

REV. JOSATEKI SERU

v.

RAMESH PALA

[HIGH COURT, 1989 (Fatiaki J) 25 January]

Civil Jurisdiction

B *Agency- contract for sale of land- whether receipt constitutes sufficient memorandum of agreement- whether alleged lack of memorandum must be specifically pleaded- legal effort of authority to sell- Indemnity Bailment and Guarantee Act (Cap 232) Section 59 (d).*

C The Plaintiff agreed with the vendor's estate agent to purchase his house. When the vendor declined to proceed with the sale the Plaintiff commenced proceedings seeking specific performance of the contract. The Defendant's case was that there was no written contract as required by law and that the terms of the agency agreement between the Defendant and the agent did not confer authority on the agent to contract on his behalf. The High Court examined the law relating to estate agents and HELD (i) that there was a sufficient written memorandum of the agreement between the Plaintiff and the agent but that (ii) notwithstanding its terms the authority to sell did not confer on the agent the sole right to sell the Defendant's property.

Cases cited:

- E *Basma v. Weekes* [1950] AC 441
Bentall, Horsley and Baldry v. Vicary [1931] 1 KB 253
Brinson v. Davies (1911) 105 LT 134
Daniels v. Trefusis (1914) 1 Ch. D. 788
Davies v. Sweet [1962] 2 QB 300
Dawkins v. Penrhyn (1878) 4 AC 51
Filby v. Hounsell (1896) 2 Ch. 737
- F *James v. Smith* (1891) 1 Ch. 384
Luxor (Eastbourne) Ltd. v. Cooper [1941] AC 108
McCallum v. Hicks [1950] 1 All ER 864
Midgley Estate Ltd. v. Hand [1952] 2 QB 432
North v. Loomes (1919) 1 Ch. 378
Ram Narayan and Another v. Rishad Hussain Shah 21 FLR 139
- G *Sorrell v. Finch* [1977] AC 729
Steadman v. Steadman [1974] 2 All ER 977

M. Raza for the Plaintiff

D. Jamandas for the Defendant

Action in contract in the High Court.

Fatiaki J:

The plaintiff in this action seeks specific performance of an agreement which he allegedly entered into with Titus (Sales) Agency (hereafter referred to as the agency) to purchase the defendant's house situated at 14 Salesi Road in Namadi Heights, Tamavua. Alternatively, he seeks damages for breach of contract. A

The defendant is the registered proprietor and owner of a freehold block of land bearing the legal description C.T. 18298 being Lot 28 on D.P. 3979 upon which is erected a concrete wood and iron building (hereinafter referred to as the property).

In the months of October, 1987 the defendant was desirous of selling the property and sought the services of the agency who are, real estate agents, operating from offices in Waimanu Road. B

On the 21st of October, 1987 the defendant signed at the offices of the agency what appears to be a standard form document entitled "Authority to sell" (Exhibit P-2). The authority in clear and unequivocal terms appoints the agency sole agent for the sale of the property at a price of \$32,000 (Thirty two thousand dollars). C

It also contains the following specific terms and conditions, namely:

- “2. THAT, this authority is irrevocable and shall remain in force until the expiration of one month from the date hereof 21.10.87. D
3. THAT, I/We will not negotiate either directly or indirectly with any person or persons the sale of the said property during the period of this agency.
4. THAT, if the said property is sold by you or through your instrumentality or to anyone introduced through your company either at the price stated above or such other price and upon such terms and conditions as are acceptable to me/us, I/We shall pay you a commission of five per centum of the sale price. E
5. THAT, if you sell my/our property beyond the above mentioned price, such extra money will be paid to the agent including 5% commission on the agreed price as mentioned above. F
6. THAT, if the said property is sold after the expiry date by agent or by the owner to any client introduced by the agent during the valid authority still a commission of 5% or any amount that exceeds the agreed price (see 5 above) is payable to the agent. G
7. THAT, the agent is authorised by me/us (Vendor) to deduct their commission from the deposit paid by the purchaser.”

A Thereafter follows details of the property to be sold and ends with provision for the owner's signature, address and phone number and similar provision for a witness.
 The document under consideration is dated the 21st of October, 1987 and is signed by the defendant. It is witnessed by David Narayan and is unstamped.

At about the same time the plaintiff was looking to buy a house in Namadi Heights. He also sought the services of the agency in late August, 1987.

B In mid November, 1987 after the property was listed with the agency, the plaintiff was shown the property and he expressed an interest in buying it at the asking price of \$32,000.00.

C It is a common undisputed fact that both parties, the plaintiff and the defendant always dealt with David Narayan an employee of the agency throughout the entire transaction.

They neither dealt with nor did they speak to or see each other. In the circumstances there can be no doubt that the defendant and plaintiff did not personally enter into any form of agreement to sell or buy the plaintiff's property nor has it been claimed or suggested otherwise.

D The plaintiff in his sworn evidence stated that he paid a cash-deposit of \$2,000 on the property to David Narayan in 2 instalments of \$1,000. The first was paid on the 12th of November, 1987 and the second on the 4th of December, 1987.

E These payments however were not receipted separately as might be expected. Rather the single receipt issued by the agency to the plaintiff is dated 4th December, 1987 and records:

	Cash
“RECEIVED from <u>Rev. Josateki Seru</u> by	Cheque
the sum of <u>One Thousand Six Hundred</u>	dollars
and _____	cents
F on account of Being Payment on Property	
14 Salesi Road, Namadi Heights described as	
C.T.No. 18298 Lot 28 on D.P. 3979. Full purchase	
price: <u>\$32,000.00</u> . Balance, purchase price: \$30,400.00	
which sum shall be paid upon registration of the Transfer	
to the purchasers.	

G Time is of essence as stipulated in sales & purchase agreement, deposit is not refundable.

\$1,600:00

With Thanks
 Titus (Sales) Agency
 Per: Sgd. D. Narayan”

By paragraph 7 of his Statement of Defence, the defendant :

“7. says that the plaintiff has no right of action against the defendant because there is no express Agreement for Sale and Purchase of the defendant’s property existing between the plaintiff and the defendant or the plaintiff and any other person lawfully authorised to sign any such agreement with the plaintiff.”

A

The evidence on this particular matter is contradictory and although the plaintiff swears that he signed some sort of purchase agreement given to him by David Narayan and that the defendant’s signature appeared on it at the time, I do not accept that assertion.

B

The defendant is adamant that he never signed any Sale and Purchase Agreement and David Narayan confirmed that the plaintiff did not sign any agreement in his office.

C

I have no hesitation in holding and I find as a fact that no written Sale and Purchase Agreement was prepared by the agency or executed by either the plaintiff or the defendant in relation to the property nor does any such agreement exist.

It is noteworthy that no written Sale and Purchase Agreement was ever produced nor does the plaintiff clearly and unequivocally plead its existence in the Statement of Claim.

D

In his written submissions to the court learned counsel for the plaintiff concedes there was no written agreement as between the plaintiff and the defendant but nevertheless argues that its absence is not a bar to relief, furthermore counsel submits that the relevant provisions of the Indemnity Guarantee and Bailment Act Cap 232 (hereafter referred to as the Act) have not been pleaded.

E

Learned counsel for the plaintiff on the other hand invokes the provisions of Section 59(d) of the Act in his written submissions. This Section corresponds precisely with Section 4 of the Statute of Frauds (U.K) and reads as follows:

F

“59. No action shall be brought -

- (d) upon any contract or sale of lands, tenements or hereditaments or any interest in or concerning them; Unless the agreement upon which such action is to be brought or some memorandum or note thereof is in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorised.”

G

Clearly the section has a dual requirement that there be some written or documentary evidence of the Agreement and that the documentary evidence be signed by the defendant or his duly authorised agent.

- I accept that as a matter of pleadings it is incumbent on a party seeking to rely on the Act to expressly plead its terms.
- A Order 18 rule 7 of the High Court Rules requires:
- “A party in any pleading subsequent to a Statement of Claim (to) plead specifically any matter (a) which he alleges makes any claim of the opposite party not maintainable.”
- B In the notes to the equivalent rule in the “White Book” the following appears at 18/8/12:
- “Statute of Frauds must be specially pleaded, if the defendant desired to rely on it.”
- C In Dawkins v. Penrhyn (1878) 4 A.C. 51 at p. 58 Lord Cairns said that the Statute of Frauds must be pleaded because it can never be predicted beforehand that the defendant who may shelter himself under the Statute of Frauds desires to do so.
- More recently in the House of Lords in Steadman v. Steadman [1974] 2 All E.R. 977 Lord Reid said at p. 981:
- D “It must be remembered that this legislation did not and does not make oral contracts relating to land void: it only makes them unenforceable. And the statutory provision must be pleaded; otherwise the court does not apply it.”
- E The rigidity of this rule is illustrated by the case of James v. Smith (1891) 1 Ch. 384 where the defendant incorrectly referred to Section 4 of the Statute of Frauds whereas he should have pleaded Section 7 and the trial judge refused to allow any amendment of the pleadings.
- F There can be no doubt in this case that the defendant has nowhere specifically pleaded the Act or its provisions, however, if I am wrong and paragraph 7 of the Statement of Defence can and does raise the relevant provisions of the Act without specific reference thereto, then I would hold that the receipt Exhibit P-1 constitutes a written note or memorandum of the agreement sufficient to satisfy the first requirement of Section 59(d) of the Act.
- G In Ram Narayan and Another v. Rishad Hussain Shah 21 FLR 139 the Fiji Court of Appeal held that a receipt issued by the defendant upon payment of a deposit did constitute an enforceable contract although there was no reference to a date of possession nor to an assignment of a cane contract.
- In Daniels v. Trefusis [1914] 1Ch. D 788 Sargant, J. said at p. 799:
- “It seems to me that the unintentional by product of satisfying the Statute of Frauds may be produced as completely by a note or

memorandum signed by an agent of the party as by a note or memorandum signed by the party himself, provided, of course, that the agent had authority to sign the particular note or memorandum.”

(See also: the receipt issued in North v. Loomes [1919] 1 Ch. 378.)

A

The receipt in this case acknowledges a deposit of \$1,600.00 as “being payment on property”. It identifies the purchaser, the purchase price, the balance purchase price, and the land by its legal and postal description and is signed by David Narayan of the agency.

B

It was held in Sorrell v. Finch [1977] A.C. 729:

“(1) that it was not in accordance with first principles in the branch of the law concerned to hold that the estate agent was authorised to receive on the vendor’s behalf a pre-contract deposit in the absence of express or implied authority so to do ;”
(my underlining).

C

In my view it is inherent in Clause 7 of the Authority to Sell that the agency is impliedly authorised to receive and therefore to issue and sign a valid receipt, for any deposit paid by the purchaser. How else could the Clause be given effect to if the position were otherwise?

D

Nevertheless it is well settled law that to satisfy the Act the agreement or memorandum must name or identify two parties who are contractually bound to each other. (Filby v. Hounsell (1896) 2 Ch. 737).

In the receipt under consideration the defendant as vendor is neither named or identified however his sole agent, the agency and its employee David Narayan are disclosed.

E

In similar circumstances, Danckwerts, L.J. said in Davies v. Sweet [1962] 2 Q.B. 300 at pp. 306 and 307:

“The real question is whether the vendor is sufficiently described in the alleged memorandum. It is to be observed that the receipt does not add any words to show that F.A. Phillips & Son are signing merely as agents for some principal in such a way as to show that they are not intended to be bound, and the principal is not described so vaguely as not to identify that party sufficiently. There are such cases in which a vague description has been held to be fatal. If the purchaser were ignorant of the identity of the principal, there is no doubt that the memorandum would be sufficient. But the position appears not to be limited to that situation, and there is authority for the proposition that even though the person signing is known to be an agent, nonetheless, he could be sued upon the contract, and his principal can be sued or can sue upon the memorandum which is

F

G

signed only by the agent and does not give the principal's name."
(my underlining).

A and later at p. 308:

"I must add that the fact that F.A. Phillips & Son were estate agents and were so described on their notepaper in my opinion does not affect the conclusions which I reached"

B (See also: Basma v. Weekes [1950] A.C. 441 (P.C) where the memorandum was signed by a solicitor who was known to be the purchaser's solicitor and agent.).

Furthermore in Davies v. Sweet the learned Lord Justice at p. 305 described the functions of an estate agent as being:

C "..... to introduce a purchaser for property which it is desired to sell and ordinarily an estate agent has no authority to enter into or sign a contract on behalf of a vendor. But such authority may be inferred from the circumstances of the case." (my underlining).

D Learned counsel for the defendant forcefully argues that the agency had no authority to conclude a contract binding on the defendant to sell the property. The Authority to Sell it is argued does not authorise the agent to make such a contract rather it is "an instruction to find a purchaser on terms and conditions acceptable to the vendor" (i.e. the defendant). Reliance was placed on the terms of Clause 4 of the Authority to Sell.

E Counsel for the plaintiff was equally forceful in his submission to the contrary effect. In his case emphasis was placed on the title of the document, the terms of Clause 2 and the evidence of David Narayan.

David Narayan in his evidence said that he gave the Authority to Sell form to the defendant to read and after he had done so the form was completed and the defendant signed it and he witnessed his signature.

F In cross-examination on the terms of the "Authority to Sell" he initially stated that he understood the document irrevocably authorised him to sell the property however he agreed he could not sign a Sale and Purchase Agreement between vendor and purchaser nor was he authorised to sign any agreement on behalf of the defendant. He denied that the defendant had told him he was only interested in a cash buyer.

G He understood the terms and conditions in Clause 4 to refer to the purchase price and the manner in which the purchaser would obtain finance. In answer to the court's questions he said he understood the document only authorised him to find a purchaser. It was also his view that property could be sold on a verbal agreement.

The defendant in his evidence understood the Authority to Sell to mean that if the agent found a buyer between 21.10.87 and 21.11.87 he would have to sell the property to that buyer. But that as he wanted to sell his house quickly he had

signed the form on the declared understanding that within the month given the agent would find him a cash buyer. He refused to sell the house because no cash buyer was found.

A

I note that although the defendant himself wrote the purchase price on the form he did not write the word "CASH" anywhere as he could have done.

Clearly the outcome of this case will depend primarily on the meaning and legal effect of the Authority to Sell and whilst the understanding of the parties to it may be of some assistance to the court the final construction of the Authority to Sell lies with the court.

B

It was said by Jenkins, L.J. in Midgley Estates Ltd. v. Hand [1952] 2 Q.B. 432 at p. 435:

"Contracts of agency between owners of property and estate agents have been many times before the courts As pointed out over and over again in reported cases, an agency contract of this sort, just like any other contract, must be construed according to its terms."

C

Furthermore Lord Denning, M.R. in McCallum v. Hicks [1950] 1 All E.R. 864 at 866 said:

"the common law is vigilant to prevent any abuse of freedom of contract, and, rather than permit any abuse, it will assume that the party intended to be reasonable and will give the contract a reasonable interpretation. This is especially so in the case of forms which the public are invited to sign without legal advice."

D

In Luxor (Eastbourne) Ltd. v. Cooper [1941] A.C. 108, Lord Russell of Killowen made the following observations with regard to commission contracts when he said at pp 124 and 125:

E

" A few preliminary observations occur to me. (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."

F

G

(my underlining).

A In Bentall, Horsley and Baldry v. Vicary [1931] 1K.B. 253 the owner of property appointed estate agents his "sole agents for the sale of the property for a period of 6 months". It was further agreed that if the estate agents introduced a purchaser, they should receive a 5% commission on the purchase price. During the agency the owner negotiated privately and sold the property to an independent person. The estate agents thereupon claimed damages from the owner for breach of contract. McCardie, J. in rejecting the agents' claim said at p. 258:

B "It is to be noted that the contract contains no express words at all indicating a prohibition against a sale by the defendant himself. If the parties intended such a prohibition nothing would have been easier than to insert the appropriate words. It is also to be noted that the defendant does not say by the contract: "I give you the sole right to sell". He says only: "I appoint you sole agents for the sale", which is, in my "opinion, quite a different thing. In such contracts as the present, it is always important to observe the exact words used." (my underlining).

D I would respectfully adopt the distinction underlined above, in the case before me. Furthermore it was the agency in this case that drafted the Authority to Sell and the *contra proferentem* rule must be remembered.

E The fact that the owner is prohibited from negotiating for the sale of the property during the term of the agency does not mean that the owner shall not negotiate with a proposed purchaser introduced or found by the agency nor in my view does it impliedly impose any obligation on the owner to sell the property to such a purchaser.

F In my opinion Clause 3 serves only to reinforce the exclusive nature of the agency's appointment as sole agent in so far as the owner is prevented in the time given the agency, from negotiating with prospective purchasers not introduced or found by the sole agent. It does not prohibit all negotiations with the owner whose acceptance of the terms and conditions of sale is expressly required by Clause 4.

G If it was intended that the agency should not only have an exclusive right to find a purchaser but also an exclusive right to dictate the terms and conditions on which the property is to be sold then a much clearer form of words would be required than presently exists in the Authority to Sell.

G For my part if the Authority to Sell were subject to two interpretations one reasonably giving effect to the document as a whole and the other giving rise to a quite extravagant result and only partial effect to the document then I would adopt an interpretation *contra proferentem* which avoided such a result.

The general and common law right of sale of the owner of land was clearly recognized in Brinson v. Davies (1911) 105 L.T. 134 where Pickford, J. said at

p. 135:

“the putting of a house for sale into the hands of an agent does not prevent the owner of the house from selling it himself and if he does that before the relationship of purchaser and vendor arises between himself and the (agent’s), nominee, then the agent has not found a purchaser, because the house has been already sold to someone whom the owner had the right to sell it.”

A

Lord Romer put it more trenchantly in Luxor’s case (op cit) when he opined a negative answer to the following question at pp 154 and 155:

B

“Where an owner of property employs an agent to find a purchaser, is it an implied term of the contract of agency that, after the agent has introduced a person who is ready, willing and able to purchase at a price assented to by the principal, the principal shall enter into a contract with that person to sell at the agreed price ? In my opinion the question must be answered in the negative.”

C

McCardie, J. described the decision in Brinson v. Davies as significant in showing the general rights of an owner in the absence of express stipulation, and although he accepted that an owner could for valuable consideration, expressly stipulate that the agent, and the agent alone, shall have the right to find a purchaser which stipulation would bind the owner not himself to sell, he also clearly drew a distinction between such a stipulation and one where the owner merely agrees for consideration that the agent shall be the sole agent for the sale of the property. (Bentall, Horsley and Baldry v. Vicary op. cit. at p. 259.)

D

I note in passing that David Narayan stated no money was given to him by the defendant for the Authority to Sell and that if he had done nothing in the time allowed by the authority he would receive no commission.

E

In my view the mere fact that the authority is expressed to be irrevocable by Clause 2, does not mean that the owner has no part to play in the negotiation of the terms and conditions of sale. It merely means that in the month that the authority remains irrevocable, the defendant cannot appoint or list his property with any other real estate agent i.e. irrevocability relates to the appointment of the agency.

F

Read in that manner the Clause is consistent with Clause 4 and produces a plainly reasonable result.

Nevertheless David Narayan in answer to a question from the court stated that he had the authority to conclude a Sale and Purchase Agreement if the vendor says his solicitors will prepare it.

G

I cannot agree that any of the terms of the document permits any such thing indeed the title of the document is a misnomer. It does not irrevocably authorise the agency to sell the property on whatever terms and conditions it considers suitable subject only to the asking price being offered by the potential purchaser.

A In my view the conditional authority given to the agency to sell the property is to be found Clause 4 which reads: (so far as relevant)

“4. That if the said property is sold by you at the price stated above and upon such terms and conditions as are acceptable to me/us, I shall pay you a commission of five per centum of the sale price.” (my emphasis and underlining).

B The plain meaning of the clause is clear in that no sale may be effected or concluded by the agency unless the terms and conditions of the sale are acceptable to the defendant. It is also clear that the purchase price is not a term or condition which is required to be accepted by the defendant who himself had entered the figures and words in the space provided on the form.

C To interpret the Authority to Sell as learned counsel for the plaintiff suggests it should be read would be unreasonable and incorrect for the following reasons:

(a) It would place too much emphasis on the title of the document at the expense of its express contents;

D (b) The agency is appointed sole agent for the sale and not sole agent with the sole right to sell;

(c) It would be an unwarranted restriction on the common law right of an owner of land to sell his property in the absence of a clearly expressed prohibition in the letter of appointment;

E (d) It would render superfluous the phrase “...and upon such terms and conditions as are acceptable to me..” in Clause 4 and overlooks the conditional nature of the agency’s right to sell.

F Taking that view of the Authority to Sell and in all the circumstances whilst one can feel some sympathy for the plaintiff, I hold that the agreement between the agency and the plaintiff is not one which the court will decree to be carried into effect.

G The plaintiff’s claim is dismissed with costs to the defendant and it is further ordered that Caveat No. 256246 on C.T. 18298 be removed within 28 days of the date hereof.

(Judgment for the Defendant.)