



BETWEEN

TASMAN LIVESTOCK LTD

Plaintiff

1378

AND

ANNIE SARTEN of  
Auckland Widow and ors

Defendant

(3) [Handwritten initials]

Hearing: 15-16 October 1984

Counsel: Mr Parker for plaintiff  
Mr Halford and Mr Shaw for defendant

Judgment: 16 October 1984

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ORAL JUDGMENT OF HILLYER J

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This is a claim for commission on the sale of a horse. The plaintiff is an agent for the sale of thoroughbred livestock and gave evidence through its principal shareholder and director Mr Owen Larsen, who was the person involved in the events I am about to describe.

The defendants are the executors of the last will and testament of James Sarten, formerly of Auckland. Mr Sarten in his lifetime, was a breeder of thoroughbred livestock and was well known, as such. Indeed he had a very well known family of horses which he bred, known as the "Belle" family. This case is in relation to one of these horses, a three year old mare named "Dame Belle" by Hermes out of Belle Time.

Mr Larsen, met Mr Sarten on 25 February 1978 at the Te Aroha races. Mr Larsen at that time knew a Mr Shepherd who wanted to acquire, as did many thoroughbred livestock breeders in the country, a Sarten mare, one of the Belle family. In discussion with Mr Sarten, Mr Larsen learned that Mr Sarten had the three year old mare Dame Belle, for sale. The price was said to be \$80,000.

On the following day, the Sunday, Mr Larsen, having ascertained that Mr Shepherd was not interested at that price, quoted Dame Belle to one David Benjamin at the price of \$80,000, but Mr Benjamin recoiled slightly at that price.

Although Mr Larsen says that it was not the case, Mr Benjamin said that he told Mr Larsen at that time that he knew that Dame Belle was for sale. Mr Benjamin's evidence before me to this effect was corroborated by the evidence of a Mr Perry who had learned that Dame Belle was on the market on 21 February when he met Mr Sarten. Mr Perry said he had told Mr Benjamin about Dame Belle. I accept therefore that Mr Benjamin knew that Dame Belle was for sale prior to his being told of this by Mr Larsen. It cannot be said therefore, that the horse was introduced to Mr Benjamin by Mr Larsen.

Mr Larsen relied to some extent on a diary in which it

appears that notes had been made, day by day, of the events that Mr Larsen recounted before me, but it became apparent in the course of his evidence and cross-examination that the notes had been written in this diary at a time other than on the day in which they appeared. Indeed it may well be that some of the notes on which Mr Larsen relied were written by him in the diary after the possibility of a dispute or litigation had arisen. I am therefore not able to give the entries in the diary the weight I would otherwise have given to contemporaneous notes, particularly as it did not become apparent until Mr Larsen's cross-examination that the notes were not contemporaneous.

In any event, it is clear that from time to time following 27 February, Mr Larsen, as behoves an energetic and competent bloodstock agent, having conceived the idea that Mr Benjamin might be interested in Dame Belle, communicated with Mr Benjamin on a number of occasions. He was still endeavouring to persuade him to purchase the mare, although on 2 March 1978 it appears that Mr Sarten told Mr Larsen that the price of the mare had gone up from \$80,000 to \$100,000.

On that day, 2 March 1978, Mr Larsen posted to Mr Sarten at Mr Sarten's home, 8 Selwyn Avenue, Auckland, a document which is of considerable importance. It is headed "Tasman Livestock Limited" with an address, is dated 2

March 1978 and it reads:

"Dear Sir,

re 'Dame Belle'

We thank you for the above-mentioned Listing and confirm that the selling price is \$100,000. Should our company complete a sale, the proceeds will be forwarded promptly. We advise that our commission rate is 10% on all sales.

Yours faithfully,

'O.E. Larsen'

This was a printed form in which the name of the horse and the price was filled in. It does however give credence to Mr Larsen's allegation that the commission he normally charged or at least sought, was 10 percent.

It was suggested by Mr Halford for the defendant that this contained the terms of the commission agency and amounted to an acknowledgement of an agency contract between Mr Sarten and Mr Larsen. I have some doubt whether it goes that far. It is in terms an acknowledgment of a listing. It is a statement that if the company receives the proceeds of a sale, that those proceeds will be forwarded promptly, and it is a statement that the commission rate is 10 percent. It does go, I think, a little further in that it says that the commission rate is 10% on all sales, which would indicate that the commission is payable if there is a sale.

It is of course on this question of whether there has been a sale that the argument in this case has turned. Indeed, that is not an uncommon question to arise in claims for commission.

Following the forwarding of that document, Mr Larsen apparently had one further interview with Mr Benjamin on 3 March when there was, he said, some reference to obtaining finance for the purpose of purchasing Dame Belle. There was no other contact between Mr Larsen and Mr Benjamin until 9 March 1978, which was the evening of a sale of horses owned by a Mr Burley. Apparently both Mr Benjamin and Mr Larsen were present at that sale and at a dinner which followed. In particular however, Mr Benjamin noted that a horse which had belonged to Mr Sarten called "Fox Belle" had been sold at the price of \$75,000, and this stimulated his interest, he said, in Dame Belle and made him think that the price of \$100,000 was not so excessive.

He had with him that night his partner, a Mr Finlayson and they met a Mr Mollet who was a friend of Mr Sarten's and on whose property some of Mr Sarten's horses were depasturing. The conversation came around, among Mr Mollet and Messrs Benjamin and Finlayson to the sale of Fox Belle and thence to the possibility of Mr Benjamin and his partner purchasing Dame Belle. Mr Benjamin told Mr Mollet he would be prepared to offer \$100,000 to purchase Dame Belle and made an arrangement with Mr Mollet that Mr

Mollet would get in touch with Mr Sarten and endeavour to persuade him to sell Dame Belle.

It appears that it was Mr Benjamin who mentioned the purchase price of \$100,000 to Mr Mollet, and it seems clear that he knew of that price through his contact with Mr Larsen. It appears also however, that Mr Sarten had not heard of Mr Benjamin through Mr Larsen. Mr Larsen, for what were said to be obvious reasons, had not told Mr Sarten that Mr Benjamin was interested, or might be interested in purchasing Dame Belle. When, therefore Mr Mollet rang Mr Sarten that evening and said he had somebody prepared to pay \$100,000, Mr Sarten did not know that that person had had some association with Mr Larsen, or that Mr Larsen was in any way involved in the deal.

Mr Mollet says that he told Mr Sarten that he was making the offer on behalf of Mr Benjamin, but evidence given by Mrs Leicester, Mr Sarten's daughter, before me, makes me believe that it was not until Mr Sarten had agreed to sell the horse at \$100,000 that Mr Mollet mentioned Mr Benjamin's name. Mrs Leicester said that she and others of her family were curious to know who it was, and that phrase carried conviction to me. I do not think it matters. The fact of the matter is that particular evening Mr Sarten knew that Mr Benjamin was the proposed purchaser, subject to veterinary inspection. He did not

know that Mr Benjamin had been introduced by Mr Larsen, or that Mr Larsen was in any way involved.

The effect of that of course, was that Mr Sarten believed that there would be no commission involved on the sale of the horse, because Mr Mollet, who had a substantial association with the Sarten family and who presumably received some benefits from that association by way of the money he received from the depasturing of the Sarten horses, said he did not want any commission. Mr Sarten therefore believed he was going to get the full \$100,000 and it may well be for that reason he agreed to sell. One does not know whether he would have agreed to sell if he had thought that he was going to get only \$90,000.

It is clear, and was accepted by counsel, that the listing that had been obtained by Mr Larsen did not permit Mr Larsen to conclude the sale of the horse without further reference to Mr Sarten. The document certainly did not appoint Mr Larsen to sell the horse on Mr Sarten's behalf. It appeared from the evidence that Mr Larsen gave, and from what counsel have said to me, that any proposed sale had to be referred to Mr Sarten for his approval before it was concluded.

In the result Mr Sarten agreed to sell the horse. A veterinary inspection was undertaken. That proved satisfactory, and on 16 March 1978 Mr Sarten signed a

contract for the sale of the horse which was forwarded to Mr Benjamin on 21 March. The \$100,000 was duly paid over on 30 March.

On 15 March Mr Larsen had some contact with Mr Benjamin, and Mr Benjamin made no mention of his purchase of the horse. It was not until 29 March 1978 that Mr Larsen called on Mr Benjamin and then learned that Mr Benjamin had purchased the mare from Mr Sarten.

Mr Larsen made a diary note theoretically on that day in which he wrote "He (Mr Benjamin) admitted lying to me about private deal." Mr Larsen was not able to tell me exactly what Mr Benjamin had said in that regard, nor did Mr Benjamin agree that he had admitted lying to Mr Larsen. I formed the impression that that note had been made at a time when Mr Larsen was reconstructing events with the thought of litigation in mind. I do not know that it is important, but to the extent that it was put forward as an indication that Mr Benjamin had misled Mr Larsen, I do not accept it.

In any event, even if Mr Benjamin did mislead Mr Larsen, unless he did so in conspiracy with Mr Sarten, that would give Mr Larsen no claim for commission against Mr Sarten. I have no hesitation in accepting on the evidence that whatever Mr Benjamin's knowledge may have been, Mr Sarten certainly did not know that Mr Benjamin



had any connection with Mr Larsen and did not know that Mr Larsen was in any way instrumental in bringing about the sale of Dame Belle.

In those circumstances I have to determine whether Mr Larsen has, on behalf of the plaintiff, sufficiently fulfilled his obligation as an agent to have earned commission. I accept that on the evidence, and in particular the uncontradicted note of 2 March 1978, the commission would be 10 percent, and I accept that that 10 percent would be payable on the sale of the horse. I do not however, accept the submission made by Mr Halford that the plaintiff through Mr Larsen, had to go to the lengths of actually completing the sale. Mr Halford based his submission on the phrase in the document of 2 March, "Should our company complete a sale." He submitted that that involved the agent in not only introducing the purchaser to the vendor, making it known to the purchaser that Dame Belle was for sale, obtaining authority from the purchaser to treat, submitting the offer to the vendor and conveying the acceptance of that offer, but even collecting the funds and accounting for the proceeds. I would not hold that if an agent had gone to the lengths of submitting an offer to a vendor which that vendor accepted, that the agent had not earned his commission, simply because the vendor himself rang the purchaser and said that the offer was acceptable, or that the vendor collected the funds and distributed the proceeds.

The duty of an agent was set out clearly in the case of Luxor (Eastbourne) Ltd & Ors v Cooper [1941] AC 108. At

P.124 Lord Russell of Killowen said :

("1.) Commission contracts are subject to no peculiar rules or principles of their own; the law which governs them is the law which governs all contracts and all questions of agency. (2) No general rule can be laid down by which the rights of the agent or the liability of the principal under commission contracts are to be determined. In each case these must depend upon the exact terms of the contract in question, and upon the true construction of those terms. And (3) 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."

Those it seems to me are the principles that should be applied in this case.

In commission contracts for the sale of land of course, the contract must be in writing, and it is therefore easier to determine what the exact terms of that contract may be. Many of the cases on agency commission concern the sale of land. Principles and guidelines have been laid down in a number of cases. In particular in the case of Latter v Parsons (1906) Vol 26 NZLR 645. Stout CJ said:

"In my opinion, however, the authorities show that if the commission agent undertakes to effect a sale for a commission he is entitled to his commission if he produces a purchaser who enters into a proper contract of sale with the vendor.

the vendor approving of the purchaser proposed, and there being no concealment or misrepresentation made by the agent regarding the purchaser or regarding any material facts upon the purchase."

I do not say in this particular case that there was any concealment by Mr Larsen of material factors from Mr Sarten, but the fact of the matter is that when Mr Sarten was agreeing to sell, he did not know that he would be expected to pay commission on the sale.

The claim of the plaintiff, however in my view, must fail upon a much more significant basis than that because it is clear that the agent must make the sale. I would be prepared to hold that if Mr Benjamin had been persuaded by Mr Larsen to purchase the mare, the plaintiff would have gone much further towards earning a commission than it did.

Mr Benjamin in the witness box on oath said before me, that he was influenced only to a very minor extent, if at all, by the approaches made to him by Mr Larsen. The matter that really decided Mr Benjamin to purchase Dame Belle was his attendance at the Burley sale, and the price that Fox Belle brought. There is no suggestion that Mr Larsen persuaded Mr Benjamin to go to that sale, nor was Mr Larsen involved in the discussion as a result of which Mr Benjamin and his partner, Mr Finlayson finally came to the conclusion they would make the offer of \$100,000.

I accept as I have said, that Mr Benjamin knew about the price of \$100,000 through Mr Larsen, but that, in my view

is not going far enough. The law on the earning of commission is set out succinctly in Fridman on The Law of Agency 4th ed at P.146:

"Even if it has been expressly or impliedly agreed by the principal that he will pay remuneration, his duty to pay remuneration only arises where the agent has earned it. This will occur only when the agent has been the direct, effective, or efficient cause of the event upon the occurrence which the principal has agreed to pay the agent remuneration. So the agent must show not only that he has achieved what he was employed to bring about, but also that his acts were not merely incidental to that result, but were essential to its happening. This, like all issues of causation is ultimately a question of fact, though certain legal principles emerge from the cases."

Again in the case of Green v Bartlett quoted in Fridman at P.147, Erle CJ said:

"If the relation of buyer and seller is really brought about by the act of the agent he is entitled to commission although the actual sale has not been effected by him."

I do not consider that the relationship of buyer and seller was really brought about by the act of the agent. If the contract of agency had been framed differently as in many cases in relation to the sale of land it is, the situation might be different. If for example the commission contract had been that commission was payable on the introduction of a purchaser who eventually purchased, the situation might be different, particularly if Mr Larsen had told Mr Sarten that he was dealing with Mr Benjamin. In this particular case however in my view, the effect that Mr Larsen's actions had did not go far enough to mean that he was fully and substantially responsible for the sale.

For those reasons therefore, the claim is dismissed with costs on the High Court scale on the claim together with disbursements and witness expenses as fixed by the Registrar.

I do not allow costs on the motion granting leave to the plaintiff to continue the action against the executors of the defendant, because it is not a matter that was in any way within the control of the plaintiff. The defendant was not put to any substantial expense in that regard; he simply consented.

I allow the defendants a total of \$75 for discovery and inspection. It was apparently necessary to move for an order for inspection of the diary and I allow costs of \$25 on that, having regard to the fact I have already allowed costs on discovery and inspection.

There was a motion for an order to strike out the plaintiff's claim which did not proceed, with affidavits filed on both sides. An order was made by consent dismissing. I will allow costs of \$50 on that motion in favour of the defendant.



P.G. Hillyer J

Solicitors:

Hessall O'Neill Allen & Parker for plaintiff  
Nicholson Gribbin & Co for defendant