[TRIANTAFYLLIDES, P., STAVRINIDES, MALACHTOS, JJ.]

SOCRATES Z. ELIADES,
Appellant-Defendant,

v.

PANTELIS PETRIDES.
Respondent-Plaintiff.

(*Civil Appeal No.* 4998).

Estate agent—Commission—Payable "when the purchase of the land would be achieved"—Intention that agreement in respect of such sale (and purchase) would be concluded upon the signing of a formal contract of sale and not before—No such formal contract ever executed—Consequently, the agent is not entitled to the agreed commission—Moreover, no commission or remuneration is payable to the agent on a quantum meruit *basis.*

Estate agent—Misconduct by agent—Sale of land—Agent actively siding with the owners against his principal—Agent loses thereby any claim for commission, agreed or otherwise—Section 180 *of the Contract Law, Cap.* 149.

Agency—Estate agent—See supra.

This is an appeal against the judgment of the District Court of Nicosia by which the appellant was adjudged to pay to the respondent (an estate agent), plaintiff in the action the amount of £3,000 as commission due under a contract of agency. This contract was entered into in relation to the intended purchase by the appellant of 1182 donums of land in the area of Kormakitis, which belonged severally to about seventeen owners. The terms of the contract were embodied in a letter dated July 22, 1969, which was addressed by the appellant (defendant) to the respondent (plaintiff); it was stated in that letter, *inter alia*, that when the purchase of land would be achieved ("ἐπετυγχάνετο") the respondent would receive from the appellant £3,000 agreed commission as follows: £1,000 would be paid immediately after the signing of the "final agreement" ("τελικῆς συμφωνίας") and the issue by the Government of a development permit in relation to the area in question; the balance of £2,000 would be paid within eighteen months after the signing of the

said final agreement. Subsequently, by a letter dated 1st September, 1969, the appellant confirmed to the respondent that in case the purchaser would be the "*Blue Sea Estates (Kyrenia) Ltd.*" company, the appellant would still be liable to pay to the respondent his commission as agreed. As a result of the contract of agency and, apparently, through the efforts of the respondent, an option was granted, by a document dated 14th September, 1969, to the said company to purchase within seventy-five days the land in question at the price of £180 per donum. It was clearly envisaged by the terms of the said document that a contract of sale in writing would have to be executed if the company should exercise its option to buy the land.

On 25th November, 1969, the company, of which the appellant was the managing director, exercised the option to buy the land by means of letters sent to the owners. On 28th November, 1969, the owners by telegram sent to the appellant informed him that they were all ready and willing to sign the contract of sale. On December 8, 1969, the appellant had a meeting with the owners and stated to them that in the circumstances he needed an extension of the period of the option. Eventually on 10th December, 1969, by a letter sent to the appellant the owners informed him that they were not prepared to grant an extension and that they were claiming "due compensation"; so, the deal fell through. It appears that this letter was prepared and typed on the instructions of the owners by the respondent himself, and it was drafted by him in a manner showing that he was instrumental in presenting the case of the owners, against the appellants; he, thus, actively sided with the owners against his principal.

The main issue in this appeal is whether on the true construction of the agency agreement embodied in the aforementioned letter of July 22, 1969 (*supra*), and in the light of the circumstances of this case, the respondent was entitled to his agreed commission of £3,000, as it was held by the trial Court.

Allowing the appeal and reversing the judgment of the trial Court, the Supreme Court :—

Held, (1). As has been stated by Upjohn J. in *Ackroyd and Sons* v. *Hasan* [1960] 2 Q.B. 144, at p. 154 : "When an agent claims from a principal commission there are certain

principles of law applicable which cannot be doubted. First, when an agent claims that he has earned the right to commission, the test is whether upon the proper interpretation of the contract between the principal and the agent the event has happened upon which commission is to be paid. Secondly there are no special principles of construction applicable to commission contracts with estate agents. Thirdly, contracts under which a principal is bound to pay commission for an introduction which does not result in a sale must be expressed in clear language."

(2) (*a*) We have, therefore, to find out when the Commission of £3,000 would become payable on the basis of the agreement between the parties.

(*b*) Construing the aforementioned letter of July 22, 1969 (*supra*), as a whole, in the light of all relevant considerations, including the nature of the proposed deal, the amount of the commission and the terms of payment of the commission, we have reached the conclusion that the commission would not become payable until the signing of a formal contract for the sale of the land concerned; therefore, on this ground only this appeal has to be allowed, in any case, as no such formal contract of sale was ever executed.

(3) Moreover, we are of the view, that the respondent has acted in a manner so inconsistent with the obligations he had under the agency agreement, as to amount to misconduct on his part, and, thus, he lost his right to his commission, even if it could be held that his right thereto accrued without the signing of a formal contract of sale. We have formed this view because of the fact that the respondent knew that the appellant wanted an extension of the period fixed for the exercise of the option to purchase, and not only it does not appear that the respondent did anything to dissuade the owners of the land from refusing further time, but on the contrary he was instrumental in preparing, as he did, on 10th December 1969, the letter of the owners refusing to the appellant more time for the exercise of the option and claiming compensation from him (see *Andrews* v. *Ramsay and Co.* [1903] 2 K.B. 635, at p. 638).

(4) We have considered the possibility of whether the respondent could be found to be entitled to the amount of £3,000 or any lesser amount by way of remuneration for his services, on a *quantum meruit* basis. The authorities point

definitely against adopting such a course in the present case where there was an agreement for the payment of commission upon the happening of a certain event and when such event has not materialized. (See *Howard Houlder Partners Ltd.* v. *Manx Isles Steamship Company Ltd.* [1913] 1 K.B. 110 at p. 114 ; *Bentall, Horsley and Baldry* v. *Vicary* [1931] 1 K.B. 253, at p. 262).

In our opinion the facts of the present case are not such as would enable us to imply a term for reasonable remuneration of the respondent although the event upon the happening of which the agreed commission of £3,000 was due did not occur. (Cf. *Bentall* case (*supra*) at p. 257).

Appeal allowed.

Cases referred to :

Ackroyd and Sons v. *Hasan* [1960] 2 *Q.B.* 144, at p. 154 ;

Andrews v. *Ramsay and Co.* [1903] 2 K.B. 635, at p. 638 ;

Howard Houlder and Partness Ltd. v. *Manx Isles Steamship Company Ltd.* [1923] 1 K.B. 110, at p. 114 ;

Bentall, Horsley and Baldry v. *Vicary* [1931] 1 *K.B.* 253, at pp. 257, 262.

Appeal.

Appeal by defendant against the judgment of the District Court of Nicosia (Kourris, Ag. P.D.C. and Santamas, Ag. D.J.) dated the 26th June, 1971, (Action No. 1645/70) whereby defendant was ordered to pay to the plaintiff the sum of £3,000 as commission due under a contract of agency.

A. Serghides with *C. Adamides*, for the appellant.

A. Tsiros with *St. Tamasios*, for the respondent.

The judgment of the Court was delivered by :—

TRIANTAFYLLIDES, P. : In this case the appellant—who was one of three defendants in the Court below—appeals against the judgment of the District Court in Nicosia by which he was ordered to pay to the respondent—the plaintiff in the action—the amount of £3,000 as commission due under a contract of agency. The action as against the other two defendants failed.

The contract of agency was entered into in relation to the intended purchase by the appellant of 1182 donums of land, near the seaside, in the area of Kormakitis, which belonged, severally, to about seventeen persons (to be referred hereinafter as " the owners ").

The terms of the contract were embodied in a letter dated 22nd July, 1969, which was addressed by the appellant to the respondent, who was acting in this matter as an estate agent ; it was stated in such letter, *inter alia*, that when the purchase of the land would be achieved (" ἐπετυγχάνετο ") the respondent would receive from the appellant £3,000 agreed commission as follows : £1,000 would be paid immediately after the signing of the final agreement (" τελικῆς συμφωνίας ") and the issue by the Government of Cyprus of a development permit in relation to the area in question ; the balance, £2,000, would be paid within eighteen months after the signing of the final agreement.

Subsequently, by a letter dated the 1st September, 1969, the appellant confirmed to the respondent that in case the purchaser would be the " Blue Sea Estates (Kyrenia) Ltd." company, the appellants would still be liable to pay to the respondent his commission as agreed.

As a result of the contract of agency and, apparently, through the efforts of the respondent, an option was granted, by a document dated the 14th September, 1969, to the said company to purchase, within seventy-five days, the land in question at the price of £180 per donum. It was clearly envisaged by the terms in which the said document was framed that a contract of sale in writing would have to be executed if the company exercised its option to buy the land. In our view, the signing of a formal contract of sale was not a mere formality, but was an essential step for the conclusion of the deal, all the more so because it would be impossible to obtain a development permit from the Government without such a contract having been executed.

On the 25th November, 1969, the company, of which the appellant was the managing director, exercised the option to buy the land, by means of letters sent to the several owners at Kormakitis. It is to be borne in mind—as being related to something which will be stated later on in this judgment—that, according to the evidence of the respondent himself, the appellant had requested the respondent to try and obtain an extension of the period prescribed for the exercise of the option and that the respondent had approached

in this connection some of the owners ; they all refused to agree to an extension, and, therefore, nothing more was done about it.

It was stated in evidence that some of the owners refused to accept the letters informing them of the exercise of the option. Of course, if this was a case in which the agreement could be finalized by the exercise of the option the failure to accept the letters could not have prevented a binding agreement from coming into existence, but, as we have said regarding the terms of the option, it was the intention of the parties that the agreement would be concluded upon the signing of a formal contract of sale, and not before that ; therefore, in view of the failure of some owners to accept the aforesaid letters the whole matter remained still under negotiation. That this was so is clear from the fact that, three days later, on the 28th November, 1969, the owners sent a telegram to the appellant to the effect that they were all ready to sign the contract of sale and that they were expecting him for this purpose on that same day in their village ; the telegram was signed by one of them, Ioannis HadjiHanni, who stated in evidence that he had come to Nicosia and consulted an advocate before sending the telegram.

It may be observed, at this stage, that the said telegram shows that it was, indeed, the intention of the parties that the deal would be concluded only upon the execution of a formal contract of sale.

The appellant replied by letter of the 29th November, 1969, saying that he was surprised to see that he was being asked to go to Kormakitis and requesting the owners to visit him in Nicosia in order to conclude the deal. The owners came, apparently, to Nicosia on the 8th December, 1969, and they had a meeting with the appellant, who said that, in the circumstances, he needed an extension of the period of the option.

It is clear that then a new round of negotiations commenced and, eventually, on the 10th December, 1969, by a letter sent by two of them, Ioannis HadjiHanni and Antonios HadjiHanni, the owners informed the appellant that they were not prepared to grant an extension and that they were claiming " due compensation "; so the deal fell through. It appears that this letter was prepared and typed, on the instructions of the said two owners, by the respondent himself, and it was drafted by him in a manner showing that he was instrumental in presenting

the case of the owners, against the appellant, as legalistically as possible ; thus, he actively sided with the owners against his principal.

The main issue in relation to which this appeal has been argued is whether on a correct construction of the agency agreement embodied in the aforementioned letter of the 22nd July, 1969, and in the light of the circumstances of this case, the respondent was entitled to his commission, as it was held by the trial Court.

As has been stated by Upjohn, L.J. in *Ackroyd* & *Sons* v. *Hasan* [1960] 2 Q.B., 144 (at p. 154) :—

> " When an agent claims commission from a principal, there are certain principles of law applicable which cannot be doubted. First, when an agent claims that he has earned the right to commission, the test is whether upon the proper interpretation of the contract between the principal and the agent the event has happened upon which commission is to be paid. Secondly, there are no special principles of construction applicable to commission contracts with estate agents. Thirdly, contracts under which a principal is bound to pay commission for an introduction which does not result in a sale must be expressed in clear language."

The above principles have been adopted, after a long review of relevant case-law, by Bowstead on Agency, 13th ed., p. 193.

The judgment of Upjohn, L.J. in the *Ackroyd* case, *supra*, continues as follows (at p. 154) :—

> " Authority for these propositions is to be found in the well-known speech of Lord Russell in *Luxor (Eastbourne) Ltd.* v. *Cooper* [1941] A.C. 108, 124 and put in more summary form by Jenkins, L.J. in *Midgley Estates Ltd.* v. *Hand* [1952] 2 Q.B. 432, 435 where he said : ' As pointed out over and over again in the reported cases, an agency contract of this sort, just like any other contract, must be construed according to its terms. One has to look at the particular contract and see whether, according to its terms, construed in accordance with the ordinary principles of construction, the event has happened on the occurrence of which the commission is expressed to be payable '. Then, after pointing out that *prima facie* the intention of the parties is likely to be that the commission stipulated for should only be payable in

the event of an actual sale resulting, he continued : ' That is the broad general principle in the light of which the question of construction should be approached ; but this does not mean that the contract, if its terms are clear, should not have effect in accordance with those terms, even if they do involve the result that the agents' commission is earned and becomes payable although the sale in respect of which it is claimed, for some reason or another, turns out to be abortive ' ".

We have, therefore, to find out when the commission of £3,000 would become payable on the basis of the agreement between the parties to this appeal :

Construing the letter of the 22nd July, 1969, as a whole, in the light of all relevant considerations, including the nature of the proposed deal, the amount of the commission and the terms of payment of the commission, we have reached the conclusion that the commission would not become payable until the signing of a formal contract for the sale of the land concerned ; therefore, on this ground only this appeal has to be allowed, in any case, as no such formal contract of sale was ever executed.

Moreover, we are of the view, in the light of all the circumstances of this case, that the respondent has acted in a manner so inconsistent with the obligations he had under the agency agreement, as to amount to misconduct on his part, and, thus, he lost his right to his commission, even if it could be held—and we have already found that it could not be so held—that his right to the commission accrued without the signing of a formal contract of sale. We have formed this view because of the fact that the respondent knew even before the exercise by the appellant of the option, on the 25th November, 1969, that the appellant wanted an extension of the period fixed for the exercise of such option, and not only it does not appear that the respondent did anything to dissuade the owners of the land from refusing further time for the exercise of the option in the course of the resumed negotiations, after the 25th November, 1969, but, on the contrary, he was instrumental in preparing, as he did, on the 10th December, 1969, the letter of the owners refusing to the appellant more time for the exercise of the option and claiming compensation from him.

The matter of misconduct by an agent is dealt with in section 180 of the Contract Law, Cap. 149, as follows :—

" An agent who is guilty of misconduct in the business of the agency is not entitled to any remuneration in

respect of that part of the business which he has misconducted."

The said section 180 is the same as section 220 of the Indian Contract Act, 1872. In Pollock and Mulla on the Indian Contract and Specific Relief Acts, 8th ed., at p. 681, the learned authors in commenting on section 220 refer to *Andrews* v. *Ramsay & Co.* [1903] 2 K.B. 635 where Lord Alverstone, C.J. stated (at p. 638) :—

> " A principal is entitled to have an honest agent, and it is only the honest agent who is entitled to any commission. In my opinion, if an agent directly or indirectly colludes with the other side, and so acts in opposition to the interest of his principal, he is not entitled to any commission. That is, I think, supported both by authority and on principle ; but if, as is suggested, there is no authority directly bearing on the question, I think that the sooner such an authority is made the better."

We need not enlarge on this aspect of the case any further except to stress that the respondent can certainly not be described as an " honest agent ", in view, at any rate, of the way in which he acted in relation to the preparation of the aforesaid letter of the 10th December 1969.

We have considered the possibility of whether the respondent could be found to be entitled to the amount of £3,000 or any lesser sum by way of remuneration for his services, on a *quantum meruit* basis. The authorities point definitely against adopting such a course in the circumstances of the present case, where there was an express agreement for the payment of commission on the happening of a certain event and when such event has not materialized.

In *Howard Houlder and Partners, Ltd.* v. *Manx Isles Steamship Company, Ltd.* [1923] 1 K.B. 110, McCardie, J. said (at p. 114) :—

> " I must point out that the commission note before me represented the result of discussion between the plaintiffs and the defendants. It embodied their bargain. They reduced their agreement to writing. There was no collateral arrangement whatsoever. The rights of the plaintiffs are to be found in the commission note alone and so the parties intended. If this be so, then it follows, as Mr. Neilson so forcibly indicated for the defendants, that the rule '*Expressum facit cessare tacitum*' here applies. There is no scope on the

present facts for the operation of the *quantum meruit* principle. If I were to rule in the plaintiffs' favour, I should ignore the well established rule and a substantial body of authoritative decision ..... The matter was clearly put in *Martin* v. *Tucker* ([1885] 1 T.L.R. 655) in the judgment of Lord Coleridge C.J., when he said that the plaintiffs ' could not claim on a *quantum meruit* because they had chosen to tie themselves down by the express terms of the agreement.' Much the same view was expressed by the Court of Appeal in *Barnett* v. *Isaacson* ([1888] 4 T.L.R. 645), where Lord Esher M.R. said that the plaintiff was only to be paid in case of success, no matter what labour and trouble he had devoted to the matter. Finally, I may mention *Lott* v. *Outhwaite* ([1893] 10 T.L.R. 76), where Lindley L.J. stated : ' It was said that there was an implied contract to pay the agent a *quantum meruit* for his services. The answer was that there could be no implied contract when there was an express contract ' ".

In Bentall, Horsley and Baldry v. *Vicary* [1931] 1 K.B. 253, it was stated by McCardie, J. (at p. 262) :—

" I need only say a few words on the final alternative demand of the plaintiffs—namely, the claim on a *quantum meruit*. Undoubtedly, as I have already pointed out, they did work and incurred expense. But this is quite a usual feature of an estate agent's vocation when he works under a commission note which only gives him a right to recover commission when he fulfils the terms of the note. He runs the risk of losing his labour and expense unless he can comply with the conditions of the bargain. There is no scope in the present case for the operation of the doctrine of *quantum meruit*. The plaintiffs worked under a special contract and they have failed to do that which entitled them to commission. The maxim ' *Expressum facit cessare tacitum* ' here applies."

Both the above cases are referred to, as correctly expounding the relevant principle of law, in Bowstead on Agency, 13th ed. p. 195. It is observed in this text-book (also at p. 195) that :—

" It may, however, be that the intention of the parties, as derived from the express terms of the contract, was that the principal should pay the agent a reasonable sum if the event upon the happening of which remuneration was due did not occur. The implication of a term to

this effect might be necessary to give business efficacy to the contract or otherwise to effect the clear intention of the parties. But it is clear that such an implication would only be made in the most exceptional cases."

In this respect in the *Bentall* case, *supra*, McCardie J. said (at p. 257) :—

> " the Court ought not to introduce an implied term into the contract unless such implication is needed for ' such business efficacy to the transaction as must have been intended at all events by both parties who are business men ' : see per Bowen L.J., in *The Moorcock* ([1889] 14 P.D. 64, 68). That decision should always be read subject to the words of Lord Esher M.R. in *Hamlyn & Co.* v. *Wood & Co.* ([1891] 2 Q.B. 488, 491). He there said : ' I have for a long time understood that rule to be that the Court has no right to imply in a written contract any such stipulation, unless, on considering the terms of the contract in a reasonable and business manner, an implication necessarily arises that the parties must have intended that the suggested stipulation should exist. It is not enough to say that it would be a reasonable thing to make such an implication. It must be a necessary implication in the sense that I have mentioned ' ".

In our opinion the facts of the present case are not such as would enable us to imply a term for reasonable remuneration of the respondent although the event upon the happening of which the agreed commission of £3,000 was due did not occur.

For all the reasons set out in this judgment the appeal is allowed and the decision of the Court below is set aside ; counsel for the appellant having stated that his client does not claim costs, either before the trial Court or before this Court, we have decided to make no order in that behalf.

Appeal allowed ; no order as to costs.