

IN THE PRIVY COUNCILNo. 3 of 1972

O N A P P E A L

FROM THE COURT OF APPEAL OF TRINIDAD AND TOBAGO

B E T W E E N :KIRPALANI'S LIMITED Appellants

- and -

GERALD ECKEL RespondentCASE FOR THE RESPONDENT

1. This is an appeal from the judgment of the Court of Appeal of Trinidad and Tobago (McShine, C.J. Phillips and de la Bastide, J.J.A.), dated the 4th June 1971, which allowed the Respondent's appeal from a judgment of the High Court of Trinidad and Tobago (McMillan, J.), dated the 14th October 1968, which dismissed the Respondent's claim for commission upon the sale of the property and business of a firm known as London Fashion to the Appellants.
2. In 1963, the Respondent approached one Black, a director of Millers Stores Limited, which owned a building and business at 6 Frederick Street, Port of Spain, on behalf of a client who wished to purchase the building. The Respondent received a letter dated the 22nd August, 1963, from Black, expressing readiness to consider an offer, but the negotiations fell through.
3. On the 19th March 1964, the Respondent approached one Ram Kirpalani, Managing Director of the Appellants, with a view to the Respondent negotiating on the Appellants' behalf a purchase of the building (with or without the business) of Millers Stores Limited. The Respondent showed the letter, Exhibit G.E.1, to Kirpalani and said that he thought that Millers Stores Limited might sell their business as a going concern or, alternatively, they might be persuaded to sell the building

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pp.149-161

pp. 64-73

Exhibit G.E.1.
p. 112.

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outright. Kirpalani agreed to the Respondent's suggestion that he should negotiate the purchase on the Appellants' behalf, on the understanding that the Appellants' name would be kept secret and that a commission of 2½% would be paid to the Respondent. Kirpalani said he would prefer to negotiate for the building alone, if possible, and instructed the Respondent to prepare an offer at a price of \$750,000.

- Exhibit A.1
p.77 4. On the same day, the Respondent prepared a draft letter setting out the terms of his agreement with the Appellants, and Kirpalani signed the letter on behalf of the Appellants. This letter confirmed that the Respondent was to negotiate 'the possible purchase of Messrs. Millers Stores Ltd.', and was to receive commission in the event of his acquiring 'the property'. The Respondent had understood that, if the Appellants did not succeed in purchasing the building alone, then they would consider purchasing Millers Stores Limited as a going concern (i.e. both the business and the building). The Respondent prepared two further letters on the same day, one containing an offer to Millers of \$750,000 for their freehold property and the other a covering letter. Kirpalani also signed the offer (Exhibit A.2(b)), the original of which the Respondent delivered to Black of Millers Stores Limited on the same day. Having received no reply, the Respondent wrote again to Black, and received a reply dated the 27th May 1964. The Respondent showed the reply to Kirpalani, and suggested to him that the Appellants should consider Millers as a going concern. Kirpalani said that, if he got the balance sheets of Millers for the last three years, he would consider purchasing the property and business of Millers. 10
- Exhibit A.2(b)
p.79 20
- Exhibit A.2(a)
p.78 30
- Exhibit G.E.2
p.113 40
5. On the 3rd July, 1964, Kirpalani told the Respondent to continue negotiations with Millers in his absence, and introduced the Respondent to one Maharaj, who was to keep Kirpalani informed of developments while he was away. (Kirpalani went abroad from the 7th July until the 9th November 1964). Kirpalani told the Respondent that he thought there should be an alternative to Millers in case nothing materialized. The firm of London Fashion, which owned a business and premises at 21 Frederick Street and 18 Chacon Street, was mentioned. The Respondent said that he had made an approach on behalf of another client to London Fashion but nothing had

materialized and London Fashion had given no indication that they wished to sell. Kirpalani asked the Respondent to approach London Fashion on behalf of the Appellants on the same terms that had been agreed between them in relation to Millers Stores Limited. He also told the Respondent that he would like to have the balance sheets of Millers before he went abroad.

10 6. Thereafter, the Respondent obtained information concerning buildings in the immediate vicinity of Millers and the approximate purchase prices of such premises. He spoke to Black and then wrote to the Appellants a letter dated the 12th August 1964; in spite of Black's reluctance to sell the business as a going concern, the Respondent had asked him to supply balance sheets to enable the Appellants to make an offer for the business. The Appellants replied by letter dated the 25th August 1964.

20 Later, one Katz, of London Fashion, told the Respondent that London Fashion had arrived at the price of \$750,000 for their building; the Respondent suggested a price of \$500,000 which was rejected. The Respondent then made measurements with a view to preparing a plan of the London Fashion building, and wrote to the Appellants a letter dated the 10th September 1964, reporting his conversation with Mr. Katz and asking the Appellants if they wished to make a counter offer. By letter dated the 6th October 1964, the Appellants authorised the Respondent to offer \$850,000 in the case of Millers and \$550,000 for London Fashion, and asked for information about part of the London Fashion premises which was let. The Respondent then wrote to London Fashion and offered \$550,000 for their freehold property at Frederick Street and delivered the letter, dated the 22nd October 1964, personally to Katz on the following day. Katz told the Respondent that his partner, one Gottfried, would have the final say in the matter. At the Respondent's request,

30 Katz gave him particulars as to the tenancy of the part of the London Fashion premises. By letter of the same date the Respondent gave these details to the Appellants.

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Exhibit A.3
pp. 80-81

Exhibit A.4
p. 82

Exhibit A.5
pp. 83-85
p.84, 11.22-25
p.85, 11.11-12

Exhibit A.6
p.86

Exhibit G.E.4
p. 115

Exhibit A.7
pp.89-90

7. About the end of October 1964 a meeting was held at the premises of London Fashion between Katz, Gottfried and the Respondent. The Respondent said that he could not disclose the name of his client. Gottfried said that he would prefer a negotiation which included the sale of the stocks of London

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Fashion at the sum of \$200,000 and their fixtures; he said that he had already turned down an offer of \$600,000 for their building. The Respondent said that his client would not be prepared to pay more than \$550,000. Gottfried then said that even though \$600,000 was a very low price he would agree to sell the building at that price if the Respondent's client would agree to take the stocks and fixtures of London Fashion at cost.

Exhibit A.8
pp. 91-92

p. 93

8. The Respondent then wrote to the Appellants a letter dated the 7th November 1964, reporting the progress of his negotiations with London Fashion and enclosing balance sheets of Millers Stores Limited for the previous three years. The Respondent delivered the letter to Maharaj, who told him that he (Maharaj) had been approached by London Fashion and has told them that the Appellants might be interested in purchasing the building at around \$500,000.

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Exhibit G.E.5
p.116

Exhibit G.E.7
pp. 119-120

Exhibit G.E.6
p. 117

9. Subsequently the Respondent heard that Kirpalani had returned from abroad, and visited him on the 18th November, 1964. Kirpalani gave the Respondent a handwritten document setting out the terms of an offer which he wished the Respondent to make to Millers Stores Limited; he said that he would consider making provision for severance pay in respect of the employees of Millers Stores Limited. According to the Respondent (although this was denied by Kirpalani), Kirpalani instructed the Respondent to make alternative offers to London Fashion. The Respondent later prepared a draft letter setting out the proposed alternative offers, which was not, in the event, submitted to London Fashion. Kirpalani instructed the Respondent to prepare the offer to Millers Stores Limited, which the Respondent did, delivering the same to Black personally on the same day.

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10. On the 22nd November 1964 one Gabe, acting on behalf of London Fashion, met Kirpalani in San Fernando; the meeting lasted for no more than twenty minutes. It was agreed between them that the Appellants should pay \$570,000 for the property of London Fashion, the furniture and fixtures to be purchased at a price to be agreed and the stocks at market price or cost, whichever was the less. It was left to Katz to negotiate in relation to the furniture and fixtures. Thereafter, the Respondent, as instructed by Kirpalani, withdrew the offer to

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- Millers Stores Limited, Exhibit G.E.6. On the 24th November 1968, when the Respondent asked Kirpalani for his commission of 2½% on the London Fashion transaction, Kirpalani refused to pay it unless the Respondent produced the written agreement to which the Respondent had referred in the course of the conversation. The Respondent wrote to Kirpalani on the same day enclosing the letter of the 19th March 1964 which set out the terms upon which the Respondent was to act for the Appellants in negotiating for Millers Stores Limited and, as agreed on the 3rd July 1964, for London Fashion. Kirpalani replied on the 26th November 1964, denying that the Appellants were liable to pay any commission.
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11. By his Statement of Claim, dated the 16th September 1965, the Respondent set out the facts relevant to his claim and contended that he was entitled to the realtor's usual commission of 2½% of the entire purchase price of the London Fashion premises, stocks and fixtures.
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12. By their Defence, dated the 15th November 1965, the Appellants contended that the request to the Respondent to negotiate in relation to Millers Stores Limited concerned Millers' building alone. It was admitted that the Respondent had been instructed to negotiate in relation to London Fashion on behalf of the Appellants, but contended that such instructions had been limited to the building alone and not extended to the business. The Appellants contended that the Respondent had been limited to the price of \$550,000 by Exhibit A.6 and had failed to acquire the building at this price or at all. It was admitted that the Appellants had acquired the premises, furniture and stock of London Fashion on the 22nd November 1964, the premises at a price of \$510,000. It was denied that the Respondent was entitled to any commission.
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13. Evidence was given by three witnesses (Katz, Gabe and Kirpalani) on behalf of the Appellants and by the Respondent and three witnesses (Mr. Ramdial, Mr. Law and Mr. Mendez) on his behalf.
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14. In his judgment, dated the 14th October 1968, McMillan, J., referred to certain authorities and held that generally in order to be entitled to his remuneration an agent must have carried out that which he bargained to do, but was entitled to it

RecordExhibit A.9
pp. 94-96Exhibit A.10
pp.97

pp.1-3

pp.4-5

p.86

pp.64-73

p.64, 1.51 to
p.65, 11.1-16

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provided that the ultimate transaction was brought about by his direct efforts. The principle was, he said, that the agent was entitled to his commission if he was the effective cause of the transaction being completed, provided that the concluded transaction was within the scope of his agency. The learned Judge therefore considered two issues, namely:-

- pp.65-72 (a) the scope of the Respondent's agency - whether such agency was limited to the acquisition of the property of London Fashion, as distinct from its property and business; and 10
- p.72 (b) whether the Respondent's efforts were the direct cause of the transaction being completed.
15. As to the first issue, the learned Judge said that both parties agreed that the agency agreement in relation to London Fashion incorporated the terms of the agency agreement in relation to Millers Stores Limited. He considered that it was necessary to look further than the Millers agreement, which was reduced to writing, because the agreement in relation to London Fashion arose subsequently to the Millers agreement and was not in writing. The learned Judge reviewed the evidence, and concluded that up to the 22nd October 1964 (apart from one suggestion by the Respondent to Kirpalani on or about the 27th May 1964 that he should acquire Millers as a going concern) all the negotiations conducted by the Respondent under his agency and the correspondence relating thereto had dealt exclusively with property. He said that it was not until the 7th November 1964 that there was any reference to the Appellants acquiring anything else but the London Fashion property and this suggestion, as in the case of Millers, had come from the Respondent. The learned Judge accepted the Respondent's account of his meeting with Katz and Gottfried of London Fashion, the substance of which was set out in the letter dated the 7th November 1964, and took the view that that letter put the accent on the cost of the property to the Appellants. He considered that up to the 7th November 1964 the Respondent's only authorisation was to negotiate for the purchase of the premises alone of London Fashion on the terms of the Millers agreement. 20 30 40
- Exhibit A.1 p.77
- p.65, 11.23-34 pp.65-68
- p.68, 11.20-24
- p.68, 11.25-28
- p.68, 1.27 to p.69, 1.20 Exhibit A.8 pp.91-92
- p.69, 11.21-35

16. McMillan, J., reviewed the evidence of the Respondent and that of Kirpalani as to the events of the 18th-24th November 1964 and said that on balance he preferred Kirpalani's evidence. He considered that the Respondent's agency was at all times limited to the acquisition of property. His view was that on the 22nd November 1964 Kirpalani had agreed with Gabe, acting on behalf of London fashion, to acquire the London Fashion building for the sum of \$570,000, the furniture and the stocks at market price or cost whichever was the less. He said that the concluded transaction was tantamount to the purchase of the entire business enterprise of London Fashion and its assets and was totally different from that which the Respondent was authorised to negotiate, i.e. the purchase of the premises only. He found, therefore, that the concluded transaction was outside the scope of the Respondent's agency, and his claim should fail on that ground.
17. As to the second issue, the learned Judge was satisfied that the Respondent's efforts were not the direct cause of the transaction being concluded. He said that it was London Fashion, through Gabe, who had made the first approach to Kirpalani, and this had not been brought about by the Respondent. The learned Judge said that it was contended on behalf of the Respondent that Kirpalani could not have come to terms with London Fashion as quickly as he did without the information and advice supplied by the Respondent and his 'preconditioning' of the partners of London Fashion. McMillan, J., said that this might well be so, but his view was that such information and advice had been gratuitously tendered for the purpose of inducing Kirpalani to negotiate for the acquisition of the building, stocks and/or fixtures, which was outside the scope of the Respondent's agency, and the 'preconditioning', such as it was, was unrelated to the final transaction. The learned Judge said that the Respondent's claim also failed on that ground. He therefore entered judgment for the Appellants with costs.
18. The Respondent appealed to the Court of Appeal of Trinidad and Tobago. The appeal was heard by McShine, C.J., Phillips and de la Bastide, JJ.A., and judgment was given on the 4th June 1971, unanimously allowing the Respondent's appeal.
19. McShine, C.J., recited the propositions of law

Record
p.69, 1.36 to
p.71, 1.4

p.71, 11.8-10

p.71, 11.28-32

p.71, 11.46-52

p.72, 11.19-22

p.72, 11.23-27

p.72, 11.27-35

pp.74-76

pp.149-161

<p><u>Record</u></p> <p>pp.149-150 Exhibit 1.A p.77</p> <p>p.150,11.6-end</p> <p>p.151,11.3-14</p> <p>p.151,11.34-36</p> <p>p.77</p> <p>p.151,1.45 to p.153,1.1</p> <p>p.152,11.10-12</p> <p>p.152, 11.12-13</p> <p>p.153,11.42-end</p> <p>Exhibit A.8 pp.91-92 Exhibit G.E.5 p.116</p> <p>p.154,11.8-13</p>	<p>relied upon by the Respondent and set out the principal issues raised in the Respondent's Notice of Appeal. The learned Chief Justice set out the circumstances leading to the letter dated the 19th March 1964, and the meeting on the 3rd July 1964 between Kirpalani and the Respondent, as a result of which that letter substantially formed the basis, and set out the terms, upon which the Respondent was to negotiate for London Fashion. The paramount question was whether the scope of the Respondent's agency was limited to the acquisition of the London Fashion building only, i.e. No. 21, Frederick Street, as separate and distinct from the rest of London Fashion's undertaking.</p> <p>20. Looking at the letter, Exhibit A.1, the learned Chief Justice saw no difficulty in construing the expression, 'the possible purchase of Messrs. Millers Stores, Limited', in the second line of the letter as meaning the whole Millers undertaking; but he felt that doubt arose when the last paragraph of the letter was read, 'in the event of my acquiring <u>the property</u> you will pay a realtor's commission'. The words, 'the property', might reasonably be defined to mean the building alone at No. 6, Frederick Street. McMillan, J., had so interpreted the expression, 'the property', but, the learned Chief Justice said he had not gone on to relate to to the earlier expression, 'Messrs. Millers Stores, Limited'. The learned Judge's view had been, broadly speaking, that the scope of the Respondent's agency did not extend beyond negotiating for Millers' building, and hence for the building of London Fashion. The learned Chief Justice found it necessary to go into the evidence in much more detail in order to determine whether this view was correct.</p> <p>21. McShine, C.J., then reviewed the evidence, and said that when Kirpalani had realised that negotiations for the Millers building would not materialize, consideration and instructions had been given for the acquisition of the whole undertaking: the learned Chief Justice referred to the letter dated the 7th November 1964 with which were enclosed the balance sheets of Millers Stores Limited, and to the memorandum of rough financial calculations intended to be the basis for the take-over of the whole Millers undertaking. The learned Chief Justice said that it was impossible, in the light of that document, prepared and written by Kirpalani</p>	<p>10</p> <p>20</p> <p>30</p> <p>40</p>
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- himself, to suggest that at no time had there been an agreement for the Respondent to negotiate for the whole undertaking of Millers Stores Limited. It was beyond question that negotiations for London Fashion had been in progress at a time when it was known to the Appellants that, if they were to get the Millers premises at No. 6, Frederick Street, they would also have to acquire the whole complex of that company. It was argued on behalf of the Respondent that it would not have been conceivable to get premises in lower Frederick Street (the area in question) in which a business was being carried on unless arrangements were made for the disposal or acquisition of the stock in trade, and Kirpalani always knew that the acquisition of No. 6, Frederick Street could only have materialized if and when arrangements had satisfactorily been made for the acquisition or disposal of the stock in trade and fixtures and possibly for the future of the staff.
- 10 It was in that setting that the Respondent negotiated for Millers Stores; that is, first a valiant attempt to acquire the Millers building alone, and if this failed, an attempt should then be made to come to terms for the whole undertaking.
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22. The learned Chief Justice said it was important to determine when first the question of negotiating for London Fashion was introduced into the discussions between the Appellants and the Respondent. If negotiations for London Fashion were to be on the same basis as for Millers (as was agreed between the parties), then the question would be, What was the extent of the negotiations in relation to Millers at the time instructions were given to negotiation for London Fashion?
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23. The learned Chief Justice reviewed Kirpalani's evidence of the meeting of the 3rd July 1964, when he instructed the Respondent to negotiate for London Fashion and said he hoped to receive the balance sheets of Millers Stores Limited, before going abroad on the 7th July 1964. He said that it might not be thought unreasonable, at a time when the negotiations for Millers were beyond mere negotiation for the building, for Kirpalani to make some specific reference, when giving instructions for the acquisition of London Fashion, that only the building was contemplated. No such reference was made, the instructions in relation to London Fashion being: '...why not you (Respondent) negotiate with them the same as with Millers. He
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- p.154,11.18-21
- p.154,11.21-27
- p.154,11.27-31
- p.154,11.32-37
- p.154,1.39 to p.155, 1.15
- p.155,11.18-21
- p.155,11.8-9

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Exhibit G.E.2
p.113
p.155,11.35-39

agreed...'. The learned Chief Justice referred to the letter dated the 27th May, 1964, and said that it seemed reasonable to suppose that by that date it was being realized that it would be near impossible to acquire Millers building without acquiring their whole business. After considering further evidence, he concluded that the position at about the 12th August 1964 was that the Respondent was to endeavour to obtain the Millers building alone, but because of the near impossibility of obtaining that building (or for that matter any other building on lower Frederick Street) with vacant possession, negotiations would have to encompass the rest of the undertaking. McMillan, J., had erred in holding that when the Respondent was asked to consider as an alternative to Millers the acquisition of London Fashion his instructions did not extend beyond negotiations for the London Fashion building alone. The Respondent was engaged to negotiate for London Fashion, for the building alone or, failing this, for the whole undertaking.

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p.156,11.39-42

p.156,11.43-45

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pp.157-161

Exhibit A.8
pp.91-92
p.158,11.16-25

24. The learned Chief Justice then considered whether the Respondent's efforts were the effective cause of the conclusion of the transaction between London Fashion and the Appellants. He reviewed the evidence leading up to the Respondent's letter to Kirpalani of the 7th November 1964, and set out part of that letter. It was most significant that Kirpalani had made no comment in relation to that letter that any consideration of stock and fixtures was wholly outside the Respondent's instructions or authority.

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p.158,11.35-38
p.158,1.37 to
p.159,1.5

25. Turning to the evidence of the position of Gabe in the London Fashion negotiations, the learned Chief Justice said two points were significant. First, it was the Respondent who before the 22nd November 1964 had already conditioned the partners of London Fashion to the view that agreement had to be arrived at with regard to the stock, furniture and fixtures; Gabe had done nothing more than say that London Fashion wished to sell and what price was being asked - both those matters were known to Kirpalani and to the Respondent, who had been trying to close the gap between \$550,000 and \$600,000. Secondly, Gabe had done nothing with respect to the stock and fixtures of London Fashion, for his evidence was that London Fashion would not sell the building alone so, when he had closed with Kirpalani at \$570,000 for the building, he had telephoned to

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Katz and told him to take over from there, that is, to complete the transaction by negotiating with regard to the stock and fixtures.

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26. The learned Chief Justice held that the intervention of Gabe could not be held to have been a decisive factor in the concluded transaction for the purchase of London Fashion. He said that it could not be right for a principal to authorize a maximum price for his agent and then go just beyond this limit himself and so deprive the agent of the commission which in all other respects he had earned. The efforts of Gabe had been directed only to obtaining the sale of the London Fashion building, with Kirpalani having to negotiate for the rest of the undertaking on his own. The Respondent had been trying to do both these things, the one being used persuasively to ease the difficulty of the other.

p.160,11.6-7

p.160,11.7-9

p.160,11.9-13

27. McShine, C.J., concluded that McMillan, J. had erred in holding that the authorisation of the Respondent as agent did not extend beyond negotiation for the London Fashion building, and in holding that the efforts of the Respondent were not the effective cause of the Appellants being able to conclude the agreement for the purchase of London Fashion. What he had stated did not in any way go contrary to the findings of fact by the learned Judge at the trial. In this case there was sufficient evidence to justify him in substituting his own findings for those of McMillan, J., particularly as there was evidence to which the learned Judge failed to give its due weight and because the proper inferences to be drawn from the facts were not so drawn by him.

p.160,11.13-17

p.160,11.18-29

28. The learned Chief Justice then considered on what sum the commission earned by the Respondent should be calculated, and concluded that the Respondent was entitled to the agreed rate of 2½% on the price paid for the London Fashion building alone and not on the value of the stock or fixtures. As to interest, the learned Chief Justice awarded 6% for the period of five years, under section 26 of the Supreme Court Judicature Act, 1962, on the damages awarded of \$14,250, making a total award of \$18,525.

p.161,11.2-10

29. Both Phillips and de la Bastide, JJ.A., agreed with the judgment of the learned Chief Justice. Accordingly, the Respondent's appeal was allowed, the judgment of McMillan, J., was set aside, and the Appellants were ordered to pay the sum of \$18,525 to the Respondent with costs of the appeal and in the Court below.

p.161

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30. The Respondent respectfully submits that the terms of his agency to negotiate on behalf of the Appellants in relation to London Fashion included authority to negotiate not only for the building, but for the business and undertaking of London Fashion as well. The Respondent's efforts, and not the intervention of Gabe, were the effective cause of the Appellants' concluding the purchase of London Fashion's building and undertaking. The Respondent is therefore entitled to commission at the agreed rate of 2½% on the price of \$570,000 paid for London Fashion's building. 10

31. The Respondent respectfully submits that the judgment of the Court of Appeal of Trinidad and Tobago is right and ought to be affirmed, and this appeal ought to be dismissed with costs, for the following (among other)

R E A S O N S

- (1) BECAUSE the scope of the Respondent's agency to negotiate on behalf of the Appellants for London Fashion extended to the transaction as concluded by the Appellants: 20
- (2) BECAUSE the Respondent's efforts in relation to London Fashion were the direct and/or effective cause of the conclusion of the transaction by the Appellants:
- (3) BECAUSE the Respondent duly earned his commission on the transaction in relation to London Fashion as concluded by the Appellants:
- (4) BECAUSE McMillan, J. failed to give due weight to the evidence and to draw the proper inferences from it: 30
- (5) BECAUSE McShine, C.J. reached the proper conclusion upon the evidence:
- (6) BECAUSE of the other reasons given in the judgment of the learned Chief Justice.

J.G. LE QUESNE, Q.C.

STUART N. MCKINNON

No. 3 of 1972

IN THE PRIVY COUNCIL

ON APPEAL FROM THE COURT OF
APPEAL OF TRINIDAD AND TOBAGO

B E T W E E N :

KIRPALANI'S LIMITED
Appellants

- and -

GERALD ECKEL
Respondent

CASE FOR THE RESPONDENT

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