BENNETT, WALDEN & CO. v. WOOD (1950) 2 A.E.R. 134

This is the latest in a series of cases in which the English Court of Appeal has had to interpret real estate agency contracts in order to determine whether the agent has earned his commission.

The plaintiffs, a firm of estate agents, wrote to the defendant: "We thank you for your instructions.... to act as your agents in the sale of (your) property, and beg to confirm that in the event of our securing for you an offer....our commission will be...." The plaintiffs in due course introduced a potential purchaser who offered to purchase "subject to contract," and paid a deposit. The defendant accepted this offer, but did not complete the transaction. The plaintiffs sued for their commission and succeeded at first instance; however this judgment was reversed on appeal.

The plaintiffs based their case on the letter, which, they contended, constituted the terms of the agency, and on what they had in fact done. The case, therefore, turned on the construction of the letter, and, in particular, on the words "securing for you an offer." In interpreting these words, the Court applied the dictum of Lord Russell of Killowen in Luxor (Eastbourne), Ltd. v. Cooper (1941) 1 A. E. R. 47: "It is possible that an owner may be willing to bind himself to pay a commission for the mere introduction of one who offers to purchase at the specified or minimum price, but such a construction of the contract would, in my opinion, require clear and unequivocal language."

The defendant had bound himself to pay a commission on the plaintiffs securing an offer. The plaintiffs had secured an offer "subject to contract." Now, under well established rules, an offer "subject to contract" is very different in effect from a "firm" offer; the former is not susceptible of being transformed into a contract by acceptance; the latter is. The term "offer" in the contract thus was not "clear and unequivocal," and so, in line with Lord Russell's dictum, was interpreted in favour of the defendant as meaning "firm" offer. Therefore the plaintiffs had not done what they had contracted to do; they had not procured an offer. It followed they were not entitled to be paid for their services.

In Luxor Ltd. v. Cooper (supra), Lord Russell also said: "No general rule can be laid down by which the rights of the agent or the liabilities 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." This is no doubt true, but in the light of the cases of which this case is the most recent, it is clear that the Court of Appeal, recognizing the relative inexperience of the ordinary vendor, and the high degree of skill and wide range of knowledge in these matters of the average broker, have tended to construe real estate agency contracts very strictly as against the agent.

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