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IN RE PADBURY.

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O'Connor J.

the will, but that hospitals privately managed and maintained, whether subsidised by government subscription or not, the funds of which are managed by trustees in the sense I have explained, and public hospitals of the first and second classes, are the hospitals within the meaning of the devise.

Appeal allowed. Order appealed from varied.

Solicitors, for the appellants, *Parker & Parker.*

Solicitor, for the respondent, *Solicitor-General for Western Australia.*

[HIGH COURT OF AUSTRALIA.]

MACNAMARA . . . . . APPELLANT;
PLAINTIFF.

AND

MARTIN . . . . . RESPONDENT
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, Dec. 16, 17, 18.

Griffith C.J., Barton, Isaacs and Higgins JJ.

Principal and agent — Agent employed to find purchaser — Right of agent to remuneration — Commission or quantum meruit — Misconduct of agent after revocation of authority — Agent acting contrary to instructions.

Practice — Appeal — Application for new trial — Parties bound by course of trial — Appeal involving small amount — Costs.

If an agent employed on commission to find a purchaser for a property succeeds in introducing to the vendor a *bonâ fide* purchaser ready and willing

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to enter into a contract of sale on the terms proposed, he is entitled to remuneration for his services, either the commission agreed upon if the sale takes place, or a *quantum meruit* if no sale results; and anything that he may do subsequently to the prejudice of his principal, though it may expose him to an action for damages will not disentitle him to the remuneration already earned.

A hotelkeeper employed an agent for a commission of £50 to find a purchaser for the goodwill and lease of his hotel on certain terms. The agent introduced a person ready and willing to purchase on the terms proposed. The vendor, intending not to accept the purchaser, instructed the agent to do nothing in the matter until he received further instructions, and later gave the agent new instructions embodying fresh terms of sale, and directed him to have no further dealing with the purchaser in question. The agent, after receiving those instructions, induced the purchaser to sign a contract of sale on the original terms, and signed it himself as agent for the vendor. The vendor refused to pay commission on the ground that the agent had acted in disobedience of his instructions. The agent sued the vendor and recovered a verdict for the full amount of the commision. At the trial the Judge directed the jury that, if they thought that the plaintiff had found a purchaser ready and willing to buy, they should find a verdict for the amount claimed.

Held, that the agent before the revocation of his authority had carried out his contract, and was therefore entitled to such remuneration as the jury thought his services were worth up to the full amount of £50, or to damages for having been prevented from earning his commission, and that the jury should have been so directed, but that, as the whole contest at the trial on both sides had been whether the agent was entitled to the whole £50 or nothing, the defendant was not entitled to a new trial on the ground of misdirection.

Quære, whether it would have been an answer to the agent's claim for commission that the vendor objected on reasonable grounds to the proposed purchaser as not being a fit and proper person to become the tenant of a hotel.

In allowing an appeal which involved an important principle of law the Court ordered the respondent to pay the costs, although special leave to appeal had been granted on the appellant undertaking, in view of the smallness of the amount involved, to abide by any order that the Court might make as to costs.

Decision of the Supreme Court: (*Macnamara* v. *Martin*, (1908) 8 S.R. (N.S.W.), 92), reversed.

APPEAL from a decision of the Supreme Court of New South Wales setting aside a verdict for the plaintiff in a District Court action and ordering that a nonsuit be entered.

The respondent, a hotelkeeper in a country town, employed the

appellant, a commission agent, to find a purchaser for his hotel on certain terms for a commission of £50. The appellant, on 15th April 1907, introduced to the respondent a Mrs. Daniels, who was a solvent person, ready and willing to enter into a contract of sale on the terms offered. On 17th April the respondent sent to the appellant a telegram in the following terms :—"Do nothing further *re* hotel until you hear from me." The appellant acknowledged receipt of the telegram and subsequently, on 20th April, sent a telegram to respondent, in which he stated that the hotel was under offer to Mrs. Daniels for a fortnight. The respondent replied that he did not wish to deal with Mrs. Daniels and instructed the appellant to put her off. At the same time he instructed him to ask for a higher price and increased the commission to £60. The appellant wrote to the respondent endeavouring to persuade him to allow the transaction to go through with Mrs. Daniels on the original terms, but the respondent refused to deal with her at all. However, on 22nd April the appellant drew up a memorandum of agreement purporting to be made between the respondent and Mrs. Daniels for the sale of the hotel upon the original terms, induced Mrs. Daniels to sign it, and signed it himself for the respondent. He also obtained a cheque from Mrs. Daniels as a deposit on account of purchase money. He then claimed his commission. The respondent refused to pay, and the appellant brought an action in the District Court claiming £50 commission, and recovered a verdict for that amount. The particulars of the appellant's claim and the points raised at the hearing are sufficiently stated in the judgments hereunder. The respondent moved the Supreme Court for an order setting aside the verdict and entering a nonsuit, and that Court made the order asked : *Macnamara* v. *Martin* (1).

From that decision the present appeal was brought by special leave, the leave having been granted subject to an undertaking by the appellant to abide by any decision the Court might make as to costs.

Gordon K.C. (*Brissenden* with him), for the appellant. The appellant before revocation of the authority had done all that the

(1) (1908) 8 S.R. (N.S.W.), 92.

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contract required of him, and was absolutely entitled to be paid for his services. All that he had to do was to find a person ready and willing to purchase the hotel at the price stated. Nothing that the principal or agent may do after the right to remuneration has accrued can disentitle the agent to be paid. As there was no sale it may be that the agent was not entitled to commission as such, but to a *quantum meruit*, but under the circumstances the *quantum meruit* would be practically the full amount. The jury were entitled to find a verdict for any sum up to £50, and at the trial the whole contest was whether the appellant was entitled to anything; it was conceded that if he was entitled to anything he was entitled to the full amount. Even if there was misconduct on the part of the appellant, it was after the introduction had been effected, and in fact after revocation of the authority. Misconduct on the part of an agent such as will disentitle him to his commission must be committed in the course of the agency, in doing the work for which remuneration is claimed. Unless that is the case the right to remuneration is unassailable, though there may be a right of action by the vendor against the agent if the misconduct has caused damage to him. [He referred to *Andrews* v. *Ramsay & Co.* (1); *Nitedals Taendstikfabrik* v. *Bruster* (2); *Roberts* v. *Barnard* (3).]

[ISAACS J. referred to *Hippisley* v. *Knee Bros.* (4).]

It may be conceded that the person introduced by the agent must be a *bonâ fide* purchaser, not a mere person of straw. But it is always a question for the jury whether the purchaser is a *bonâ fide* purchaser, ready and willing to buy, and whether the agent has taken reasonable steps to obtain a purchaser to whom no valid objection can be made by the vendor. [He referred to *Heys* v. *Tindall* (5).]

[GRIFFITH C.J.—You contend that there was an implied promise by the vendor that he would not capriciously reject a tenant, on much the same principle as in the case of a covenant in a lease not to assign without licence, there is an implied promise by the lessor not to capriciously refuse licence.]

(1) (1903) 2 K.B., 635.
(2) (1906) 2 Ch., 671.
(3) 1 Cab. & El., 336.
(4) (1905) 1 K.B., 1.
(5) 1 B. & S., 296.

Sheridan and *F. A. A. Russell*, for the respondent. The nonsuit entered by the Full Court may be supported on any ground that was open to the defendant on the motion for a nonsuit at the hearing, even though the ground was not argued before the Full Court: *Harris* v. *Sydney Glass and Tile Co.* (1). It is not contended that the agent disentitled himself to commission after he had earned it, but that under the circumstances of this case the negotiations were still open at the time of the agent's misconduct. The agent's authority was to find a purchaser, not to enter into a contract on behalf of the vendor. That authority was not revoked by the letter of 17th April, so that the agency continued up to the 20th, when the misconduct took place. The agent's hands were tied, so that the attempt to bind his principal was contrary to express instructions. An agent is bound to act in the interests of his employer, at the risk of disentitling himself to his commission. The appellant by his conduct exposed his principal to the risk of a law suit. That was inconsistent with his duty as agent and was done in the course of the agency. He is not now entitled to deny that he assumed to act as the respondent's agent when he made the contract.

Again, Mrs. Daniels did not become a purchaser within the meaning of the contract during the continuance of the agent's authority to deal with her. That is merely a question of fact. There was no evidence that the appellant had done what he was employed to do. Mrs. Daniels came to the hotel merely to inspect; that was no evidence that she was ready to purchase at any time before the revocation. An agent takes his chance of success as a condition of his right to commission. The contract was for £50 commission if a purchaser was introduced. [They referred to *Simpson* v. *Lamb* (2); *Prickett* v. *Badger* (3).

[ISAACS J. referred to *Rosenbaum* v. *Belson* (4).]

The jury were wrongly directed. The effect of the Judge's direction was that the plaintiff was entitled to the amount claimed provided that the purchaser was a *bonâ fide* purchaser. But the real question was, assuming that there was a revocation of authority, What was the value of the plaintiff's services?

(1) 2 C.L.R., 227.
(2) 17 C.B., 603; 25 L.J.C.P., 113.
(3) 1 C.B.N.S., 296; 26 L.J.C.P., 33.
(4) (1900) 2 Ch., 267.

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[GRIFFITH C.J.—But if you did not ask for that direction you cannot complain.

HIGGINS J.—The actual direction was rather too favourable to you, because it may be that the plaintiff was entitled to recover even if no contract was made.]

The defences raised put the plaintiff to the proof of the work done. He was bound to give all his evidence on both counts. There is no evidence on which to base a *quantum meruit*, and he clearly did not earn the commission. The jury should have been directed to consider the question whether the defendant was not entitled under the circumstances to reject the purchaser as unsatisfactory, not being a suitable tenant for a hotel. Every agent must be taken to know that the personality, as well as the financial strength, of a purchaser is very material in such a case. One question for the jury was, therefore, whether the defendant *bonâ fide* and on reasonable grounds objected to the purchaser as unsuitable. There is an implication in the contract with the agent that the purchaser shall be acceptable to the vendor. [They referred to *The Moorcock* (1).] The Judge refused to so direct the jury.

Special leave having been granted on terms as to costs, the appellant should be ordered to pay the costs of both parties even if the appeal is allowed. The amount involved is very small in proportion to the appealable amount. There is no point of great general importance in the case. None but the immediate parties have an interest in the decision. [They referred to *Forget* v. *Ostigny* (2).]

[GRIFFITH C.J.—It is a matter in the discretion of the Court in each case. On its own undertaking the Crown very often is ordered to pay all the costs of an appeal when successful, but it does not follow that the same rule should apply in a case between private persons.]

December 18.

GRIFFITH C.J. This was an action brought in a District Court by the appellant to recover commission upon a contract under which the defendant employed him to find a purchaser for a licensed hotel. The purchaser was in fact to be a tenant. The

(1) 14 P.D., 64, at p. 68.

(2) (1895) A.C., 318.

plaintiff entered upon the work, and after a short time introduced to the defendant a Mrs. Daniels who was financially competent, and against whom it appears nothing is known. At that period of the negotiations the defendant seems to have changed his mind. He told the plaintiff to go no further in the matter, and later on gave him an entirely new set of instructions. To give instructions entirely inconsistent with the original contract is clearly a revocation of the original authority. The plaintiff claims that under these circumstances he has earned something, either the whole £50 according to the contract, or something by way of *quantum meruit* for services rendered, or that he is entitled to something in the nature of damages for not having been allowed to carry out the contract and earn the commission. The particulars of the action in the District Court were in the form of a claim for commission under the special contract, and a claim under the common count of *indebitatus assumpsit*. The plaintiff obtained a verdict for £50. On appeal to the Supreme Court that verdict was set aside on the ground that after revocation of the authority the agent had done something inconsistent with his duty to the defendant. Now the act alleged to be inconsistent with his duty to the defendant was this, that being under the impression that the defendant was not behaving fairly to Mrs. Daniels, who had been introduced by him to the defendant, he tried to persuade the defendant to take a different view, and then, having failed in that, drew up a document in the form of an agreement between himself as agent for the defendant and got Mrs. Daniels to sign it. The plaintiff had no authority to make such a contract on behalf of the defendant, and the document was therefore not binding upon the defendant, though it might perhaps have been binding upon Mrs. Daniels if the defendant had adopted it. That is the alleged misconduct. But it had no detrimental effect upon the defendant so far as we know. If it was a breach of any legal duty, and the defendant suffered damage, he was entitled to recover that damage from the plaintiff in some form of proceeding. But damage would be a necessary part of the cause of action. It is not, however, suggested that any harm was caused to anybody by it. The learned Judges of the Supreme Court were of opinion that it was misconduct by

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the agent in the course of the agency disentitling him to recover money he had already earned. The learned counsel for the respondent did not attempt to support that position here: it is not necessary therefore to say anything more about it than that where a man has earned a remuneration his right to receive it can only be taken away by something in the nature of payment, accord and satisfaction, or release. But the learned counsel for the respondent has set up some other grounds, some of which were open to him, and some were not. I will deal first with the alleged ground of misdirection. The learned Judge told the jury, in effect, that if they found that the plaintiff *bonâ fide* entered into a contract with a *bonâ fide* purchaser, and that purchaser was ready and willing to carry out the contract, then they should come to the conclusion that the plaintiff had done all that he contracted to do, and if they believed that, then the plaintiff was entitled to the £50 mentioned in the contract. That was not strictly correct. The plaintiff was not necessarily entitled to the whole £50, but to a verdict for a sum the amount of which might be what the jury might think his services were worth, not exceeding £50. But it was conceded between the parties at the trial that the plaintiff was really entitled to £50 or nothing. So there is nothing in that point. Another objection to the form of the direction was that the jury might have been led to think that the plaintiff's right to recover depended upon his getting the contract signed. It is clear that that is not so. His rights do not depend upon that. He earned his remuneration if he found a *bonâ fide* purchaser irrespective of the signing of the contract. But any error in that statement objected to is rather in favour of the defendant than the plaintiff. That, therefore, is not a ground for reversing the judgment. The third point made was that his Honor refused to direct the jury that if they found that the defendant *bonâ fide* objected to Mrs. Daniels as a tenant the plaintiff could not recover. Now that ground assumes that upon a contract of that sort no remuneration is payable unless the principal actually enters into a contract with the person introduced. But that is not the meaning of the contract. The defendant sought to show that there was a *bonâ fide* objection, and failed, so that the point is not now material. It was sought to

sustain the same point upon a somewhat different ground, putting a different meaning on the words *bonâ fide*, that is, that if the defendant had an objection, based upon reasonable grounds, to the tenant as not being a fit and proper person to be given a lease of the hotel, that was an answer to the plaintiff's claim. Possibly it might be. But no such question was raised at the trial. That, therefore, is out of the way. All the objections taken by the defendant to the judgment of the District Court fail, and in my opinion the appeal ought to have been dismissed.

We granted special leave to appeal from the decision of the Supreme Court, because, it was suggested, the opinion pronounced by the Supreme Court, that a man who has earned money for services rendered is, nevertheless, disentitled to receive it if he afterwards does something inconsistent with his duty, might lead to confusion in the administration of justice in the inferior Courts. I may add that for my part I do not see that there was any misconduct on the part of the appellant in this case which could have that effect even if the doctrine were sound. It was suggested that he was guilty of misconduct in endeavouring to persuade his principal to do what he considered a "fair thing" by the purchaser. That was very properly not pressed before us. In my opinion, therefore, the appeal should be allowed and the judgment in the District Court restored.

BARTON J. I am of the same opinion.

ISAACS J. I think, too, that the appeal should be allowed. The claim was made in the alternative, first, on an express contract to find a purchaser for a commission of £50, and, secondly, under an indebitatus count for £50 for work done, &c. Now the defence raised at the trial was this: non assumpsit, and denial that plaintiff did the work, that the property was put into plaintiff's hands on certain terms and that plaintiff did not conduct the business properly, and did not get a purchaser who could carry out the contract, and in fact, that there was fraud on the part of the plaintiff. The learned Judge in his report to the Supreme Court said:—"The whole contest between the parties was, as far as I could judge from the evidence and the manner in which the

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case was fought on both sides, whether the plaintiff was entitled to £50 or nothing." So no question was raised as to the amount the plaintiff was entitled to on the basis of a *quantum meruit*. The learned Judge proceeds:—"The defendant's case is that plaintiff's claim was based on fraud and therefore plaintiff could not recover anything. Plaintiff claimed that he acted honestly throughout and was therefore entitled to the £50 mentioned in the agreement." Now there is nothing better established with respect to procedure than this, that with regard to the facts parties are bound by the way they fight the case at the trial, and the issue there fought was whether the plaintiff had misconducted himself by getting Mrs. Daniels to sign that contract, she not being a person who could carry out the contract, and doing that fraudulently. That was the one issue, and that was found against the defendant. Now I do not doubt that upon the circumstances as proved many questions of fact might have been raised with more or less success at the trial, but it is too late, in my opinion, for the defendant now to raise questions and issues of fact that he did not raise then, and as to which it is obvious that there may have been good reasons why he should not wish to raise them. He therefore raised the one point that Mrs. Daniels was not a person who could carry out the contract, and more, that the plaintiff was guilty of fraud in inducing her to sign the contract. Looking at the points which the learned counsel for the defendant asked the learned Judge to reserve, and at the grounds of appeal to the Supreme Court as a whole, I feel no doubt that that was the one point variously stated. Under these circumstances it seems to me that the appeal must be allowed, because the ground upon which the learned Chief Justice of New South Wales based his decision was this, that though the plaintiff was otherwise entitled to a *quantum meruit* in respect of the work done before the contract was terminated, he says (1):—"I think the answer to this is, that his previous service was of no value whatever to his principal." I may interpose—Why was it not? Because the defendant would not accept it. The learned Chief Justice proceeds:—"And by his subsequent misconduct, or ignorance of his duty as a commission agent, he forfeited any claim he might

(1) (1908) 8 S.R. (N.S.W.), 92, at p. 97.

otherwise have had." That would depend on whether it was already earned or not. I think, therefore, that the plaintiff was entitled, at all events to some remuneration as upon a *quantum meruit*, or as damages for not being allowed to earn the £50 under the express contract. And as the parties raised the one issue of fact they must abide by it, and as they agreed that it was a case of £50 or nothing the damages are fixed at that amount. Under these circumstances I think that the appeal should be allowed.

HIGGINS J. I agree that the appeal should be allowed, and wish just to say that it must be clearly understood that we are confined to the points taken by the defendant on his application for a nonsuit, that the plaintiff was to get nothing unless the defendant actually gave a lease to the plaintiff's client.

GRIFFITH C.J. Under the circumstances we do not see any reason for departing from the ordinary rule that the unsuccessful party pays the costs of the appeal.

Appeal allowed Order appealed from discharged. Motion for new trial dismissed. Judgment in the District Court restored. Respondent to pay the costs of the appeal.

Solicitor, for appellant, *H. F. McKay* by *E. P. Bassett.*
Solicitor, for respondent, *F. McGurin* by *A. J. McDonald.*

C. A. W.