# THE IMPLICATION OF A PROMISE TO BUY OR SELL INTO A REAL ESTATE BROKERAGE CONTRACT: AN ANALYSIS OF THE READY, WILLING AND ABLE THEORY

*A real estate broker named Wyatt,*
*When asked to find homes said, "I'll try it."*
*Out of all those erected,*
*One house was selected:* [1]
*Now, has purchaser promised to buy it?*

In the typical real estate brokerage agreement, the broker can recover his commission even though there has been no sale of property. This recovery is based on the widely used theory that a commission is earned as soon as the broker produces a prospect who is ready, willing and able to buy on the owner's terms.[2] But because this theory is mechanically used only to determine when a commission has been earned from the principal who promised to pay it, the ready, willing and able test is overlooked by courts deciding those cases in which an owner hires a broker with the understanding that commissions will be paid by the purchaser,[3] or those in which a prospective purchaser hires a broker and requires the latter to seek remuneration from the owner.[4] Such a broker might complete his task of procuring a satisfactory parcel or a satisfactory buyer only to find that his principal arbitrarily refuses to consummate the transaction. The broker cannot sue the party who did promise to pay the commission, since this promise is conditioned on the passing of title, and the promisor has not wrongfully prevented the passing. Therefore, if the broker is to have any relief, it will have to be against the defaulting principal, who has not promised to pay his commission.

While the broker can bring an action in quantum meruit for the reasonable value of his services,[5] it is unlikely that this "value" will be as great as the commission which he would have received had the sale actually been consummated.[6] A more desirable remedy for the broker would

[1] Selected by the purchaser, of course.

[2] *E.g.*, Doe v. Eggleston, 106 N.J.L. 565, 146 Atl. 175 (Ct. Err. & App. 1929); Simon v. H. K. Porter Co., 407 Pa. 359, 180 A.2d 227 (1962); Hambelton v. Seldon, 163 Pa. Super. 259, 60 A.2d 369 (1948).

[3] *E.g.*, Stagg v. Lawton, 133 Conn. 203, 49 A.2d 599 (1946); Kaercher v. Schee, 189 Minn. 272, 249 N.W. 180 (1933); Aronson v. Carobine, 129 Misc. 800, 222 N.Y. Supp. 721 (N.Y. City Munic. Ct. 1927); Atkinson v. Pack, 114 N.C. 597, 19 S.E. 628 (1894).

[4] *E.g.*, Calkins v. F. W. Woolworth Co., 27 F.2d 314 (8th Cir. 1928); Shepley v. Green, 243 S.W.2d 772 (Mo. Ct. App. 1951); Tanner Associates, Inc. v. Ciraldo, 33 N.J. 51, 161 A.2d 725 (1960).

[5] See Mulhall v. Bradley & Currier Co., 50 App. Div. 179, 63 N.Y. Supp. 782 (1900); Darling v. Moscowitz, 159 N.Y. Supp. 672 (Sup. Ct. 1916). For discussion of whether an action in quantum meruit should lie when a state statute requiring that the agreement to pay commissions be in writing prevents the broker from recovering on an oral contract of employment, see 46 Ky. L.J. 278 (1958).

[6] Conversations with a Philadelphia real estate broker in August and September, 1965, indicated that suit on the contract is the more desirable alternative. The amount

therefore be a suit on his employment contract for damages measured by the lost commission. To rebut defendant's contention that a commission cannot be recovered from one who never promised to pay it, the broker usually argues that the principal promised, as part of the employment contract, to buy a satisfactory parcel, or to sell to a satisfactory buyer.[7] The broker further claims that by arbitrarily refusing to buy or sell, the principal breached his contract and is liable for damages.[8] Since this promise to buy or sell is rarely expressly made, courts are frequently asked to imply it.

In *Duross Co. v. Evans*,[9] a broker was hired by prospective purchasers to locate a suitable parcel of land within a certain area. Defendant purchasers selected one parcel from all those found by the broker and authorized him to submit a specific offer to the owner. The owner accepted the offer, agreed to pay the broker a commission when title passed and signed a contract of sale. Defendants then arbitrarily refused to sign this contract. The New York Supreme Court, Appellate Division, First Department, held that the broker's complaint stated a cause of action on the brokerage contract saying: "*Implicit* in the allegations . . . is the agreement on the part of defendants to purchase on the basis of the alleged offer." [10] Unfortunately, this conclusion was not supported by analysis of what the parties reasonably expected. Moreover, the four major cases upon which the court relied are distinguishable since they involved express promises to buy or lease.[11]

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of the quantum meruit recovery would probably not be equal to the lost commission since the commission is set with a view toward compensating the broker for his unsuccessful as well as his successful efforts.

[7] The difficult question of what constitutes a satisfactory parcel or buyer is beyond the scope of this comment. See, *e.g.*, Abbott v. Lee, 86 Conn. 392, 85 Atl. 526 (1912); Connell v. Avon Garage Co., 391 Pa. 189, 137 A.2d 765 (1958); Restifo v. Pastor, 129 A.2d 533 (D.C. Munic. Ct. App. 1957); Dowining v. H. G. Smithy Co., 125 A.2d 272 (D.C. Munic. Ct. App. 1956). In the cases discussed, the question whether the broker has performed to the satisfaction of defendant has not been in issue.

[8] See cases cited note 3 *supra*; cases cited note 12 *infra*.

[9] 22 App. Div. 2d 573, 257 N.Y.S.2d 674 (1965).

[10] *Id.* at 573-74, 257 N.Y.S.2d at 676. (Emphasis added.) This was a promise implied by law; it was not implied merely because the plaintiff failed to allege an existing express promise to buy. The damages flowing from the breach of this promise were equal to the commission lost by the broker. *Id.* at 574-75, 257 N.Y.S.2d at 677.

[11] In relying upon Ackman v. Taylor, 185 Misc. 807, 57 N.Y.S.2d 433 (Sup. Ct. 1945), *aff'd*, 269 App. Div. 1025, 59 N.Y.S.2d 375, *aff'd*, 296 N.Y. 597, 68 N.E.2d 881 (1946), the *Duross* court cited only the supreme court decision. In the court of appeals, however, the allegations in the complaint were fully set out. 296 N.Y. at 597. They clearly show an express promise to lease the premises that the broker found for the defendant. In Pease & Elliman, Inc. v. Gladwin Realty Co., 216 App. Div. 421, 215 N.Y. Supp. 346 (1926), defendant wrote a letter to plaintiff which said: "I am to enter into a lease for 21 years . . . on the property located at 6 East Forty-eighth street, and will pay a net annual rental as follows. . . ." *Id.* at 422, 215 N.Y. Supp. at 347. Express promises were also present in McKnight v. McGuire, 117 Misc. 306, 307, 191 N.Y. Supp. 323 (Sup. Ct. 1921), and in James v. Home of Sons & Daughters of Israel, 153 N.Y. Supp. 169 (Sup. Ct. 1915). Not only do these four cases involve express promises to buy or lease, but all are concerned with a purchaser who hired his broker to obtain the sale or rental of an already selected property at a specific price. It is on the latter ground that the dissent in *Duross* distinguishes

*Duross* is not the first case in which a court, without stating its reasoning, implied such a promise into a broker-principal employment contract. Whether called upon to imply a promise to buy [12] or sell,[13] courts have consistently sent the litigants home knowing only who won, but not why. For example, in *Tanner Associates, Inc. v. Ciraldo*,[14] the Supreme Court of New Jersey reversed the lower court's flat refusal to read any promise to buy into the contract between broker and purchaser,[15] saying only: "The affidavits justify the inference that, in exchange for these services, defendants would, if plaintiff found lands satisfactory to them, complete and perform an agreement of sale with the vendor so that plaintiff might earn a commission from the vendor." [16]

In other areas of contract law, when courts are asked to imply a promise, the test customarily used is whether a reasonable person in the position of the promisee would expect the promisor to perform the act which the promise requires.[17] This test has been distilled from the cases by Professor Williston.[18] When applied to the real estate commission problem, it focuses on whether a broker is reasonable in expecting that his principal will consummate a transaction once the broker has found a satisfactory parcel or buyer. By the time such a parcel or buyer has been found, the broker has practically completed his work. All that remains is to draw up the contract of sale and pass title, both of which functions are probably performed by lawyers. It hardly seems likely that a broker would spend valuable time seeking out prospects if he did not expect that a sale would be consummated once the principal approved the product of the broker's labor.[19]

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these cases. Duross Co. v. Evans, 22 App. Div. 2d 573, 578-79, 257 N.Y.S.2d 674, 680-81 (1965) (Eager, J., dissenting).

Both in the four New York cases cited by *Duross* and in cases in other jurisdictions, *e.g.*, Eells Bros. v. Parsons, 132 Iowa 543, 109 N.W. 1098 (1906); Shepley v. Green, 243 S.W.2d 772 (Mo. Ct. App. 1951); Livermore v. Crane, 26 Wash. 529, 67 Pac. 221 (1901), brokers have recovered whenever their employment contracts contained express promises to buy or lease.

[12] See, *e.g.*, Tanner Associates, Inc. v. Ciraldo, 33 N.J. 51, 161 A.2d 725 (1960); Westhill Exports, Ltd. v. Pope, 12 N.Y.2d 491, 191 N.E.2d 447, 240 N.Y.S.2d 961 (1963) (defendant to purchase newsprint rather than real estate); Louis Starr, Inc. v. Blumenthal, 132 Misc. 222, 228 N.Y. Supp. 486 (Sup. Ct. 1927).

[13] See, *e.g.*, cases cited note 3 *supra*.

[14] 33 N.J. 51, 161 A.2d 725 (1960).

[15] Tanner Associates v. Ciraldo, 58 N.J. Super. 398, 156 A.2d 289 (1959).

[16] 33 N.J. at 67, 161 A.2d at 734.

[17] See, *e.g.*, Sacramento Nav. Co. v. Salz, 273 U.S. 326, 329 (1927) (implied promise in a contract to transport cargo by barge that a tug would be supplied to pull the barge); Wood v. Lucy, Lady Duff-Gordon, 222 N.Y. 88, 118 N.E. 214 (1917) (implied promise that plaintiff would use reasonable efforts in marketing defendant's dress designs); Reback v. Story Prods., Inc., 15 Misc. 2d 681, 181 N.Y.S.2d 980 (Sup. Ct. 1958), *aff'd per curiam*, 9 App. Div. 2d 880, 193 N.Y.S.2d 520 (1959) (implied promise by buyer of motion picture rights to plaintiff's literary property either to make a film or to use reasonable efforts to do so).

[18] 5 WILLISTON, CONTRACTS § 1293 (rev. ed. 1937).

[19] Of course, in cases like *Duross*, the broker might be asked to locate many parcels that can be purchased within a general price range set by his principal. Even

The use of the reasonableness concept in the Williston test, however, might arguably require courts to examine the broker's reasonable prediction of his principal's thoughts. Although there is little doubt that these thoughts include the eventual consummation of a sale, the mystique of the written word might nevertheless lead a principal to believe that he is under no legal obligation to anyone until a written contract of sale is signed. Thus, the broker's expectation of a sale might be considered unreasonable if formed before that signing. But even though the principal is correct in assuming that he is under no obligation to the prospect until the contract of sale is signed,[20] he is not correct in thinking that this Statute of Frauds immunity extends to the implied promise in a broker's contract. The Statute, which protects the principal in his dealings with a prospect, does not affect the brokerage contract.[21] The principal may believe that the signing of the contract of sale alone triggers not only his obligation to the prospect but also his obligation under the brokerage agreement. Absent actual knowledge to the contrary, however, it is reasonable for the broker to expect that his principal is not relying on this erroneous assumption of law. The harshness of thus binding the principal is largely mitigated since he is never forced to purchase or convey as he might be in a successful suit upon the contract of sale; he is required only to pay damages to the broker in the amount of lost commissions.

Both the limited use of the ready, willing and able analysis in those cases in which the principal promises to pay commissions, and the courts' failure to use any analysis in the implied promise cases result from the

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under the Williston test, the purchaser should not be held liable for a failure to buy any of the parcels found unless he has approved them. However, once the purchaser has singled out one specific parcel and has authorized the broker to make one specific offer to the owner, the broker can certainly expect a sale if the offer is accepted.

[20] This is so because the Statute of Frauds requires that executory promises to convey or purchase real estate be evidenced by a written memorandum signed by both parties. 2 CORBIN, CONTRACTS § 396 (1950); 3 WILLISTON, CONTRACTS § 450 (3d ed. 1960). See generally CORBIN, *op. cit. supra* §§ 396-419; WILLISTON, *op. cit. supra* §§ 487-494.

[21] Two isolated cases have stated, one as holding, DeLucca v. Flamingo Corp., 121 So. 2d 803 (Fla. Dist. Ct. App. 1960), the other as dictum, Stagg v. Lawton, 133 Conn. 203, 209, 49 A.2d 599, 601 (1946), that when the contract of employment is oral, the broker may not recover damages for the breach of the principal's promise to convey, since this would make the oral employment contract into one for the sale of an interest in real estate which is unenforceable under the Statute of Frauds. Other courts, however, have either ignored the Statute of Frauds completely, see, *e.g.*, Shepley v. Green, 243 S.W.2d 772 (Mo. Ct. App. 1951); Louis Starr, Inc. v. Blumenthal, 132 Misc. 222, 228 N.Y. Supp. 486 (Sup. Ct. 1927), or summarily dismissed it as not applicable to a brokerage contract, *e.g.*, Tanner Associates, Inc. v. Ciraldo, 33 N.J. 51, 67, 161 A.2d 725, 734 (1960).

Williston declares the Statute inapplicable to cases in which one party agrees with another to buy land from a third person, and the purchaser intends to hold it for his own benefit. 3 WILLISTON, CONTRACTS § 488, at 514 (3d ed. 1960). Corbin specifically states that oral promises made by owners to their brokers are enforceable. 2 CORBIN, CONTRACTS § 399, at 364 (1950).

Some states have enacted statutes requiring promises to pay real estate brokers' commissions to be in writing. *E.g.*, CAL. CIV. CODE § 1624; IND. ANN. STAT. § 33-104 (1949); N.J. STAT. ANN. § 25:1-9 (1940). These statutes, however, do not apply to the promise to buy or sell that will be the basis of broker's action.

courts' apparent failure to realize that the ready, willing and able theory is in fact a specialized application of the Williston test. Use of the ready, willing and able theory as a mere mechanical formula to decide when a commission is earned, rather than as a means to determine when the principal's implied promise becomes a binding obligation, gives rise to the notion that in cases where the principal promises to pay commissions this express promise to pay is the crucial factor in the broker's recovery.

This is a false notion. When real estate is sold, brokers' commissions are often paid by owners out of the money the owners receive from purchasers.[22] But when a sale is aborted because of the owner's fault, he must pay the commission directly out of his own pocket. To call this an earned commission is in no way responsive to the original intentions of either owner or broker. The parties contemplated not that a commission would be payable when a ready, willing and able purchaser was found, but rather that it would be payable only when that purchaser actually bought the property. Yet, when courts ignore the clear thrust of statements in owner-broker contracts that commissions will be paid only upon consummation of sale,[23] they seem to be declaring, as a matter of law, that the parties intended otherwise. Perhaps, however, these courts are merely guilty of a failure to elucidate the real foundation of their decisions—the implied promise to sell.

A more accurate description of what happens when the owner hires the broker and also agrees to pay the commission is that the owner makes two conditional promises to his broker. The first is an implied promise to sell his property to a purchaser who is ready, willing and able to buy on the owner's terms. This obligation to sell becomes absolute only if and when the broker finds such a purchaser. The second promise is the express promise to pay commissions, which becomes absolute when title passes. On a time continuum, the contract of employment has three phases. In the first period—between the initial employment and the finding of a ready, willing and able purchaser—both promises remain conditional. The owner is therefore free to terminate the relationship without liability.[24] In the second period—between the finding of a purchaser and the passing

[22] See LUSK, LAW OF THE REAL ESTATE BUSINESS 18 (rev. ed. 1965).

[23] Often brokers have recovered without an actual sale. *E.g.*, Finch v. Donella, 136 Conn. 621, 73 A.2d 336 (1950) (brokerage contract provided commission for obtaining the sale of property); Home Banking & Realty Co. v. Baum, 85 Conn. 383, 82 Atl. 970 (1912) (commission if property sold or exchanged); Cox & Co. v. DiMarco, 201 Pa. Super. 596, 193 A.2d 842 (1963) (owner to pay commission at time of final settlement). *But see* Filipp v. Schultz, 118 Ohio App. 261, 25 Ohio Op. 2d 95, 191 N.E.2d 228 (1963) (commission payable only when sale is consummated); Clark v. Provident Trust Co., 329 Pa. 421, 198 Atl. 36 (1938) (commission to be paid only on final settlement and when full purchase money received). In these cases the courts felt that the contractual language precluded use of the ready, willing and able purchaser theory.

[24] Cases in which the broker is given an exclusive right to sell are exceptions. Here the owner makes a third promise, absolute between the initial employment and the end of the time period in the listing agreement, in which he agrees not to take his house off the market, sell the property himself, or sell through another broker. See HEBARD & MEISEL, PRINCIPLES OF REAL ESTATE LAW 392-93 (1964).

of title—the promise to sell has been rendered absolute, while the promise to pay commissions remains conditional. During the last time period—between the passing of title and the paying of commissions—the promise to sell has been fulfilled and the promise to pay is now absolute. Therefore, if the owner defaults during the second time period, the broker has only one absolute promise upon which to sue, the implied promise to sell.[25] Since the promise to pay is still conditional, the commission is not yet earned.

The failure of courts to discuss the ready, willing and able theory correctly in terms of an implied promise has left them unable to deal with those cases in which the defendant did not promise to pay commissions. In such a case, only the ready, willing and able version of the Williston test supplies satisfactory logic for reaching a proper result. Since the principal's default occurs during the time period when the promise to buy or sell is absolute, the broker can recover no matter who has promised to pay commissions.

[25] Basing the broker's recovery upon an implied promise to sell rather than upon the express promise to pay might result in the prospect's attempting to recover damages or even force a sale by suing on this same implied promise as a third party beneficiary when the principal refuses to sign the contract of sale. There is little chance however that the prospect would succeed. Either the court could strike down the complaint on a Statute of Frauds theory, since the Statute does affect any promise to sell vis-à-vis vendor and purchaser, or it could simply declare that the prospect is a mere incidental beneficiary and thus not entitled to recover.