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[STAVRINIDES, L. LOIZOU, A. LOIZOU, JJ.]

COSTAS  
KALISPERAS  
v.  
GERALD TH.  
KABABE

COSTAS KALISPERAS,

*Appellant-Plaintiff,*

v.

GERALD TH. KABABE,

*Respondent-Defendant.*

(Civil Appeal No. 4895).

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*Contract—Estate agent—Contract between estate agent and client giving sole authority to agent to sell land on payment of agreed commission—Sale effected not as a result of the agency but directly by principal (client) during the validity of the said sole authority and principal acting in breach of the contract—Whether, on the true construction of the relevant clause 7 of the contract, commission or damages payable—Matter turning on the true construction and true meaning and effect of said clause 7—Damages under section 74 of the Contract Law, Cap. 149, rightly held to be the sole remedy—The case of Kalisperas v. Papadopoulos (infra) followed; the case of Kokkinomilos v. Kalisperas (infra) distinguished.*

*Damages—Agreed damages—Section 74 of the Contract Law, Cap. 149—Court entitled to award a reasonable amount as compensation, but not exceeding the amount stipulated in the contract.*

In this case the Supreme Court, following its decision in *Kalisperas v. Papadopoulos* (1969) 1 C.L.R. 480, and affirming the judgment of the trial Court, held that the plaintiff-appellant estate agent, in the events of the case and on the true construction of clause 7 of the contract sued on, did not earn his agreed commission but that he was only entitled to damages for breach of contract on the part of the defendant-respondent principal; and as the measure of damages was agreed in the contract to be 5% on the actual sale price, section 74 of the Contract Law, Cap. 149 (*infra*) comes into play which means that the Court may award such compensation as it may think reasonable in the circumstances but in no case exceeding the amount stipulated in the contract (such amount coming in this case to £1,050, *infra*). Actually the trial Court assessed such compensation to £650, the Supreme Court on this appeal leaving that award undisturbed.

Section 74(1) of the Contract Law, Cap. 149 reads as follows :

“ 74. (1) When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

A stipulation for increased interest from the date of default may be a stipulation by way of penalty.”

The salient facts of the case are briefly as follows :

The plaintiff-appellant is an estate agent and the defendant-respondent at the material time was the owner of a ground floor house and field, situate at Karavas, in the Kyrenia District. By an agreement in writing the respondent-owner gave to the appellant-agent exclusive authority for the duration of one year as from October 6, 1967, to find for him a purchaser for the said property at the sum of £30,000. By clause 5 of the contract it was agreed that in the event of such sale the agent (appellant) would be entitled to a commission at the rate of 5% on the sale price.

During the currency of the aforesaid sole authority, namely on July 13, 1968, the respondent-owner, acting in breach of clause 7 of the contract (*infra*), sold the property himself directly to Pharos Agencies Ltd. for £20,500. On being informed by the respondent about the said sale, the appellant demanded payment of £1,025 being agreed commission at the rate of 5% on the said amount of £20,500 ; that claim on the part of the appellant was based on clause 7 of the contract, the full text of which clause reads as follows :

“ 7. The owner-principal on the other hand undertakes that during the aforesaid mandate he will not come into contract with prospective purchasers of the said property, considering that it is an exclusive mandate to the ‘ agent ’. In case, however, the property, in breach of this clause, is sold either directly by the ‘ owner-principal ’ or through a third person, the whole of the commission on the pur-

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chase price as hereinabove fixed (*viz.* at the rate of 5% on the actual price) becomes payable by the owner-principal as in paragraph 5 hereof.”

On September 19, 1968, the respondent paid to the appellant £600 claiming that this was sufficient amount to compensate him for the breach of the contract on his (respondent's) part, whereas the appellant accepted this sum on account of his claim for £1,025 being agreed commission at the rate of 5% as aforesaid alleged to be due to him under clause 7 of the contract (*supra*); and the appellant claimed the balance £425.

Eventually the appellant instituted his action claiming the sum of £400 being the balance of agreed commission etc., or, in the alternative, the said sum as agreed or reasonable compensation for the breach of the contract entered into on October 6, 1967, between the parties. The District Court held that the appellant-plaintiff on the true construction of clause 7 of the contract (*supra*) is not entitled to a commission but only to just compensation in accordance with the rule in section 74 of the Contract Law, Cap. 149 (*supra*); and applying that section, the trial Court assessed the just compensation to £650 and, as the respondent-defendant had already paid £600 before the institution of the action, it gave judgment for the plaintiff (appellant) for the balance *i.e.* £50.

It is against this judgment that the plaintiff took this appeal.

The Supreme Court, dismissing the appeal:—

*Held*, (1). The whole case turns on the construction of clause 7 of the contract sued on (*supra*). The question that arises for consideration is (a) whether a direct sale of the property by the owner during the currency of the exclusive authority to sell given to the agent (appellant) is an event provided for in the contract, the happening of which entitled the agent to his commission, or, (b) a breach of contract which only entitles the agent to such reasonable compensation, not exceeding the amount specified in the said clause, the exact amount being calculated on the basis that the commission would have been calculated under clause 5 of the contract, *i.e.* 5% on the actual sale price.

(2) (a) We have come to the conclusion that the present case is one of breach of the contract, entered into between the parties on October 6, 1967, committed by the respondent

during the validity of the exclusive authority given to the appellant. This brings this case within the ambit of clause 7 of the contract (*supra*) (*Kokkinomilos v. Kalisperas* (1967) 1 C.L.R. 276, *distinguished*).

(b) As we have stated above, the present case turns on the true construction and true meaning and effect of clause 7 (*supra*). This brings the case within the four corners of the case *Kalisperas v. Papadopoulos supra* with the reasoning of which we are in full agreement. Very rightly, therefore, the trial Court proceeded to assess the damages under section 74 of the Contract Law, Cap. 149 (*supra*), as interpreted in the case of *Christodoulos Tseriotis v. Chryssi Christodoulou and Another*, 19 C.L.R. 216.

(3) (a) Before concluding we would like to refer to one more point. In *Bowstead on Agency*, at p. 198 it is stated :

“ Some agency contracts may, however, expressly prohibit the principal from selling other than through the agent during the period of the sole agency or, provision may be made that commission must, nevertheless, be paid to the agent if the principal sells the property himself.”

With regard to the last part of this passage, reference is made to the case of *Tredinnick v. Browne* [1921] cited in *Bentall, Horsley and Baldry v. Vicary* [1931] 1 K.B. 253, at p. 260, *per* McCardie J. (see this passage *post* in the judgment of the Court).

(b) We are of the view that the facts of the present case should be distinguished from the facts of the *Tredinnick* case (*supra*), as the wording of clause 7 (*supra*) is clear and unambiguous in the sense of prohibiting the seller from coming into contact with any prospective purchasers during the duration of the sole agency and refers also to the case when in breach of the said term the property would be sold directly to a third person by the owner. Clause 7 (see *supra*) is so phrased that it leaves no room for such interpretation as to render the principle in the *Tredinnick's* case (*supra*) applicable.

(4) Therefore, on the true construction of the meaning and effect of clause 7 and in the light of the interpretation given to it by this Court in the *Kalisperas v. Papadopoulos* case (*supra*) and fully adopted by us, the appeal is dismissed with costs.

*Appeal dismissed with costs.*

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Cases referred to :

*Kokkinomilos v. Kalisperas* (1967) 1 C.L.R. 276 ;  
*Kalisperas v. Papadopoulos* (1969) 1 C.L.R. 480 ;  
*Midgley Estates Ltd. v. Hand* [1952] 1 All E.R. 1394 ;  
*Luxor (Eastbourne), Ltd. v. Cooper* [1941] A.C. 108 ;  
*E. P. Nelson and Co. v. Rolfe* [1950] 1 K.B. 139 ;  
*Tredinnick v. Browne* [1921] unreported, cited in *Bentall* ;  
*Bentall, Horsley and Baldry v. Vicary* [1931] 1 K.B. 253, at 260 ;  
*Christodoulos Tseriotis v. Chryssi Christodoulou*, 19 C.L.R. 216.

### Appeal.

Appeal by plaintiff against the judgment of the District Court of Nicosia (Stylianides, D.J.) dated the 21st March, 1970, (Action No. 4645/68) by virtue of which the defendant was adjudged to pay to the plaintiff the sum of £50 as damages for breach of contract.

*G. Ladas*, for the appellant.

*D. Papachrysostomou*, for the respondent.

*Cur. adv. vult.*

STAVRINIDES, J. : The judgment of the Court will be delivered by Mr. Justice A. Loizou.

A. LOIZOU, J. : In this case the plaintiff claimed the payment of £400 being the balance of agreed commission for the sale of immovable property or, in the alternative, the said sum as agreed and/or reasonable compensation for the breach of the contract entered into between the parties on the 6th October, 1967. The District Court of Nicosia assessed the compensation to which the plaintiff was entitled at £650, but as the defendant had paid before the institution of the action the sum of £600, it gave judgment for the plaintiff for £50 with no order as to costs.

The plaintiff appeals from the said judgment on the following grounds :

“(1) The learned trial Judge erroneously decided that the *Kokkinomilos v. Kalisperas* case (1967) 1 C.L.R. 276 does not apply in this case ;

(2) the learned trial Judge erroneously found as fact that the person who eventually bought the said

property was not brought into contact with the property and therefore with the respondent ; and

(3) the learned trial Judge erroneously decided that appellant was entitled to damages only and not to earn his commission as agreed by the contract of agency, *Exhibit 1.*"

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The facts of the present case as appearing from the judgment of the trial Court are as follows : The plaintiff is an estate agent in Nicosia and the defendant at the material time was the owner of immovable property, to wit a ground floor house and field, situate at Karavas, in the Kyrenia District. By a written agreement, *Exhibit 1*, the defendant gave to the plaintiff exclusive authority to find for him a purchaser for the said property at the sum of £30,000. We shall be referring, in due course, to the terms of the said contract and particularly clause 7, regarding its true meaning and effect.

The duration of this exclusive authority was one year, *i.e.* from the 6th October, 1967, to the 6th October, 1968. After the lapse of this period the defendant would be entitled to terminate the contract by a thirty days' written notice to the agent. With the signing of the said contract the plaintiff proceeded to try to secure prospective purchasers and to that end he advertised in the *London Estates Gazette*, placed posters on the property, issued leaflets, advertised the sale in the news sheet 'Ktimatiki' which is published by him, and introduced the property to certain persons and companies. The prospective purchasers were offering around £20,000 with the exception of a Cypriot from London who offered £22,000. The defendant turned down these offers. He was not informed, however, by the plaintiff of the names of any of the prospective purchasers.

The defendant on the 13th July, 1968, sold the property himself to Pharos Agencies, Ltd., for £20,500. The defendant informed about it the plaintiff, who thereupon demanded payment of commission at the rate of 5%. The defendant paid to the plaintiff on the 19th September, 1968, £600, claiming that this was sufficient amount to compensate the plaintiff for the breach of the contract, whereas the plaintiff received this on account of his claim for commission and some time later the action was instituted.

The trial Court further found "from the pleadings and the evidence before me that the said transaction, *i.e.* the sale of the property in question, in respect of which

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the claim was made, was not the result of the agency.” This finding of fact was reasonably open to the trial Court to make for the following reasons: P.W. 1 Medhon HjiAntoniou, the Director of the Nicosia office of the plaintiff, stated that a certain Mr. Keheyian offered to the office to buy the said property for £20,000 in October, and November, 1967, and the defendant was informed of this offer, but it was turned down as being too low. Mr. Keheyian is the Managing Director of Pharos Agencies, Ltd., the ultimate purchasers of the property, but in cross-examination the said witness stated that the defendant sold the property in question directly to Pharos Agencies, Ltd., explaining that the office introduced this property to that purchaser but did not introduce the purchaser to the defendant. Furthermore, by paragraph 6 of the statement of claim the plaintiff alleged that the defendant sold directly the said property to Pharos Agencies, Ltd. There is no allegation in the pleadings that the said purchaser was introduced to the property or to the defendant seller by him.

We consider it pertinent to set out verbatim here clause 7 of *exhibit* 1. It reads:

«Ο ἰδιοκτῆτης-ἐντολεὺς ἀφ’ ἐτέρου ἀναλαμβάνει ὅπως διαρκούσης τῆς ὡς ἄνω ἐντολῆς μὴ ἔλθῃ εἰς ἐπαφὴν μὲ ὑποψηφίους ἀγοραστὰς τοῦ ἀνωτέρω κτήματος, δεδομένου ὅτι εἶναι ἀποκλειστικὴ ἡ ἐντολὴ εἰς τὸν ἐντολοδόχον-μεσολαβητὴν. Εἰς περιπτώσιν δὲ καθ’ ἣν κατὰ παράβασιν τοῦ παρόντος ὄρου, τὸ κτῆμα ἤθελε πωληθῆ εἴτε ἀπ’ εὐθείας ὑπὸ τοῦ ἰδιοκτῆτου-ἐντολέως εἴτε μέσῳ τρίτου προσώπου, ὀλόκληρος ἡ προμήθεια ἐπὶ τοῦ ὡς ἄνω καθοριζομένου τιμήματος καθίσταται πληρωτέα ὑπὸ τοῦ ἰδιοκτῆτου-ἐντολέως ὡς ἐν τῇ παραγράφῳ 5 ἀνωτέρω.»

“(The ‘owner-principal’ on the other hand undertakes that during the aforesaid mandate he will not come into contact with prospective purchasers of the said property, considering that it is an exclusive mandate to the ‘agent’. In case, however, the property, in breach of this clause, is sold either directly by the ‘owner-principal’ or through a third person, the whole of the commission on the purchase price as hereinabove fixed becomes payable by the ‘owner-principal’ as in paragraph 5 hereof.”

The whole case turns on the construction of this clause. The question that arises for consideration is (a) whether a direct sale of the property by the owner during the validity of the exclusive authority to sell given to the agent

is an event provided for in the contract, the happening of which entitles the agent to his commission, or, (b) a breach of contract that entitles the agent to such reasonable compensation, not exceeding the amount specified in the said clause, the exact amount being calculated on the basis that the commission would have been calculated under clause 5 of the contract, *i.e.* 5% on the actual sale price?

It was in favour of the question under (a) above that learned counsel argued this appeal.

On ground 1 his argument was that the decision in *Kokkinomilos v. Kalisperas* (*supra*) was applicable in the present case, as the difference between the facts of that case and those of the present one is not such as to render the principle therein decided inapplicable. The purchaser in the *Kokkinomilos* case (*supra*) was brought into contact with the seller by the agent during the period of the existence of the contract. The Court, therefore, should not distinguish between such introduction brought about by the agent and a breach of the contract committed by the sale of the property by the owner-seller during the mandate.

On ground 2, he said that if this Court found that the *Kokkinomilos* case did not apply, then there was no point in pursuing it further.

On ground 3 of the appeal learned counsel very fairly conceded that the decision of this Court in *Kalisperas v. Papadopoulos* (1969) 1 C.L.R. 480, is against his client's case and invited us to overrule this decision, on the ground that an agent is entitled to earn his commission on the happening of an event which is specifically mentioned in the contract and to rule that a breach of contract contrary to clause 7 is such an event entitling the plaintiff-appellant to his full commission and not merely to compensation or damages, as clause 7 was expressed in such clear and unambiguous language that there was no room for any other meaning being given to it. In support of this argument he referred us to *Bowstead on Agency*, 13th edition, p. 182, Article 70. He referred us also to *Midgley Estates Ltd. v. Hand* [1952] 1 All E.R. p. 1394. We may say here that the aforesaid case is not one of breach by the owner selling the property himself but one of refusal to sell to (complete with) a purchaser introduced by the agent. This case together with two other cases, *Luxor (Eastbourne), Ltd. v. Cooper* [1941] A.C. 108, and *E.F. Nelson & Co. v. Rolfe* [1950] 1 K.B. 139, were in fact relied upon by the learned counsel in arguing the appeal in the *Papadopoulos* case (*supra*).



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We have considered the able argument of learned counsel for the appellant and we have come to the conclusion that the present case is one of a breach of the contract, *exhibit 1*, committed by the respondent during the existence of the period of the exclusive authority given to the appellant. This brings this case within the ambit of clause 7 of *Exhibit 1*. In the *Kokkinomilos* case the issue was definitely a different one. Josephides, J. in delivering the judgment of the Court at pp. 279-280 said :

“ There is no doubt in our mind that, apart from the letter of the 26th August, 1965, the respondent would be entitled to receive his commission under the express provisions of the contract because the sale was effected in March, 1966, prior to the 25th July, 1966, to a person who was brought into contact with the appellant by the respondent. The only question which we have to consider, therefore, is whether the terms of the letter of the 26th August, 1965, alter this position. In brief, this appeal turns on the construction of this letter ..... ”

We have already commented on the findings of the trial Court and particularly the finding that the sale of the property in question in respect of which the claim is made was not the result of the agency. We have, therefore, reached the conclusion that the *Kokkinomilos* case was rightly distinguished by the trial Court from the present case and held not to be applicable.

The present case turns on the construction and true meaning and effect of clause 7. This brings it within the four corners of the *Papadopoulos* case (*supra*) where Vasiliades, P. in delivering the judgment of the Court had this to say at pp. 486-487 :

“ Clause 7 of the contract between the parties herein, can only be construed as providing for damages payable to the agent by the client in case of the breach therein described. Reading clause 7 of this contract in its context we can have no doubt that this is what the parties intended ; and that this is its true meaning and effect, as decided by the District Court. The agent is only entitled to damages for the breach of the contract by the client in contacting directly, during the validity of the contract, the prospective buyer ; and in eventually selling the property in contravention of the contract.”

Very rightly therefore the Court proceeded to assess the damages under section 74 of our Contract Law, Cap. 149, as interpreted in the case of *Christodoulos Nicola Tseriotis v. Chryssi Christodoulou and Another*, 19 C.L.R. p. 216. Before concluding, however, and as we have been asked to overrule the said decision, with the reasoning of which we are in full agreement, we would like to refer to one more point. In Bowstead on Agency at p. 198 it is stated :

“Some agency contracts may, however, expressly prohibit the principal from selling other than through the agent during the period of the sole agency, or, provision may be made that commission must, nevertheless, be paid to the agent if the principal sells the property himself.”

With regard to the last part of this passage, reference is made to the case of *Tredinnick v. Browne* [1921] cited in *Bentall, Horsley & Baldry v. Vicary* [1931] 1 K.B. 253, 260. McCardie J. reading his judgment referred to *Tredinnick* case at p. 260 of the report :

“(c) *Tredinnick v. Browne* [1921] unreported, heard before Swift J. of which case a shorthand note has been supplied to me. I have read the whole of it. The action was by an estate agent for commission. There had been much correspondence between the plaintiff and the defendant who owned the property and it was necessary for the Court to construe various letters and various interviews between the parties. In substance, the learned Judge found the actual contract to be that the plaintiff should not only be appointed sole agent for the sale of the property but also that he should receive a commission whether he introduced the purchaser or not. The keynote of the case appears where Swift J. said : ‘If two men, A. & B., like to make a bargain that A. shall pay B. £500 if A.’s estate is sold whether B. has anything to do with the selling of it or not, then, if the estate is sold, A. must pay.’ If I may respectfully say so, I agree with the actual decision of Swift J. in the plaintiff’s favour in that case because the bargain between the parties was of a special character. It was quite different from the contract before me in the present case.”

We are of the view that the facts of this case should be distinguished from the facts of that case as the wording

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of clause 7 is clear and unambiguous in the sense of prohibiting the seller from coming into contact with any prospective purchaser during the duration of the contract and refers also to the case when in breach of the said term the property was sold directly to a third person by the owner. Clause 7 is so phrased that it leaves no room for such interpretation as to render the principle in *Tredinnick's* case applicable. Therefore, on the true construction of the meaning and effect of clause 7 and in the light of the interpretation given to it by this Court in the *Papadopoulos* case and fully adopted by us, the appeal is dismissed with costs.

*Appeal dismissed with costs.*