintiff when they have received it.

As this action seems to me to have been misconceived, it has been necessary to state at length the legal relationship of the parties as appearing in the letters of October 26, 1927, and up to the time of the sending of the cable to *Negombo Estates, Ltd.*

One point remains for determination, namely, when would the commission be due and demandable. The defendants' letter P3 of October 26, 1927, says it is "not to be paid until the deal has been completed", but as the letter does not say what deal, and as it explicitly refers to an earlier letter of the same date, we must turn to that letter, namely, P2, and read the two documents together. The letter P2 says that Rs. 50,000 of the purchase price is to be paid within one month, *i.e.* of a contract being made, Rs. 150,000 within three months, the balance within one year and the purchaser to pay interest at 7 per cent. "until the purchase is completed", also *Harrisons & Crosfield* to retain the agency and control of the estate "until the purchase is completed". Then, reading these two letters together, as one must, the words "purchase" and "deal"

are clearly synonymous, and "completed" means, when the purchase price has been paid in full. The commission would be payable then but not earlier.

This really disposes of the case. In his plaint the plaintiff does not aver that the purchase price was paid, but simply that "the offer of his client as purchaser was accepted", but it is better to finish the story.

A cable was sent by *Harrisons & Crosfield* to *Negombo Estates, Ltd.*, and a reply was received from the latter some time early in November. It accepted the offer of October 26 but subject to certain added conditions. Among these was a condition that instalments were to be forfeited "failing due completion"—the same terminology is used as before, the word "completion" being clearly used to mean payment in full—and further conditions as follows:—"Notarial agreement to be entered into forthwith. Sale subject to ratification by general meeting which will be convened as soon as notarial agreement completed and held seven days later". Until ratification by the general meeting, there would be no contract. The contents of the cable were communicated forthwith by the defendants to plaintiff, and some days later at his request defendants wrote him a letter of November 14, P1, which admittedly was an accurate statement of the conditions on which *Negombo Estates, Ltd.*, were willing to accept plaintiff's offer contained in P2. Plaintiff had previously communicated the conditions to the client of his who was offering the £72,500 and now showed him the letter P1. The client, who gave evidence in the case, is positive that he did not make any definite offer until he had seen P1, but there is some conflict of testimony as to what else happened. Still it is admitted that at some time in the negotiations *Harrisons & Crosfield* informed the defendants that they had an offer to buy at £75,000, and that the defendants informed the plaintiff and his client accordingly. The chief point on

which there is conflict of testimony is this. The plaintiff says that his client informed the defendants' representative, Mr. Forbes, that he agreed definitely to buy on the terms in letter P1; that representative says he never met the plaintiff's client at all until after he had learned of Harrisons & Crosfield having received the increased offer, of £75,000. Let us however assume in plaintiff's favour, what is by no means certain on the evidence, that at some stage in the negotiations, plaintiff's client did say definitely, before witnesses, that he agreed to buy on the terms in letter P1; this assumption is necessary because plaintiff's contention is that once he had introduced a purchaser on the terms contained in letter P1, he had done everything necessary and had earned his commission. In any case plaintiff's client, after hearing that Harrisons & Crosfield had an offer of £75,000, increased his own offer to the same sum. Eventually Harrisons & Crosfield received an offer of £76,000, and through them the Negombo Estates, Ltd., sold at that figure to the offerer, a someone other than the plaintiff's client, through other brokers, not the plaintiff or the defendants. It is proved that thereafter they paid the $2\frac{1}{2}$ per cent. commission to those other brokers.

The plaintiff's position on these facts is that he had found a purchaser willing to buy at the figure, and on the conditions, of the vendors' agents, Harrisons & Crosfield, and that having done so, the transaction was "complete" and that he had earned his commission. The documents which he admits embody any agreement he had made, negative that contention: the transaction was not to be considered complete until the vendors had ratified the sale at a general meeting and the purchase price had been paid in full. But taking the admitted facts, namely, that the defendants never did receive payment of the commission, and then granting for the sake of argument that the transaction was "completed" the moment

plaintiff had found a purchaser willing to buy at the figure and on the conditions of the vendors' agents, and granting further that commission became thereupon payable to him, clearly it was demandable by him from, it was payable to him by, the vendors the Negombo Estates, Ltd., but not demandable from or payable by the defendants. The contractual nexus between plaintiff and defendants which would have enabled plaintiff to claim it from defendants was wanting.

I pass over the difficulties as to the absence of writing and notarial attestation as required by Ordinance No. 7 of 1840, and also the question whether the plaint as it stands discloses, in the absence of further and better particulars, any cause of action at all. The above analysis of the relations between the parties seems to me sufficient to show that this action has been misconceived.

The appeal must be allowed with costs. The decree must be set aside and judgment entered for defendants with costs.

GARVIN S.P.J.—

I agree.

In the view most favourable to the plaintiff of the agreement upon which this action is brought he could not succeed except upon proof that the defendants had received the commission the half of which he claims or possibly in the alternative upon proof that the defendants had done all such things as they were required to do and that the commission became payable and was recoverable by action.

Admittedly no commission was received. Had it become payable? The two plantations were the property of the Negombo (Ceylon) Coconut Estates, Ltd., of which Harrisons & Crosfield, Ltd., were the local agents. It is not suggested that these local agents had power to conclude any contract of purchase. All they did was to cable against their won judgment an offer to London at the expense of the person making the offer and assent to the request for the payment of a commission subject

to the stipulation that it would not be payable until the deal was completed. It can hardly be pretended that they employed or ever desired to employ a broker to find a purchaser for the property of the company for whom they were agents. The modified offer which was cabled from London manifestly was of a tentative nature and any offer on these terms was expressly stated to be subject to confirmation at a general meeting. Whoever sent that cable did not purport to be in a position to conclude the contract on behalf of the company. The acceptance of the offer by the plaintiff on behalf of his client was never approved at any such general meeting. In short, the deal was never completed and no commission became payable.

Whether Messrs. Harrisons & Crosfield were under any duty to convey the acceptance of the offer to the London representatives of the company and whether if they did fail to do so any remedy was available against them are not questions which arise or need be considered.

The plaintiff has failed to show that commission was paid or that it became payable and his action fails.

Appeal allowed.
