E. W. RESER (DEFENDANT) . . . . APPELLANT;

AND

W. M. YATES (PLAINTIFF) . . . . RESPONDENT.

1909
*Feb. 23.
*April 5.

ON APPEAL FROM THE SUPREME COURT OF SASKATCHEWAN.

Sale of lands—Conditions—Deposit of price—Compliance with instructions—Vendor refusing to complete—Broker's commission—Remuneration for procuring purchaser.

A broker instructed to sell lands for a price to be deposited in a bank pending arrival of clear title, procured a purchaser who made the deposit to his own credit without appropriating it to any special purpose. On refusal by the vendor to complete the bargain, the broker sued him for a commission or remuneration for the services rendered.

Held, reversing the judgment appealed from (1 Sask. L.R. 247) Idington J. dissenting, that there had not been such compliance with the terms of the instructions as would entitle the broker to recover commission or remuneration for his services in procuring a purchaser.

APPEAL from the judgment of the Supreme Court of Saskatchewan, *in banc*(1), affirming by an equal division the judgment of Newlands J. at the trial, which maintained the plaintiff's action with costs.

The circumstances of the case are stated in the judgments now reported.

Ewart K.C. for the appellant.

G. F. Henderson K.C. for the respondent.

*PRESENT:—Sir Charles Fitzpatrick C.J. and Girouard, Davies, Idington and Duff JJ.

(1) 1 Sask. L.R. 247.

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THE CHIEF JUSTICE.—I agree in the opinion stated by Mr. Justice Duff.

GIROUARD J. agreed in the opinion stated by Duff J.

DAVIES J.—I would allow this appeal and enter judgment for the defendant with costs.

I agree that the nature of the plaintiff's agency was to procure a purchaser and not to effect a sale of the defendant appellant's property.

But I also think that under his authority the plaintiff was to procure a purchaser who would deposit

with the Union Bank at Swift Current the sum of $4,000 on or before the 22nd August pending arrival of clear title.

That condition I do not think was complied with by the purchasers procured by plaintiff depositing the $4,000 to their own credit and so that they could withdraw it at any moment they liked. I agree that the condition called for a payment made with the bank in some way insuring that it would remain there for at least a reasonable time as a guarantee to the vendor that the proposed purchaser would carry out the sale if the vendor within a reasonable time produced a clear title to the land.

No such deposit or payment was made. What was done by the proposed purchasers was to deposit a sum of $4,000 to their own credit and not having any relation or reference so far as the bank or the vendors were concerned to the contemplated purchase. The latter could at any moment withdraw it. Yates, the plaintiff, had written the purchaser a letter on August 16th, enclosing a copy of the "terms the vendor Reser would sell on," and explaining to them that "the money of course would remain in the bank until he gave the

bank the clear titles." They knew, therefore, when they wired the money on the 20th to the bank that the deposit ought to remain in the bank until the purchaser gave or produced to the bank a clear title. But they simply deposited the money to their own credit without any notice whatever to the bank of its object or purpose.

It was open to Yates, the agent, when he received the telegram from the purchasers on the 20th August

change contract to conform to Reser's demands and have him sign them. Have wired four thousand to Union Bank to-day

to have given the bank notice of the telegram he had received from the purchasers in reply to the letter he had written them, and that the money deposited by them was deposited with the object and purpose of fulfilling the contract of purchase on vendor's terms. If he had done so it probably would have been sufficient to satisfy the conditions prescribed by the vendor on which he (Yates) was authorized to sell. He, however, did nothing until the 22nd, the last day for the making of the deposit when instead of notifying the bank he wired the intending purchasers as follows: "Money should be deposited to your credit to be withdrawn by Reser on production of clear title. Instruct bank promptly."

It was then too late. Their instructions were not sent to the bank as requested by Yates until the 24th and were not received until the 25th. In the meantime and at the close of business at the bank on the 22nd Reser had gone to the bank and found out the facts whereupon he immediately wrote Yates that as the condition relating to the deposit had not been complied with the "deal was off."

Yates, it seems to me, has himself to blame for not

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having on or before the close of the 22nd August, after receiving the purchasers' telegram of the 20th, given the necessary notice to the bank of the purchase and of the purpose and object of the deposit and so earmarked the deposit as to make it a compliance with the vendor's terms of sale.

By neglecting to do so and taking the course he did he justified the vendor legally in declaring the deal at an end.

IDINGTON J. (dissenting).—This is an appeal from the Supreme Court of Saskatchewan affirming the judgment of the trial judge for $400 in an action for commissions respondent claimed to have earned by bringing to the appellant a purchaser for land he owned in said province.

The land was entrusted by the appellant to the respondent exclusively for one month from the 18th of July for sale on terms specified in writing bearing that date.

The respondent effected a sale in writing to parties in Illinois signed by them and by appellant through respondent as his agent, but in some respects bound appellant therein to what was in excess of his instructions.

Upon his raising this objection the month had only two days yet to run. The agent who had been at some expense begged, having regard to the distance at which the buyers lived, four days' extension of time to see if objectionable features could not be dropped from the contract and as became a man experienced in business this was conceded by the appellant upon somewhat burthensome terms being added to what he would have been entitled to on the original arrangement with the respondent.

The following is a copy of memorandum the appellant signed to shew what more he wanted:

The following are the terms upon which I agree to sell my farm: *i.e.*, N.E. ¼ of 14-16-14 and N.W. ¼ of sec. 13-16-14, together with all buildings as they stand at present and one-half share of all my share of all crops now on said premises. Terms: $4,000 *to be deposited with the Union Bank at Swift Current on or before August 22nd, 1906, pending arrival of clear title.* Balance to be paid to suit purchaser at 8 per cent. interest or cash on arrival of title without interest if desired.

Purchasers agree to pay any expenses incurred in building granary for said half share of crop and also half share of all harvesting operations and expenses. Possession to be given at opening up of spring, 1907.

Commission to W. M. Yates to be 5 per cent. of purchase price.

(Sgd.) E. W. Reser.

The respondent having procured this wrote the same day one of the intending purchasers who had signed, explaining the situation and enclosing copy of the above and as to the money to be deposited explained

the money of course would remain in the bank until he gave the bank the clear titles.

On the 20th of August, 1906, a telegram was sent signed by both purchasers who had signed the agreement of purchase to the respondent as follows:

Change contract to conform to Reser's demands and have him sign them. Have wired four thousand to Union Bank to-day.

The money thus provided was duly credited by the Union Bank to Murray & Hein, the purchasers, by deposit as of the 20th August as if to their current account.

It seems quite clear that they had bound themselves to buy these lands on the terms set forth in their first agreement to be modified by the hand of the appellant's agent to meet the requirements of the appellant

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as shewn on the above quoted memorandum and had literally complied with the exact terms thereof, stipulating for a deposit of $4,000 with the Union Bank at Swift Current on or before the 22nd August.

The appellant got everything tendered him which his instructions required.

The letter of his own agent upon which the purchasers acted had specified that the deposit

must remain in the bank until he gave the bank the clear titles.

And in accepting the terms offered and acting in pursuance thereof and depositing the money accordingly it would have been idle for them to pretend they had the money on call only.

All that was needed to make the matter binding on the local banker as well as his principals in Illinois was for the appellant to signify assent and inform the banker, who evidently knew no more than to accept the deposit, of the history I have related and the appellant's rights and claims under it to have the money retained for such reasonable time as might enable him to complete the title.

When this stage was reached the respondent had earned his commission and was entitled to be paid, whether the appellant chose to act in the curious way he did or not and refuse to act as ordinary men would have acted.

We are asked to read into these words in which the appellant had framed his instructions and terms he required something that is not there. He might have insisted, if appellant chose to say so, on the gold being brought in a bag and left with the bankers. But he did not.

No explanation appears therein such as is alleged is usual to have done in such cases, namely, to deposit

in specified terms the appellant now pretends would have suited him. No law or legal custom ever existed to interpret the words used in that way and no other.

Nor do I think a prudent business man would dream of placing so much money in the unrestricted power of another an entire stranger without providing for determining or limiting his power of detention.

The letter of Yates, appellant's agent, covered this by the two week's limit the appellant had requested.

This letter containing the two important provisions I have adverted to, one stipulating for the money remaining in the bank until title made, and the other just mentioned naming the two weeks, seems to have been overlooked by the court below. I venture to think the court could have seen in them coupled with the acceptance thereof in the way I have dealt with already, if attention had been drawn thereto, that very protection in law sought for appellant by part of the court.

It was suggested here that he may not have known of that. His own agent it was who, placed by him in a position having the right to do this, had effectually served him and if treated fairly would have explained, on being given a chance, all he had done.

Moreover, the very agreement this agent had a solicitor draw up and which the appellant professes to have been willing to sign contains in it a provision suggesting all this had been provided for. A little reasonableness in this regard on the appellant's part would have led him to be fully satisfied if he had desired to act fairly.

The appeal should be dismissed with costs.

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DUFF J.—I think the conditions of the respondent's right to commission were that on or before the 22nd August, 1906, he should procure a purchaser, that is to say a person willing to enter into a contract of purchase; and that the purchaser should deposit in the bank specified a sum of $4,000 appropriated to the purchase, but actually payable to the vendor only when (within a reasonable time, of course) a title should be shewn.

The respondent had a person willing to purchase before the date mentioned, and the sum required was in the bank, but unfortunately owing apparently to his misapprehension of the terms of his engagement he failed to produce the evidence of his authority to conclude a bargain with the appellant and the sum remained at large at the disposal of the purchasers until after the limit of time specified in his instructions—without being appropriated to the purchase as the terms of the respondent's employment required. I regret the necessity of coming to this conclusion because the respondent's failure was due only to a mistake, and I think the appellant's conduct in taking advantage of that mistake merits the reprobation of all right-minded people.

The appeal should be allowed with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Grayson & Armstrong.*

Solicitors for the respondent: *Willoughby & Pickett.*