ARBITRATION - Award - Application to set aside - Recorder of proceedings servant of defendant - Fact known to both parties - No objection raised - Whether sufficient ground to set aside award **Adisi v. Construction & Furniture Co. (W.A.) Ltd. of Accra [1963] 2 GLR 42, SC**

ADISI v. CONSTRUCTION & FURNITURE CO. (W.A.) LTD. OF ACCRA [1963] 2 GLR 42-53.

IN THE SUPREME COURT

17TH JUNE, 1963

ADUMUA-BOSSMAN, CRABBE AND BLAY JJ.S.C.

Arbitration—Award by arbitrator—Application to set aside—Recorder of proceedings serva defendant—Fact known to both parties—No objection raised—Whether sufficient ground to set award.

Agency—Contract—Frustration—Agent commissioned to sell business—Prevention of sale by princi Whether contract frustrated by principal.

HEADNOTES

This was an appeal by the plaintiff against the decision of Ollennu J. (as he then was) refusing to set an arbitration award made between the plaintiff and the defendants. The grounds of appeal were namely, that the person who recorded the proceedings at the arbitration was a servant of the defe and as such was an interested party who was likely to record the proceedings in a [p.43] m prejudicial to the plaintiff but favourable to the defendant. The plaintiff knew that the recorder w servant of the defendant. He did not raise any objection. The record of proceedings was read morning by the arbitrator and agreed upon by both the plaintiff and the defendant. The second grou appeal was that the defendants by their action had frustrated an agreement entered into betwee plaintiff and the defendants whereby the plaintiff was to negotiate for the sale of the defendants' busi The plaintiff alleged that the defendants by their action frustrated the negotiation being completed.

Held, dismissing the appeal:

(1) the circumstances under which an arbitration award may be set aside are where it is proved tha award was the result of corruption or fraud or that the arbitrator completely ignored the ordinary rul the proper administration of justice. In this case even if the allegations were true the right to objec waived by the applicant when he continued to take part in the proceedings with full knowledge o alleged improprieties and without protest. Hodgkinson v. Fernie (1857) 3 C.B.(N.S.) 189 at p. 202; v. Haigh (1861) 5 L.T. 507; Bignall v. Gale (1841) 10 L.J.C.P. 169 at p. 171; Re Hopper (1867) L.R. 2 367 at p. 375 and Re An Arbitration between Elias Underwood and the Bedford and Cambridge Ra Co. (1861) 5 L.T. 581 applied.

(2) Unless there is an express term in a contract to the contrary, in a contract of agency for the sa property for a commission, the principal may, without the knowledge of the agent dispose of the pro himself in which case the agent would not be entitled to any commission. In this case the agent cou claim that the contract was frustrated by the conduct of the principal as he would be only entitled to e commission on the sale being concluded. Luxor (Eastbourne), Ltd. v. Cooper [1941] A.C. 108, Dennis Reed, Ltd. v. Goody [1950] 2 K.B. 277 at p. 284, C.A.; Peter Long & Partners v. Burns [19 W.L.R. 413 at p. 416; Sethia v. Partabmull Rameshwar [1950] 1 All E.R. 51 at p. 59; Scottish Navig Co. v. Souter & Co. [1917] 1 K.B. 222 at p. 249, C.A.; Bank Line, Ltd. v. Capel & Co. [1919] A.C. 435 460, H.L. and Bentall, Horsley and Baldry v. Vicary [1931] 1 K.B. 253 cited.

CASES REFERRED TO

(1) Hodgkinson v. Fernie (1857) 3 C.B.(N.S.) 189; 27 L.J.C.P. 66; 140 E.R. 712

(2) Haigh v. Haigh (1861) 5 L.T. 507; 31 L.J.Ch. 420, C.A.

(3) Bignall v. Gale (1841) 10 L.J.C.P. 169; 133 E.R. 980

(4) Re Hopper (1867) L.R. 2 Q.B. 367

(5) Re An Arbitration between Elias Underwood and the Bedford and Cambridge Railway Company (5 L.T. 581

(6) Crossley v. Clay (1848) 5 C.B. 581; 136 E.R. 1006

(7) Champsy Bhara & Co. v. Jivraj Balloo Spinning & Weaving Co. Ltd. [1923] A.C. 480; 129 L.T. 16 T.L.R 253, P.C.

(8) Luxor (Eastbourne), Ltd. v. Cooper [1941] A.C. 108; [1941] 1 All E.R. 33, H.L.

(9) Dennis Reed, Ltd. v. Goody [1950] 2 K.B. 277; [1950] 1 All E.R. 919, C.A.

(10) Peter Long & Partners v. Burns [1956] 1 W.L.R. 413; [1956] 2 All E.R. 25

[p.44]

(11) Hirji Mulji v. Cheong Yue Steamship Co. [1926] A.C. 497; [1926] All E.R. Rep. 51, P.C.

(12) Prickett v. Badger (1856) 1 C.B. (N.S.) 296; 140 E.R. 123

(13) George Trollope & Sons v. Martyn Bros. [1934] 2 K.B. 436; 152 L.T. 88, C.A.

(14) George Trollope & Sons v. Caplan [1936] 2 K.B. 382; [1936] 2 All E.R. 842, C.A.

(15) Howard Houlder & Partners Ltd. v. Manx [1923] 1 K.B. 110; 128 L.T. 347

(16) Sethia v. Partabmull Rameshwar [1950] 1 All E.R. 51, C.A.

(17) Scottish Navigation Co. v. Souter& Co. [1917] 1 K.B. 222; 115 L.T. 812, C.A.

(18) Bank Line, Ltd v. Capel & Co. [1919] A.C.435; [1918-19] All E.R. Rep. 504, H.L.

(19) Bentall, Horsley and Baldry v. Vicary [1931] 1 K.B. 253; 170 L.T. Jo. 515

NATURE OF PROCEEDINGS

APPEAL from a refusal of Ollennu J. (as he then was) sitting in the High Court, to set aside an arbit award of J. S. Manyo-Plange, Esq. and dismissing the plaintiff's claim against the defendant, repor [1962] 1 G.L.R. 30.

COUNSEL

Asafu-Adjaye, Snr. for the appellant.

Quashie-Idun for the respondents.

JUDGMENT OF CRABBE J.S.C.

This is an appeal from a refusal of Ollennu J. (as he then was) sitting in the High Court, Accra, to set an award of J. S. Manyo-Plange, Esquire (sole arbitrator) dismissing the applicant's claim agains defendants.

The main grounds on which the applicant sought to impugn the award in the High Court wer misconduct on the part of the arbitrator and (2) error of law on the face of the award.

The basis of the court's jurisdiction to set aside awards of arbitrators is set out in a statement of Willia in Hodgkinson v. Fernie.1 He said:

"The law has for many years been settled, and remains so at this day, that, where a cause or matt difference are referred to an arbitrator, whether a lawyer or a layman, he is constituted the sole and judge of all questions both of law and of fact . . . The only exceptions to that rule, are, cases wher award is the result of corruption or fraud, and one other, which, though it is to be regretted, is now, I firmly established, viz. where the question of law necessarily arises on the face of the award, or upon paper accompanying and forming part of the award. Though the propriety of this latter may very w doubted, I think it may be considered as established."

[p.45]

Other cases in which the principles upon which the court sometimes acts when considering applicatio set aside awards is Haigh v. Haigh,2 where Turner L.J. said:

"Then as to the other grounds on which his case is rested, it is to be observed, in the first place, th

arbitrator being a judge selected by the parties, and chosen to decide without appeal, this cour nothing to do with any mere error in judgment on his part. The parties have chosen him to be their j and have agreed to abide by his determination; and by that determination, if fairly and properly made must be content to be bound; but, on the other hand, arbitrators, like other judges, are bound, where are not expressly absolved from doing so, to observe in their proceedings the ordinary rules which ar down for the administration of justice; and this court, when called upon to review their proceedin bound to see that those rules have been observed. The difficulty which the court has to encoun determining a question of this nature is not as to the principles by which its decision ought to be gove but in determining whether what has been done falls within the range of the arbitrator's judgme contravenes the rules which ought to be observed in collecting the materials on which that judgment be exercised."

It seems therefore that apart from corruption or fraud a departure from the ordinary rules for the p administration of justice constitutes a breach of duty on the part of the arbitrator, and may amount to misconduct as will justify the setting aside of an award.

"Misconduct" is, of course, used in its legal or technical sense in which it is known in the law relati arbitrations as denoting irregularity, and not, as counsel for the applicant-appellant emphasized, any obliquity or anything of that sort.

The misconduct alleged in this case was the employment by the arbitrator of a recorder who wa employee of the defendants and who by reason of her interest in the defendants' business recorde proceedings in a manner prejudicial to the applicant but favourable to the defendants.

The first objection with regard to the recorder was that the record of proceedings contained "deliberat calculated perversion" of statements actually made by the applicant in the course of the proceedings these charges were denied by the defendants whose managing director swore to an affidavit in whi deposed as follows:

“3. That I was present at all the sittings of the arbitration, and before evidence was heard on each da previous day's proceedings were read over by the arbitrator and counsel on both sides.

4. That neither the plaintiff, nor his counsel took any objection against any of the proceedings that supplied to them daily, and I am advised by counsel that the arbitrator and counsel for both p accepted the same as being correct.

5. That further to the above-mentioned facts, the arbitrator himself had a notebook in which I saw him his own notes on some questions and answers."

[p.46]

These facts stated by the managing director appear to me to be amply corroborated by the app himself when he deposed as follows in paragraph 4 of his affidavit:

"An important statement was made by the arbitrator on the 22nd September, 1961, with referen omissions discovered by him from the record of proceedings of the 20th September, 1961, in rega

very important questions' put by him to the defendants' witness, Mr. Read, and answers given thereto arbitrator expressed surprise at counsel for not calling his attention to the said omissions after re copies of the proceedings supplied them."

It seems to me plain beyond dispute that the applicant had full knowledge, throughout the proceedin the omissions and distortions about which he now complains, or at least he must have been awa these objections on the 22nd September, 1961, when the arbitrator himself called attention to c omissions in the record of proceedings.

If this objection is well-founded then the obvious course opened to the applicant was to protest again conduct of the recorder and withdraw or to continue to conduct his case in the proceedings befor arbitrator under such protest. The applicant in this case did neither of these things. A party arbitration cannot be allowed to lie inactive and indecisive so as to obtain the benefit of an award if i his favour and to have it set aside if it is against him. Thus in Bignall v. Gale3 Tindal C.J. said:

"In coming to a determination upon this case, I cannot get rid of what makes a great impression upo mind, that the defendant for three weeks knew of every objection which has now been urged to this a and gave no notice of his intention to dispute it on those grounds. He knew, on the 17th of Dece these witnesses had been examined in his absence. What right had he then to lie by, with this griev dormant in his own bosom, and now dispute, for the first time, the validity of the authority which has exercised?"

In my judgment even if these allegations are true the right to object was waived by the applicant wh continued the proceedings with full knowledge of the alleged improprieties and without protest.

The second ground on which the charge of misconduct is founded is stated in paragraph 12 o applicant's affidavit and it is in these terms:

"The arbitrator was fully aware, from the very beginning of taking evidence, I am informed and believe, that the lady recorder was a secretary to the defendants and therefore must be interested i proceedings in so far as her employers were concerned and, quite naturally, to my detriment."

At first blush this would appear to be a very grave charge because arbitrators are required to conduct proceedings according to the principles of justice and "must not do anything which is not in itself fa impartial." However, counsel for the applicant was unable to show how the arbitrator was, or could been influenced, by the recorder.

[p.47]

No doubt if the arbitrator knew that the recorder was an employee of the defendants it would be imp for him to have employed her; but it is not every kind of impropriety in conduct that affords groun setting aside an award. Thus in Re Hopper,4 Cockburn C.J. said:

"I would observe that we must not be over ready to set aside awards where the parties have agre abide by the decision of a tribunal of their own selection, unless we see that there has been some

radically wrong and vicious in the proceeding . . .”

In Re Hopper (supra) two parties referred certain disputes to two arbitrators and an umpire. After a
evidence had closed and nothing remained but for the umpire to make up his mind and make his a
one of the parties who was an innkeeper invited the two arbitrators, the umpire, and his own attorn
dinner at his inn. They all dined together in the absence of the other party or anyone on his behalf.
matters of reference were mentioned, and the umpire became completely intoxicated and was oblig
spend the night at the inn. He eventually made an award in favour of the party who invited him
house. In dealing with this conduct of the umpire in a judgment on an application to set aside th
award Cockburn C.J. said5:

"No doubt all this was extremely improper and unbecoming. It is to be very much regretted that ar
who has to exercise judicial functions should place himself in the position of appearing under an oblig
to one of the parties, even in respect of hospitality; because a person who has to administer justice s
be above suspicion, and therefore I cannot help regretting that that course of proceeding should have
adopted. But the question is, whether upon that ground we should set aside the award. If it could be
clear that the object of Wrightson, one of the parties, in inviting the arbitrators and umpire to go
partake of the hospitalities at his house, had been to corrupt the umpire, or if we could see tha
hospitalities thus bestowed upon the umpire had that effect, and had in any way influenced the award
he made, I quite agree that would be a very sufficient reason for setting aside this award, or at all e
for refusing to enforce it summarily; but I cannot believe, looking at all the circumstances, that the
and intention of Wrightson was to corrupt the umpire, and I do not see the slightest reason for supp
that the umpire was in any way influenced by the hospitality he had received."

In another case Re An Arbitration between Elias Underwood and the Bedford and Cambridge Ra
Company,6 the attorney to one of the parties to a reference under the Lands Clauses Consolidation
18457 who had appeared as advocate for such client before the arbitrator was consulted by the arbi
and assisted him in drawing up the award, and charged for the same in his bill of costs sent in t
arbitrator and by him claimed from the opposite party. An application to set aside the award on [p.4
grounds of misconduct by the arbitrator was refused by the court, Earle C.J. who delivered the judgm
the court said8:

“The course which has been pursued by the arbitrator in this case is one which I, as judge, I
disapprove of, because it creates a just ground of suspicion and dissatisfaction to the parties, les
person appointed to judge and decide impartially between them has been swayed one way or the oth
the interference of the attorney of one of the parties. I repeat, that it is conduct calling for an express
strong disapprobation. At the same time I see nothing in the present case to lead me to the concl
that the decision come to by the arbitrator on the question before him was influenced by the proceedi
the attorney."

In this case there is no suggestion of any improper relationship between the recorder and the arb
who himself took notes of the evidence. On the contrary the applicant admits that on the 22nd Septe
1961, the arbitrator himself called attention to some serious omissions discovered by him in the reco
proceedings and expressed surprise that counsel for the applicant had not called his attention earl
these omissions. Surely, how could any reasonable man say that such arbitrator was likely
influenced by the recorder? Mere suspicion that the arbitrator was, or could be, influenced is no grou

induce the court to interfere; there must be something more than that: see Crossley v. Clay.9

In my judgment both Re Hopper (supra) and Re An Arbitration between Elias Underwood and the Be and Cambridge Railway Company (supra) are much stronger cases than this present one becaus misconduct in each was more serious. I cannot in all the circumstances of this case come t conclusion that the arbitrator was in any way influenced by the recorder.

The learned judge of the court below gave a very careful consideration to the misconduct alleged ar views are contained in the following passage from his judgments10:

"Thus if the complaint had been that by employing the particular recorder the arbitrator disabled hi from dealing with any of the matters referred to him, it could be said that the said employment const misconduct. Again if there were reasonable grounds to show that the employment of the part recorder resulted or even could result in the arbitrator obtaining some information from the recorder ou the evidence led before him, e.g., if the arbitrator held private discussions of the record of proceedings the recorder in the absence of the parties or any of them, that act of private discussion, would amo misconduct. But the mere employment of the recorder to take the proceedings with nothing more, is opinion, not misconduct to warrant the award being set aside."

I find myself in entire agreement with the views of the learned judge and in this appeal nothing has urged to persuade me that he was wrong.

[p.49]

The next ground of appeal is on the question of law and it is stated in these terms:

"The defendants having interfered with the people with whom the plaintiff was negotiating unde mandate given by the defendants, the learned trial judge erred in his ruling that the contract wa frustrated by the contact which the opposers made with the firms in question through a person who believed, as stated in the letter exhibit Q, was assisting the applicant in the negotiations for a purcha their business, could not in any way so strike at the root of their agreement with the applicant, ar entirely beyond what was contemplated as to frustrate the performance of the contract'."

In order to succeed on this ground it must be shown that this is an error of law which appears on the of the award. In Champsey Bhara & Co. v. Jivraj Balloo Spinning & Weaving Co. Ltd.,11 Lord Du who delivered the opinion of the Board of the Judicial Committee of the Privy Council said as follows:

"An error in law on the face of the award means, in their Lordships' view, that you can find in the awa a document actually incorporated thereto, as for instance a note appended by the arbitrator statin reasons for his judgment, some legal proposition which is the basis of the award and which you can say is erroneous."

The error of law complained of here does not form the basis of the entire award but only in so far affects the applicant's third claim. In considering the question of law that arose in this claim the arbi posed the following pertinent and vital question:

"The agreement was that the plaintiff earns the commission only on a concluded sale. There having no sale, even if plaintiff's negotiations were frustrated as alleged, is the plaintiff entitled to a commissio

On the authority of Luxor (Eastbourne), Ltd. v. Cooper,12 the arbitrator had no hesitation in answerin question in the negative. In my judgment the arbitrator was perfectly right, for as Denning L.J. (as he was) pointed out in Dennis Reed, Ltd v. Goody13:

"When a house-owner puts his house into the hands of an estate agent, the ordinary understanding i the agent is only to receive a commission if he succeeds in effecting a sale; but if not, he is entitl nothing. That has been well understood for the last 100 years or more: see Simpson v. Lamb per J C.J., and Prickett v. Badger, per Williams J. The agent in practice takes what is a business risk: he on himself the expense of preparing particulars and advertising the property in return for the subst remuneration—reckoned by a percentage of the price—which he will receive if he succeeds in find purchaser: see Luxor (Eastbourne), Ltd. v. Cooper."

[p.50]

In Peter Long & Partners v. Burns14 Lord Goddard C.J. also said:

"It has been laid down clearly and concisely by the Court of Appeal that the general understa involved in the employment of a house or property agent to sell property is that he is to be remune only if the sale goes through, so that the vendor will receive the purchase price out of which he will pa commission. That is the general principle, which applies in the absence of special circumstanc special terms."

It was however contended by the applicant at the court below that this principle does not apply when agent was deprived of his commission by an act of the employer which frustrated the purpose o contract.

By the doctrine of frustration the court infers a term for the discharge of the contract in the event whic occurred, if this is in accordance with the presumed intention of the parties. The principle has been s in simple but apparently definite language by the Judicial Committee of the Privy Council in Hirji M Cheong Yue Steamship Co.15 where it was stated that:

"The doctrine of frustration rests upon a term or a condition implied in the contract. In contemplation o the parties, if they had anticipated and had taken into consideration the events which ultimately frust the object of their adventure, would have made provision for it, and, again in contemplation of law, the operation of those events upon the contract is the very thing for which that term would have prov Hence, in implying that term to give a foundation for a legal conclusion, the law is only doing wha parties really (though subconsciously) meant to do themselves."

There seems to be some support for the contention of the applicant-appellant in Prickett v. Badg which established the general proposition that where an agent is employed at an agreed commissi sell land and succeeds in finding a person able and willing to purchase at the stipulated price, bu employer refuses to sell and rescinds the agent's mandate, then a term ought to be implied that the is entitled to sue on a quantum meruit for his work and labour on the ground that the performance o

contract was frustrated by the wrongful act of the employer. This principle of implied term in comm agreements was applied in George Trollope & Sons v. Martyn Bros.17 by the Court of Appeal (Sc L.J. dissenting) and unanimously recognised in George Trollope & Sons v. Caplan.18

But the decision in Prickett v. Badger (supra) was not followed in later cases. Thus in Howard Houl Ltd. v. Manx Isles Steamship Company,19 a shipbroker had effected a charter-party which contain [p.51] option to the charterer to purchase the ship for £125,000, and the shipbroker was entitled commission on that sum if the option was exercised. The option was, unfortunately for the shipbroke exercised, but the shipowners and the charterers entered into a new agreement with which the broker nothing to do that the vessel should be sold to the charterers for £65,000. It was held by McCardie J the brokers could not claim their commission on either the £65,000 or on a quantum meruit. He that20:

"It is a settled rule for the construction of commission notes and the like documents which refer t remuneration of an agent that a plaintiff cannot recover unless he shows that the conditions of the w bargain have been fulfilled. If he proves fulfilment he recovers. If not, he fails. There appears to b halfway house, and it matters not that the plaintiff proves expenditure of time, money and skill."

In Luxor (Eastbourne), Ltd. v. Cooper (supra) Lord Wright thought the judgment of McCardie J. in Ho Houlder & Partners Ltd. v. Manx Isles Steamship Co. Ltd. (supra) was right whilst the House disapp the principle adumbrated in George Trollope & Sons v. Martyn Bros. (supra).

In my view the judgment in Luxor (Eastbourne), Ltd. v. Cooper21 is decisive against the contention applicant. In that case the agent was employed by the principal to sell a certain property, the agree being that the agent should receive a commission on the completion of sale to any purchaser who could introduce. He introduced a suitable purchaser, but the principal refused to sell. The agent the sued the principal for breach of contract, his contention being that in law there was an implied term agreement that the principal would not without just cause prevent the agent from earning his commis The House of Lords held that when a contract provides a commission payable to house agents is payable "on the completion of purchase" then it is not earned until the purchase is in fact completed there is no implied term that the employer will not dispose of the property himself or otherwise act so prevent the agent earning his commission.

In his judgment Lord Wright considered at some considerable length the question whether the princi a commission agent is liable for damages for breach of an implied term. He refused to read such a into the contract and said that22:

"The commission agreement is, however, subordinate to the hoped for principal agreement of sa would be strange if what was preliminary or accessory should control the freedom of action of the pri in regard to the main transaction which everyone contemplates might never materialize. I cannot thin a property owner can be held, in virtue of a commission contract like this, to have bound himself by implication to complete the sale or to pay damages to the agent. Express words are in my op necessary to effect this result. Indeed the stipulation `payment [p.52] on completion of purchase' is opinion contradictory of the implication that there is to be payment, even in the shape of damages, event of the sale not being completed."

Later he observed that23:

"Thus when it is said in the present case that the appellants prevented the respondent from completin contract it must be shown that the appellants broke some term of the contract between them an respondent. The appellants cannot be held liable on the ground of prevention where all that happ was that they did, or omitted to do, something which as between themselves and the respondent they free to do or omit to do. I question if there is any exception to this principle, but I am clear that there exception material to this case. Since, in my opinion there was no such implied term as the respo claims, there can be no case of prevention rendering the appellants liable."

A contract of agency is, like any other contract, construed according to its terms. There is a ge presumption that parties to a contract have expressed in it every essential term, and terms will n imported into it which the parties have not expressed. But the court will give effect to the intention parties if this was only expressed defectively or there was an omission of something because it se too obvious to express.

The true legal position of a commission agent vis-a-vis his principal was summarized by Lord Wri these words24:

"In the case of the commission agent, to whom payment is dependent on completion or the like cond the principal does not promise that he will complete the contract for reasons which I have explained only promise is that he will pay commission if the contract is completed. There is no promise to reasonable remuneration if the principal revokes the authority to the agent. And it is a further objectio claim on a quantum meruit that the employer has not obtained any benefit. The agent has earned no until the event materializes. It may seem hard that an agent who has introduced a potential purch able and willing to complete, should get nothing for what he has done, if, during the negotiations principal decides not to complete, according to his own pleasure and without any reason which quoa agent is a sufficient excuse. But such is the express contract . . . The agent in practice takes wha business risk."

To succeed therefore in this case on his second ground of appeal the applicant must show tha contract with the defendants contained express words indicating a prohibition against interference b defendants with prospective buyers who were already in direct negotiation with him. In the alternati must show that this is a proper case in which the court ought to imply a term of prohibition. Howev Sethia v. Partabmull Rameshwar25 Jenkins L.J. advised the following caution:

"One thing, I think, is clear about implied terms. I do not think that the court will read a term into a co unless, considering the matter from [p.53] the point of view of business efficacy, it is clear beyo peradventure that both parties intended a given term to operate, although they did not include it in so words."

There are two reasons why I think that the applicant's case does not fall within the doctrine of frustr The first is that if the applicant's contention were upheld he would be entitled to such general damag the law will presume to be the direct natural or probable consequence of the act complained of; that say, the commission which he would have received if the defendants' conduct had not prevented him earning it. Such a result in my view would be inconsistent with the express term that commission was

earned on a concluded sale.

My second reason is that it must have been obvious to the applicant that the contract did not hampe principal making his own independent arrangements to sell his property to any person willing to buy. parties must therefore have contemplated the event as it happened and should have made with resp that contingency an express provision of prohibition. Their deliberate omission to guard against su eventuality that was present to their minds raises the inference that they were content to run the risk frustration caused by the event that happened. In the words of A. T. Lawrence J. in the Scottish Navig Co.'s case26 approved by Lord Sumner in Bank Line, Ltd. v. Capel & Co.27:

"No such condition should be implied when it is possible to hold that reasonable men could contemplated the circumstances as they exist and yet have entered into the bargain expressed i document."

In Bentall, Horsley and Baldry v. Vicary,28 the principal appointed estate agents as "sole agents" t property upon the terms that five per cent commission shall be payable if they introduced a purch The principal himself sold privately to a purchaser and the agents sued the principal for damage breach of contract. In giving judgment for the principal McCardie J. made the following per observations that29:

"It is to be noted that the contract contains no express words at all indicating a prohibition against a sa the defendant himself. If the parties intended such a prohibition nothing would have been easier th insert the appropriate words."

In my judgment the applicant failed to show such an intention of prohibition in the contract, and o authorities I am satisfied that the learned judge of the court below was right in rejecting his contentio the purpose of the contract was frustrated by what the defendants did.

For the above reasons I would dismiss this appeal.

JUDGMENT OF ADUMUA-BOSSMAN J.S.C.

I agree.

JUDGMENT OF BLAY J.S.C.

I also agree.

DECISION

Appeal dismissed.

K. T.

FOOTNOTES

1 (1857) 3 C.B. (N.S.) 189 at p. 202; 140 E.R. 712 at p. 717.

2 (1861) 5 L.T. 507 at p. 509, C.A.

3 (1841) 10 L.J.C.P. 169 at pp. 171-172; 133 E.R. 980 at p. 983.

4 (1867) L.R. 2 Q.B. 367 at p. 375.

5 Ibid. at pp. 374-375.

6 (1861) 5 L.T. 581.

7 8 & 9 Vict., c. 18.

8 (1861) 5 L.T. 581 at p. 582.

9 (1848) 5 C.B. 581; 136 E.R. 1006.

10 [1962] 1 G.L.R. 30 at p. 32.

11 [1923] A.C. 480 at p. 487, P.C.

12 [1941] A.C. 108, H.L.

13 [1950] 2 K.B. 277 at p. 284, C.A.

14 [1956] 1 W.L.R. 413 at p. 416.

15 [1926] A.C. 497 at p. 504, P.C.

16 (1856) 1 C.B.(N.S.) 296, 26 L.J. (C.P.) 33.

17 [1934] 2 K.B. 436, C.A.

18 [1936] 2 K.B. 382, C.A.

19 [1923] 1 K.B. 110.

20 Ibid. at pp. 113-114.

21 [1941] A.C. 108, H.L.

22 Ibid. at pp. 138-139, H.L.

23 Ibid at pp.148-149 H.L.

24 Ibid at p.141, H.L.

25 [1950] 1 All E.R 51 at p. 59, C.A.

26 [1917] 1 K.B. 222 at p. 249, C.A.

27 [1919] A.C. 435 at p. 460, H.L.

28 [1931] 1 K.B. 253.

29 Ibid. at p. 258.