ORIGINAL

IN THE HIGH COURT OF AUSTRALIA

AUSTRALIAN RECORD COMPANY LIMITED

V.

MILLER

£3.10.0

REASONS FOR JUDGMENT

Judgment delivered at Sydney

on Friday, 18th May 1956.

W. M. HOUSTON, Govt. Print., Melb.

C.1978/55

THE AUSTRALIAN RECORD COMPANY LIMITED

v.

MILLER

O R D E R

Appeal dismissed with costs.

AUSTRALIAN RECORD COMPANY LIMITED

v.

MILLER

JUDGMENT

DIXON C.J.
McTIERNAN J.
WEBB J.
TAYLOR J.

AUSTRALIAN RECORD COMPANY LIMITED

v.

MILLER

JUDGMENT

This is an appeal from an order of the Supreme Court of New South Wales (Walsh J.) which directed that judgment should be entered for the respondent in an action in which he sued the appellant for remuneration for services rendered pursuant to an agreement alleged to have been made between the appellant, on the one hand, and the respondent and his brother, Bernard L. Miller deceased, on the other. The contract alleged in the declaration was that "in consideration that the plaintiff would act as agent for the defendant in the United States of America in the obtaining for the defendant of contracts between the defendant and American recording companies whereby the defendant would obtain licenses from such companies to manufacture in Australia records from the recordings of the said American recording companies and in consideration that the plaintiff would introduce the defendant to the said American recording companies whereby the defendant obtained (sic) such licenses as aforesaid the defendant would pay to the plaintiff and the said Bernard Miller by way of reward for the said services a royalty of one cent of United States currency upon every recording manufactured by the defendant in Australia from the recordings of American recording companies under any contracts made between the defendant and any American recording company as a result of the agency of or introduction of the plaintiff as aforesaid." It was further alleged that the "plaintiff pursuant to the said agreement acted as agent for the defendant as aforesaid and introduced the defendant to American recording companies and as a result of such agency and introduction the defendant obtained a contract with an American recording company, namely Capitol Records Inc." and that no royalties were ever paid. The

substantial issues were whether any agreement such as that alleged was ever made between the parties and, if so, whether any royalties ever became payable thereunder.

The agreement sued upon was not in writing and it should be observed at once that the declaration is, to say the least, somewhat inaptly and inartistically framed. In particular there is nothing in the case to suggest that any agreement ever existed under which the respondent became the agent of the appellant or under which the appellant undertook to pay anything for his services. Nor can it be suggested that the evidence establishes that the respondent's services were a material factor in obtaining the contract with Capitol Records Inc. The plain fact is that the respondent's case at the trial did not concern itself with attempting to establish any of these allegations. If there was an agreement proved upon which the respondent could found a claim it was an agreement under which the appellant became bound to pay to the respondent and his brother remuneration for their services in connection with the negotiations which led to the contract referred to. However no question was raised concerning these matters and the only problems which arose for our consideration were whether the learned trial judge was in error in accepting the respondent's evidence concerning the agreement which he alleged, whether that evidence discloses an enforceable contract and, finally, whether his Honour should have held that the condition or conditions upon which the stipulated remuneration was payable had been fulfilled.

The respondent and his brother were attorneys-at-law practising in partnership in New York. The latter died on 27th March 1953, some eight or nine months before the commencement of the action. The appellant is an Australian company the major activity of which, in 1946, appears to have been the preparation of recordings for use in broadcasting programmes. It was not engaged in the manufacture or the processing of recordings for sale to the public but the knowledge and experience of its personnel was such as to entitle it to regard its entry into

this field as a natural extension of its business activities. In particular the company became interested in obtaining master records or "matrices" from well-known manufacturers of gramophone records and in securing licenses to "press" records therefrom for sale to the public in Australia.

The possibility of obtaining such licenses was a matter which Mr. Fegan, the Managing Director of the appellant company, contemplated exploring during a projected visit to the United States in 1946. But before leaving he had some conversation with one, Jack Davis, a music publisher, and ultimately left Australia armed with a letter of introduction to Davis's attorneys in New York, Miller and Miller. There is some conflict between Fegan and Davis concerning the circumstances in which their discussion took place but, despite the fact that the learned trial judge felt that Davis was not a reliable witness, there can be no doubt that Fegan accepted assistance at the hands of Davis whether he had solicited it or not and that, as a result of their discussion, steps were taken to apprise Bernard Miller of Fegan's projected visit and that Bernard Miller, in turn, immediately corresponded with a number of record manufacturing companies with a view to ascertaining or stimulating their interest in the Australian market. These companies included Majestic Records Inc., Capitol Records Inc. and Asch Recording Studios. They were informed of Mr. Fegan's forthcoming visit and that he was desirous of "negotiating" or "arranging some record deals". The evidence strongly suggests, even if it falls short of establishing, that it was contemplated by Fegan, even at this stage, that his association with Miller and Miller would be on a business basis and not merely for the purpose of availing himself of their professional legal services.

Fegan arrived in New York on 30th June 1946 and he called at the offices of Miller and Miller on the following day. In the first instance he saw Bernard Miller who, as already appears, died before this action was commenced. Subsequently he saw Morton Miller, the respondent, on one or two occasions

but substantially his business talks took place with Bernard Miller on occasions between 1st July and 6th September 1946. Fegan appears to have been in New York from 30th June 1946 until 3rd July when he went to Washington for about six days. Thereafter he returned to New York for a day or two and then left for England via Montreal on 10th or 11th July. He returned to New York about 30th July where he remained until a day or two after 6th September 1946. It is common ground that at some time while Fegan was in New York he called upon Miller and Miller for the purpose of enlisting their aid in obtaining licenses from a number of manufacturers of gramophone records and that discussions along these lines took place. But Fegan insists that all of his business discussions took place with Bernard Miller and that the evidence given by the respondent concerning discussions which the latter alleged took place on 1st July and 6th September 1946 is untrue. It was upon the evidence relating to these conversations that the respondent's claim, in the first instance, substantially depended and, in the result, the learned trial judge accepted the respondent's evidence and rejected that of Fegan. In the course of a careful judgment his Honour stated the reasons which led him to do this. He does not appear to have received any material assistance from his observation, during the course of the trial, of the two witnesses in conflict, but his Honour gave weighty reasons why the evidence of the respondent should be accepted in preference to that of Fegan. These reasons were the subject of considerable criticism by counsel for the appellant but upon a consideration of the evidence and the voluminous correspondence in the case we are satisfied that his Honour rightly rejected the evidence of Fegan on this aspect of the case.

This witness said that he first saw Bernard Miller on 1st July 1946. This was the day after his arrival in New York and he called at the offices of Miller and Miller. There was, he concedes, a conversation but there was no business discussion.

He merely introduced himself and Bernard Miller asked him if he had had a good trip to the United States and asked what his plans were. Fegan said that he was going to London fairly soon but first of all he was going to Washington and asked if his mail might be addressed to Millers' office. It is unnecessary to relate the whole of the conversation as deposed to by Fegan but it is clear that, according to his evidence, the matter of obtaining licenses from any of the record companies was not adverted to. According to Fegan there were no business discussions until 31st July after his return from England. Fegan said that on this occasion he again called to see Bernard Miller and that, after picking up his mail, he "had been invited to go into his office and have a general discussion with him". Bernard Miller is alleged to have said that he had been waiting for Fegan to get back from England so that he could really get moving on the various gramophone contracts, particularly Capitol and Majestic. There was considerable discussion during which the activities of Fegan's company were mentioned and, in the course of which, Miller said that he had a "close" knowledge of the gramophone business, that he had been in the "equipment" business for some time, that he was a personal friend of Wallichs, the President of Capitol Records Inc., and that every time he went out to Hollywood they had a great time together. This was the company in which Fegan was particularly interested and he so informed Miller. It was, he said, a virile company and an up and coming concern. Miller is then alleged to have said "I won't have any trouble in getting you a contract before you go home because I have been in touch with them and I know Wallichs". There were also discussions about Majestic Records Inc. and Asch Recording Studios. At one stage during the conversation when Miller intimated that he would not have any difficulty in getting contracts both with Capitol and with Majestic Fegan, according to his evidence, said "Well if you can do that we will not be ungenerous with your fees". Miller's

answer to that was, "A man who works well and does a good job deserves good fees" and according to Fegan "He laughed and said that seemed a good proposition."

It will be seen that, upon the evidence, the question of what payment, if any, should be made for Miller's services was left entirely in the air. On this point there was, according to Fegan, no further discussion until the 6th September 1946 which was a day or two before Fegan left New York to return to Australia. Nevertheless from the outset Bernard Miller had been exerting himself to interest the record manufacturing companies referred to in the Australian market and Fegan concedes that, during the intervening period, there had been some discussions between him and Bernard Miller "about how things were going with Capitol and Majestic". On 6th September Fegan again called and saw Bernard Miller and it is quite clear from Fegan's evidence that he then knew and fully appreciated the fact that Miller had been exerting himself in the appellant's interest. According to Fegan he opened the discussion with Miller on 6th September by saying, "Can you give me the situation up to date with what has happened to Capitol and Majestic?" Thereupon Miller said that "he had made all the contacts both at Majestic and Capitol" and that "I was to see Mr. De Azevedo at Captiol, and a man called Del Mercado at Majestic." Thereafter Fegan's evidence continues as follows:-

> "He (Bernard Miller) said, 'How would you like to come back home with a contract in your pocket'? I said 'That is what I came over for'. Then he used an American expression; he said 'I have got news for you. I was in touch with Del Mercado by phone last night and I have a contract fixed up for you, and you must go out to St. Charles'. I said, 'Where is that?' He said - so many miles outside Chicago; I can't remember how many miles. He also said, 'There is something you may not know about business in America; it is done on a different basis, possibly, to what you do it in Australia'. I said, 'What do you mean?' He said: 'I may have to look after Del Mercado; I was talking to him last night on the phone'. He said, 'This could be a special deal with Majestic, because I have to look after him, and I think I owe something to Jack Davis for having introduced him'. He said, 'Would you agree to a royalty on the records produced from Majestic?' I said, 'That depends on what the royalty is'. He suggested a cent a record; and I thought then - as I said to him - 'That seems high'; because the record business I believe makes its profits in pennies per record.

"He then gave me some figures of what publishers accept for the use of their copyrights; and he made some calculations on a piece of paper. I endeavoured to follow him, but he was much faster than I was, and I think my calculations didn't amount to much; but he showed me it should be practicable --- (Objected to)

He said, 'A cent a record won't materially affect your ultimate profits'. He showed me the pencilled sheet of paper, which showed publisher's copyright at a certain figure. I think it was calculated on a selling price of about 75 or 80 cents.

Q. What did you say? A. He then stressed the fact he could get me this contract from Del Mercado when I got through to St. Charles. I said I would agree."

This evidence is in substantial conflict with that of the respondent. According to him there was a business discussion on the occasion of Fegan's first visit to the offices of Miller and Miller. The respondent claims that he was present at this conversation. His brother, he says, introduced him to Fegan and thereafter a discussion followed. It is unnecessary to set out fully the evidence concerning this discussion but, according to it, Fegan told the Miller brothers that he was the managing director of the Australian Record Company, he informed them of his company's desire to obtain licenses from record manufacturing companies and asked if the Millers would be in a position to help him in the making of such deals. Bernard Miller said that they would certainly be in suoh a position, that they had already arranged for him to meet a number of people and that they would be glad to do whatever they could "to consummate any arrangements that he might make in connection with these companies". No agreement was reached on this occasion concerning remuneration. Fegan is alleged to have said that "he was not in a position to make any commitment as far as an actual payment in dollars or the like were concerned" for Millers' services and "he wanted to know whether or not they would be interested in another deal as far as payment for services was concerned." Bernard Miller is alleged to have said that they would be interested and that perhaps a deal on a royalty basis could be worked out. This, Fegan said, would be perfectly satisfactory if such a deal could be worked out. Thereupon

Bernard Miller said that they would want one cent a record but there was some demur on this point because Fegan did not know whether he would be in a position to pay one cent a record over and above the royalties that would be required by any manufacturing company from whom he obtained an agreement. However, according to the respondent, Bernard Miller said that that was the only basis upon which they would proceed, "more particularly in view of the fact that we would have to include Mr. Jack Davis in the arrangement". Fegan was alleged to have said that he was not objecting to the cent per record; he felt that it was reasonable but it was just a matter of determining whether or not the deals that might be made would be the kind of deals that would allow one cent per record.

It is understandable that at this stage Fegan was unwilling to commit himself to the payment of remuneration at this rate because at this time he probably had little idea of what royalties would be required by record manufacturing companies and he was unable to estimate what margin would be left to his company out of which the Millers might be paid. But the respondent says that this matter was settled on 6th September 1946. He says that on that day he was called into his brother's office and he gives the following account of what then took place:

> "Mr. Fegan and my brother were there. My brother said to me that Mr. Fegan and he had come to an agreement as far as our representation of Australian Record Company in connection with deals was concerned; that Mr. Fegan was agreeable to pay us one cent per record; they had been going through costs and that Mr. Fegan was agreeable, regardless of what the royalty might be, as far as any other record deal was concerned, to pay us one cent per record aside from our legal services. He wanted to know if that was all right so far as I was concerned. I said, of course, it was all right as far as I was concerned and that I was very happy with the arrangement. Mr. Fegan then said that he hoped that we would be able to make some deals here and that we would be paid one cent per record for any deals that were made, and he hoped that we would both be making a lot of money together. I said so -
>
> Q. One cent per record on what? A. On every record manufactured by Australian Record Company in Australia.

"Q. From? A. From - in connection with any deal made from Matrices supplied to Australian Record Company by the American Record Company. My brother then told Mr. Fegan of the fact that he expected and hoped that he would be in touch with him after he had seen Majestic and Capitol at the coast. Mr. Fegan said that he would be in touch with us and that he would be telling us what occurred and that we would, of course, be following through. That was the conversation we had, after which Mr. Fegan left."

If there was any doubt in Fegan's mind before he left Australia for the United States that his association with the Millers in attempting to negotiate with the gramophone recording companies referred to were to be on a business basis there certainly could have been no doubt remaining in his mind at this stage. On his own evidence he had committed his company to the payment of a royalty of one cent per record manufactured and sold under any contract obtained through the intervention of the Millers from Majestic Records Inc. and there is not the slightest reason to suppose that the Millers were prepared to negotiate with the other two companies on any basis which did not provide for remuneration to them. If there could be any room for doubt it would be completely dissipated by a perusal of the correspondence which passed between Fegan and the Millers between the time of his return to Australia and the month of June 1948 when the negotiations were discontinued. As will appear they had not, at that time, resulted in the obtaining of a contract though, at a later stage, a contract with Capitol was concluded.

Fegan had called on Majestic Records Inc. and Capitol Records Inc. after leaving New York on his way to Australia and the Millers appear to have had every reason for thinking that they might have been apprised of the result of his interviews. Not having heard from him they wrote to him on 10th October 1946 enquiring if anything had been accomplished. The immediate answer to this was a cable from Fegan in which he expressed his regrets at being unable to communicate with the Millers before leaving the United States and in which he intimated that the Majestic Company had been receptive of the proposal and that the

Capitol Company was "not entering into overseas negotiations for twelve months though I believe this attitude could be changed if exeoutive higher than Azevedo approached by you." This cable was followed by a letter, dated 4th December 1946, from Fegan which reviewed the latter's activities in the United States after his departure from New York and before he left that country for Australia. He mentioned that he had seen Del Mercado and that he had had discussions with executives of Majestic. He referred, also, to his discussions with representatives of Capitol. He said that the time spent with Capitol was not quite as productive as that which had been spent with the representatives of Majestic but he added that he had gained the impression that if a little time could be taken to concentrate on some executive in Capitol higher than De Azevedo "it would be possible to have them come into an arrangement regarding the pressing of their discs for the Australian market." The letter clearly indicates a desire on the part of Fegan to obtain an agreement with Capitol and his wish that the Millers should follow the matter up. At the conclusion of his letter Fegan mentioned that quite apart from the normal business of recording and processing his company had quite adequate investment funds available "to buy rights or licenses of anything that looks like a good proposition in order to exploit it in Australia". "This", he said, "would apply particularly to commodities or manufactured articles that could be made in Australia. He added "Do not forget that if anything crosses your mind we can do a deal and cover you for a share in the Australian company and/or its profits". Before receiving this letter Bernard Miller had written on 21st November 1946, acknowledging receipt of the cable referred to. He said that he had been ill and that as soon as he returned to his office he would "be glad to follow up with Capitol Records". On 6th December 1946 Fegan again wrote to Bernard Miller. With this letter he forwarded a copy of a long letter which he had written to Majestic setting out a detailed proposal to handle their recordings in Australia.

He referred briefly to the fact that the proposal confirmed negotiations on a three-cent royalty basis and he observed "as you will remember there is a cent royalty which will be earmarked on top of that between yourself and Jack Davis". A further reference was made to the fact that the appellant was "vitally interested in buying Patent Rights or Licenses to use Patents in Australia so that we can make investments in the manufacturing field". Again he added "So don't forget we can come to a very profitable arrangement, I am sure, between us if you can spot out anything of interest knowing your wide scope of activity". On 30th December 1946 Miller and Miller wrote to Fegan referring to the proposed deal with Majestic and said that they had "not yet had an opportunity of doing anything on Capitol Records but would definitely make an effort during the next week or two to get after this". On 25th February 1947 Fegan, by his letter of that date, expressed his pleasure that the Millers were "pursuing the Capitol matter because I know there are other people out here who have their eyes on it." By May of 1947 Bernard Miller had had a number of discussions with a Mr. Porges, who had then recently been appointed head of the International Department of Capitol Records, and on 26th May he wrote to Fegan asking for detailed information on a number of matters. An early reply was sought to this letter as Miller and Miller wanted to continue their conferences with Mr. Porges and if possible "close a deal with Capitol". This letter brought a long reply from Fegan which was dated 3rd July 1947. The detailed information which had been sought was furnished, Fegan adding that he thought "that this covers your requirements fairly well and I will leave it to you to take up with Mr. Porges." At the same time Fegan wrote to Porges and said, "I have recently received a letter from Bernard L. Miller, acting on our behalf and have replied fully thereto in answer to the number of questions detailed in his letter. We understand that you applied to him for this information and have therefore sent it to him direct." Subsequently to the receipt

of this information Bernard Miller again saw Porges. This fact is referred to in a letter to Fegan from Porges dated 11th July 1947. Porges added "As we found various letters in our files from Mr. Miller on your behalf, we felt that he was authorised to act for you." During the month of July Mr. Jack Davis was in the United States and apparently was with Bernard Miller when he received Fegan's letter of 3rd July. Within a week Bernard Miller and Davis had a further discussion with Porges. This is referred to in the letter of Miller and Miller dated 23rd July. From this letter it appears that on the previous day they had "had a very lengthy conference with Mr. Porges." The conference was, it was said, "a very fruitful one" and it informed Fegan that Porges intimated frankly at its conclusion that "he is discontinuing all other negotiations for Australia and is making a special recommendation to the Board of Capitol Records to work out a deal with us." This same discussion was referred to in a letter from Porges to Fegan dated 7th August. Porges said that after having analysed all the facts he had submitted his suggestion to the General Management of the Company and that he would "contact" Fegan as soon as he should hear from them. Within four days Porges again wrote to Fegan setting out "a tentative proposal", the "highlights" of which he purported to state therein. The "highlights" consisted of eighteen numbered paragraphs the only one of which it is necessary to mention being the final paragraph which proposed the stipulation of minimum guarantees, payable in United States dollars, for various periods of the proposed arrangement. A copy of the "highlights" of the tentative proposal had also been supplied to Miller and Miller and Bernard Miller wrote on 14th August 1947 urging that the matter should be given Fegan's immediate attention.

In the following month, September 1947, the problem presented by currency regulations raised its head. On 10th September the Millers cabled Fegan enquiring what had been done concerning the tentative proposal. Within a day or two this brought

a cabled reply in the following terms: "Dollar exchange position creating considerable difficulties Discussions still proceeding Don't be downhearted". On 19th September Fegan wrote to Bernard Miller acknowledging receipt of the first of the cables above-mentioned and said that redrafts of both the Capitol and Majestic agreements were being prepared and should be available at an early date. Thereafter he stressed the "dollar exchange position". "All such matters in this country" he said "are handled by a Government authority, known as Exchange Control Board and for the last month or so no funds are being permitted to leave this country to dollar areas. Until the whole situation is clarified we can give no assurance that we will be allowed any dollar funds in respect of any of our business undertakings, and this applies to any new venture even more stringently than it does to an existing well-established set up." In response to a cable from Porges enquiring the appellant's attitude to the tentative proposal Fegan cabled on 25th September that the proposal was broadly acceptable and intimated that he would shortly be air mailing a "suggested redraft of several clauses". The cable added that the appellant was still experiencing difficulty "regarding dollar exchange" and intimated that a decision was expected within a week. This cable was confirmed by letter of the same date. This letter again referred to the difficulty created by problems of dollar exchange and there was enclosed with it a suggested redraft of the headings for the proposed agreement. On 7th October 1947 Fegan forwarded to the Millers copies of correspondence with Capitol and Majestic and intimated that "the position of obtaining dollar currency for remittance overseas is still being discussed with the Exchange Control Board". A month later, on 7th November, Porges wrote to Fegan making enquiries concerning "the dollar exchange situation in Australia". He intimated that Fegan had stated earlier that a decision was expected within a week and Capitol had not been informed of the decision. On 19th November Fegan cabled Porges indicating that the ruling of the Exchange Control

Board was "not quite satisfactory" and the proposals were being resubmitted. On 28th November 1947 the Millers wrote to Fegan referring to a further conference which had taken place with Porges and said that, "while there are certain questions yet to be straightened out in connection with the contract itself, neither of us has any doubt that this matter can be satisfactorily concluded if the financial situation is handled". "Porges", he said, "will write you himself regarding the various changes but I do hope that long before this letter reaches you I will have received a reply from you regarding the financial situation". There seems little doubt that the statement of the Millers in this letter that the financial situation was "definitely the crux of the agreement" was well founded. On 4th December Fegan cabled that the dollar position was still obscure but that the position should be clarified by the New Year. The cable added that it was acceptable to the appellant to have Porges prepare a contract providing for an initial payment on 1st February. This was followed by a letter from Porges dated 30th January 1948 referring to the visit of "your representatives, Mr. Bernard Miller of New York City, and Mr. Service, your Australian attorney, on December 11th during which we discussed your redraft". A copy of the draft contract which resulted from that discussion was forwarded under cover of this letter, Porges stating that "this draft of contract may ... be submitted to the authorities for their approval and the subsequent release of the necessary funds". This draft contract was still under discussion in Australia until after the middle of February 1948 when Fegan again wrote to Miller mentioning a number of matters which still required discussion. Fegan intimated that he was extremely disappointed "in having received a contract which in so many directions proves to be quite prohibitive" and pressed upon Miller the difficulties which these matters raised. He added "I know you have tried very hard on this deal, Bernie, and I had hoped that we might have been able to meet together some day and compare our respective profits from this undertaking, however at this stage that happy event seems a little

remote". Further discussions took place during March between Bernard Miller and Porges and reference to this fact is made in the Millers' letter to Fegan dated 1st April 1948. A fortnight later Miller again wrote to Fegan concerning the result of his discussions with Porges. It is unnecessary to refer to the details of this letter but it is clear that the discussions had not produced a draft which, at that stage, was acceptable to Fegan. But by the month of June it became apparent that it would be futile to negotiate further because the respondent had been unable to overcome the difficulties created by its inability to obtain access to dollar currency. Accordingly on 8th June 1948 Fegan wrote to Morton Miller, the respondent (his brother being then ill) in the following terms: "We regret that on the terms of the contract, and specificially as they relate to those clauses concerning exclusivity and taxation, we cannot take advantage of any offer to proceed." He added "Irrespective of the foregoing facts it is completely impossible to obtain dollars for any new project of this nature under our Government Exchange Control system, and also this precludes the signing of a contract involving future dollar commitments. Frankly, the whole international situation seems to us out here to preclude all possibility of spending any dollar currency, and it is with more than passing regret that I have to write to you to this effect." On 29th June 1948 the respondent answered this letter expressing the hope that it would not be "too long before the general situation takes a change for the better" and informing Fegan that Porges had been informed of the position. In fact Porges was informed by a letter of 29th June 1948 from the Millers that it was completely impossible to obtain dollars and that the whole international situation seemed to preclude the possibility of spending any dollar currency. Regret was expressed that nothing"can be done at the present time".

For the appellant it was contended that the negotiations came to an end at this stage and that the conclusion of the contract between the appellant and Capitol at a later stage was

the result of entirely fresh negotiations with which the Millers had no concern.

From the correspondence to which brief reference has been made it is apparent that in June 1948 negotiations with Capitol ceased. As appears, the primary reason for this was that currency controls made it impossible for the respondent to enter into an agreement which bound it to make payments in United States currency. There were, however, some matters upon which the parties were not agreed. But the only point of real significance - and the only one discussed on the hearing of the appeal - was that referred to in Fegan's letter of 8th June 1948 as "exclusivity". At this stage Capitol was insisting that the agreement should provide that the respondent should not during the term thereof "engage directly or indirectly in any business competitive with the manufacture and distribution of phonograph records" as in the agreement provided and this was understood as designed to prevent the respondent from pressing or distributing records bearing any label other than that of Capitol. On this point the parties were still firmly divided but in view of the currency situation further negotiations were not worth pursuing. As Fegan agreed in his evidence it would have been a waste of time seeking to resolve the matters of disagreement between the parties in view of the currency situation. But he agreed that, at a later stage, "when the dollar difficulty was overcome the other difficulties were ... smoothed out and a contract resulted". Porges' view was much the same and he agreed that after he knew that the appellant "could not get dollars out of Australia" his company was not prepared to go on with the negotiations for a contract.

It is not out of place at this stage to indicate the difficulty which was presented to the respondent by the form of currency control which was in operation in 1948 and, broadly, the manner in which, subsequently, the difficulty was overcome. The form of agreement proposed in the early part of this year called for the payment in United States currency of royalties at a specified rate on records manufactured and sold by the respondent.

But the proposed agreement also called upon the respondent to pay to Capitol "minimum annual guaranteed amounts" in respect of royalties in each year during which the agreement should operate. The term of the agreement was to be for an original period of seven consecutive years commencing on 1st March 1948 and continuing from year to year consecutively after the original period unless terminated by a prescribed notice. But in June 1948 it was apparent that it was quite impossible for the respondent to undertake these obligations. Thereupon negotiations ceased but they were resumed in April 1949 shortly after a conversation had taken place in Sydney between Fegan and one, Peer. The next step in the negotiations was a letter from Capitol to Fegan dated April 29th 1949. The letter referred to the fact that a letter had been received from Peer and mentioned the desire on the part of the appellant to re-establish negotiations "which were not finalised due to ... inability to obtain the necessary dollar exchange for payments." "Fundamentally", it was said, the appellant had "agreed to the proposal submitted ... and the only impediment was the exchange situation." The letter added "Regarding payment it, of course, would be a preference that this be effected in American dollars. We do not know whether this would be possible but have heard that the Commonwealth Bank of Australia would authorise payment in U.S. currency upon presentation of an agreement." Further information was sought concerning the possibility of payment in U.S. currency at that stage and an early reply was requested. This letter was replied to on 17th May 1949. Fegan's letter in reply gave a great deal of information in response to the enquiries made by the earlier letter. At this stage there is discernible the germ of an idea which subsequently made agreement possible. "With regard to dollar funds", it was said, "unfortunately the exchange control regulations which still exist will not permit to guarantee payment or payments for metal matrices to be made in dollars". The letter added that:

> "From political statements made within the last few months, we feel that there is little possibility of Exchange Control restrictions being lifted in the near future, inasmuch as authoritative statements have been made to the effect that no easing of the position could be anticipated before approximately three years from now. It is a fact that payments of any kind for items such as gramophone records, or means for the production thereof, are considered to lie within the non-essential category and so do not receive any consideration whatsoever."

But it will be noticed that the first suggestion made in this letter is that it would be impossible to obtain dollar funds to meet minimum guarantee payments; nothing is said concerning payments in respect of royalties actually accruing due in respect of records manufactured in Australia. The next letter from Fegan to Capitol was dated 15th September 1949. In this letter Fegan informed Porges that additional avenues had been explored with respect "to the availability of dollar currency" and that it was felt that the avenues then being explored might well bear favourable results. On 12th October Fegan cabled Porges to the effect that changes in Government policy had made the possibility of an agreement "involving dollars" infinitely brighter and requested a reply if Porges was still interested in discussing the "Australian proposals". A cable of 12th November shows that Capitol was still interested and a letter was requested giving full details. In response to further requests from Capitol proposals were made by Fegan for the purpose of overcoming the currency difficulty and various avenues directed towards this end were explored. There were delays from time to time in the negotiations but ultimately agreement was reached in 1951. The final agreement was substantially in similar terms to the proposed agreement in 1948. It provided for payment of royalties at a specified rate but there was a significant difference with respect to guarantee payments. The agreement did not provide for "minimum annual guarantee payments" but provided that in the event of the number of records manufactured and sold pursuant to its terms not exceeding specified numbers in each year of the operation of the agreement/or, in the alternative, at the appellant's discretion, in the event of "the fees" paid to Capitol not exceeding specified amounts during

those years, Capitol should have the right to terminate it. Clause 12 of the agreement required the company "as soon as the laws of the Commonwealth of Australia permit it to do so" to deposit to Capitol's account in an American bank the sum of 25,000 dollars as security for the due performance of the agreement. Provision was made for security in a different form until the provisions of Clause 12 should become operative. It is unnecessary to say more than that interim security was to be provided by the deposit with Capitol of certificates for a specified number of shares in the appellant company. From Mr. Fegan's evidence it appears that the insuperable difficulty up till 1948 was to obtain permission to remit dollars for any purposes associated with the agreement whereas at a later stage it became possible to obtain permission to remit dollars in respect of royalties earned but not in respect of "guaranteed amounts, or prepayments". The effect of Fegan's evidence was that permission could not be obtained to remit dollars for any purpose up to the time when the negotiations were discontinued in 1948 but that when negotiations were resumed he believed they "would be able to remit dollars by way of royalties but not by way of security guarantees or prepayment". He added "Earned royalties, I believe, could be remitted."

Neither Bernard Miller nor the respondent took any part in the negotiations after June 1948. They were not informed by Fegan that such negotiations had been resumed until after the middle of 1950 when he was in New York. Bernard Miller apparently told Fegan - who had called at Miller's office - that he had heard indirectly that negotiations had been recommenced with Capitol and that a contract had either been signed or was about to be signed. He added that it was impossible to find out about this and wanted to know what the situation was. According to the respondent's evidence Fegan said that it was correct that the negotiations had been reopened but the contract had not yet been signed but "they hoped that it would be signed." There does not appear to have been a great deal of discussion because Fegan, apparently, was in a

hurry to keep another appointment and left after having promised that he would, if possible, call on the Millers again and discuss the matter with them. Fegan denies that he saw the respondent at all in 1950. He says however that he saw Bernard Miller. He agrees that Bernard Miller asked what was "going on with Capitol" and that he told Miller that a contract had not yet been signed. In response to Miller's enquiry as to where his firm stood in the matter Fegan is alleged to have said "Well we made the arrangement that you would have your fee but I have seen no bill of costs from you. That is one of the reasons why I came up there." Fegan says that he did not promise to call back but said that he would try to do so and that he would get back if he could. He did not, in fact, return to the Millers' office. From October 24th 1950 until November 1951 many letters were written by the Millers to Fegan asking for information as to what had happened with respect to Capitol negotiations. Quite obviously these letters were written with a view to making a claim upon the appellant for remuneration and it is an understatement to say that Fegan employed every subterfuge to avoid giving any information to the Millers or committing himself to anything. His explanation for this conduct is that he did not wish at that stage to tell the Millers that they had no interest in the matter because they might have used their influence to intervene with Capitol and prevent the proposed deal from going through. It is quite obvious not only that Fegan appreciated that the Millers would make a claim if the deal with Capitol was concluded but also that they had substantial grounds for making such a claim. On the evidence which Fegan gave at the trial the Millers, of course, had no grounds for any such claim and the attitude taken by him over this period is quite inconsistent with the evidence which he gave. Moreover the reason given by him for evading the Millers' enquiries is quite unconvincing.

Upon this necessarily incomplete review of the evidence the following comments may be made:

1. It is beyond doubt that Fegan was desirous of enlisting the services of the Millers in attempting to negotiate agreements with record manufacturing companies in the United States;
2. Equally there can be no doubt that he called upon the Millers in 1946 for this very purpose and, in fact, enlisted their services;
3. Nor can it be doubted that the arrangement which he then made was intended to be a business arrangement. On this point the documents are eloquent and it is unnecessary to do more than refer again to Fegan's letter of 18th February 1948, when the prospects of concluding a contract in the near future with Capitol were not bright. "I know" he said "you have tried very hard on this deal, Bernie, and I had hoped that we might have been able to meet together some day and compare our respective profits from this undertaking, however at this stage that happy event seems a little remote."
4. The last assertion is strengthened by Fegan's admission that he agreed with Bernard Miller that one cent per record manufactured and sold by the Australian company should be payable in the event of a contract with Majestic Records Inc. being obtained. The reason for this, according to Fegan was that the deal with this company "could be a special deal" because Miller would "have to look after Del Mercado" and something would "be owed" to Jack Davis. The first of these obligations would arise, it was said, because business "is done on a different basis, possibly, to what you do it in Australia", and the second, because of Davis's part in the introduction. For our part we cannot see any grounds for thinking that the proposed deal with Majestic stood on any footing materially different from that on which the proposed deal with Capitol stood. Davis was just as much concerned in that deal and we fail to see why, in the one case, the Millers were to be remunerated by royalties - even if they kept only some portion for themselves - and were content with respect to their efforts

on Fegan's behalf with Capitol, to accept, according to the latter, the somewhat nebulous promise of "not ungenerous fees" or "generous fees" for unspecified legal services. Fegan's letter of 6th December 1946, of course, made it impossible for him to deny that an agreement existed to pay the Millers at the rate of one cent per record in the event of a contract being concluded with Majestic and this circumstance made it necessary to explain that the "Majestic deal" was "special".

5. A perusal of the evidence and correspondence shows that the negotiations were protracted and that the Millers' part in them was not inconsiderable. There is no reason to think that either Fegan or the Millers ever thought that the negotiations would or could be concluded without the expenditure of a great deal of time and effort and, in these circumstances, the suggestion that Bernard Miller agreed to accept in return "not ungenerous legal fees" or "generous legal fees" is fanciful. To say that he should not only have agreed to this but should also have asserted that it was "a good proposition" stretches credulity beyond breaking point.

6. But if Fegan was truthful on this point there was, of course, no need for him to have constantly avoided the Millers' enquiries in 1950 and 1951. His explanation for doing so is quite unsatisfactory and his conduct in doing so is entirely destructive of his credibility on this point.

It is, as the learned trial judge said, difficult, if not impossible, in a case of this kind to specify every phase or circumstance that presents itself during a long hearing - and, we should add, during a reading of correspondence extending over a number of years and of the evidence related to it - but the matters to which we have referred satisfy us that the arrangement which Fegan made with the Millers was a business arrangement, that it stipulated that the latter were to be remunerated for

their services in the event of negotiations with any of the record manufacturing companies proving successful and that it is probable that remuneration was to be at the rate of one United States cent per record pressed and sold in Australia.

On the last mentioned point there was but little evidence. Bernard Miller died before the action was instituted but the respondent's evidence, if believed, would be sufficient to conclude the matter. There was a good deal of criticism of this evidence and it may be that it was invented to deal with a known or assumed situation and to overcome the difficulty caused by the death of Bernard Miller. But it is not inherently improbable that the respondent was called into his brother's office to meet Fegan and to be apprised of the suggested arrangement, and the arrangement sworn to appears to be more consistent with the probabilities and with the documents in the case than the conversation deposed to by Fegan. In these circumstances we cannot see the slightest reason for disagreeing with the view of the learned trial judge on this point.

There is, however, an additional ground justifying a finding that remuneration at the rate of one cent per record was stipulated. When Jack Davis was in the United States in 1947 he received written confirmation from Bernard Miller, on behalf of Miller and Miller, of a promise to remunerate him. This document is in the following terms:

"Mr. Jack Davis
Essex House
160 Central Park South
New York 19. N. Y.

Dear Jack:-

This is to confirm the understanding between us.

As you know, we have an arrangement with Dudley Fegan for a royalty of one (1¢) cent a record on business deals with any record companies involving the representation of such record companies in Australia. This one (1¢) cent is to cover both you and ourselves.

On the pending deal with Capitol Records, it is our agreement that one-quarter (1/4¢) cent on such one (1¢) cent

" payment is to be paid to you as and when payment is received by us, and three-quarter (3/4¢) cents is to be retained by us. This one-quarter (1/4¢) cent is to be net, all expenses to be paid for out of our share.

We shall open a special account here in which this money will be deposited, subject to withdrawal by me on your order.

With respect to any other business deals which you may recommend to us from Australia, it is our understanding that one-third (1/3) of the moneys we receive for such deals, aside from legal fees, shall be your share and two-thirds (2/3) shall be our share.

Will you please confirm the foregoing as the arrangement between us.

Sincerely,

BERNARD L. MILLER
MILLER AND MILLER "

We do not understand the authenticity of this letter to be challenged and it is clear that the first paragraph, pursuant to sec. 14B of the Evidence Act 1898-1954, was evidence of the facts therein stated. This evidence, supplemented by the oral evidence concerning the conditions upon which the remuneration was to become payable, amply justifies a finding for the respondent on this aspect of the case.

But then, it is said, the agreement proved was too uncertain to be enforced. It did not, it was contended, define with sufficient certainty the services upon performance of which the remuneration was to become payable. We do not assent to this submission. This was not a case in which an agent was obliged to obtain a contract for his principal. In this case the principal intended to take a substantial part in the negotiations himself - personally whilst Fegan was in the United States and, at other times, by correspondence - and the agent's function was to aid those negotiations. This meant personal representations to Capitol and advice and direction to the principal. The arrangement required the Millers to render such assistance as Fegan might require and, additionally, to take such other steps as the state of the negotiations from time to time might reasonably require. In our opinion such an agreement is capable of giving rise to enforceable rights. Though the agreement was oral and it is necessary that its terms

should be spelt out of the relevant conversations we see little to commend the contention that the parties had not so expressed themselves "that their meaning can be determined with a reasonable degree of certainty" or that "no practical meaning can be given to" the agreement. (cf. Scammell v. Ouston (1941 A.C. 251 at pp. 255 and 268)).

The final question is whether the stipulated remuneration became payable under the agreement. No question arises concerning the amount involved - the only question is whether, in the events which happened, the remuneration can be said to have been earned at all.

From what has already been said it is apparent that the condition upon which remuneration became payable was not that the respondent and his brother should obtain a contract from any of the record manufacturing companies in the sense that they, and they alone, should conduct the negotiations through to the conclusion of the contract. On the contrary the conditions upon which remuneration was to become payable to the Millers was that they should arrange for Fegan to meet representatives of the manufacturers referred to, that they should give appropriate help and advice in connection with the negotiations and that they should "follow up", as required, the representations made by Fegan from time to time. That they did this there can be no doubt upon the evidence and we should have thought that it would have been sufficient for the respondent to have alleged and proved the fulfilment of these conditions. But the issues raised by the pleadings on this aspect of the case were, in effect, whether the efforts of the respondent and his brother materially or substantially contributed to the making of the contract with Capitol and neither at the trial nor upon this appeal was it suggested that the respondent carried any lesser burden. Nevertheless we are satisfied that the respondent was entitled to succeed upon this issue. There is no doubt in our minds that the fundamental reason for the discontinuance of negotiations in 1948 was the difficulty occasioned by the currency situation. No doubt there then remained some points of

disagreement between the parties but the correct conclusion is that, probably, they would have been overcome if no extraneous difficulty had presented itself and if negotiations had been continued. Indeed when they were resumed - and "resumed" is, we think, the right word to use in all the circumstances - the points of disagreement were "smoothed out". That the negotiations were not concluded until 1951 was substantially due to the fact that different avenues were being explored for the purpose of overcoming the currency problem and not to the failure of the parties to reach ready agreement on the form of contract that was, otherwise, to govern their relationship. It perhaps should be added that the help of the Millers at this stage was neither needed nor solicited. But before the discontinuance of the negotiations the Millers had brought the parties together and their efforts had been instrumental in producing substantial agreement between the parties. That they were not still actively engaged in the negotiations when the currency difficulty was overcome and the remaining points of disagreement "smoothed out" subtracts nothing from this statement if, as we think is the correct conclusion, the negotiations from 1949 onwards were a resumption of the former negotiations and not the result of a new and independent approach. In our opinion the correct conclusion is that they were a resumption of the former negotiations induced by a belief that the difficulty caused by the currency situation, which up to that time had presented an insuperable obstacle in the way of the appellant assuming liability to make any payments in United States currency, might then be overcome. It was in fact overcome and after the few remaining matters had been resolved a contract resulted. We have no doubt that the efforts of the Millers materially and substantially led to the ultimate making of the contract.

For the reasons given the appeal should be dismissed.

THE AUSTRALIAN RECORD COMPANY LIMITED

v.

MILLER

JUDGMENT

KITTO J.

THE AUSTRALIAN RECORD COMPANY LIMITED

v.

MILLER

JUDGMENT KITTO J.

I have had the advantage of reading the judgment of my brother Taylor and agree in it.

The only hesitation I have felt in arriving at this conclusion has arisen from a consideration of certain letters which Miller and Miller wrote to Fegan on October 24, 1950 and at intervals thereafter. These letters are open to the construction that the writer knew that under the agreement between his firm and the appellant company no remuneration was payable unless the firm actually negotiated a contract with Capitol; that the firm's attempts to negotiate such a contract had come to nought; that he was now relying, in order to get some remuneration, upon a new promise by Fegan that if fresh negotiations with Capitol should result in a concluded contract his firm would not be "left out of the picture"; and that this left his firm's rights completely undefined, so that pending further word from Fegan he did not know where he stood.

It would not matter, I think, if the consideration which Miller and Miller had to give to earn their commission had been the carrying of negotiations with Capitol to a successful conclusion; for in so far as the negotiations which in fact led to the contract of 1951 were not conducted by Miller and Miller that was only because Fegan, on behalf of the appellant company, took portions of the work out of the hands of Miller and Miller after they had effected the necessary introductions and conducted a substantial part of the negotiations. He did not terminate their agency and prevent them from earning their commission, so as to entitle them only to recover damages. What he did amounted to dispensing with the performance by them of more than they in fact performed, so that their rights must be held to be the same as if

they had done everything necessary to earn their commission under their agreement with the appellant company. It is in this sense that I understand the explanation of Green v. Bartlett (1863) 14 C.B. (N.S.) 682, which Willes J. gave in Curtis v. Nixon (24 L.T. 706 at p. 708.)

It is involved in what I have said that I regard the two parts into which the negotiations were divided by the break which began in June 1948 as having together produced the contract made between the appellant company and Capitol in 1951, so that what Miller and Miller did in the period before the break made a real and substantial contribution to the conclusion of that contract. The letters I have mentioned seemed to me to require consideration because, if they should be construed in the sense I have mentioned, they would point to the conclusion that the agency agreement had gone off, and that the negotiations subsequent to the break were new and independent, so that any contract resulting from them could not be causally connected with the work done by Miller and Miller. I am satisfied, however, that the letters reflect only the anxiety of an agent who, after doing a considerable amount of the work for which he looked to his commission to reward him, finds, after reaching what seemed an impasse for the time being, that his principal is making efforts to get round the impasse with the assistance of another agent. The possibility that this might indicate an intention to treat the agency agreement as having ended without any right to remuneration having accrued under it sufficiently accounts for the requests to be told "just where we stand".

In any case, I think that Walsh J. was right in finding that the consideration which was to entitle Miller and Miller to a commission of one cent per record was an introduction of Fegan to the executives of Capitol and the giving of such assistance towards obtaining a contract with Capitol as Fegan might ask or the circumstances might require. The introduction was effected, all the assistance in negotiation that was asked or allowed to be

given was rendered, and the work so done came to fruition in the contract with Capitol which was ultimately brought about.

I agree that the judgment below should be affirmed and the appeal dismissed.