

Privy Council Appeal No. 3 of 1972

Kirpalani's Limited - - - - - *Appellants*

v.

Gerald Eckel - - - - - *Respondent*

FROM

THE COURT OF APPEAL OF TRINIDAD AND TOBAGO

**JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 19TH JUNE 1973**

Present at the Hearing :

LORD WILBERFORCE.

LORD KILBRANDON.

LORD SALMON.

[*Delivered by* LORD SALMON]

The respondent is an estate agent dealing with commercial and residential properties mainly in Port-of-Spain. The appellants own a large store in Frederick Street which is one of the main shopping centres in Port-of-Spain. In March of 1964 the appellants were anxious to acquire further premises in Frederick Street. The respondent went to see Mr. Kirpalani, the appellants' managing director, and told him that he thought that it might be possible for the appellants to acquire Miller's Stores in that street. Mr. Kirpalani said that he would be interested in that property and considered \$750,000 to be a good price for it. It was agreed between them that the respondent should negotiate for this property on behalf of the appellants but should not disclose the name of his principals. The appellants were a well-known and flourishing concern and Mr. Kirpalani feared that if their identity were revealed this might encourage Miller's Stores Ltd. to hold out for a larger sum than they might otherwise accept.

On the 19th March 1964 the following document was signed by both parties:

"Messrs. Kirpalani United Co. Ltd.
Frederick Street,
Port of Spain.
Attention: Mr. Ram Kirpalani

March 19th 1964

Dear Sirs:

This serves to confirm my proposal that I will negotiate, on your behalf, in the possible purchase of Messrs. Millers Stores Ltd., on the understanding that your name is not made known to them and any

offer that I put forward, the duplicate shall be signed by your goodselves as confirmation of the terms stated therein, prior to any offer being formally submitted, a copy of which shall be retained by both parties.

It is also understood that in the event of my acquiring the property you will pay me a Realtor's commission.

Yours faithfully,
(Sgd) Gerald A. Eckel "

" Agreed:
KIRPALANI UNITED COMPANY LIMITED
(Sgd) Ram Kirpalani "

It is common ground that the commission referred to was to be at the rate of $2\frac{1}{2}\%$.

There was an acute conflict of evidence as to what was said between Mr. Kirpalani and the respondent on the 19th March 1964 in relation to stock and fixtures and fittings. Mr. Kirpalani said that he made it plain that he was only interested in acquiring Miller's premises alone. The respondent said that although Mr. Kirpalani told him that he would prefer to acquire the premises alone, he indicated that, if necessary, he was prepared to take over the stock and all fixtures and fittings and possibly the business as a going concern. The learned trial judge took a pessimistic view of both Mr. Kirpalani and the respondent. He said that each was "prepared to sacrifice candour on the altar of expediency" and that it would be unsafe to act on the uncorroborated evidence of either. It was argued by Counsel on behalf of each of the parties before this board and in the Courts below that the phraseology of the document of the 19th March 1964 supported the version of the conversation for which he contended. Their Lordships propose to approach the matter on the basis that the respondent failed to establish his version of that conversation and that nothing was said on or prior to the 19th March about acquiring anything except the premises. This however appears to their Lordships to be immaterial for reasons which will presently appear. The true construction of the words "It is also understood that in the event of my acquiring the property you will pay me a realtor's commission" is however of vital importance. Clearly these words cannot be construed literally. No one supposed that the property was to be acquired by the respondent himself. It was the appellants who were to acquire the property and the respondent who was to negotiate the acquisition on their behalf. Their Lordships consider that the true meaning of the letter is quite plain, namely that if the appellants acquired the property as a result of the respondent's efforts on their behalf, then commission should be payable.

"The question whether or not an agent is entitled to commission on a sale of property has repeatedly been litigated; and it has usually been decided that, if the relation of the buyer and seller is really brought about by the act of the agent, he is entitled to commission although the actual sale has not been effected by him." *Green v. Bartlett* (1863) 14 C.B. (N.S.) *per* Erle C. J. at p. 685.

There is no dispute about the fact that the respondent did a great deal of work in an attempt to bring about a sale of Miller's property to the appellants. There were protracted negotiations which, however, in the end came to nothing.

By late May or early June 1964, Mr. Kirpalani, according to his own evidence, told the respondent that he would not mind buying Miller's stock, furniture and fittings if this would help in the acquisition of the premises. He even considered buying the shares of Miller's Stores Co. Limited and asked the respondent to get him its last three years' balance

sheets. Their Lordships consider that from this date the respondent certainly had authority to negotiate on behalf of the appellants for Miller's premises on the basis that he would be entitled to his commission at any rate on the purchase price of the premises if his efforts were the effective cause of the appellants acquiring the premises and the stock and fixtures.

On the 3rd July 1964 there was an important meeting between Mr. Kirpalani and the respondent. By this time Mr. Kirpalani was pessimistic about the prospects of the Millers deal materialising and wished to have an alternative should it fail to do so. He told the respondent that he had learnt from a Mr. Gabe that some other large premises in Frederick Street owned by a firm called London Fashion might be up for sale. He said that Mr. Gabe was a friend of his and of the partners in London Fashion and there was no question of any commission being payable to him by either side. Mr. Kirpalani suggested that as a hedge against the Millers deal, the respondent should negotiate with London Fashion on the appellants' behalf just as he was doing with Millers, keeping the appellants' name secret and that in the event of success, the appellants would pay the respondent commission on the same basis as they would pay him commission should his efforts result in a deal with Millers being concluded. The respondent agreed. At the same meeting Mr. Kirpalani told the respondent that he was leaving shortly for India and would be away for some months but that in his absence Mr. Maharaj would be acting as the appellants' managing director. Mr. Kirpalani left Trinidad a few days later and returned on the 9th November 1964. On the 22nd November 1964 Mr. Kirpalani at an interview with Mr. Gabe closed a deal with London Fashion to buy their premises for \$570,000, their stock at cost or market price whichever was the lower and their fixtures and fittings at a price to be agreed. All these facts are taken from Mr. Kirpalani's own evidence and were accepted by the learned trial judge.

Between the 3rd of July 1964 and the completion of the deal on the 22nd November 1964 the respondent conducted extensive negotiations with London Fashion (which I shall presently summarise) parallel with the negotiations he was conducting with Millers. The learned trial judge gave judgment for the appellants finding that

1. the transaction concluded between the appellants and London Fashion was "totally different from that which (the respondent) was authorised to do, namely, to negotiate for the purchase of the premises only" and that
2. "(the respondent's) efforts were not the direct cause of the transaction being concluded".

The Court of Appeal accepted all the trial judge's findings of primary fact but concluded that he had drawn the wrong inferences from the evidence which he had accepted and from the documents. They accordingly reversed his two findings set out above, allowed the appeal and ordered that judgment should be entered for the present respondent for a sum equal to $2\frac{1}{2}\%$ of \$570,000 together with interest thereon at the rate of 6% for five years from November 1964.

Their Lordships have no doubt but that the decision of the Court of Appeal was correct.

It follows from what has already been said in this judgment that the first finding upon which the trial judge based his judgment cannot be supported; the learned trial judge does not state what constructions he put upon the important letter of the 19th March 1964. It clearly meant as already indicated that the respondent should be entitled to commission if his efforts on behalf of the appellants were the effective cause of the premises being acquired by the appellants. If in the course of negotiation

sellers make it clear that they are unwilling to sell their premises without their stock, fixtures and fittings and then, as a result of the agent's efforts, his principals acquire the premises and the stock, fixtures and fittings, it would surely be absurd to suggest that the agent would not be entitled to his commission at any rate upon the purchase price paid for the premises because the deal included the purchase of something other than the premises. Accordingly even if the conversation between Mr. Kirpalani and the respondent in late May or early June 1964, in which the stock, fixtures and fittings were expressly covered, had never taken place, the respondent would be entitled to his commission if the deal with London Fashion, which was closed on the 22nd November 1964, was really brought about by his efforts.

After the 3rd July the respondent opened negotiations with London Fashion keeping the name of his principals secret. In a letter of the 10th September 1964 the respondent reported to the appellants, amongst other things, the stage reached in the negotiations in the following terms:

"As requested, it may be well to mention at this stage that I have just been given a price by the owner of London Fashion for his property at \$750,000.00 (Attached please find plan of same) which works out at approximately \$100.00 per square foot. I suggested \$500,000 to them which they rejected and were quick to refer to Tip Top Tailors opposite who got \$350,000 for 3,000 square feet. Also the Fogarty Building next to the Canadian Bank of Commerce on Independence Square has just been sold to an insurance company for the sum of \$420,000.00 the area of which is 110' x 64', i.e. approximately 7,040 square feet which works out at \$60.00 per square foot.

.....

With regard to London Fashion, would you care for me to make a counter offer on your behalf as was done in the Miller case and, if so, please advise what the offer should be."

The appellants replied to this letter by a letter of the 6th October 1964 as follows:

"In the case of London Fashion, I think the price of \$500,000.00 is reasonable. You can offer \$550,000.00 maximum. We will not pay more. I think London Fashion on Chacon Street side is rented. What is the income and what are the tenancy conditions? You write them in the same way as you did Millers."

The respondent then wrote to the appellants on the 22nd October 1964 informing them that he had made an offer of \$550,000 and was awaiting a reply and also gave the information about rents and tenancy conditions for which the appellants had asked in their letter of the 6th October 1964.

By the 7th November 1964 London Fashion, as the respondent informed the appellants by letter of that date, had made a counter offer to sell their premises for \$600,000 provided the buyer also bought their stock of fixtures and fittings. By the time Mr. Kirpalani returned to Trinidad on the 9th November 1964 the original gap between the price which London Fashion had been asking for their premises and were by comparisons seeking to justify, namely \$750,000, and what the appellants had been willing to pay, namely \$500,000, had been reduced from \$250,000 to \$50,000. It must have been obvious to Mr. Kirpalani that as the appellants had offered \$550,000 through the respondent and that as London Fashion who had originally asked \$750,000 had, as a result of their negotiations with the respondent, come down to \$600,000 the deal was on if the appellants were prepared to increase their

offer by about half the difference between \$550,000 and \$600,000 and acquire the stock, fixtures and fittings. This Mr. Kirpalani was prepared to do. We know from Mr. Gabe's evidence, accepted by the learned trial judge, that London Fashion were prepared to take anything they could get for their premises between \$550,000 and \$600,000. Mr. Kirpalani must also have been aware that if he allowed the respondent to continue and conclude the deal on this basis, the appellants could have no answer to a claim for commission save the rather improbable one that no commission was payable because the deal included the acquisition of stock, fixtures and fittings as well as the premises. On the other hand if Mr. Kirpalani by-passed the respondent and concluded the London Fashion deal himself, there was at any rate a chance of depriving the respondent of his commission. Accordingly he gave the respondent until the 21st November to conclude a deal with Millers Stores Ltd. on the basis of an offer by the appellants which he must have known there was little chance if any of Millers Stores Ltd. accepting. They did not accept and on the following day Mr. Kirpalani concluded the deal with London Fashion through Mr. Gabe (to whom no commission was payable) at \$570,000 for the premises and for the stock at cost or market value whichever was the lower and the fixtures (a comparatively insignificant item) at a price to be agreed. Their Lordships agree with the Court of Appeal that the only proper inference to be drawn from the documents and the primary facts found by the learned trial judge is that the respondent's efforts were the effective cause of the sale. Their Lordships will accordingly humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the costs of the appeal.

In the Privy Council

KIRPALANI'S LIMITED

v.

GERALD ECKEL

DELIVERED BY
LORD SALMON