BOOTS v. E. CHRISTOPHER & CO., (1951) 2 ALL E.R. 1045

ESTATE AGENT – COMMISSION ON COMPLETION OF CONTRACT – DEFAULT OF PURCHASER – FAILURE OF VENDOR TO CLAIM SPECIFIC PERFORMANCE OR DAMAGES

The English Court of Appeal in this recent case was once again called upon to construe a real estate agency contract to determine whether the agent was entitled to his commission.

The plaintiff instructed the defendants, a firm of estate agents, to find a purchaser of his business, and it was agreed that only in the event of the defendants finding the plaintiff a purchaser able and willing to purchase at the price of £2500, or at such lower figure as might be accepted by the plaintiff, the defendants' commission "would be at the rate of five per cent, of the total purchase price obtained." A potential purchaser, able and willing to purchase the business, was duly introduced by the defendants, a written contract was entered into between the plaintiff and the purchaser and a deposit was paid to the defendants. The purchaser subsequently repudiated the contract and authorized the defendants to pay the deposit to the plaintiff, who accepted it, but failed to seek specific performance of the contract, or damages for its breach. The defendants claimed to be entitled to deduct from the deposit the full amount of their commission. The plaintiff, claiming the return of the deposit, failed at first instance; however this judgment was reversed on appeal.

The Court of Appeal was of the opinion that there was a contract arising out of two letters written by the defendants to the plaintiff, holding that the second letter constituted the contractual document. The key words in the second letter which the Court had to interpret are set out in the statement of facts viz. "....of the total purchase price obtained." Counsel for the defendants contended that the word "obtained" merely meant the purchase price as obtained by the agent as the figure contracted to be paid. However the Court of Appeal interpreted the word to mean the purchase price as obtained, or received, on completion. Having thus contrued the vital term of the contract, it is clear that the defendants could not succeed unless they could establish that the non-receipt of the purchase money was due to some wrongful act of the plaintiff.

The trial Judge held that the plaintiff was at fault in failing to bring an action for specific performance or damages, thus depriving the defendants of their commission. The Court of Appeal, however, applied the dictum of Denning L.J. in the case of Dennis Reed, Ltd. v. Goody, (1950) 1 ALL E.R. 919, in which he said that the vendor was not bound to bring an action for specific performance or damages simply to enable the agent to earn his commission; he was entitled to merely accept the deposit, as had been held in Beningfield v. Kynaston (1887) 3 T.L.R. 122, 279.

The judgment of Denning L.J. is of particular interest because in it he suggests the possibility of an estate agent succeeding in a case such as the present, notwithstanding the rigid rule of construction in contracts of this kind which has been followed by the Court of Appeal. He points out that in an action for specific perfomance or damages by the vendor, the purchaser would complete, but under compulsion. Since the purchaser could not properly be said to be "willing" to complete, a claim for commission would not be recoverable on the contract as such. But he does say, and these words are important, "It would, however, be recoverable in an action for restitution, or, if you please, on an implied contract." Where to only a portion of the damages are recovered, or the purchaser forfeits the deposit, it is clear that no claim for commission can be made on the contract as such, however Denning L.J. suggests that the vendor should pay a reasonable remuneration in an action for restitution, which may be a good deal less than the commission. Under his reasoning, an estate agent claiming for a reasonable remuneration, rather than a commission on the full purchase price, may well succeed.

The words of Denning L.J. are, of course, only obiter, and one cannot foretell what weight, if any, will be given them in subsequent decisions. They do, however, represent a novel and refreshing approach to the matter, and, if accepted would tend to ameliorate the effect of a rule of construction of contracts of this type, which, the writer feels, has become too stringent as against the agent.

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