Estate Agents' Commissions and the Failure of Contract

by
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Home may not be where the heart is, but most of us experience a sense of loss when circumstances require the sale to strangers of a dwelling house rich in family memories. The despair which follows the withdrawal of a buyer unable to raise finance, coupled with the realisation that improvements which were a source of pride have little value to others, may (in some cases) render the exercise quite traumatic. A dispute with an agent is a cruel and final blow. It is a blow which the *Auctioneers and Agents Act* 1971 does little to deflect.

Appointment

An agent may claim commission only from a person by whom he has been employed.

> "It is impossible to affirm in general terms that A is entitled to a commission if he can prove that he introduced to B the person who afterwards purchased B's estate, and that his introduction became the cause of the sale. In order to found a legal claim for commission, there must not only be a causal, there must also be a contractual, relation between the introduction and the ultimate transaction of sale."[1]

It is for that reason that a friend who assists a vendor to bring about a sale has no legal claim to commission, howsoever much he may be deserving of reward.[2] The law has rightly recognized that it would be intolerable if a person could not speak to an associate about a property which he has for sale without exposing himself to the risk of liability.

The difficult case is that in which a vendor releases details of the price and terms which he is prepared to accept to a person who carries on the business of an estate agent and who declares an interest in finding a buyer. No doubt the circumstance that the vendor knew (or ought to have known) that the agent would expect to receive a commission is an insufficient basis on which to fix him with liability, if he did not realize (and ought not to have realised) that the agent would look to him for payment of the commission.[3] However, where the evidence shows that the vendor did appreciate that the demand for commission would be made against him, e.g. where the vendor attempts to safeguard his position by refusing to list the property with the agent, the release of the crucial informative accompanied by the use of words suggesting that the agent is to have the chance

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1. *Toulmin* v. *Millar* (1887) 3 T.L.R. 836, per Lord Watson.
2. *O'Sullivan* v. *Dower* [1915] Q.W.N. 17.
3. See e.g. *Smith* v. *Stallard and French* (1919) 21 W.A.L.R. 19 and *Chapple* v. *Moss and Richardson* (1920) 22 W.A.L.R. 74.

to sell, e.g. "If you find a buyer I may give you the offer", may be held to confer a right to commission if the agent introduces a buyer and business is done.[4] To assert that a volunteer who acts as a go-between and ultimately produces a sale cannot found a claim for commission on his success, is not to assert that a promise to pay which is inferred is any less enforceable than a promise to pay which is express.

On its face s.70(1) (c) of the *Auctioneers and Agents Act* 1971 protects vendors against claims for commission founded on disputed conversations and/or inferences. S.70(1) (c) confines the right to sue for or recover or retain any fees, charges, commission, reward, or other remuneration for or in respect of any transaction as a real estate agent to those whose engagement or appointment to act as a real estate agent in respect of such transaction is in writing signed by the person to be charged with such fees, charges, commission, reward or other remuneration or his agent or representative.

In *Gardiner* v. *Fiannded*[5] the counterpart Western Australian provision (*Land Agents Act*, 1921 to 1964) was held to mean what it said. An agent whose appointment was oral was denied commission though his appointment was ackowledged in writing (signed by the vendor) after the acts of agency resulting in a sale had been performed. Similarly, in the earlier case of *De Pedro* v. *Young*[6], the Court had insisted upon an unequivocal appointment in writing of a specified person to act as the agent of the appointor. In that case the plaintiff had written to the vendor telling her that he had a client desirous of buying her hotel freehold and that he thought the deal could be arranged with little loss of time. He also asked her to let him have her price. He followed this with a telegram which read "Have cash buyer freehold Shamrock. Will you sell. If so, what price. Regards de Pedro." The vendor replied by telegram "Will sell Shamrock freehold twenty thousand pounds." Subsequently the vendor concluded the sale of her hotel freehold direct to the prospective purchaser. The agent sued for his commission. The Court held that the documents did not manifest the clear and unambiguous intention to authorise the agent to perform services for the vendor that the statute required. An even more rigorous view has been adopted in Victoria.

In *Theobold & Son* v. *West Heidelberg Motors Pty. Ltd.*[7] Smith J. (with whom Pope J. agreed) held that s.33(1) (b) of the *Estate Agents Act* 1958, which expressly declared it to be sufficient if the agent held the written engagement or appointment before he had

4. *White* v. *Lucas* (1887) 3 T.L.R. 516; *Edwards* v. *Walton* (1891) 10 N.Z.L.R. 426; *Wilson* v. *Learmouth* (1898) 16 N.Z.L.R. 602. It is submitted that *Young* v. *Tibbits* (1912) 14 C.L.R. 114 might have been differently decided if the agent had not been employed as a sub-agent by a second agent after being told by Young "as advised you more than once Yarrandale is not for sale. At the same time we will be prepared to consider an offer of not less than 50s. per acre as it stands. When you think you have a buyer up to that value we may then be prepared to give you the offer."
5. [1967] W.A.R. 35.
6. (1940) 42 W.A.L.R. 79.
7. [1970] V.R. 552.

done everything required of him under the terms of his engagement or appointment but was otherwise equivalent to s.70(1) (c), required "an appointment in writing, in the sense of a communication in writing by the principal to the agent of the terms of the authority conferred."[8] Gillard J. expressed himself more fully[9] —

> Having regard to the requirement that the writing should be in existence prior to any negotiations being commenced, it seems to me that the minimal contents of the writing required under paragraph *(b)* as then enacted were threefold: (a) a date to identify when the engagement or appointment was made in writing to discover whether it was before negotiations were commenced; (b) the appointment and naming of a specified person as agent, in order to identify the person engaged or appointed as agent; (c) a general description of the transaction which the parties mutually have in mind in order that it might be clearly identified. For example, on the sale of real estate the writing should contain an unequivocal statement by the principal that the agent was authorized to sell or find a purchaser (as the case may be) of the land reasonably but clearly identified.

The Queensland cases are commonly considered to display quite a different approach.

First in time is the decision in *Canniffe* v. *Howie*.[10] Of that case, The Honourable Percy Joske in his excellent monograph *Commission Agency*[11] observes:[12]

> "In *Canniffe v. Howie* [1925] QSR 121; the opinion was expressed that it is sufficient if the relationship of principal and agent in respect of the transaction in question is evidenced in writing and that this meets the requirements of s.23(1) (b),[13] and the other terms of the agency contract may be effectively made and effectively varied verbally. So a document signed by a principal which was primarily intended to secure a binding option to a prospective buyer, and which also stated that the principal placed the property under firm offer to the agent in order that he might sell it on the principal's behalf has been held sufficient proof of the appointment of the agent for the purposes of the statutory provision (cf. *Leighton v. Bird & Co. Ltd.* (1924) 20 MCR (NZ) 8)."

In fact the opinion reproduced was the opinion of Lukin J. McCawley C.J. took quite a different view, holding that the document which Lukin J. described as "a binding option to the prospective buyer"[14] was a written engagement which fully satisfied the requirements of the section.[15] On the facts that was a tenable and, with respect, a preferable view. The relevant document, which was signed by the vendor and addressed to the agent, read: "In consideration of the sum of one shilling, which is hereby acknowledged, I hereby place under firm offer to you to sell on my behalf my freehold property and business known as 'the Globe

8. Ibid, at p. 553.
9. Op. cit., at p. 559.
10. 1925, St.R.Qd. 121.
11. 1974 Butterworths.
12. At para [35].
13. S.23(1) (b) of *The Auctioneers and Commission Agents Act of 1922* — the precursor to s.70(1) (c).
14. 1925, St.R.Qd. 121, at p. 127.
15. Ibid, at p. 124.

Laundry', and situated at Brookes Street, Bowen Hills, Brisbane, at present consisting of the whole of the machinery and plant as a going concern to sell for the price (£4,150) four thousand one hundred and fifty pounds, terms to be satisfactorily arranged. This option to remain open for the period of (42) forty-two days from the date ending the 30th June, 1924." On the view taken by the Chief Justice the only issue was whether the transaction effected by the agent was the transaction referred to in the document. In a single sentence judgment MacNaughton J. said: "I also think the appeal should be dismissed."

The Full Court judgment in *Skipper* v. *Syrmis*[16] was delivered three months later. In an action to recover commission alleged to be due in respect of the sale of a hotel, the agent relied upon inter-connected documents commencing with a letter written by him to the vendor stating that he (the agent) was a hotel broker who had a client desirous of purchasing a country hotel and asking the vendor to send him particulars on an enclosed form if he was interested in selling. The form enclosed was in the following terms — "H.H. Skipper . . . Please find me a purchaser for my hotel, particulars of which are as follows." Then followed the particulars required, with blank spaces to be filled in, and a final blank for vendor's signature. The vendor did not complete the form. The vendor replied to the effect that he was not particular about selling, "but should you have somebody willing to buy I may consider it. Price about £8,000 freehold." The agent wrote to the vendor again three weeks later, asking further particulars, and the vendor replied a further month later stating: "I have mislaid the sheet of inquiries, but I will give you a few more particulars." And further particulars were given. The agent again wrote to the vendor for further information, and three weeks after his last letter the vendor replied complying with his request. An exchange of telegrams followed in which the vendor referred to "your offer" and "your buyer" and the agent referred to "my client". The Full Court held that the documents satisfied s.23(1) (b) of *The Auctioneers and Commission Agents Act of 1922* and that the agent was entitled to his commission. The decision is very difficult to reconcile with *De Pedro* v. *Young*.[17] There is much to be said for the view that, so far from manifesting an unequivocal intention to appoint the hotel broker as the vendor's agent, the documents, as O'Sullivan J. (dissenting) held, showed that the vendor (reasonably) regarded the broker as the buyer's agent. Howsoever that may be, once Lukin J. (with whom MacNaughton J. agreed) had held that the documents, which came into existence prior to the sale, manifested "a present intention" on the part of the vendor to engage or appoint the agent,[18] the matter was at an end. It was quite unnecessary to the decision for Lukin J. to add —

> In the case of *Canniffe* v. *Howie*, heard by this Court, in a judgment following several judgments on a similar question, under the 4th and

16. 1925, St.R.Qd. 129.
17. (1940), 42 W.A.L.R. 79.
18. 1925, St.R.Qd. 129, at p. 134.

> 17th sections of the Statute of Frauds, I gave a judgment, for the reasons therein appearing, holding that so long as the relationship of principal and agent in respect of the transaction in question has been evidenced in writing, the requirement of s.23*(b)* has been duly complied with, and that any document signed by the principal at any time before action brought, which evidences the essential fact, the existence of the relationship in respect of the transaction in question, is sufficient to comply with the Statute. I adhere to that opinion.[19]

But the addition was made.

Roach v. *Hough*[20] was a case in which the owner of a residential accommodation business put it into the hands of an estate agent for sale, gave him particulars of same which were entered agents "book", gave the agent an oral promise to pay him £30 commission, and after the agent had brought about the event upon which commission was payable refused to honour his commitment. The owner's signature appeared only on the standard form contract of sale, which recognized that "the vendor's agent" had acted in the matter and contained a clause making the vendor responsible for "all agents' charges for commission for effecting the sale," but which coyly omitted to name the agent. The agents' claim for commission failed for failure to satisfy s.23(1) (b). The Full Court rejected the argument that once it appeared from a document signed by the vendor that there was an agent in the transaction and that he was to be paid by the vendor, parol evidence might be given to identify the agent. It was unnecessary for the Court to consider (and the Court did not consider) the crucial question whether a document which came into existence after the agent had done all that he had to do to earn his commission might be relied upon to satisfy the section. That question did arise in the next case of significance, *Bennett & Co.* v. *Connors.*[21]

The facts were that after a sale was completed solicitors acting for the agent wrote to the vendor's solicitors asking whether the vendor recognized the agents claim for commission. The vendor's solicitors asked for particulars of the claim which were supplied by a letter to which they replied in writing, admitting the agency but denying that the agent had been the effective cause of the sale. The vendor having set up s.23(1) (b) as a defence, the agent relied upon the solicitor's letter as a writing sufficiently satisfying the section. The agent succeeded, Macrossan C.J. observing that the letter's contents were "sufficient to satisfy the requirements of s.23(b) of the Auctioneers and Commission Agents Acts as that section has been construed by this court in the cases of *Canniffe* v. *Howie* ([1925] St. R. Qd. 121) and *Skipper* v. *Syrmis* ([1925] St. R. Qd. 129). I think it is now too late to question the authority of these cases in this court."[22]

19. Ibid,?
20. 1926, St.R.Qd. 24.
21. 1953, St.R.Qd. 14. *Davison* v. *Wade* 1933, St.R.Qd. 105 gave rise to the same issue as *Skipper* v. *Syrmis* 1925, St.R.Qd. 129 on facts more favourable to the agent. It is significant only because it decides that, where the inter-connected documents support a finding that the agent was the vendor's agent, oral evidence may not be admitted to show that he was the buyer's agent.
22. Ibid, at pp. 19 to 20.

In fact counsel for the vendor had not argued that the letter was "too late" and/or that it ratified rather than appointed or engaged. The case was fought on the simple ground that the solicitor's admission was beyond the scope of his authority.

Unfortunate though it may be that the Full Court elected to treat as authoritative a proposition which had not formed part of the *ratio decidendi* in any of the earlier cases whilst denied the benefit of argument on the point, the material facts in *Bennett & Co.* v. *Connor*[23] were such that it must be treated as establishing that a document evidencing the relation of agent and principal between plaintiff and defendant in respect of the transaction upon which the claim to commission is founded, brought into existence before the action is brought, even if after the agent has done all that is required of him, satisfied s.23(1) (b).

The decision in *Anderson* v. *Densley*[24] put the matter beyond doubt. In a matter in which the point did not arise and had not been argued the High Court chose to say:

> "A long line of cases in Queensland has decided that the paragraph does not require the contract of engagement or appointment of the agent to be in writing. It is sufficient if some writing or connected writings exist evidencing the creation of the relationship of principal and agent in respect of the transaction pursuant to an oral contract."[25]

It is unnecessary to speculate on whether the High Court itself would regard that passage as an approval of the Queensland cases. It is a very safe assumption that the Queensland courts would not have sought to re-interpret the Queensland cases in some other way.

It is respectfully submitted that in construing s.23(1) (b) analogously with the Statute of Frauds the Queensland courts have committed a cardinal error. The Statute of Frauds has been benevolently construed because if carried into execution according to the letter it would be a most potent instrument of fraud; the very mischief it was designed to prevent. No such risk is associated with s.23(1) (b) of *The Auctioneers and Commission Agents Act of 1922* or the current s.70(1) (c) of *The Auctioneers and Agents Act* 1971. The burden of the section(s) falls on real estate agents. No person may practice as a real estate agent or sue for, recover or retain a commission unless he holds a licence as a real estate agent, ss.14, 70(1) (a) and 71A. The Code of Professional Conduct of Auctioneers and Real Estate Agents[26] requires licensed agents to have a knowledge of the Act, and it is entirely reasonable to proceed on the basis that they ought to know the requirements of the Act. If the requirements of s.70(1) (a) were rigorously insisted upon, it is much more likely that agents would develop and use suitable standard forms than that dishonest vendors would be given the opportunity to dishonour promises they had made. Allowing the section to operate according to its terms would not only confine the right to commission to those whose appointment is clear and

23. Op. cit.
24. (1953), 90 C.L.R. 460.
25. Ibid., at 468.
26. Queensland Govt. Gazette, 13th July 1974, at pp. 1598 to 1599.

unequivocal and insulate vendors from argumentative claims, but would ensure that the event upon which commission is payable is certain beyond doubt.

Although it is sometimes said that "It is fundamental to a right to claim commission that the claimant is able to prove that he has been employed as an agent by the person against whom he makes the claim",[27] the agreement between a vendor and his agent is not a contract of employment in the ordinary sense. The common understanding of a contract of employment is that wages are payable for service.[28] In *Luxor (Eastbourne) Ltd.* v. *Cooper*[29] Lord Russell of Killowen described agency arrangements thus —

> "Contracts by which owners of property, desiring to dispose of it, put it in the hands of agents on commission terms, are not (in default of specific provisions) contracts of employment in the ordinary meaning of those words. No obligation is imposed on the agent to do anything. The contracts are merely promises binding on the principal to pay a sum of money upon the happening of a specified event, which involves the rendering of some service by the agent. There is no real analogy between such contracts, and contracts of employment by which one party binds himself to do certain work and the other binds himself to pay remuneration for the doing of it."

In the premises identification of the specified event is a matter of some importance.

As the cases discussed at "Right to Remuneration" (below) show clearly enough, even when the parties are *ad idem* as to what was said, they often disagree as to what was intended. The Court's task is ever so much more difficult and the litigation so much less satisfactory if there is a "preliminary trial" on the issue, "What was said?" Where that enquiry satisfies the Court that the agency contract, insofar as express, was exiguous in the extreme, the opportunity for satisfactory resolution is foreclosed forever. There are no special principles of construction applicable to commission contracts with estate agents.[30] Such contracts must be interpreted according to the ordinary rules of construction.[31] But a promise that commission will be paid on the introduction of a purchaser who is ready, willing and able to buy is no more and no less efficacious[32] than a promise to pay in the event of an actual sale to an introduced purchaser.[33] An officous bystander who suggested inclusion of a term that commission was payable so soon as the agent introduced an able and interested purchaser, would not necessarily be shushed into silence by the vendor.[34] A vendor may well intend to pay the commission out of the purchase price and be unwilling to accept a

27. Joske, P.E., *Commission Agency*, 1974 Butterworths, at para [96].
28. *Automatic Fire Sprinklers Pty Ltd* v. *Watson* (1946), 72 C.L.R. 435.
29. [1941] A.C. 108, at p. 124.
30. *Ackroyd & Sons* v. *Hasan* [1960] 2 Q.B. 144, at p. 154 per Upjohn L.J.
31. Ibid, at p. 1652 per Ormerod L.J.
32. If "business efficacy" be the test, *The Moorcock* (1889) 14 P.D. 64, at p. 68.
33. If that be the test, *Shirlaw* v. *Southern Foundries (1926) Ltd* [1939] 2 K.B. 206, at p. 227. *Lister* v. *Romford Ice & Cold Storage Co Ltd* [1957] A.C. 555, at p. 597 per Lord Somervell.
34. If that be the test, *Midgley Estates Ltd* v. *Hand* [1952] 2 Q.B. 432, at p. 435 per Jenkins L.J.

liability to pay should the sale not be completed. The vendor would not necessarily shush the bystander into silence if he suggested an express promise of payment on completion. An agent's involvement normally comes to an end on introduction of a person interested in buying. An agent may well be unwilling to make his entitlement to commission depend on what happens thereafter, howsoever limited may be his opportunity to influence events. In the absence of reliable survey materials any assertion as to the probable, likely or prima facie intention of parties to all such contracts,[35] is open to attack as little more than the trial judge's perception of what is fair and just formed in the light of his experience at the junior bar when he "did that sort of case".

The author accepts that it is (just) arguable that the cases decided upon s.23(1) (b) of *The Auctioneers and Commission Agents Act of 1922* have no application to s.70(1) (c) of *The Auctioneers and Agents Act* 1971, because the former Act was concerned only with the agent's right to sue whereas the present Act bars retention of the commission also.[36] For reasons given hereafter it is submitted that Legislative reform is preferable.

Right to Remuneration

It is settled law that the event upon the happening of which the principal/vendor is to pay commission to his agent is fixed by the contract between them and is to be ascertained by the construction of that contract. The law was settled by *Luxor (Eastbourne) Ltd* v. *Cooper*,[37] a case in which the point did not arise.

The agent (Mr Cooper) was appointed to act in the sale of two leasehold cinemas. He did. The purchaser introduced by him was ready and willing to purchase on the vendors' terms. He did not change his mind. The vendors did. They rejected his offer to buy. Counsel for the agent did not attempt to argue that commission was payable. Since commission was expressed to be payable "on completion of the sale", he could scarcely have done so. The argument advanced was that the agent was entitled to damages equal in amount to the agreed commission, because he would have earned the commission if the vendors had not broken an implied contractual promise to do nothing to prevent his earning the commission according to the contract. The agent failed. The House of Lords (reversing the decision of the Court of Appeal) held that it was impossible to imply such a term, even if it were qualified by the addition of the words "without just cause".

The decision in *Luxor (Eastbourne) Ltd* v. *Cooper*[38] is indubitably right. The consequence is that courts come to the question of construction fixed with the knowledge that the meaning which they attribute to a vague and ambiguous phrase will determine whether the agent recovers the whole of his commission, or nothing at all.

35. A distinction relied upon by Qillard J. in *Theohold & Son* v. *West Heidelberg Motors Pty Ltd* [1970] V.R. 552, at p. 561.
36. [1941] A.C. 108.
37. Ibid.
38. [1931] V.L.R. 269.

The result is the most important part of any case. The court which comes first to the construction of an engagement "to find a purchaser" is free to consider the justice of the agent's case. The court which comes second to that question is not so free and unfettered. Our system of justice repudiates opinionated, sense of justice, decision making. It seeks consistency through the doctrine of precedent. A court confronted by a claim by an agent who did no more than introduce a ready, willing and able purchaser who withdrew before a binding contract was executed, may be required to give weight to or even be bound to follow a decision upon the meaning of "to find a purchaser" given in a case where a ready, willing and able purchaser unlawfully repudiated a contract of sale binding upon him. The court will not be so fettered if the event which the agent must bring about to earn his commission is differently expressed, e.g. "to secure a buyer", and is always free to engage in the time honoured technique of distinguishing, provided that the terms and/or circumstances of the agreement rather than the consequences may fairly be said to be different. Inevitably the same phrase has acquired different meanings within different hierarchies of courts, similar phrases have acquired quite different meanings within the one hierarchy, and obfuscation has replaced the certainty which the system seeks to achieve.

The Queensland and Victorian authorities upon the true meaning of such commonplace terms of appointment as "to find a buyer" and "to sell" are illustrative of all of the points made above.

The first substantial Victorian case involving the phrase "to find a purchaser" was *MacArthur & McLeod Pty. Ltd.* v. *Carey*.[39] In an action to recover his commission the agent called sufficient evidence to establish that he had been employed to find a purchaser on the ordinary terms as to commission, and that a purchaser introduced by him had entered into a binding contract of sale with the defendant vendor. He did not lead evidence from which it might have been inferred that the purchaser was ready willing and able to carry out his contract of purchase. At the close of his case, he was non-suited on that ground. The Full Court allowed his appeal and ordered a new trial. The basis of the Full Court's decision was that "it has never been known that the plaintiff has been defeated in his claim for commission, after a vendor has entered into a contract, on the ground that he has not proved affirmatively that the purchaser can carry out his contract."[40] The Court said nothing about what the outcome might be if the defendant established that the buyer was not "ready, willing and able." Neither did it comment upon whether the ultimate onus would revert to the plaintiff if the defendant introduced some evidence on that issue.

Perhaps unfortunately, the Full Court cited with approval certain passages from the New Zealand case of *Latter* v. *Parsons*.[41] The Court said:

> ". . . [W]e are in accord with the New Zealand case of *Latter* v. *Parsons*, as to the circumstances entitling the agent to recover commission . . . I

39. Ibid, at p. 273.
40. [1906] 26 N.Z.L.R. 645.
41. [1931] V.L.R. 269, at pp. 272 to 273.

refer to two other passages, one in the judgment of Denniston J., at p. 654, where he says: 'The weight of judicial authority is in favour of the view that the terms of the agreement were, on the plaintiff's part, completed, and the commission earned, when the defendant, with a full knowledge of the facts and every opportunity for inquiry, entered into the written agreement'; and, at p. 655, Cooper J., with whom Chapman J. agreed, said this: 'In my opinion, where a land agent is instructed to sell a property and he introduces a proposed purchaser to his principal, and the principal takes no trouble to ascertain the financial position of the proposed purchaser, and a contract is entered into between the principal and the proposed purchaser whereby the proposed purchaser binds himself to purchase the property at the stipulated price, and the principal afterwards, without the intervention of the agent, releases the purchaser from the agreement, the agent is entitled to his commission.' We also think that this decision is entirely in accordance with the Victorian decisions on the subject."[42]

In later cases that passage has been given greater weight than the decision itself.

In *Scott* v. *Willmore and Randell*[43] the plaintiff in an action for money received to his use had requested the defendants, who were estate agents, to "sell" his property for him and agreed to pay the ordinary estate agent's commission. The defendants procured a person to sign a contract of sale. The plaintiff also executed the contract. The trial judge, who was not satisfied that the purchaser was able to complete the purchase by paying the balance of purchase money at the due date, disallowed the defendants' claim (set off) for commission in reliance on the decision of the Court of Appeal in *James* v. *Smith*.[44] The plaintiff appealed. He was successful.

The Full Court's decision may not be explained on the simple basis that, apart from authority, the Court was satisfied that the primary meaning of "to sell" was "conclude a binding agreement for sale."[45] The matter was not free from authority. In *James* v. *Smith*[46] the defendant agreed to pay the plaintiff a commission of £1,000 if her property was sold for £31,000. The plaintiff introduced a purchaser who signed a contract with the vendor to purchase the property for the sum named. The purchaser was unable to complete the purchase because of lack of finance. It was held that the plaintiff was not entitled to commission. Bankes, L.J., pointed out that three different constructions of the authority had been advanced in relation to the events upon which the commission was payable, namely, that commission was payable:—

(i) if the sale was completed and the purchase money paid;
(ii) if a contract of purchase was signed by a person able and willing to complete; and
(iii) if a contract of purchase was signed by someone introduced by the agent with whom the vendor was willing to make a contract, regardless of whether the person introduced could or could not complete the purchase.

42. [1949] V.L.R. 113.
43. [1931] 2 K.B. 317 n.
44. [1949] V.L.R. 113, at p. 115 per Herring C.J. & Gavin Duffy J.
45. [1931] 2 K.B. 317 n.
46. [1949] V.L.R. 113, at p. 130 per O'Bryan J.

His Lordship held that the second construction was the correct one. The other members of the Court delivered separate judgments expressing the same views. All members of the Court pointed out that the willingness and readiness of the purchaser was a matter of fact to be proved by evidence. It did not depend upon the agent's belief. In 1949 the Full Court of Victoria generally followed decisions of the Court of Appeal in preference to previous contrary decisions of its own.[47] The Full Court seized on the inconsistency between the reasoning in the decision approved in *MacArthur and McLeod* v. *Carey*,[48] viz, *Latter* v. *Parsons*,[49] and *James* v. *Smith*[50] as justification[51] for departing from the general rule, notwithstanding that the Court recognized that the decision in *MacArthur and McLeod* v. *Carey*[52] was "helpful by way of analogy and illustration" rather than decisive of the case before it.[53] Strangely, in reliance on *Passingham* v. *King*,[54] the Full Court cast doubt on the reasoning in *MacArthur and McLeod* v. *Carey*[55] in its application to appointments "to find a purchaser", observing "while there can be no better proof that the agent has found a purchaser whom the vendor was willing to accept and who would accept the vendor's terms than that the two of them executed a contract of sale, still to find such a person and to introduce a person who actually becomes a party to a fully executed contract of sale is not necessarily the same thing."[56]

The passage cited must have encouraged the unsuccessful plaintiff in *Gerlach* v. *Pearson*.[57] The facts were that the agent, who had been appointed "to secure a purchaser" and "accept from such a purchaser an offer to purchase the business on the above or such other terms as are accepted by me", introduced a prospective purchaser who, with the vendor, signed a subject to finance contract which "fell through" because the purchaser could not raise finance. The short answer to the agents' claim was, of course, that execution of a subject to finance contract did not establish acceptance of the terms of the purchaser's "offer" by the vendor. In truth there was no "offer" at all. The so-called "offer" did not bind the purchaser. It could not be converted into an enforceable contract by acceptance. The significance of the case is not what it decided but Dean J.'s observation that, whereas an agent appointed to obtain an offer "on *terms* acceptable to the vendor" may become entitled to his remuneration if he establishes acceptance of the *terms* of the offer by the vendor whether or not a binding contract results, an agent

47. [1949] V.L.R. 113.
48. [1906] 26 N.Z.L.R. 645.
49. [1931] 2 K.B. 317 n.
50. The Full Court relied also on an inconsistency with the reasoning in *Luxor (Eastbourne) Ltd* v. *Cooper* [1941] A.C. 108 which quite eluded Hilbery J. in *Jones* v. *Lowe* [1945] 1 K.B. 73 and Singleton J. in *Poole* v. *Clarke & Co* [1945] 2 All E.R. 783.
51. [1949] V.L.R. 113.
52. Ibid, at p. 118.
53. (1898) 14 T.L.R. 392.
54. [1949] V.L.R. 113.
55. Ibid, at p. 118 per Herring C.J. & Duffy J.
56. [1950] V.L.R. 321.
57. 2nd Edition, 1974, at p. 92.

appointed "to find a purchaser" must establish execution of a binding contract with the vendor to establish his claim to commission.

In what has become the standard Victorian text, *Real Estate Agency in Victoria*, Story and Goldberg summarize the Victorian position as follows:

> "4. Where an agent is employed to find a purchaser he will be entitled to remuneration:—
>
> (a) in Victoria, only if he finds a person who enters into a binding contract of sale with his principal, regardless of whether or not that person is ready, willing and able to complete. This states the position in the light of present Victorian authority. If the matter were reconsidered, it is quite possible that the English view [see later] would be followed in preference to this view.
>
> 5. Where an agent is employed to sell, he will be entitled to remuneration:—
>
> (a) in Victoria, only if he procures a person who enters into a binding contract of sale with his principal, regardless of whether or not that person is ready, willing and able to complete. This states the position in the light of present Victorian authority."[58]

As has been seen, para 4(a) is not supported by the *ratio decidendi* of any reported Victorian decision and is consistent with all the *dicta* only if the word "only" is deleted. As will be seen, para 5(a) should also carry the warning "if this matter were reconsidered, it is quite possible that the English view would be followed."

The Queensland authorities are quite different. In *Pettigrew* v. *Klump and Klump*[59] the Full Court overruled its earlier decision in *Bond* v. *Dawson*,[60] which established that an agent appointed "to sell" earns his commission when a purchaser introduced by him enters into a binding contract of sale, regardless of whether the purchaser is ready, willing and able to complete or subsequently repudiates the contract. Purporting to follow *James* v. *Smith*[61] the Full Court held "that the agent does not, in the absence of an express contract to the contrary, perform his obligation merely by introducing a person who is willing to enter into a contract to purchase, but that the agent must introduce a purchaser willing and ready, that is to say, able, up to the time he signs the contract. This is an absolute obligation — it is performed by introducing a person who in fact is ready and willing, and not merely one whom the agent believes, on reasonable grounds, to be ready and willing.[62] Philp J., dissenting, took the not unreasonable point[63] that to construe the words used in the light of the "usual contract", unless express words were used, was to fly in the face of the decision in *Luxor (Eastbourne) Ltd* v. *Cooper*.[64]

58. 1942, St.R.Qd. 131.
59. 1923, St.R.Qd. 63.
60. [1931] 2 K.B. 317 n.
61. 1942, St.R.Qd. 131, at p. 134 per Webb C.J. and at pp. 136 to 137 per Macrossan S.P.J.
62. Ibid, at pp. 139 to 140.
63. [1941] A.C. 108.
64 1942, St.R.Qd. 131.

Pettigrew v. *Klump and Klump*[65] was followed by the Full Court in *Hill* v. *Davidson*[66] where an agent engaged to "find a buyer" failed in a claim for commission because he did not discharge the onus of showing that the purchasers (who signed an enforceable contract) were able, at the time the contract was made, to find the money necessary to perform their obligations under the contract. The decision was later followed in *Bunney* v. *Halliday*.[67] In that case the agent (appointed "to sell") succeeded. The evidence established that the purchaser was ready, willing and able to complete when the contract was executed. It was held to be irrelevant that he changed his mind and was released by the vendor on payment of an agreed sum by way of damages.

It is not put that the Queensland authorities are to be preferred to the Victorian authorities. The fact is that the Full Court of Queensland has adopted a particular stage in the development of English law.

The English cases decided in the immediate aftermath of *Luxor (Eastbourne) Ltd* v. *Cooper*[68] cast no doubt on the authority of *James* v. *Smith*.[69] Indeed *Luxor (Eastbourne) Ltd* v. *Cooper*[70] was treated as authority for the proposition that "if an agent's commission is payable on his introducing a purchaser, he does not earn that commission merely by introducing someone who is ready and willing to purchase, but only earns it if the person who is ready and willing to purchase goes so far as to sign a legal contract binding him to go through with the purchase."[71]

Table One

Rule in *James* v. *Smith* observed

Name of Case	Term	Transaction failed because	Successful Party
Jones v. *Lowe* [1945] 1 K.B. 73	introducing a purchaser	vendor withdrew prior to contract	vendor
Poole v. *Clarke & Co.* [1945] 2 All E.R. 445	finding a purchaser	purchaser unable to complete	vendor
Murdoch Lownie Ltd v. *Newman* [1949] 2 All E.R. 783	in the event of business resulting	conditional contract/ vendor withdrew before purchaser's opportunity to satisfy condition expired	vendor
McCallum v. *Hicks* [1950] 2 K.B. 271	to find someone to buy my house	no binding contract/ vendor withdrew	vendor

65. 1950, St.R.Qd. 31.
66. 1956, St.R.Qd. 450 (Full Court).
67. [1941] A.C. 108.
68. [1931] 2 K.B. 317 n.
69. [1941] A.C. 108.
70. *Jones* v. *Lowe* [1945] 1 K.B. 73, at p. 75 per Hilbery J.
71. [1941] A.C. 108, at p. 125 per Lord Killowen.

Luxor (Eastbourne) Ltd v. *Cooper*[72] had made it clear that given sufficiently clear language an agent would be entitled to payment on the introduction of one who did no more than offer to purchase at the vendor's specified or minimum price. Agents and their advisers commenced to take advantage of that proposition.

Table Two

Rule in *James* v. *Smith* avoided

Name of Case	Term	Transaction failed because	Successful Party
Giddys v. *Horsfall* [1947] 1 All E.R. 460	introducing a party prepared to purchase on the terms of your instructions or on terms acceptable to you	vendor withdrew from subject to finance agreement	agent
Bennett & Partners v. *Millett* [1949] 1 K.B. 362	introducing a purchaser who is able and willing to complete	vendor withdrew after purchaser made unconditional offer of purchase	agent
Dennis Reed Ltd v. *Nicholls* [1948] 2 All E.R. 914.	to procure a person ready willing and able to purchase	vendor withdrew from subject to finance contract	agent
E.P. Nelson & Co. v. *Rolfe* [1950] 1 K.B. 139	introducing a person able, ready and willing to purchase	vendor withdrew after introduction of able, ready and willing purchaser	agent

In fairness to English estate agents it should be noted that in not one of the cases at Table Two did the agent seek to insist on a commission for doing less than introduce a ready, willing and able buyer.[73] In each of those cases the agent succeeded against a vendor who had withdrawn because the court did not insist on proof of a binding contract as a prerequisite to a finding of willingness. That is probably still the law of England.[74] However in three of the cases *Giddys* v. *Horsfall*,[75] *Bennett & Partners* v. *Millett*[76] and *Dennis Reed Ltd* v. *Nicholls*[77] the court inferred "willingness"

72. In *Bennett and Partners* v. *Millett* [1949] 1 K.B. 362 the purchaser did not have the necessary moneys when the contract was made but, on the evidence, was at that time able to raise those moneys by completion.
73. Contra Denning L.J. in *Dennis Reed Ltd* v. *Goody* [1950] 2 K.B. 277, to p. 285. Bucknill L.J. and Hodson J. appear to have thought that a binding contract was not essential. It is doubtful if Lord Denning's dictum will survive the attack made on his judgment in *Christie Owen and Davies Ltd* v. *Rapacioli* [1974] 1 Q.B. 781.
74. [1947] 1 All E.R. 460.
75. [1949] 1 K.B. 362.
76. [1948] 2 All E.R. 914.
77. [1950] 2 K.B. 257.

notwithstanding that the contract executed was conditional. Each of those cases was overruled by the Court of Appeal in *Graham and Scott (Southgate) Ltd* v. *Oxlade.*[78] That case establishes that a purchaser who makes an offer "subject to contract" or subject to some other event cannot be held to be a "willing" purchaser.[79] Only *E.P. Nelson & Co.* v. *Rolfe,*[80] itself a decision of the Court of Appeal, survives. It survives on the simple ground that counsel for the vendor admitted that the purchaser was ready, willing and able at all material times.[81]

The other common factor of the cases at Table Two is that in each of them it was the vendor who withdrew. That feature has now been elevated to the status of a material fact. In *Dennis Reed Ltd* v. *Goody*[82] it was held that on an appointment to introduce a person ready, willing and able to purchase, an agent was entitled to commission only if he introduced a purchaser unconditionally ready, willing and able to purchase at all times up to completion, or up to such time as the vendor declined to proceed. Without intending any disrespect to the other members of the Court, the author proposes to quote extensively from what fell from Denning L.J. (as he then was), because in more recent times the English debate has been largely a debate about His Lordship's views. His Lordship said:

> "So many cases have now come before the courts on claims by house agents to commission that the document cannot, I think, be interpreted in vacuo. It must be interpreted in the light of the general law on the subject, which I will endeavour to state. When a house owner puts his house into the hands of an estate agent the ordinary understanding is that the agent is only to receive a commission if he succeeds in effecting a sale; but if not, he is entitled to nothing. That has been well understood for the last 100 years or more: see *Simpson* v. *Lamb* (1), per Jervis C.J., and *Prickett* v. *Badger* (2), per Williams J. The agent in practice takes what is a business risk: he takes on himself the expense of preparing particulars and advertising the property in return for the substantial remuneration — reckoned by a percentage of the price — which he will receive if he succeeds in finding a purchaser: see *Luxor (Eastbourne) Ltd* v. *Cooper* (3). Some confusion has arisen because of the undoubted fact that, once there is a binding contract for sale, the vendor cannot withdraw from it except at the risk of having to pay his agent his commission. This has led some people to suppose that commission is payable as soon as a contract is signed: and I said so myself in *McCallum* v. *Hicks* (3).
>
> But this is not correct. The reason why the vendor is liable in such a case is because, once he repudiates the contract, the purchaser is no longer

78. A purchaser may be held "willing" if the vendor responds to an unqualified offer by insisting on the insertion of a "subject to contract" clause in the agreement; Ibid, at p. 265 per Cohen L.J.
79. [1950] 1 K.B. 139.
80. [1950] 2 K.B. 257, at p. 264 per Cohen L.J.; [1950] 2 K.B. 277, at p. 289 per Denning L.J.
81. [1950] 2 K.B. 277, at pp. 284 to 285 per Denning L.J., and at p. 292 per Hodson J. Bucknill L.J., at p. 283, phrased the rule quite differently — ready, willing and able to purchase up to the time when an enforceable contract is made, or, up to the time when the vendor refuses to enter into such a contract on terms on which the buyer is willing to purchase and the vendor was at one time willing to sell. On the facts that proposition was sufficient to dispose of the matter in the vendor's favour. The contract entered into was conditional.
82. Ibid, at pp. 284 to 288.

bound to do any more towards completion: and the vendor cannot rely on the non-completion in order to avoid payment of commission, for it is due to his own fault: see *Roberts* v. *Bury Improvement Commissioners* (4), and *Luxor (Eastbourne) Ltd* v. *Cooper* (5) per Lord Russell, and per Lord Wright. But if the vendor could show that the purchaser would not in any event have been able or willing to complete, he would not be liable for commission: see *British & Benningtons Ltd* v. *N. W. Cachar Tea Co.* (6), per Lord Sumner. When it is not the vendor, but the purchaser, who withdraws, the case is entirely different; for, even though a binding contract has been made, nevertheless, if the purchaser is unable or unwilling to complete, the agent is not entitled to his commission: *James* v. *Smith* (7); *Martin* v. *Perry & Daw* (2). The vendor is not bound to bring an action for specific performance or for damages simply to enable the agent to get commission; but if he does get his money, he will probably be liable to pay the commission out ot it. It only remains to add that, when no binding contract has been made, the vendor can himself withdraw at any time without being liable to pay commission: *Luxor (Eastbourne) Ltd* v. *Cooper* (8). A fortiori, if the purchaser withdraws, the vendor is not liable for commission.

So far, I have considered this particular clause only. But I would like to add that the various new clauses that have appeared seem to be capable of a similar interpretation. I can see no sensible distinction between instructions to 'find a purchaser', 'find a party prepared to purchase,' 'find a purchaser able and willing to complete the transaction,' and 'find a person ready, willing and able to purchase.' The rights and liabilities of house owners in these cases should not depend on fine verbal differences."[83]

Four points may usefully be made.

First, *Dennis Reed Ltd.* v. *Goody*[84] was a case in which the purchaser withdrew from a conditional contract. The proposition developed by Denning L.J. and Hodson J. went beyond what was necessary for the decision.

Second, all of the subsequent English cases in which Lord Denning's views have been approved are cases which went off on another point.

Third, Denning L.J. reached the conclusion that the ordinary understanding is that an agent is to receive his commission out of the purchase price received if a sale results, without the benefit of any of the survey materials on which sociologists place such credence. The matter was not too notorious to be a matter of serious dispute. As the text indicates the matter was repeatedly the subject of vigorous dispute.

Fourth, that part of His Lordship's opinion which it is most difficult to accept is the attempt to force the "common understanding" on agreements which use language suggesting that the parties had reached quite a different understanding. It was that approach which lead His Lordship to dissent in *Sheggia* v.

83. [1950] 2 K.B. 277.

84. With the exception of *Blake & Co* v. *Sohn* [1969] 3 All E.R. 123 where the argument turned on the meaning of "fault" in the proposition that the vendor may not rely on non-completion in order to avoid payment of commission if it is due to his own fault.

Table Three

Dennis Reed, Ltd. v. *Goody* approved

Name of Case	Context	Narrow ground for decision
Boots v. *E. Christopher & Co.* [1952] 1 K.B. 89	purchaser repudiated binding contract/ vendor successful	appointment provided for payment of commission out of purchase price
Midgley Estates Ltd v. *Hand* [1952] 2 Q.B. 432	purchaser withdrew from binding contract/ agent successful	appointment provided for payment of commission if purchaser introduced by agent signed "a legally binding contract"
Dellafiord v. *Lester* [1962] 3 All E.R. 393	contract conditional on lessor consenting to assignment/no consent/ vendor successful	appointment did not provide for payment unless agent introduced person willing and able to purchase — person introduced not "able", i.e. "able to complete"
Sheggia v. *Gradwell* [1963] 3 All E.R. 114	binding contract/ vendor had right to rescind if landlord refused to assign/ refusal/ recission/ agent successful	appointment provided for payment of commission if "legally binding contract to purchase" entered into by person introduced by agent
Jagnes v. *Lloyd D. George & Partners Ltd* [1968] 2 All E.R. 187	vendor successful	commission clause unenforceable for uncertainty agent had misrepresented effect of clause to vendor

Gradwell[86], and in *Christie Owen & Davies* v. *Rapacioli*[87] lead Cairns L.J. to say, "With the utmost respect to Lord Denning M.R. that appears to me to be contrary to the views expressed in the House of Lords in *Luxor (Eastbourne) Ltd* v. *Cooper* [1941] A.C. 108 that the exact terms of the contract are of great importance",[88] and lead James L.J. to say "I pay great respect to the observations of Denning L.J. in *McCallum* v. *Hicks* and in *Dennis Reed Ltd* v. *Goody*, but I find them out of line with the body of opinion to which I have referred, and contrary to the speeches in the House of Lords in the *Luxor* case [1941] A.C. 108".[89]

The material facts in *Christie Owen & Davies* v. *Rapacioli*[90] were as follows:

> The defendant vendor instructed the plaintiff estate agents to assist him in the sale of his business and to quote a price of £20,000. He agreed that commission should be payable in the event of the plaintiffs' effecting an

85. [1963] 3 All E.R. 114.
86. [1974] 1 Q.B. 781.
87. [1974] 1 Q.B. 781, at p. 787. At p. 790, Orr L.J. agreed with Cairns L.J.
88. Ibid, at p. 791.
89. [1974] 1 Q.B. 781.
90. Ibid, at p. 789 per Cairns L.J.

introduction either directly or indirectly of a person ready, able and willing to purchase at that price, or for any other price he might agree to accept. The plaintiffs did introduce a prospective purchaser, who offered £17,700. The defendant agreed to accept that price. A contract was executed by the purchaser and sent to the defendant who refused to proceed. The plaintiffs' claim for commission was dismissed by the trial judge but allowed by the Court of Appeal.

The case is not therefore direct authority on the contract of appointments "to sell" or "to find a purchaser". Strictly, the case decides no more than that—

"(1) The decision as to whether the commission is payable depends on the terms of the contract and on ordinary rules of construction. (2) When the agreement between principal and agent is for commission to be payable on the introduction of a person ready, able and willing to purchase, the commission is payable if a sale actually results, but may become payable when the transaction becomes abortive. (3) Commission is payable when a person who is able to purchase is introduced and expresses readiness and willingness by an unqualified offer to purchase, though such offer has not been accepted and could be withdrawn."[91]

However, the matter was so fully argued and the authorities so thoroughly reviewed that the decision must be treated as giving the contemporary imprimatur of the Court of Appeal to the basic proposition of *Luxor (Eastbourne) Ltd* v. *Cooper*,[92] viz, the decision as to whether commission is payable depends on the terms of the contract and on the ordinary rules of construction. The decision (potentially) represents a fresh starting point in the development of English law.

The author's concern is with the law of Queensland. It may be that if the matter were reargued the Full Court would follow its own previous decisions. It may be that the Court would follow *Christie Owen & Davies* v. *Rapacioli*[93] on appointments to introduce a person ready, willing and able to buy, and treat it as authority to rethink the matter on other appointments. It may be that on the commonplace appointments "to find a purchaser" and "to sell" the Full Court would adopt the views of Denning L.J. in *Dennis Reed, Ltd* v. *Goody*.[94] The latter course is not an unlikely one. The Australian courts have not been silent.

In *Anderson* v. *Densley*,[95] where the point was irrelevant to the decision, the High Court said, "Where an agent is employed on commission to sell a property (and non-completion is not due to the default of the vendor) the commission only becomes payable if the sale is completed." More recently, in *L.J. Hooker Ltd* v. *W.J.*

91. [1941] A.C. 108.
92. [1974] 1 Q.B. 781.
93. [1950] 2 K.B. 277.
94. (1953), 90 C.L.R. 460, at p. 467. Of the three cases relied upon by the High Court only *Midgley Estates Ltd* v. *Hand* [1952] 2 Q.B. 432, where the comments made were dicta, gives any support to the proposition. *James* v. *Smith* [1931] 2 K.B. 317 n is inconsistent with it and *Boots* v. *E. Christopher & Co* [1952] 2 Q.B. 432, a case where the commission was expressly made payable out of the purchase money, is irrelevant to it.
95. (1977), 138 C.L.R. 52.

Adams Estates Pty Ltd[96] Gibbs J. (as he then was) said, "As at present advised I see no reason to differ from the view expressed in *Anderson* v. *Densley*, but it is unnecessary to consider the matter more fully because in the present case the contract made was actually completed." Stephen J.[98] said of the appointment ("locate a satisfactory purchaser at a satisfactory price"), there is, I think, no doubt that the term requires that there must be an actual sale to an introduced purchaser; such a meaning will both reflect what is the prima facie likely intention of the parties to all such contracts", and Jacobs J.[99] said "In my opinion in a case such as the present, a quite ordinary case of the putting of a property in the hands of a real estate agent "for sale" (as it is commonly but inaccurately expressed) the implied contract intended by the parties is that the agent is entitled to commission on that which the purchaser located by him purchases, a commission calculated on the price of that which the purchaser purchases." In *Montano* v. *Caffrey*[1] the New South Wales Court of Appeal held that because the expression "willing and able to purchase" connotes a continuing willingness and ability to purchase commission is payable only on completion, save where a binding contract goes off by the vendor's default or express terms to the contrary are adopted by the parties.

The Need for Reform

A client requires an answer, not an explanation of why it is difficult to give one. On the current state of the law, no practitioner could give confident advice on the meaning of an appointment "to sell" or "to find a purchaser". To advise on the likely outcome of a Full Court Appeal (if the matter proceeds so far) is to give inadequate advice, notwithstanding that all proper warnings that costs will follow the event be added. Even if a man of principle emerge who is willing to litigate to settle the law for others, he will achieve nothing. For reasons already given, the decision can never be more than a point of departure in subsequent cases.

The law of contract has failed. There is a need for legislative specification of the circumstances in which an agent is to be paid commission.

Freedom of contract ranks equally with freedom of expression and freedom of assembly. To the extent that if it is diminished society is less free. However in the current context, the freedom of a vendor and his agent to agree upon the circumstances in which commission is to be payable, has degenerated into a freedom for

96. Ibid, at p. 67.
97. Op. cit., at p. 75.
98. Op. cit., at p. 83.
99. [1968] 2 N.S.W.R. 182. In *Summergreene* v. *Parker* (1950), 80 C.L.R. 304, at pp. 319 to 320 Williams J. arrived at the same result for marginally different reasons.
1. If "enforceable" had stood alone it would have been taken to mean enforceable in damages whether or not specific performance might have been ordered, *Sheggia* v. *Gradwell* [1963] 3 All E.R. 114, at p. 121 and p. 123. The Courts may well be prepared to read it as "specifically enforceable" to give content to the other condition, "valid".

agents and their industry associations to settle the terms of standard form letters of appointment. Whilst the use of standard forms injects a desirable element of certainty, it does so at the expense of vendor interests. For example, the standard for appointment made available by the Real Estate Institute of Queensland provides for the payment of commission where the agent—

(a) introduces a purchaser who enters into a valid and enforceable contract of sale confirmed by me/us for such property and who completes such contract or,
(b) introduces a purchaser who enters into a valid and enforceable contract of sale confirmed by me/us for such property and the purchaser does not complete such sale in circumstances where the deposit paid or some part thereof is forfeited provided however that in no case shall you be able to recover as commission an amount in excess of the amount of the forfeited deposit.

Paragraph (a) is unexceptional. It is well within the mainstream of contemporary authority. Indeed, by confining the right to commission to those cases in which completion occurs pursuant to a "valid and enforceable[2] contract of sale", the clause may well be more solicitous of vendors than the courts will prove to be. It is certainly true that the decisions identifying completion as the relevant event assume that the purchaser has completed under a binding contract of sale. The assumption has its origin in the history of the matter. A dispute about whether the relevant event was execution of a binding contract or the introduction of a ready, able and willing purchaser was resolved by insisting on both elements. "Willing and able" was then expanded to mean "continuing willingness and ability", which (vendor default apart) might be established only by evidence of completion. As opinion settles that completion is crucial, it may well be held that it is unnecessary to enquire into the enforceability of the vendor-purchaser contract, which in the events which have happened may be presumed to have been of little moment as between vendor and agent.

Paragraph (b) is quite exceptional. It converts the deposit into a security for the agent's commission, rather than a security for the performance of the buyer's obligations. It provides for the payment of part-commissions. It provides for payment where the purchaser repudiates his obligation and reneges on a binding bargain. It is quite inconsistent with the mainstream of authority. Arguably, because of the reference to forfeiture of "some part" of the commission, it provides for payment in circumstances such as arose in *Montano* v. *Caffrey*[3] where the vendor and the purchaser

2. [1968] 2 N.S.W.R. 182.
3. Such a construction produces strange results. In domestic transactions, where the deposit is small, the vendor would be contesting and/or settling proceedings with the buyer for the benefit of the agent. If "forfeited" is read as "rightly forfeited" contracts between the agent and his vendor will involve the agent in asserting that (as against the purchaser) the vendor was right, and the vendor asserting that (as against the purchaser) he, the vendor, was wrong and the purchaser was right.

compromised proceedings relating to the deposit on terms that part was forfeited to the vendor and part refunded to the purchaser.[4]

The fact is that agents and their clients have different interests. Vendors look to their agents for fruitful introductions. Agents look for suitable introductions. The legislature is the appropriate body to reconcile the competing interests.

It is respectfully submitted that the legislature should be guided by the experience of the courts and should select completion as the event on the occurrence of which commission is to be payable.

Such a conclusion is clearly less generous to agents than the developing judicial rule. Whilst that rule recognizes that the contract between the vendor and the agent is unilateral[6] rather than bilateral, it recognizes also the implication of a term rendering the vendor liable to the agent where, in breach of his obligations to the purchaser, he resiles from a binding contract of sale? However litigation between A and B which depends for its resolution on findings as to the rights inter se of A and C (who is not a party and who is probably uninterested in the outcome) is never satisfactory. An element to compensate agents for lost commissions may readily be built into the maximum rates of commission prescribed by the Auctioneers and Agents Act 1971. Most agents charge no less than the maximum fee.[8]

To confer rights that the beneficiaries do not know about is an exercise of limited value. It is submitted that the problems of appointment and remuneration are best dealt with by the imposition of a legislative rule that an agent may recover commission only where he has been appointed by the execution in duplicate[9] of a statutory form of appointment which makes it clear that commission is payable only on completion. The maximum permissible rates of commission might reasonably be printed on the back of the form. It might also be useful to take up a matter with which this article has dealt not at all, and exclude the possibility that agents might take up the suggestion of McPherson J. in *Rasmusen & Russo Pty Ltd* v. *Gaviglio* that by the use of appropriate words the need for a causal nexus between the agents' activities and completion by the purchaser might be waived.

4. The author recognizes that a case can be made for excluding transactions in which agents are appointed to market an estate, a block of units or a chain of stores. The case for reform relates to sales of single parcels of land, single dwellings and units, and single businesses.
5. I.E., the vendor's offer of a reward is accepted only when the agent performs the act in return for which the reward is payable. See generally Murdoch, J.R., *The Nature of Estate Agency*, (1975) 91 L.Q.R. 357 and *L.J. Hooker Ltd* v. *W.J. Adams Estates Pty Ltd* (1977), 138, C.L.R. 52 at p. 73 per Stephen J.
6. *Luxor (Eastbourne) Ltd* v. *Cooper* [1941] A.C. 108, at p. 126 per Lord Killowen; *Dennis Reed Ltd* v. *Goody* [1950] 2 K.B. 277 at p. 285 per Denning L.J., *Alpha Trading and Dunn-Shaw* v. *Patten Ltd* [1981] Q.B. 290, at p. 304 per Brandon L.J., at p. 306 per Templeman L.J. and at p. 308 per Lawton L.J. Lord Wright's view — [1941] A.C. 108, at p. 142 — that what is payable is not commission but damages is contrary to the weight of authority.
7. Agents may not charge more, ss. 71 and 72.
8. One copy to be retained by the agent and one by the vendor.
9. [1982] Qd.R. 571, at p. 581.