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9th April 1986.

Inter Med Services Ltd. v. Shield Investments (Jersey) Ltd.

The Plaintiff at the times material to this action traded as an Estate Agent under the name and style of Prestige Properties of Royal Square. The Defendant is and was the owner of the Jersey Holiday Village at Portelet and is a company owned by the Butlin family interests. The claim by the Plaintiff is for commission for the introduction of an applicant ready willing and able to purchase the property.

The circumstances under which this claim is made arose when Mr. Derek Judd whom we understood to be the then owner and Managing Director of the Plaintiff company informed the Court that, having heard on the professional grapevine that the Jersey Holiday Village was for sale, had consulted his computer which had produced half a dozen people who could be interested. Armed with this information and although he had never been employed previously by the Butlin family he had got in touch with Mr. T. Devine the Managing Director of the Defendant company. Mr. Devine is the younger brother of Lady Sheila Butlin, who was called by the Plaintiff, and is also, as is Lady Butlin, a trustee for the Butlin family interests.

Mr. Judd informed the Court that he had indicated to Mr. Devine that he had people who could be interested in buying. Mr. Devine's account of this conversation which he thinks would have taken place on or about the 18th May 1984 was that a representative of the Plaintiff asked if they could represent the Defendant company. This request he says was refused. Subsequently however on the 24th May he received a telephone call from his sister Lady Butlin when she asked him to get in touch with Mr. Judd. Before he could do so however, Mr. Judd had telephoned him and asked him to meet a party from the Isle of Man who were to fly in the next day. There is some conflict of evidence at this point with that given by Mr. C. Bannister the negotiator at that time employed by the Plaintiff but we do not believe it to be material.

Mr. Bannister, though, who was called at very short notice and without warning to give his evidence of events which occurred some 18 months previously (and which came, he said, as a surprise), was quite definite that Mr. Devine had been instructed to put the property on the market at a particular price by his sister Lady Butlin.

On the 25th May both Mr. Judd and Mr. Bannister attended at the Holiday Village, with London representatives of the Island of Man party. Mr. Judd had not dealt with these representatives or the Isle of Man party previously: and having first said that he was not allowed to say who the Isle of Man people were, he then qualified this answer by saying he had never met them nor did he know their names. He hoped, he said, that they existed.

Mr. Judd told the Court that when the representatives were coming over he realised that he had no instructions signed by either the Isle of Man party or by the Defendant.

In these circumstances both he and Mr. Bannister attended on Mr. Devine after lunch on the 25th May 1984. Whilst Mr. Judd waited downstairs with the representatives, Mr. Bannister went on upstairs to meet Mr. Devine taking with him a letter of instruction. Mr. Bannister says that he saw Mr. Devine alone for two or three minutes and handed him the letter of instruction which he read and signed. Mr. Devine states that before he signed the letter he telephoned to Lady Butlin to ask for her consent; a statement which is confirmed by Lady Butlin who told us that her brother had informed her that the agents were there, that they were waiting for the Isle of Man people to arrive and had asked her whether he should sign a paper for their commission if there were a sale, to which she replied in the affirmative. Mr. Devine says Mr. Bannister must have heard him make the call, and although Mr. Bannister does not recall it we think it highly unlikely that in such circumstances Mr. Devine would have committed the company to a potential liability of £60,000 without his sister's authority and that, in this instance, Mr. Bannister's memory has betrayed him. At, or just after, the letter was signed, Mr. Judd entered with the representatives.

The letter is in the following terms:-

"Dear Mr. Devine,

Re: Jersey Holiday Village, Portelet Bay, St. Brelade
I have pleasure in acknowledging your kind instructions for us to place the above property on our register, and to produce an applicant ready, willing and able to purchase the property for the sum of £3,000,000 or other such sum acceptable to you.

May we take this opportunity of confirming that in the event of our producing a purchaser able to proceed at an agreed price, our commission charges will be in accordance with the locally agreed scale of 2% for the freehold & contents.

Every endeavour will be made to dispose of the property as confidentially and expeditiously as possible.

Assuring you of our prompt and personal attention at all times.

Derek W. Judd"

and is endorsed:-

(Sgd) "F.T. Devine
Director
Jersey Holiday Village Protelet Bay
Shield Investments (Jersey) Ltd."

There is a strong conflict of evidence between Mr. Devine and Mr. Bannister as to whether the agreement reached in or evidenced by this letter, the meaning of which Mr. Devine stated he did not fully understand, was, first, to apply only to the Isle of Man party or was, as the Plaintiff claims, at large, and, second, whether commission would only be payable in the event of a sale, as the Defendant claims, or would be payable under the terms contained in the letter, that is, upon the introduction of an applicant ready willing and able to purchase. We will return to these points in due course because following the meeting and the signature of the letter the Plaintiff then set about finding purchasers. Among those who were approached were the Modern Hotels Group (M.H.). We have had produced to us a letter from M.H. to Mr. Bannister dated 21st June 1984 where Mr. Segal the Managing Director of the Group advised him he would be meeting on July 4th with Mr. Devine. Mr. Devine, who accepted that, whether with or without his authority, the Plaintiff had introduced M.H. as a prospective purchaser met with Mr. Segal on July 2nd, which he recalls as it was Mrs. Devine's birthday. We accept that, and we also accept that following the luncheon, Mr. Devine telephoned to Mr. Judd and told him that neither he nor Mr.

Bannister were to approach him again nor to come near the Holiday Village, but that he Mr. Devine, would continue with the three people he was in discussion with and would advise Mr. Judd ultimately if a sale were concluded. He followed this with a letter dated 3rd July 1984 which read as follows:-

"Dear Mr. Judd,

Reference the sale of Jersey Holiday Village. We have at present two of your clients actively engaged to considering the purchase, and the original clients from the Isle of Man. We will in good faith continue in negotiation with these clients for the purpose of concluding a sale, however we do not at this stage propose to consider any further persons you may bring to us.

I must at this stage emphasise that the Company details we supplied to you were for your Isle of Man clients, you did assure me that it was only for them, I was therefore most surprised to find you had circulated them. As I explained to you when you first approached us we were not at that time actively going into the market to sell, as the one thing we wished to avoid was having at a busy period of the year a succession of parties coming to view the site. As I explained to you, we are not in the position of forced sellers, we therefore feel we are entitled to choose our own time and method for selling, we certainly do not want a mass circulation of material unsolicited arriving at various company offices throughout the island.

Yours sincerely,
F.T. DEVINE"

It is common ground that one of the "clients" mentioned in this letter was M.H. and that meetings correspondence and telephone calls continued between that Group and the Defendant.

On the 18th July 1984, Mr. Judd acknowledged this letter, but did not reply directly to the points raised by Mr. Devine, writing as follows:-

"Dear Mr. Devine,

We thank you for your letter, the contents of which have been noted.

May we immediately reassure you that contrary to your letter we are most certainly not "circulating a mass of unsolicited material to various company offices throughout the island". It is our policy to negotiate confidentially and expeditiously. To this end we have informed you of each applicant that has shown interest, and in turn have told them that all information is confidential. We have, as I mentioned to you, one further interested party in the form of a Mr. Davis. He is the Financial & Planning Director for Messrs. Greenall Whitley. We have told him that there are other interested parties, and he has asked us to keep him informed of the situation. He has also requested us to arrange a viewing at a convenient time to all concerned. (He is on holiday until August 6th)

As you may be aware, we as a Company sell a lot of hotels, and it is a matter of record that the majority are sold when they are "busy". There is nothing more 'off-putting' to a potential buyer than to see a premise when it is in its maintenance period'. We must therefore apologize for bringing potential purchasers to you

at your busy period, but this has always proven to be successful. We have not heard from Mr. David Kirch - so we assume he has dropped out, but will keep in touch.

Mr. Segal has gone a little quiet, so I feel our Greenall Whitley contact will have to be cultivated at a convenient time to all. Trusting you had a pleasant trip to Canada, and assuring you of our confidentiality at all times.

Yours sincerely,
Derek W. Judd"

The next letter between the parties was written by Mr. Devine on the 6th August 1984:-

"Dear Mr. Judd,

We are still in negotiation with Modern Hotels re: the sale of the Jersey Holiday Village, in good faith we will continue with these. However my sister and I after much rethinking have decided that should these negotiations fail then the 'Village' is to be retained by the family.

Yours sincerely,
F.T. Devine"

This was acknowledged by Mr. Judd on the 8th August 1984:-

"Dear Mr. Devine,

Thank you for your letter.

Obviously we are disappointed with the contents as we have put a lot of time and effort into the sale of the Holiday Village. Mr. Davies of Greenall Whitley has telephoned to ask us if next Thursday is convenient for him to come to Jersey. We have written to him to say that you wish to complete the current negotiation before proceeding further. This will in effect 'keep him on ice' for any possible future developments. We have also written to Mr. Segal (copy enclosed) to inform him that there is another interested party in the background which may induce him to make an early decision. We would appreciate your keeping us informed if you have any news.

Yours sincerely,
Derek W. Judd"

At the same time Mr. Judd wrote again to Mr. Segal but thereafter his involvement ceased: as Mr. Judd admitted in cross examination, he was effectively precluded from being party to any further negotiations after the end of July.

It is our view that the contractual position reached by the parties following the meeting and letter of the 25th May had now been clarified.

So far as the first point in contention is concerned, that is, whether the agreement reached on the 25th May was limited to the Isle of Man party or not, it is, in our view, immaterial. If it were so limited, then it was varied by agreement to include M.H., the only interested prospective purchaser relevant to these proceedings. If it were not so limited, but at large, then it was varied by agreement to

so as

be limited to M.H.; and it was quite clear to the parties that M.H. had been accepted by the Defendant as a possible purchaser introduced by the Plaintiff, with the assent of the Defendant.

Whatever the intial contract on this point, we find therefore that it was varied by mutual agreement whether by extension or by limitation to embrace M.H.

It is equally clear to us that there was no mutual agreement to vary the second point in contestation, so that we have to decide on this point whether we find for the contention of the Plaintiff or for that of the Defendant, that is what is the event which would trigger the payment of commission.

That there are no peculiar rules relating to commission contracts is clear from the words of Lord Russell of Killowen in Luxor (Eastbourne) Lt (in liquidation) & others v. Cooper (1941) 1AER 33 @ 43 where he states:-

"A few preliminary observations occur to me (1) Commission contracts are subject to no peculiar rules or principles of their own. The law which governs them is the law which governs all contracts and all questions of agency. (2) No general rule can be laid down by which the rights of the agent or the liabilities of the principal under commission contracts are to be determined. In each case, these must depend upon the exact terms of the contract in question, and upon the true construction of those terms."

We are not prepared to look beyond the terms of the letter or to import into the agreement terms which are plainly contrary to those contained in it. The letter is perfectly clear; it was presented to Mr. Devine who accepted and signed it and we are satisfied that it sets out the event which would trigger the payment of commission. It was certainly not varied by mutual agreement and we find therefore that the arrangements as to the payment of a possible commission were not that it should be payable on a completed sale but in accordance with the terms of the letter.

This however is not the end of the story.

There were a whole series of letters between the Defendant and M.H. which were obviously necessary because from an early stage, negotiations were carried on mostly, and latterly entirely, between the parties without the intervention of the Plaintiff. On the 9th July Mr. Segal wrote to Mr. Devine requesting information; on the 30th July Mr. Devine writes to Mr. Segal assuring him the family are "not going to push you

into an early decision re: the 'Village'; on the 3rd August Mr. Segal replied as follows:-

"Dear Terry,
Can I thank you for the courtesy extended to my colleagues and I on Wednesday of this week.
At present, we have not changed our decision of our interest in the Holiday Village, but it will take us a little bit longer than first envisaged before we can come back to you. As explained, with interest charges as high as they are we have to look at the whole financial situation very closely. I hope to be able to come back to you by the first week in September, and should be grateful to receive from you the figures I have asked for as soon as possible.
I thoroughly enjoyed our short discussion with Jean, and look forward to meeting you both again in the not-too-distant future.

Kindest regards
Yours sincerely,
Maurice E. Segal"

On the 6th August, Mr. Devine again assures Mr. Segal that he will not hassle him, and promises to send him figures. On the 13th August, Mr. Segal wrote as follows:-

"Dear Terry,
Many thanks for your letter of 6th August and it is still going to be a few weeks before I am in a position to make some proposals to you.
We are having discussions with our Bankers and other Financial Advisors with a view to seeing at what rate we can raise the capital.
Am I correct in assuming that your comment to me over lunch some weeks ago that you would contemplate leaving £1M in at 10% is a firm offer.
I envisage being able to talk to you at the end of the first week in September and I hope you find that satisfactory.

Kindest regards
Yours sincerely,
Maurice E. Segal"

To this Mr. Devine replied on the 15th August:-

"Dear Maurice,
Thank you for your letter of the 13th August. My offer of leaving £1,000,000.00 on loan at 10% was firm, this would be only a medium term loan of say five years.
As to regards a concluding date for negotiation, we are not hassling you, we have informed Prestige Properties that we are in negotiation with you and that in the event we do not conclude, Sheila and I have decided to withdraw as sellers and continue with the management and ownership of the 'Village'.
Kind regards,
Terry Devine"

Mr. Segal wrote again on the 3rd September stating inter alia that he hoped to make proposals within two weeks; on the 13th to say it would be a few more weeks and on the 8th October to say he was finalising his finances.

Finally, on the 11th October 1984 M.H. wrote as follows:-

"Dear Terry,

Holiday Village

I refer to our various meetings and discussions with reference to the proposed purchase by Modern Hotels of the Jersey Holiday Village.

I apologise for the delay this has taken but with the size of the village and the amount of money involved, obviously we had to make the necessary arrangements which included discussions with our Bankers and other Financial Advisers.

We are now in a position to make an offer for the Company which controls the Holiday Village of £2,700,000, clear of all liabilities.

I would also like to have further discussions with you with reference to Shield Travel because quite obviously this has been one of the major selling arms for the Village and if we are to be successful in marketing it then we will need the support of Shield Travel.

We would like to hold open the option for you to leave in from the present beneficial owners £1,000,000 at 10% for not less than 5 years as quoted in your letter of 15th August.

I look forward to hearing from you when the Trustees have had an opportunity of considering this offer.

Kindest regards
Yours sincerely,
Maurice E. Segal"

Four days later Mr. Devine replied on the 15th October as follows:-

"Dear Maurice,

Thank you for your letter of 11th October 1984, and confirmed offer for the purchase of the Jersey Holiday Village.

Sheila and I have shared discussions on the offer received. As you know in recent months the 'Village' had been withdrawn from the market, in good faith it was decided the negotiations previously entered into with you on the basis of our asking price £3,000,000.00 would continue. The offer received falls far short of the asking price, and is unacceptable.

We have no wish to enter a counter figure to that offered, and consider the negotiation has been concluded, the 'Village' is now no longer available for purchase.

Please be assured of our good faith and respect for yourself and the Modern Hotels Group. We do sincerely hope that we can continue to enjoy a good relationship between us, hopefully a closer business relationship can be developed between us.

Kindest regards,
Yours sincerely,
Terry Devine"

This effectively ended negotiations, and the Defendant afterwards, refused to reopen them in spite of a further letter dated 22nd October from M.H.:-

"Dear Terry,

I am in receipt of your letter of 15 October and you can imagine my disappointment on reading it.

Whilst I appreciate that the decision on whether to sell the Holiday Village rests with you and Sheila, I was under the impression, as a result of our conversation over lunch when we first met on the matter some months ago, that there was leeway in the price you were asking.

You are well aware of the amount of effort we have put into trying to structure our Group finances to enable us to purchase the Village. This has necessitated many meetings and trips to Jersey with our Professional Advisers from the U.K. You know this because they have all been to see the Village.

If all that is between us is £300,000 then I am quite happy to increase the offer made in my letter of 11 October to the asking price, on the basis of the contents of that letter.

I sincerely hope that you will now accept this offer on the basis of your letter to me of some weeks ago, that if Modern Hotels did not purchase the Village it would be withdrawn from the market. As we are now willing to meet your asking price then you should show a sign of good faith and accept our offer.

I look forward to hearing from you.

Kindest regards
Yours sincerely,
Maurice E. Segal"

The Defendant has claimed that before what it describes as a second offer for the Holiday Village was received negotiations had been concluded and the property was no longer available for purchase.

Whatever the effect of the first letter of the 11th October from M.H. there can be no question but that it did not, under any stretch of the imagination, bring about a situation which made the Defendant liable to the Plaintiff.

In these circumstances, it seems to us that before we have to consider the effect, if any, of what the Defendant states is an offer of £3m for the property, that is, the offer, if such it be, received after the property was withdrawn, we have first to decide whether the Defendant can withdraw from the negotiations in such a way as to disentitle the Estate Agent to commission even if, subsequently, M.H. were to make an offer bringing themselves within the terms of the letter of the 25th May 1984.

In their letters of the 3rd July and 6th August to the Plaintiff the Defendant had undertaken to negotiate in good faith with M.H. Although the correspondence conducted by Mr. Devine is not always entirely clear, it is clear that the Defendant did not intend to negotiate indefinitely and that this was accepted by the Plaintiff as is shown by its letter of the 8th August. That the Defendant did negotiate is clear from the offer, never clearly defined, to leave £1m on loan; but that was as far as it went. There is no evidence before us that there was to be any negotiation on ~~that~~ the sale figure. Indeed the evidence is to the contrary. It may well be that the Butlin

interests were hoping that no firm offer would be forthcoming at £3 million, but it is equally clear from the evidence of Lady Butlin that the family would have honoured their undertaking to sell at this price. We may say that Lady Butlin also added that Mr. Segal knew he was the only person in the running, and went on to say that she was astounded that after Mr. Segal had received the letters, knew there was no opposition and that it was not on the open market, he should have put in the first offer. She had the feeling that he was just playing and that whatever offer was put on the table he would try to undercut it. She wished she said to hear no more of it.

It is quite clear to the Court that neither Lady Butlin nor Mr. Devine at any time contemplated selling at less than £3 million. Mr. Devine was very firm in his evidence that he had never given Mr. Segal the impression that the price might be reduced, and that they were open to an offer at £3 million, but no less.

We accept this evidence.

We find further that when Mr. Devine for the Defendant writes that he was going to negotiate in good faith he meant that the Defendant would give M.H. who had been introduced by the Plaintiff, the opportunity to offer £3 million for the property. The Defendant has in fact gone further than this, as it had waited several months, and offered to leave money in. This though was as far as it was to go and no reduction in price was to be considered.

When a lesser offer was made, the Defendant closed the negotiations as it was quite entitled to do vis a vis M.H.

The question, as we have said previously, which we must answer is whether by discontinuing discussions and thus depriving M.H. of any possibility of making an offer, they are relieved of any liability towards the Plaintiff; or whether, after the Defendant had withdrawn, it might at some future time become subject to such liability should M.H. see fit to make an offer within the terms of the letter of the 25th May.

It was strongly argued for the Plaintiff that the Defendant could not do so. Mr. Whelan urged upon us the view that once the introduction is made the Vendor cannot withdraw and refuse to pay commission if an offer is subsequently made. For this he relied on E.P. Nelson & Co. v. Rolfe (1949) 2AER 584. He urged that the contract of agency is independant and not ancillary and that although the Defendant need not sell to M.H. he must nonetheless keep faith with the Agents; see Christie Owen & Davies Ltd. v. Rapacioli (1974) 2AER 312. He claimed that even if the property had been withdrawn in August and M.H. had offered in October the Defendants would be liable to pay commission. He sought to overcome the difficulty posed by an open ended obligation of this nature, that is, one without limitation of time by saying that it must last for a reasonable period.

With respect to the arguments of learned Counsel the Court is quite unable to accept that submission. In E.P. Nelson & Co. v. Rolfe, the facts are rather different. The facts there recited @ p. 586 A-G were as follows:-

"I hereby instruct Messrs. E.P. Nelson & Co. to offer for sale the property described above on the understanding that in the event of Messrs. E.P. Nelson & co. introducing to me a person able ready and willing to purchase the property on the terms indicated above, or on terms subsequently authorised by me, I will pay them immediately upon such introduction commission in accordance with the terms and conditions as specified in the Scale of Professional Charges of the Auctioneers' and Estate Agents' Institute of the United Kingdom, an extract of which scale is given overleaf and which I have carefully read."

"The extract simply says:

"Private Treaty. Negotiating a sale by private contract; or introducing a person able, ready and willing to purchase on terms authorised by the vendor..."
and it sets out the percentages.
"Another agent to whom the house had been entrusted was Messrs. Cowdrey & Co., and on the day following the signing of the contract with the Plaintiffs a Mr. Emile, sent by Cowdrey & Co., came to the bungalow and said he would like to buy it. He then went back to Cowdrey's, saw Mr. Christelow, and said he wished to purchase the property but had not got the full ten per cent deposit. He made a preliminary deposit of £5. Mr. Christelow said that he then got into communication with the defendant and on Mr. Emile's behalf asked for an option on the property for 24 hours at a higher figure than that asked by the defendant, and the defendant agreed to give Mr. Emile the option as requested. After Mr. Emile had been to the bungalow, a Mrs. Payne arrived, having been sent by the plaintiffs. She liked the bungalow, but said she wished her husband to see it, but he could not come until the next day and asked the defendant to keep it for them. The defendant said she could not do so, as it might be sold before they had reached

a decision. Mrs. Payne then went away, but she returned in the afternoon with her husband. The defendant then said that the house was sold, that she had given an option on it, and that a deposit had been paid. Eventually, the house was sold to Mr. Emile for £2,700."

The Court of Appeal strongly disagreed with the Judge at first instance who instead of limiting the implied term to an actual sale, had gone beyond that and said in effect that the contract would not apply if the property had been taken off the market - not legally but in a business sense.

It is quite clear that the house was at all times for sale, and the judgement was given against the Vendor on the grounds @ 587 that it was "clear that it had not been sold at the time when Mr. & Mrs. Payne arrived, and, as it had not been sold, the contract was still in existence."

In our view, the principles which are relevant are to be found in Luxor (Eastbourne) Ltd (in liquidation) and others v. Cooper (1941) op. cit. a decision of the House of Lords and thus of the highest persuasive authority in this Court. The contract with the Agent was in this case one where the Agent was to find a purchaser rather than one within the terms of the instant contract: but in our view the words of Lord Russell of Killowen, at p. 46 clarify and illuminate the principle of law with which we are concerned when he said:-

"My Lords, in my opinion there is no necessity in these contracts for any implication, and the legal position can be stated thus. If, according to the true construction of the contract, the event has happened upon the happening of which the agent has acquired a vested right to the commission (by which I mean that it is debitum in praesenti, even though only solvendum in futuro), then no act or omission by the principal or anyone else can deprive the agent of that right. Until that event has happened, however, the agent cannot complain if the principal refuses to proceed with, or carry to completion, the transaction with the agent's client."

In our view this passage reflects accurately the position in this case. It is our opinion that the Vendor may withdraw without liability to the agent before an offer is made which might trigger payment of commission. It is our view that regardless of what Mr. Devine had written to Mr. Judd as to his intention to negotiate in good faith, this placed no legal obligation upon the Defendant to continue after it

had decided to withdraw: but we may perhaps add that we find that it did in fact fulfil its stated intention of acting in good faith by behaving as it did and waiting on to see if M.H. would make an offer. The position had been made perfectly clear to the Plaintiff in August and accepted by it.

We find that the Defendant was entitled to withdraw the property as it did without any obligation to the Plaintiff. The claim of the Plaintiff is therefore dismissed.