[HIGH COURT OF AUSTRALIA.]

DOLPHIN . . . . . APPELLANT
DEFENDANT,

AND

HARRISON, SAN MIGUEL PROPRIETARY LTD. . . . . } RESPONDENTS
PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1911.

MELBOURNE, *Sept.* 25, 26.

Griffith C.J., Barton and O'Connor JJ.

Principal and agent—Contract of agency—Agent to procure purchaser—Right to commission—Evidence of contract.

The respondents who were cork and general merchants, and as such had had previous dealings with the appellant, a brewer, wrote to the appellant as follows:—"The writer is under the impression that he heard somewhere that you were inclined to sell your business. If such is the case we should be glad to hear from you stating what amount you require for same and any particulars that are likely to help us to make a sale. We have an inquiry for a small brewery and shall be glad to hear from you on the subject." The appellant wrote in reply:—"In reference to sale of brewery I want £2,500 net for the business. If I can't get that I don't sell. The only reason for selling I am getting too old, if I was 20 years younger I would not think of selling. Any further particulars you can have by applying."

Held, that the letters did not establish a contract between the appellant and the respondents that the appellant would employ the respondents as his agents to introduce a purchaser or a promise by the appellant that, if the respondents did so, he would pay them a commission.

Held, therefore, the respondents having brought the brewery under the notice of S. who subsequently purchased it directly from the appellant for £2,500, that the respondents were not entitled to recover from the appellant commission on the sale.

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Decision of the Supreme Court of Victoria: *Harrison, San Miguel Proprietary Ltd.* v. *Dolphin*, 33 A.L.T., 5, reversed.

APPEAL from the Supreme Court of Victoria.

Harrison, San Miguel Proprietary Ltd. brought an action in the Supreme Court of Victoria against James Dolphin claiming by their writ £125 for work and labour done or commission earned by the plaintiffs upon the sale of the defendant's brewery at Daylesford for the defendant at his request.

The request was alleged to be contained in a letter from the defendant to the plaintiffs of 25th September 1910 or was to be implied from the correspondence contained in that letter and a letter from the plaintiffs to the defendant of 10th September 1910. Those letters and the other facts are set out in the judgments hereunder.

The action was tried before *Hodges* J. who reserved for the consideration of the Full Court the question whether the plaintiffs were entitled to judgment, and if so for how much, it being admitted that £75 was the usual amount charged by a commission agent upon a similar transaction of the same amount.

The Full Court held that the defendant was bound to pay commission: *Harrison, San Miguel & Co.* v. *Dolphin* (1).

The defendant now by special leave appealed to the High Court.

Irvine K.C. (with him *Cohen*), for the appellant. The letters do not contain any authority by the appellant to the respondents to find a purchaser, and, if they do, the authority is a definite one namely to find a purchaser at such a price as would give the appellant £2,500 net. There is no evidence of an employment by the appellant of the respondents as his agents to sell or to find a purchaser, and, if so, the further question, whether the sale was brought about by the respondents is unimportant. There are no facts from which an agency might be applied. In *Green* v. *Bartlett* (2) and *Burchell* v. *Gowrie and Blockhouse Collieries Ltd.* (3), relied upon below, there was no question as to the fact of an agency existing.

(1) 33 A.L.T., 5.
(2) 14 C.B.N.S., 681, at p. 685.
(3) (1910) A.C., 614, at p. 625.

Schutt (with him *Dethridge*), for the respondents. The letters are sufficient to establish a contract of agency. The words "to make a sale" in the letter of 10th September mean "to effect a sale for you." They indicate that the respondents are offering to find a purchaser, and negative any suggestion that the respondents were acting as agents for a purchaser. The following words "we have an inquiry for a small brewery" indicate that it is part of the respondents' business to negotiate sales. The appellant's answer is an acceptance of the respondents' offer to act as agent to find a purchaser, and the statement that the appellant wants £2,500 net shows that the appellant understood that he would have to pay some commission, and means that he wants such a sum as, after payment of commission, will give him £2,500. If there was a contract to employ the respondents as agents for reward, they have done their part, and are entitled to commission: *Mansell* v. *Clements* (1); *In re Bell, Ex parte Durrant* (2). The letters are open to the construction put upon them by the Supreme Court, and this Court will not interfere with the decision.

Irvine K.C., in reply, referred to *Cooper* v. *Whittingham* (3) on the question of costs.

GRIFFITH C.J. This case came before us so recently on an application for special leave to appeal that it is not necessary to take further time to consider it. The question for determination at first sight seems a small one. The amount concerned is very small, but we granted special leave to appeal because there seemed to be involved in it a very important question of law, namely, whether a person who has property for sale and is assisted in bringing about a sale by a friend thereby becomes impliedly liable to pay commission on the transaction to that friend. Of course that would be an intolerable position—that a person could not speak to a friend about property he had for sale without incurring liability to pay commission on the sale.

The action is for commission, and the plaintiffs had to establish

(1) L.R. 9 C.P., 139, at p. 143. (2) 5 Morr. Bky. Rep., 37.
(3) 15 Ch. D., 501, at p. 504.

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Griffith C.J.

a contract between the defendant and themselves that the defendant would employ the plaintiffs as his agents to introduce a purchaser on the terms that if they did so they should receive a pecuniary reward. That is the contract the plaintiffs had to prove. Whether there was such a contract depends entirely upon the construction of two documents.

The plaintiffs are merchants. They describe themselves on their stationery as "cork merchants, and importers of machinery and all requisites for ærated water manufacturers, brewers, bottles, confectioners," &c. They had had some previous dealings with the defendant in that capacity. On 10th September 1910 they wrote a letter to the defendant, who was the owner of a brewery, in the following terms:—The writer is under the impression that he heard somewhere that you were inclined to sell your business. If such is the case we should be glad to hear from you stating what amount you require for same and any particulars that are likely to help us to make a sale. We have an inquiry for a small brewery and shall be glad to hear from you on the subject." Stopping there, the defendant is informed that some customer, or some person with whom the plaintiffs are acquainted, is inquiring for a brewery, and that the plaintiffs have heard that the defendant's brewery is for sale, and the defendants ask what price he wants. So far I cannot see a suggestion of a request by the plaintiffs to the defendant to employ them as his agents to obtain a purchaser. But these words are relied upon by Mr. *Schutt*, and they are the only words that can be relied upon. "We should be glad to hear from you stating what amount you require for same and any particulars that are likely to help us to make a sale." Conceding for a moment that that is open to the construction contended for by Mr. *Schutt*, then comes the defendant's answer on 28th September as follows:—"In reference to sale of brewery I want £2,500 net for the business. If I can't get that I don't sell. The only reason for selling I am getting too old, if I was 20 years younger I would not think of selling. Any further particulars you can have by applying." That seems to me to negative the idea that the defendant was employing the plaintiffs to sell on commission. He said "I will take £2,500 from anybody, but I will pay no commission to anybody." That

is what he said. From that it is contended that there was an implied promise to pay commission if they introduced a purchaser.

I will refer now to what happened afterwards. The plaintiffs' friend was one Shepard, and he was informed by the plaintiffs of the defendant's willingness to sell. Shepard saw the plaintiffs' manager and then went to Knight, the managing director of R. Montgomery & Co., who gave him a written introduction to the defendant as follows:—"This will be handed to you by a very old friend of the firm's who is on the look-out for a business and has been informed that yours is for sale. We can only speak of him in the most highest terms of praise and if you have determined to dispose of your brewery you need have no fear of discussing the matter with him as in the event of his not buying the whole subject will be treated most confidentially." Shepard took that to the defendant and the result was that the defendant sold his brewery to Shepard for £2,500.

Now it is suggested that, as the plaintiffs were the means of introducing Shepard to the defendant, and as Shepard and the defendant made a contract for the sale of the brewery, there was a liability on the part of the defendant to pay commission to the plaintiffs. If there was a promise by the defendant to pay commission to the plaintiffs for finding a purchaser, that is, no doubt, quite right. It would not matter in that case what price the defendant accepted from Shepard because the services had been rendered by the plaintiffs to the defendant. But it is quite clear that there was no such contract between the plaintiffs and the defendant. The defendant said "I will pay no commission. I must have £2,500 net"—by which I understand exclusive of any commission. So that if the plaintiffs could make the defendant pay commission on the sale, the defendant would be entrapped into making a bargain which the plaintiffs knew he would not make. If Shepard had told the defendant that he had come from the plaintiffs, so that the defendant had known that he might be liable to pay commission, it is clear the contract would not have been made. In my opinion there is no justice in the claim set up by the plaintiffs, entirely apart from its legal validity. I think it is impossible to find any promise by the defendant to

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pay commission for the introduction of a purchaser by the plaintiffs. For these reasons I think the appeal should be allowed.

BARTON J. I am of the same opinion. I think the action was perfectly baseless.

O'CONNOR J. I concur.

Appeal allowed. Judgment appealed from discharged. Judgment for defendant with costs of action, including costs of reference to the Full Court.

Solicitor, for the appellant, *Alan Skinner* for *R. W. Shellard*, Daylesford.

Solicitors, for the respondents, *Madden & Butler*.

B. L.

Appl *Enterprise Gold Mines NL v Mineral Horizons NL (No1)* 52 NTR 13

[HIGH COURT OF AUSTRALIA.]

FEDERAL GOLD MINE LIMITED . . APPELLANTS; DEFENDANTS,

AND

ELIZABETH ENNOR AND OTHERS . . RESPONDENTS. PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

H. C. OF A. 1910.

PERTH, *Oct.* 18, 20.

Griffith C.J., Barton and O'Connor JJ.

Workers' Compensation Act 1902 (*W.A.*) (1 & 2 *Edw. VII. No.* 5), *sec.* 6—*Accident arising out of and in the course of the employment—Disease—Local Courts Act* 1904 (*W.A.*) (4 *Edw. VII. No.* 51), *secs.* 107, 110, 111—*Appeal on question of fact.*

Sec. 6 of the *Workers' Compensation Act* 1902 (W.A.) provides that an employé, if he suffers personal injury caused by accident arising out of and in the course of his employment, shall be entitled to compensation.