IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0082 OF 2007S
(High Court Civil Action No. HBC 88 of 2000S)

BETWEEN: INTERNATIONAL PROPERTY AUCTIONS LIMITED

Appellant

A N D: FIJI DEVELOPMENT BANK

Respondent

Coram: John Byrne, JA
Chandra Datt, JA
Andrew Bruce, JA

Hearing: Monday, 23rd June 2008, Suva
Thursday, 17th July 2008, Suva

Counsel: P. Knight for the Appellant
D. Sharma for the Respondent

Date of Judgment: 29th July 2008

JUDGMENT OF THE COURT

Introduction

[1] This is an appeal by the Appellant against the decision of His Lordship Mr. Justice Coventry of 3 July, 2006, in which His Lordship dismissed the Appellant's claim against the Respondent's liability to pay the Real Estate Agent's commission for locating a purchaser who completed the purchase of the Korean Village resort at Pacific Harbour, Suva. The primary finding of His Lordship was that there was no agreement between the parties, and also there was no claim for *quantum meruit* established upon which the Appellant could seek reasonable payment for introducing the purchaser to the Respondent.

Background

[2] The Respondent Bank was the mortgagee in possession of the Korean Village Resort at Pacific Harbour. It took possession of the resort after the owners failed to comply with a notice of demand for payment issued by the Respondent. After taking possession, the Respondent unsuccessfully attempted to locate a suitable purchaser to sell the resort to recover its mortgage debt. Mr. Lal, the Manager, Special Services, employed by the Respondent was instrumental in this matter.

[3] The evidence at trial was that Mr. Sibary, the agent, and Mr Lal knew each other prior to the Respondent taking possession of the resort. Mr. Sibary is a resident of the United Kingdom and has been operating a real estate agency business in the United Kingdom for over 30 years. Prior to 1992 he conducted his business under the name of Focus Abroad Ltd, a United Kingdom registered company. After 1992 he changed its name to International Property Auctions Ltd. The company acquired 'Focus Abroad' as its registered business name. Mr. Sibary continues to remain a director of the International Property Auctions Limited [IPAL]. He claims that the appellant company is registered under the United Kingdom Companies Act and is entitled to enter into contract with the Respondent. His personal liability as a director is not applicable because the transaction is entered in the United Kingdom by the Respondent company.

[4] On 24 July 1998, Mr Lal, acting on behalf of the Respondent bank sent a fax letter to Mr Sibary, at his address in the United Kingdom, and appointed Focus Abroad Ltd as its selling agent for the resort at a commission of 3% on sale. Mr Sibary rejected this offer and made a counter offer in the sum of 5%. The Respondent replied in its letter dated 5 August 1998 by making a counter offer stating that it will pay 5% commission, only if the sale "exceeds reserve price". But the Respondent failed to disclose the reserve price. While Mr Sibary was negotiating with Mr Lal to remove the clause "exceeds reserve price" from the letter of appointment, he introduced the prospective purchaser, a Mr Sherlock to Mr Lal, who ultimately purchased the resort. After Mr.Sibary introduced the prospective purchaser, the Respondent appointed the Receiver, who sold the resort on behalf of the Respondent. The condition 'exceeds reserve price' was neither varied nor removed from the letter of appointment of 5 August 1998.

[5] After the conveyance was completed, the agent submitted his commission fee which was 5% on the total sale price, in the sum of $160,000.00. The total sale price included purchase of the two additional adjoining land lots, value of which was estimated in the sum of $100,000.00. The Respondent refused to pay. The Appellant issued a statement of claim seeking payment of commission in the sum of $160,000.00.

The Trial

[6] The claim was heard in the High Court before Coventry J on 3 July 2006. The primary issue before the High Court was whether there was a legally binding commission agreement between the Appellant and the Respondent. The Respondent pleaded various defences in denying the Appellant's right to any commission.

[7] At the hearing, the Appellant relied on three different issues in seeking to establish its claim for payment of selling commission.

[8] Firstly it argued that there is a valid agreement between the Appellant and the Respondent, based on several letters exchanged between the parties, but more particularly the two letters which were sent to Mr Sibary by Mr Lal dated 24 July and 5 August 1998. The Appellant based his claim on the 5% commission payable as provided in the Respondent's letter dated 5 August 1998. This letter became the central issue between the parties. It is in the following terms: "The Respondent will pay 5% subject to only if the sale "exceeds reserve price". The Respondent did not inform the Appellant the reserve price. The evidence before the trial Judge was that while the Appellant continued to negotiate the removal of the words "if the sale price exceeds the reserve", Mr Sibary introduced the purchaser, Mr Sherlock to Mr Lal. There was evidence before the trial Judge that the Appellant continued to negotiate with Mr Lal to remove the clause "exceeds reserve price" from the letter of appointment, but this was not agreed to by the Respondent.

[9] Since the Respondent failed to respond, the Appellant claimed that the Respondent, by remaining silent had consented to the removal of the foregoing terms contained in the

letter of appointment. The trial Judge held that there was no meeting of the minds, therefore, there was no agreement between the parties.

[10] Secondly, the Appellant argued that if the documents do not support the contention that there is a legally enforceable commission agreement between the parties, then, the Appellant seeks payment based on implied agreement, and that the Respondent will pay the Appellant a reasonable commission on completion of the sale. The trial Judge held that there was no implied contract applicable and rejected the claim.

[11] Thirdly, the Appellant argued that if these two arguments (above) failed, then the plaintiff is entitled to seek payment from the Respondent based on the doctrine of *quantum meruit*, but the Appellant failed to provide any particulars of such claim. The trial Judge held that even though there is a claim for *quantum meruit* as such, it is not claimed in the pleadings, hence the claim failed.

[12] The Respondent in reply, submitted to the trial Judge that there was no binding agreement between the parties, since the words "exceeds reserve price" rendered the contract uncertain in terms of the amount on which the 5% commission could be applied, therefore, the contract was invalid and unenforceable.

[13] The Respondent further claimed at the trial that it did not enter into any commission agreement with the Appellant company since it only had dealings with Focus Abroad. It never intended to enter into any agreement with the Respondent thus, claiming that there is no privity of contract between the parties. The trial Judge held that, *"It is not entirely clear, on the face of the documents whom Mr.Lal considered the bank would be contracting with".*

[14] The Respondent further submitted that Mr Sibary did not have a work visa to be employed in Fiji therefore, the contract if any, is void, the Appellant is not entitled to any payment. The only finding by the trial Judge in relation to the work visa is referred to in paragraph 42 of the judgment in the following terms, "It necessarily follows that if the plaintiff's case is correct Mr.Sibary must have been acting as the director, servant or agent of Focus Abroad and or IPAL whilst in Fiji". There was no further evidence either

submitted or questions raised in this matter, therefore, we do not consider it relevant for further scrutiny.

[15] While the Appellant was negotiating the removal of the clause, "subject to reserve price", the Respondent appointed a Receiver to advertise the property for sale by tender.

[16] After the appointment of the Receiver, the Respondent argued that the sale was negotiated by the Receiver with Mr Sherlock, and it had nothing to do with the Respondent Bank.

[17] The Respondent's most critical argument is that the clause "subject to reserve price" incorporated in the letter dated 5 August 1998, renders the entire contract unenforceable for uncertainty. There was never any reserve price placed on the resort, therefore, there is no binding agreement. For the above reasons, His Lordship held *"that there was no meeting of the minds"*.

[18] In addition, the Respondent argued at the trial that even if the letters indicated that there was a legally enforceable agreement; Mr Lal did not have the authority to enter into a commission agreement with Mr Sibary. The findings of Coventry J at paragraph [20] were based on the unchallenged evidence of Mr Nand, where he commented, "That any commission agreement would have to go to the Board and that didn't happen. Mr. Lal did not have the authority to make such an agreement".

[19] The Appellant responded by submitting that Mr Lal had the authority to enter into a commission agreement with Mr Sibary and claimed that the letters issued by the Respondent support that contention.

[20] Before the appointment of the Receiver, Mr Sherlock made an unsuccessful offer to purchase the resort. After the appointment of the Receiver, Mr. Sherlock submitted his first tender to purchase the resort. This tender was rejected. Thereafter, Mr Sherlock entered into further negotiations to purchase the resort together with the two adjoining lots for $3,200,000.00. The Respondent accepted the purchase price. Mr Sherlock

completed the purchase of the resort. The value of the two allotments was agreed at $100,000.00 which was included in the purchase price.

[21] On the completion of sale, Mr. Sibary claimed commission in the sum of $160,000.00, 5% of $3,200,000.00 being the total sale price. The Respondent denied payment on the basis that they did not owe any commission to the Appellant.

[22] The Appellant claimed that the commission was payable after the prospective purchaser introduced by the Appellant completed the purchase. We note that neither the Receiver nor Mr Lal was called to give evidence at the trial.

[23] The letter issued by Mr Lal dated 5 August 1998 became the conditional agreement and created an uncertainty of the whole agreement since the meaning of 'exceed reserve price' could not be ascertained. The trial Judge at paragraph [20] commented in the following terms:

> *"The letters which followed the crucial meeting showed there was a divergence of recollection as to what, if anything was agreed. On one hand it could be said Mr Lal was trying to back paddle in what he agreed shouldn't have agreed, on the other that Mr Sibary was trying to steam-roller 'an agreement that hadn't been reached".*

[24] After the trial, His Lordship in his decision of 3 July 2006 held that there was no need to consider whether the contract was void, voidable or unenforceable on the grounds of illegality or public policy. Accordingly, His Lordship held that there was no contract between the Plaintiff and the Defendant and no *quantum meruit* has arisen. The claim was dismissed with costs.

The appellant now appeals against that decision.

Grounds of appeal

1 That the learned Judge erred in finding that there was no contract between the Appellant and the Respondent whereby Respondent engaged the services of the Appellant to find a purchaser for the property at Pacific Harbor known as the 'Korean

Village resort' (the resort) and whereby, if the Appellant introduced a purchaser who purchased the Resort, the Respondent would pay the Appellant a commission,

2 The Learned Judge erred in finding that the Appellant did not plead in its statement of claim by way of an alternative claim to breach of contract that it should be compensated by way of quantum meruit.

3 The Learned Judge erred in finding that the Respondent was not obliged to compensate the Appellant by way of quantum meruit as an alternative to damages for breach of contract.

[25] At the hearing of the appeal, Counsel for both the Appellant and the Respondent made written and oral submissions. The Court is indebted to them for their assistance.

Ground 1

"That the learned Judge erred in finding that there was no contract between the Appellant and the Respondent whereby Respondent engaged the services of the Appellant to find a purchaser for the property at Pacific Harbour...."

[26] At the appeal hearing, Counsel for the Appellant submitted that it relied on three different grounds of appeal in seeking to establish that it was entitled to payment of commission, firstly, 5% on the sale price, or in the alternative, payment of a reasonable sum for introducing the purchaser who eventually completed the resort.

[27] He argued that:

(a) There was a legally binding agreement between the Appellant and the Respondent.

(b) In the alternative, there is an implied agreement for payment of a reasonable commission for locating a purchaser, who completed the purchase, or, in the alternative,

(c) The Appellant is entitled to seek payment based on *quantum meruit*, however, the Appellant failed to particularize any claim in its pleadings.

Is there a Valid Agreement?

[28] The Counsel for the Appellant submitted various matters in support of establishing that there was a prima facie agreement for payment of commission. In the alternative, the Counsel submitted that if the Court found that there was no binding agreement between the Appellant and the Respondent, then, the Appellant sought to rely on an implied agreement, that on completion of the sale, the Respondent would pay a reasonable commission.

[29] While the pre-condition subject to "exceeding the reserve price" remained in the letter of appointment, it created an uncertainty in the commission agreement, hence the agreement is unenforceable. In **May & Butcher v R** [1934] 2 KB 17, the court held that while vital matters still remain to be settled, the agreement, while the fundamental terms remain outstanding, was incomplete and the parties had to enter into another agreement to conclude the terms of the first agreement, see also **British Hemophone Ltd v Kunz** (1935) 152 LT 589.

[30] Counsel for the Respondent submitted that there was no contract between the parties for payment of commission; therefore, the Appellant was not entitled to any payment. He further submitted that the Respondent agreed to pay 5% commission but imposed a condition, which the Appellant disregarded as the pre-condition to payment of commission. He submitted that the Appellate Court should be reluctant to interfere with the findings of the High Court, as referred to in **South Pacific Academy of Beauty Therapy Ltd v Coral Surf Resort Ltd** [2007] FJCA 14, when this Court applied the principles enunciated in the House of Lords decision in **Benmax v Austin Motors Co Ltd** [1955]1 All ER 326.

[31] We note that the Appellant did not refer in its pleadings to any claim for either, unjust enrichment, restitution, or in *indebitatus*, but included a claim in *quantum meruit* without particularizing any details of such claim.

[32] The Appellant at the appeal hearing relied on the letter dated 5 August 1998 to establish that this document was a legally binding agreement between the parties. Counsel for the

Appellant submitted that the learned Trial Judge erred in his finding and referred to various letters exchanged between the Respondent and Mr Sibary. Counsel claimed, when looking at the totality of all letters, it can be concluded that there was a legally binding agreement between the parties for payment of 5% commission on the sale price of the resort. He further submitted that the agreement entered into by the parties should be divided into two parts, one for the sale of the property and the other to negotiate payment of commission by the Respondent to the Appellant. We disagree.

[33] The Respondent claimed that as all letters were exchanged by the Respondent with Mr Sibary as a director of Focus Abroad, the Respondent never intended to enter into any selling agency agreement with the Appellant company.

[34] After examining the two letters issued by the Respondent to the Appellant, dated 24 July 1998 and 5 August 1998, we found that it contained a conditional acceptance by the Respondent to pay 5% commission, if the sale exceeded the "reserve sale price", which is a 'condition precedent'. Unless the condition precedent was ascertained, there was no legally enforceable agreement between the parties. If the Respondent had provided the reserve sale price to the Appellant, the condition precedent would have been ascertained, the Appellant would have a valid and enforceable contract. However, this condition precedent was never determined and communicated to the Appellant. Accordingly, we agree with the learned trial Judge, there was no agreement between the parties. The meaning and application of a condition precedent in an agreement was explained in **Maynard v Goode** (1926) 37 CLR 529, at p 540. We do not find any evidence to suggest that this condition was removed or varied by the Respondent. Therefore, the term "reserve sale price" suspended all legal rights and liabilities between the parties. The meaning and application of a condition precedent in an agreement was further explained by the Privy Council in **Aberfoyle Plantations Ltd v Cheng** [1960] AC 115 [1959] 3 All ER 910, and also see **Pym v Campbell** (1856) 119 ER 903.

[35] There are two vital or fundamental terms for consideration in the commission agreement:

[a] the percentage of payment of commission, and

[b] The amount upon which the percentage of commission could be applied.

[36] In this case, while the rate of payment of commission is defined, the amount on which the percentage is to be applied remains uncertain. If the sale price remains uncertain, the commission agreement is unenforceable, due to lack of certainty of the sale price.

[37] Mr.Sibary gave evidence before the trial Judge that the agreement for the payment of commission was partly verbal and partly in writing. He stated that Mr Lal verbally agreed to remove the clause sale price "exceeding the reserve price" from the letter of appointment after he received the letter dated 5 August 1998. Mr.Sibary, in his evidence at trial stated at page 13 and para 15 that "I had verbal agreement with Brij Lal with Bank". There is no evidence to support the Appellant's contention that the subject clause was either removed or withdrawn. In each case the Court must decide whether the parties have or have not reduced their agreement to precise terms of an all-embracing written formula. While Mr Lal did not appear to give evidence, His Lordship, found the evidence of Mr Sibary not as dishonest or unreliable, but credible. However, oral evidence could not be adduced to contradict or vary the written contract, it can only be subordinate to the written agreement as explained in **Van Den Esschert v Chappell** [1960] WAR 114, and also see **Walker Properties Investments (Brighton) Ltd** [1947] 177 LT 204.

[38] In order for the Appellant to succeed in its claim for commission, the Appellant has to demonstrate that there is sufficient connection between the agency and the transaction and whether the conclusion was as a direct consequence of the initial introduction. The question of entitlement of payment of commission was explained by Gleeson CJ in **Moneywood Pty Ltd v Salamon Nominees Pty Ltd** (2001) 202 CLR 351. In allowing the appeal, His Honour said,

"The identity of the buyer and the fact that the work was done as an agent was an effective cause of the relevant transaction, in the circumstances there is a sufficient connection between the agency and the transaction in question to treat the appointment as being in respect of the transaction , and to conclude that the requirements of Section 76(1)(c) were satisfied. The Appeal should be allowed [in favour of the appellant agent]."

[39] In **Dennis Reed Ltd v Goody** [1950] 2 KB277, Lord Denning said,

"The services rendered by the agent may be merely an introduction. He is entitled to commission if his introduction is the efficient cause of bringing about the sale". Furthermore, in **Collette v Olsechuk** (1958) 16 DLR (2d) 563, at 566, Freedman J explained as follows, *"The agent whose work is the effective cause, the causa causans, of the sale is the one who is entitled to the commission".*

[40] However, in this case, while the sale was concluded directly by Mr.Sibary's introduction, he failed to negotiate with the Respondent to have the uncertain clause, "subject to reserve", removed or varied, which rendered the contract unenforceable. We agree with His Lordship's findings that there was no meeting of the minds, there was no agreement between the parties.

Is there an Implied agreement?

[41] The Appellant submitted that if the court finds that there is no valid commission agreement between the parties, then in the alternative, it relies on an implied agreement for payment of commission, on the basis that the Appellant has completed the work that is, introducing the purchaser, who has completed the purchase of the resort.

[42] The doctrine of implied contract was explained by Bowen L J in **The Moorcock** [1889] 14 PD 64, [1886-90] All ER (Rep) 530. See also: **White v Australian & New Zealand Theatres Ltd** (1943) 67 CLR 266.

[43] Counsel for the Appellant further submitted that an agreement may be completed, even though the terms may not be worked out in meticulous details. The Appellant's contention is that there is an implied agreement that the Respondent will pay to the Appellant a reasonable commission on completion of the sale.

[44] In our view, His Lordship correctly concluded that "*there was no meeting of the minds,*" and in this regard, he contemplated the passage referred to in **Chitty on Contract,** (24th Edition) paragraph 2104, titled 'Commission' which states:

> *"The remuneration of the agent frequently takes the form of a commission, being a percentage of the value of the transaction the agent is required to bring about for the principal".*

And again at paragraph [4] states:

> *"Express and implied contracts are both contracts in true sense of the term, for they both arise from the agreement of the parties, though in one case the agreement is manifested in words and in the other case by conduct.....Today it is generally recognized that cases of this sort have no very close connection with the law of contract, but constitute a separate branch of the law, distinct from both contract and tort, which is called 'restitution'".*

[45] The Appellant relied on the letter of 5 August 1998 and argued that it is a legally binding agreement, when the Appellant ought to have known that one of the fundamental terms of the agreement, namely the sale price, was unascertainable. The term sale 'exceeds reserve price' could not be considered as the sale price, if the reserve price is not known or disclosed to the Appellant. The letter dated 5 August 1998 states:

> *"Please note that the Bank is agreeable to pay 5% commission to your Company, meaning Focus Abroad Ltd, the payment is subject to the selling price exceeding our reserve price".*

The Appellant replied,

> *"Thank you for your letter of today's date confirming the commission payable by the FDB of 5% to the selling price in the event of the successful sale of the above mentioned resort. As the reserve price asked for by the Receivers and the price accepted by yourself is often different, the commission should be based on the actual sale price which is normal".*

[46] The Respondent claims that there is no implied agreement for payment of commission, therefore the Appellant is not entitled to any payment. His Lordship in his judgment found that there was no implied agreement upon which the Appellant could justify his claim for payment of commission for the sale of the resort.

[47] Counsel for the Appellant argued that, even if this court is unable to find the existence of a valid and enforceable agreement between the parties, then the Appellant submits that

the court should consider that there is an implied agreement that after the sale was concluded, the Respondent would pay 5% commission on the total sale price. The application of implied agreement is explained by Scrutton LJ in **Reigate v Union Manufacturing Co (Ramsbottom)** [1918] 1 KB 592.

[48] The term "implied agreement" is only to be invoked if there is evidence that it was clearly intended as such, where the contract will fail to take effect, unless some oversight is remedied. In this case, there was clearly, no oversight, the fundamental term of the agreement was being negotiated but was not settled between the parties. Since the term in question, 'the reserve price' was never agreed between the parties, an implied agreement could not arise between the parties. The formula for implied contract and its application to an existing contract was adumbrated in **Heimann v Commonwealth of Australia** (1938) 67 CLR at p 199.

[49] Counsel for the Appellant further submitted that even if there was no agreement for payment of commission between the Appellant and the Respondent, it was not fatal for the selling agent to recover commission after completing sale of the property. He referred to several cases, including **L J Hooker v W J Adams Esate Pty Ltd** (1977) 138 CLR 52, Counsel for the Appellant did not consider the obvious difference between the **L J Hooker's** case and the present case. In **L J Hooker's** case, there was a statutory requirement which provided that no agent shall be paid commission unless there was an agency agreement executed between the parties as required under the Auctioneers and Agents Act. In that case, there was a legally binding agreement between the parties. Furthermore, the comparable difference between the two cases, is that in **L J Hooker's** case, the pleading upon which the initial decision was made states:

> *"That the respondent promised to pay commission at a rate referentially agreed between them upon the appellant introducing to the respondent a person who becomes a purchaser of the property on terms acceptable to the respondent".*

The terms of payment of commission were clearly identified.

[50] Whereas in the present case, there is no agreed amount upon which 5% could be applied, therefore, the parties had to re-negotiate and enter into further terms to complete the agreement.

[51] During the appeal hearing, the Counsel for the Respondent took great pains to submit, that the sale was made by the Receiver; and it had nothing to do with the Respondent Bank, therefore, the Respondent did not have any control of the negotiations or the sale. The learned Counsel submitted that the Appellant ought to have joined the Receiver, since the Receiver sold the resort. We agree with His Lordship's findings when he concluded in paragraph [32], "That it did not matter whether the actual sale was concluded by the Bank or the Receiver".

[52] We find that the learned Trial Judge came to the correct conclusion in holding that there was no implied contract applicable in this case.

Appellant claims silence amounts to acceptance

[53] The Appellant's Counsel argued that since the Respondent did not reply to the Respondent's letters dated 5 and 8 August 1998, it should be assumed that the Respondent agreed to removing the condition '*subject to sale price*' from the letter of appointment. The clause "*subject to sale price*" became the vital term of the agreement, and it could not be assumed by the Appellant that since the Respondent did not reply, it accepted to remove the clause from the letter of appointment. The Appellant claimed that by remaining silent, the Respondent agreed to waive the clause *"Subject to sale price"* from the letter of appointment. The question of whether an offer can be accepted by silence is explained in **Felthouse v Bindley** (1862) 14 ER 1037, also see **White Trucks Pty Ltd v Riley** [1948] 66 WN (NSW)101, when the court held that silence cannot amount to an acceptance of an offer.

[54] The trial Judge did not conclude that while the Respondent remained silent, it accepted to remove the clause '*subject to reserve price*'. His Lordship found to the contrary, that there was no agreement between the parties for payment of any commission.
His Lordship at paragraph [26] of his decision stated,

> "*The tenor of Mr Sibary's letters is one of describing documents as he wishes to see them and putting aside the full conditions of what the Bank is offering. He*

persistently seeks to assert his position but with no acceptance thereof by the bank".

[55] The offeror only has himself to blame if the terms of his offer put him at the mercy of the offeree. He should not be permitted to escape liability when he has induced the offeree to believe that there is a contract and to act in reliance thereon, see **Corbin "Offer and Acceptance and Some of the Resulting Legal Relations"** 26 Yale LJ 69 at 200. Failure to reject an offer does not itself constitute an acceptance. This rule was explained in **Manco Ltd v atlantic Forest Products Ltd,** (1971) 24 DLR (3d) 194 at 200, Hughes JA said:

> *"I take the applicable rule to be that failure to reject an offer does not of itself constitute evidence of its acceptance unless the offeree's silence would in the circumstances lead a reasonable person in the position of the offeror to believe that the offeree had accepted the terms offered and unless the offeror did in fact believe the offeree had accepted them and proceeded under that belief".*

[56] The Appellant submitted that after Mr Sibary introduced Mr Sherlock to Mr Lal, who continued to encourage and support Mr Sibary to liaise with the Receiver, the Respondent's conduct led the agent to believe that there will be an agency agreement forthcoming, despite the fact that the Respondent itself did not know what the reserve price would be placed on sale.

[57] There was no submission made by the Appellant at the trial that the clause 'reserve price' was an unreasonable term therefore, it ought to have been wholly deleted from the contract. The Appellant did not argue this point, before the trial judge, therefore, it is unnecessary to discuss this any further.

[58] The principles of 'unreasonable term' in a contract are explained by the court in **John Lee & Son (Grantham) Ltd v Railway Executive** [1949] 2 All E R 581.

[59] The Appellant had the opportunity to formalize his agency agreement with Mr.Lal before he introduced Mr Sherlock to the Respondent bank, but he failed to do so. As an experienced sales agent for over 30 years, Mr Sibary ought to have understood his right to commission before he introduced Mr Sherlock to the Respondent bank.

[60] In our view the trial Judge correctly pointed out at paragraph [27]:

> *"Mr Sibary has over 30 years experience as an estate agent. It is difficult to understand why someone with such experience and a practice of not affecting an introduction without a letter of appointment should make an introduction when it was clear from correspondence that the assertion of 5% was being disputed and he did not have an unequivocal letter of appointment".*

[61] We find the trial Judge correctly concluded that there was no meeting of the minds; therefore, there was no contract between the parties for the payment of commission to the Appellant.

Respondent claims sale by the Receiver

[62] At the appeal hearing, Counsel for the Respondent submitted that after the appointment of the Receiver, the Respondent did not sell the resort; therefore, the Appellant is not entitled to any commission. The trial judge at paragraph [31] in his judgment stated, "*the bank asserts that had there been a mortgage sale utilizing the banks power of sale under the mortgage deed, then a commission would have arisen".* In rejecting that argument, His Lordship stated,

> *"The purpose was for the bank to recover its capital interest and costs; in those circumstances it did not matter whether the actual sale was effected by the Bank or the Receiver".* We agree.

[63] Counsel for the Respondent argued that after the appointment of the Receiver, the Respondent was no longer selling the property, and suggested that the Appellant ought to have joined the Receiver. The trial Judge in his judgment at paragraph 31 stated, *"the bank asserted that had there been a mortgage sale, under the mortgage deed, then a commission would have arisen".* His Honour correctly rejected that argument.

Respondent claims there is no privity of contract

[64] The next issue the Respondent argued before the trial Judge and also at the Appellate Court was that it never intended to enter into a commission agreement with the Appellant

Company, since it had sent all the correspondence addressed to Focus Abroad, and the replies it received were also in the letterhead of the same business name. The Respondent therefore, claimed that there was no privity of contract between the Appellant and the Respondent, since there was absence of consideration by the Appellant.

The meaning of privity of contract is explained by the court in **International Harvester Co of Australia Pty Ltd v Carrigan's Hazeldene Pastoral Co** (1958) 100 CLR 644, at p 652, and also see **Peterson v Moloney** (1951) 84 CLR 91, at pp 94-95.

[65] After the initial hearing, His Lordship did not make a conclusive finding whether there was a valid commission agreement between the Appellant Company and the Respondent. At the trial, there was evidence that all letters sent to and received from the Respondent were in the name of Focus Abroad which is the business name belonging to the Appellant company.

[66] We find that the trial Judge was uncertain in his findings, as to the party with whom the Respondent was dealing with. In paragraph [23] he stated,

> *"It is not entirely clear on the face of the document whom Mr Lal considered the Bank would be contracting with".* The learned Judge further referred in paragraph [24] of his orders that, *"Mr Sibary's letter of 30 July, rejects the offer and makes a counter offer of 5% commission. This is on a paper headed Focus Abroad".*

[67] His Lordship was referring to the second letter dated 5 August 1998 which contained the clause "subject to reserve price" when His Lordship correctly concluded that there was no contract between the parties. At paragraph [26] His Honour stated:

> *"Mr Sibary twice labeled bank offers as 'letters of terms of appointment' when there was simply no contract between IPAL trading as Focus Abroad and the bank".*

[68] His Lordship made the comments in reference to the two letters upon which the Appellant was relying on to constitute the commission agreement between the Appellant and the Respondent. Even though His Lordship referred to 'IPAL' trading as Focus

Abroad, he did not make any specific findings that Focus Abroad is the business name registered by International Property Auctions Limited.

[69] At the appeal hearing, the Respondent argued that it did not enter into any commission agreement with the Appellant because at no time it neither received any communication in the name of the International Property Auctions Limited nor the Appellant disclosed that it was the proper contracting party with the Respondent.

[70] The Appellant responded by referring to the letters sent to Mr Lal by Focus Abroad indicating categorically that in 1998 the facts were as shown at the bottom of the letterhead. At the bottom of the letterhead it is clearly noted that Focus Abroad is the trading name of International Property Auctions Limited.

[71] We do not consider that this is a case where there is an undisclosed principal since the letters in question clearly show that Focus Abroad is the business name of the Appellant Company.

[72] After examining the correspondence which emanated from Mr Sibary, we find that he was acting as an agent or a director of the Appellant Company. It is evident from the documents referred to in the correspondence between the Appellant and the Respondent, that Focus Abroad, a trading name was acquired by the Appellant company.

[73] The meaning of privity of contract is explained in **Price v Easton** (1883) 4 B & Ald.433, where it was established:

> *'That the Plaintiff not being a party to the contract was unable to recover, and it was said that an action for breach of contract must be brought by the person from whom the consideration moved."*

[74] This doctrine of privity of contract in a case of an undisclosed principal was further explained by Lord Haldane in the House of Lords in **Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd** [1915] AC 847, 853.

[75] We are of opinion that that even if Mr. Sibary was acting on behalf of an undisclosed principal, the Appellant still remains entitled to a commission, whether it is based on an

agreement or a claim for *quantum meruit*. The outstanding feature of the doctrine of undisclosed principal is that it allows one person to sue another on a contract not entered with the person suing, see 3 L Q R at 359, **Ames : Lectures on Legal History** pp 453-463 also see **Cambridge Law Journal** 1932 pp 320-356. Although this doctrine has been questioned for its application, but, it nonetheless continues to be applied as discussed in **Keighley Maxsted & Co v Durant** [1901] A C 240 at p 261. It is further referred to in Boston **Deep Sea Fishing & Ice Co v Farnham** [1957] 1 WLR 1051, and also see **Davis v Sweet** [1962] 2 QB 300.

[75] The Respondent argued that the Appellant was a registered company in the United Kingdom, unknown to the Respondent; the Respondent initially entered into a commission agreement with Focus Abroad, therefore, there is no legally binding agreement for payment of commission with the Appellant. The Respondent, in its submission failed to consider that Mr Sibary was acting either as a director or an agent on behalf of the principal company which is the owner of the business name, Focus Abroad.

[76] The Trial Judge considered this question but did not make any finding other than simply stating in his orders in paragraph [23] *"it is not entirely clear on the face of the documents whom Mr Lal considered the Bank would be dealing with"*.

[77] The Appellant's Counsel submitted that the Respondent knew that it was Mr. Sibary, who was acting as an agent on behalf of the parent company, which had a registered business name of Focus Abroad. The Appellant claims that the names of both the Appellant Company as well as its business name, Focus Abroad are printed in the letterhead. In the instant case, even if the Appellant failed to disclose the existence of the Appellant company, the Appellant is clearly entitled to payment of commission as explained in **Keighley Maxted & Co v Durant** [1901] AC 240. At p 261, Lord Lindley explained the basis on which the Appellant is able to claim against the Respondent, unless there is a misrepresentation.

[78] From various letters issued by Mr.Sibary to Mr.Lal, it is clear that he represented Focus Abroad. It is evident that International Property Auctions Limited printed at the bottom of the letterhead of Focus Abroad is the principal company which has the trading name as

shown in those documents as Focus Abroad. It is obvious that if there was any contract, it would have been between International Property Auctions Limited and the Respondent.

Respondent submitted void or voidable contract

[79] At the trial before the High Court the Respondent argued that the Appellant was not entitled to work in Fiji without a work visa, while he was employed by another company in Fiji. On this basis the Respondent submitted that the Appellant is not entitled to any commission on a void contract.

[80] The Appellant submitted that while Mr Sibary was in Fiji, he was acting as an agent, director on behalf of the Appellant Company based in the United Kingdom. Counsel for the Appellant submitted that the company was not restricted or prohibited from selling the resort on behalf of the Respondent. There is no evidence to suggest that the defence raised any question during the trial whether the contract was concluded in Fiji or in the UK, after sending the letter of appointment to Focus Abroad in the United Kingdom.

[81] Before the Trial Judge the Respondent argued that the Appellant was working for another company and did not have the requisite visa to be employed as a commission agent for the Respondent. His Lordship made the following comments concerning Mr Sibary's agency activity in paragraph 3(h) as follows: -

> *"Contrary to the terms of his work permit, Mr. Sibary was already working or purporting to work as a real estate sales agent for Mr Jim Sherlock in March 1998".*

[82] On the basis of the Respondent's submission that Mr Sibary did not have the required work visa to sell the resort, it is clear that if the Respondent knew that a visa was required, the Respondent ought not to have made the offer to Mr Sibary to sell the resort. His Lordship, at paragraph [11] and [42] of his judgment stated,

> *"If the plaintiff's case is correct Mr. Sibary must have been acting as the director, Servant, or agent of Focus Abroad or IPAl whilst in Fiji" If he was doing this then it also opens up a strong argument that he should have had a work permit for these activities"*

[83] Apart from the above references, His Lordship did not make any conclusive findings that while Mr Sibary was a citizen of the United Kingdom, acting as a director of a United Kingdom based company either he or the Appellant company was required to obtain a visa to sell the resort.

[84] Even if the work has been completed under a void or voidable contact, it is our view, the Appellant is entitled to recover a reasonable sum for his services, as explained in **Craven Ellis v Cannons Ltd** [1936] 2KB 403, also see **Scott v Pattison** [1923] 2 KB 723. If the Respondent by its conduct leads the Plaintiff to provide services, knowing that it is not provided gratuitously, the respondent is liable for payment to the Appellant, in the absence of a claim in contract, of a reasonable sum for having completed the work for the benefit of the Respondent.

[85] We find that the question of void contract was raised before the trial Judge, however, there were no submissions made, hence the trial judge did not consider making any conclusive finding, since he concluded that there was no binding agreement between the parties, therefore, the question of whether the contract was valid or void does not arise.

Ground 2 and 3

[86] Grounds 2 and 3 are based on the claim for *quantum meruit*. In his submission, Counsel for the Appellant correctly submitted that it had pleaded in its statement of claim an alternative payment on the basis of *quantum meruit*, which the trial Judge noted in paragraph [6] of his judgment, but in paragraph [44] His Lordship concluded that "there was no contact between the Plaintiff and the Defendant and no *quantum meruit* has arisen."

[87] His Lordship remarked that if the Appellant believed that there was a contract which the Respondent has breached, the Appellant should have pleaded breach of contract, rather than seeking a reasonable amount based on *quantum meruit*. The Appellant did not plead damages arising out of breach of contract.

[88] Whilst we agree with the trial Judge's finding on the *quantum meruit* claim, we consider that he was referring to the absence of any particulars of pleadings which supported the claim for *quantum meruit*, see **Flett v Deniliquin Publishing Co Ltd** [1964-5] NSWR 383 at pp 385. *Quantum meruit* can arise in cases where there is a claim based on a breach of contract, but it can only be enforceable under one heading. Furthermore, it also arises where there is no special agreement between the parties but one party has performed its obligation and the other refuses to pay.

[89] We find that the Appellant did not provide any particulars of *quantum meruit* in his pleadings, hence the trial Judge was correct in concluding that the claim for *quantum meruit* did not arise. In the within case, even though the parties attempted to finalize a commission agreement, they failed to conclude any valid agreement. Since there was no agreement between the parties, the Appellant becomes entitled to seek payment on the doctrine of *quantum meruit*. The plaintiff's entitlement under this doctrine was explained by Tindall CJ **in Planche v Colburn** (1831) 8 Bing 14 at p16.

[90] The Counsel for Appellant submitted that the Appellant based its claim on *quantum meruit* on the basis that the Appellant made it known to the Respondent that the services would be provided at a fee, which was initially acknowledged by the Respondent in its first letter as 3% on sale price. The obligation to pay on the basis of *quantum meruit* is explained by the House of Lords in **Way v Latilla** [1937] 3 All ER 759 in the following terms,

> *"That in a contract for work to be done, if no scale of remuneration is fixed, the law imposes an obligation to pay a reasonable sum (quantum meruit). In such a case there has to be a clear intention of the parties that the work was not to be carried out gratuitously before the court will, in the absence of an express contract, infer that there was a valid contract with an implied term that a reasonable remuneration will be paid*" and **British Bank for Foreign Trade v Novinex LD** [1949] 1 KB 623, **L J Hooker Ltd v W J Adams Real Estate Pty Ltd** (1977) 138 CLR 52.

It is noted that the Appellant neither pleaded unjust enrichment, restitution nor *indebitatus* as an alternative independent causes of action.

[91] The trial Judge in paragraph [6] of his judgment, stated, *"by way of an alternative pleading, the Appellant claimed that if there was no such agreement then IPAL is entitled*

to that sum on a quantum meruit". However, in this case the Appellant claimed there was an agreement, but it became an invalid and unenforceable contract *ab inito*, due to the pre-condition contained in the letter of 5 August 1998.

[92] We agree with His Lordship's finding that the claim for *quantum meruit* could not succeed unless there is an appropriate pleading in the claim. In the absence of a formal contract between the parties, the Appellant is entitled to seek from the Respondent payment based on work done and services provided in the absence of a legally binding agreement between the parties, which is explained by Starke J in **Phillips v Ellinson Bros Pty Ltd** (1941) 65 CLR 235 at p 179.

[93] However, this is a discretionary matter, provided the Appellant has pleaded *quantum meruit* in its claim but has failed to provide particulars of such claim; the court should, in fairness to the Appellant, make an assessment for services rendered to the Respondent so as to overcome the common dilemma of unjust enrichment.

[94] The basis of the application of the doctrine of quantum merit is applied by the Courts in order to avoid unjust enrichment by one party as against the other. See the discussion of **Unjust Enrichment in Melbourne University Law Review 26, Rise and Fall –Unjust Enrichment**. The Appellant asserts that while there was no legally enforceable agreement for payment of commission the Court might decide whether the claim could include a simple basis of allowing a reasonable payment for locating the purchaser, who eventually completed the purchase of the resort. The basis of reasonable payment is discussed in **Powell v Braun** [1954] 1 All E R 484.

[95] The Respondent's reply to the claim for *quantum meruit* is that the Appellant is not the contracting party; hence the company should not have the locus standi to bring this action against the Respondent.

[96] The Appellant claims the purchaser introduced by Mr Sibary, completed the purchase; there is no reason at common law that the Respondent should deny reasonable payment for work completed. He claims that his claim is supported by the principles established in **British Bank for Foreign Trade LD v Novinex LD** [1948] KB 623. The facts in this

case were that there was a transaction between the Plaintiff and the Defendant. On completion of the work, the defendant refused to pay. The Court held that,

> *"Since the contract was executed on one side, by the Plaintiff, having put the Defendants in direct contact with the P & G Trading Co, Ltd there was necessarily implied from the conduct of parties to the contract that, in default of agreement a reasonable sum was to be paid for commission".*

[97] The Appellant failed to plead the doctrine of restitution in which case the Appellant would have been entitled to an equal amount of commission, or a reasonable compensation. The application of restitution was applied by Denning L J in **James Thomas H Kent & Co Ltd** [1950] 2 All E R 1099, His Lordship stated,

> *"What the plaintiff could recover in such an action was not the debt arising under the unenforceable contract at all but reasonable compensation which 'might' be 'equal' to the stipulated amount. The reasons for that His Lordship explained (ibid) was that the proper ground of the claim is not in contract at all but in restitution"*

[98] Furthermore, in a more recent American judgment, the doctrine of *quantum meruit* was examined in **R L Johnson v Kappeler** [2001] WL 1658178 (Ohio App 2nd Dist 2001) when the court held the plaintiff was entitled to payment based on the theory of *quantum meruit* provided the plaintiff was able to establish that:

[a] *That the services were rendered by the plaintiff to the defendant.*

[b] *That the services were provided with the knowledge and consent of the defendant,*

[c] *Under the circumstances it makes it reasonable for the plaintiff to expect a reasonable payment. In the above case, the Plaintiff entered into an oral contract to perform electrical work for the construction of the defendant's car wash. After the defendant failed to pay, the plaintiff filed suit based on the theory of quantum meruit against the defendant. The defendant claimed that the plaintiff failed to establish his claim because he failed to show a reasonable value of his services. The Appellate court held that 'When a court finds that a party has been unjustly enriched by an aggrieved party, the court adopts a legal fiction, quasi contract, to provide the aggrieved party a remedy under the theory of quantum meruit."*

[99] Generally, the Plaintiff is entitled to pursue a claim upon *quantum meruit* for services rendered notwithstanding the existence of an oral contract for those services, even if such

agreement was unenforceable by reason of s 4 of Statute of Frauds, Jordan CJ in **Horton v Jones** (1934) 34 SR (NSW) 359, explained at pp 367 -368,

> *"If however, a person does acts for the benefit of another in the performance of a contract which is unenforceable by reason of the fourth section of the Statute of Frauds, and the other so accepts the benefit of those acts, that, in the absence of the unenforceable contract, the former could maintain an action of debt upon the money counts, he may sue in **indebitatus** to obtain reasonable remuneration of the executed consideration ,* see also **Gray v Hill** [1826] at 1070 Ry & Mood 420[171 E R 41,

[100] The concept of the obligation to pay for the work done, goods supplied, or services rendered arises from the defendant having taken the benefit of the work done, goods supplied, or services rendered as explained in **Sumpter v Hedges** [1898] 1 Q B 673, and approved in **Phillips v Ellison Brothers Pty Ltd** (1941) 65 C.L.R 221.

[101] The Appellant claims that the decision in **Pavey v Mathews Pty Ltd** (1987) 162 CLR 221, supports its claim for payment of commission by the Respondent. In the above case, there was no contract in writing between the parties. Deane J concluded:

> *"That action on quantum meruit such as that brought by the appellant, rests, not on implied contract, but on a claim to restitution or one based on unjust enrichment , arising from the respondents acceptance of the benefits accruing from the appellant's performance of the unenforceable oral contract"*

[102] Further, the doctrine of *quantum meruit* has also been extended by the development of the theory of ***unjust enrichment*** as explained by Mason and Wilson JJ in a *quantum meruit* claim, in the following terms:

> *"Since then the shortcomings of the implied contract theory have been rigorously exposed... see* **Deglman v Guaranty Trust** *(*1954) 3 DLR 785, at pp 794-795.

> *"We are therefore, now justified in recognizing, as Deane J has done, that the true foundation of the right to recover on a quantum meruit does not depend on the existence of an implied contract.....However, when success in a quantum meruit depends, not only on the plaintiff proving that he did the work, but also on the defendant's acceptance of the work without paying the agreed remuneration , it is evident that the court is enforcing against the defendant an obligation that differs in character from the contractual obligation had it been enforceable ".*

[103] We find that the Appellant having established its claim under *quantum meruit*, now has to establish its entitlement for payment. We accept the Respondent's written submission paragraph [29] that it is difficult for the court to determine any payment under the quantum merit claim, when there are no particulars upon which the Appellant seeks to claim such payments. However, the court exercising its powers under Rule 22 (3) of the Court of Appeal Act Cap 12, is able to nominate payment of a global sum, since the sale was, we find on the evidence in this case, concluded by the efforts of Mr Sibary, an agent or a director of the Appellant company.

Conclusion;

[104] In view of the foregoing, the value of work and expenses which we consider may have reasonably been incurred in the absence of any detailed account being particularized in the *quantum meruit* claim, we consider, the best we can do in the circumstances to allow a global sum which we consider reasonable in the sum of $20,000.00 to be paid to the Appellant.

Orders

1 Appeal allowed.

2 That the appellant be allowed a reasonable payment for services based on *quantum meruit*, in arranging and facilitating purchase of the subject resort assessed at $20,000:00 [Twenty thousand dollars]

3 Respondent to pay the Appellant's cost in the sum of $1000.00. All payments are to be made within 21 days.

Byrne, JA

Datt, JA

Bruce, JA

Solicitors:

Cromptons Solicitors, Suva for the Appellant
R Patel and Company, Suva for the Respondent