31-12-13

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
CICA 8/ 2013
G281/2011

The Right Hon Sir John Chadwick, President
The Hon Elliott Mottley, Justice of Appeal
The Hon Ian Forte, Justice of Appeal

ON APPEAL FROM THE GRAND COURT
Chief Justice Smellie QC

BETWEEN
CAYMAN REALTY CONSULTANTS SERVICES LIMITED
Plaintiff/Respondent

-and-

SIMBA LIMITED
(Trading as Re/Max Cayman Islands)
BOGGY SAND ROAD LAND COMPANY LIMITED
Defendants/Appellants

Mr. M. Imrie and **Mr. S. Alexander** of Maples and Calder appeared for the Appellants
Mr. J. Kennedy of Samson and McGrath appeared on behalf of the Respondent

Hearing: 17 July 2013

JUDGMENT

Revised from transcript and Approved

Released 31 December 2013

Sir John Chadwick, President:

1. This is an appeal from an order made by the Chief Justice on 9 April 2013 in proceedings brought by Cayman Realty Consultant Services Limited, as plaintiff,

against Simba Limited (trading as Re/Max Cayman Islands), as first defendant, and Boggy Sand Road Land Company Limited, as second defendant.

2. The circumstances in which the claim arose can be described shortly. The second defendant company, Boggy Sand Road Land Company Limited, is owned and controlled by Mr Greg Walton and his wife, Mrs. Sandra Walton. Mr. and Mrs. Walton are property developers on the Island. In the course of 2010, they developed a property known as Sea Forever on the West Bay Road. In October 2010, they entered into a multiple listing agreement in relation to their property with two agents, the first defendant, Simba Limited (or Re/Max), and Cayman Luxury Property Group Limited. Cayman Luxury Property Group Limited appear to have taken no further part in the material events.

3. Mr Bob Simpson and his wife, Mrs Janice Simpson were prospective purchasers for a property of that nature on the Island. They were based in Texas. In the early months of 2011 they instructed the plaintiff, a firm of realty consultants, as buying (or finding) agents for such a property. In due course Mr Duke Tibbetts, an employee of the plaintiff company ("CRC"), made contact with Miss Kass Coleman, an employee of Re/Max, to arrange a viewing of the property by Mr and Mrs. Simpson. They liked what they saw; and they came back on the following day, 20 March 2011, to view the property for a second time.

4. Re/Max are members of Cayman Islands Real Estate Brokers Association ("CIREBA"). CIREBA purports to bind its members to rules which prevent them from entering into commission-sharing arrangements with brokers who are not members of the association. In effect it seeks to operate a cartel on the island. CRC were not members of CIREBA. Mr Tibbetts had been a member of CIREBA; but, having moved to CRC, had ceased to be a member. But, plainly, he knew of the restriction in the CIREBA rules. The fact that neither CRC nor Mr Tibbetts were members of the association was notified to Re/Max on 31 March 2011.

5. As a member of CIREBA, Re/Max was not permitted by the rules of that association to offer Mr. Tibbetts what he sought; namely, a 50/50 split of the

commission (5%) to be paid on the sale and purchase of the property. The most that Re/Max could offer Mr Tibbetts (or CRC) was 20% of half of that commission; that is to say, an amount equal to 0.5% of the total purchase price. Mr. Tibbetts made it clear that that offer was not acceptable; and that he would only deal on the basis of a 50/50 split. The Chief Justice found that, when Mr. Tibbetts made his position on that matter clear to Miss Coleman, she told him that she would consult her manager and see what could be done. She said that she would get back to him. She did not do so. In the result, no agreement was reached between the agents in relation to that matter

6. On 2 April 2011, the Simpsons made an offer of purchase. They did so on a form provided by CRC which contained a condition in these terms (at clause 5):

> "Vendor agrees to pay five percent commission to listing and selling brokers."

The proposal that the vendor pay commission to both listing and selling brokers reflected market conditions. A vendor seeking to sell a property of this value (for a price in excess of US$6 million) to an overseas buyer would be likely to need an introduction from a buyer's agent instructed to find a suitable property. The buyer's agent would, of course, expect to receive some payment or commission for the services that he was providing. Those services were for the benefit of the buyer - in that the buyer's agent would find a suitable property at a price which he could recommend to the buyer - but they were also, indirectly, for the benefit of the seller - because without the services of the buyer's agent, it was unlikely that the buyers would be identified and introduced. The vendor sets the price at which he is prepared to sell. In those circumstances it makes commercial sense that, as between vendor and buyer, it is the vendor who will be responsible for the payment of commission to both selling and finding agents.

7. The offer of 2 April 2011 was not accepted by the sellers. On 4 April 2011, the Simpsons made a second offer to purchase. That offer, also, was rejected by the sellers. On 5 April Miss Coleman informed notified Mr. Tibbetts that the vendors - that is to say, Mr. and Mrs. Walton acting for their company, Boggy Sand Road

Land Company Limited - would accept an offer of US$6.6 million. An offer in that amount was duly made; and was accepted. The existing offer to purchase document was amended to show the new agreed price of US$6,600,000. Curiously, the offer document described the offer as an offer made by the Simpsons to Sea Forever in care of Re/Max. That document was signed by both parties.

8. The offer to purchase document was then retyped - but with the same date (4 April 2011) - and was signed by Mr and Mrs Simpson as purchasers. That version described the offer as an offer made to Mr and Mrs Walton. It was signed by Mr Walton "for Boggy Sand Road Land Company Limited" as vendor. As signed, the retyped offer to purchase document contained these provisions, so far as material. First, it provided that, of the purchase price of US$6,600,000, a deposit of US$330,000 would be paid within five business days of the acceptance; with the balance (US$6,270,000) being paid on completion. Second, clause 3 contained these terms:

> "All deposit monies paid by the purchaser shall be held by the vendor's authorised broker Re/Max Cayman Islands as stakeholder and the total amount of the deposit shall be held in trust at all times, subject to the terms and conditions set forth in this offer to purchase until completion at which time all such monies shall be paid over to the vendor and the deposit monies shall not be paid over to the vendor prior to completion unless agreed in writing by both purchaser and vendor."

Third, the second paragraph of clause 19 was in these terms:

> ""The vendor also agrees to pay to the broker for services rendered in securing sale of the property the commission of five percent which shall be paid upon closing. In case of a co-broker sale, 50 percent of the total commission shall be paid to both brokers at closing."

9. The final sentence of that paragraph - that is to say, the sentence "In case of a co-broker sale 50 percent of the total commission shall be paid to both brokers at closing" - had not appeared in the equivalent paragraph in the document which had been signed previously. The equivalent paragraph contained only the single sentence:

> "The vendor also agrees to pay to the broker for services rendered in securing sale of the property the commission of five percent which shall be paid upon closing".

The additional sentence had been inserted by Mr. McCoy - who was Mr Tibbetts' principal at CRC - in order to reflect what he (Mr McCoy) understood was the basis upon which the introduction was made: an understanding which, it seems, had arisen in the circumstances that there had been no response from Miss Coleman (or Re/Max) to CRC's insistence that those were the terms upon which it would make the introduction. That additional sentence was not brought to the attention of Miss Coleman; and the judge accepted that she did not notice it. Nevertheless, it is plain to see in the document which Mr. Walton signed on behalf of Boggy Sand Road Land Company Limited. It has not been suggested that it did not have contractual effect as between vendor and purchasers.

10. The offer document which, when signed on behalf of vendor and purchasers, became the sale and purchase agreement, is not, of course, a contract to which either Re/Max or CRC were parties: it was a contract between the vendor and the purchasers. But it had three important features in the context of the present dispute. First, the first sentence of clause 19 makes plain that as, between the vendor and the purchasers, the vendor will be responsible for the payment of brokers' commission: so that the purchaser is not responsible as between those parties. Second, clause 3 makes plain that the five percent deposit (US$330,000) was to be held by Re/Max as stakeholders on trust pending completion; and that, when completion took place, Re/Max should account to the vendor for that sum, subject to the terms and conditions of the document. Third, the second sentence of clause 19 provides, as part of those terms and conditions, that a commission of five percent (equal to the amount of the deposit) is to be paid to both brokers on a 50/50 basis.

11. When the time came for payment of the deposit, CRC sought to withhold one half of the US$330,000 as security for the half share of the commission which Mr. Walton and his company had agreed that CRC should be paid. So CRC sent Re/Max a cheque for UD$165,000, explaining that that was what they were doing. The response of Re/Max was that, if CRC insisted on retaining the balance of the

deposit, then the sale was off and Mr. and Mrs. Walton (or Boggy Sand would not complete. Miss Coleman wrote on the 12th of April 2011:

> "I received the partial deposit funds cheque along with your letter. The contract states that Re/Max as the listing company shall hold all deposit monies therefore you are putting your client in breach of contract. The monies are due according to the contract five business days after acceptance which brings us to today April 11th. You are not entitled to by the existing contract to disburse or hold funds as you wish as a back up on the property and you are making your clients vulnerable with your actions. I expect the remainder of the deposit funds today".

It was made clear, therefore, that, unless the 50 percent commission to which CRC claimed to be entitled was paid over to Re/Max as stakeholders under the contract, the sale would go off and the purchasers would lose the benefit of the contract into which they had entered. Unsurprisingly, faced with that threat, CRC paid over the remaining US$165,000; but, by doing so, it did not give up its claim to the one-half commission for which the signed contract provided. They relied, no doubt, on the trust to which the deposit monies were subject in the hands of Re/Max as stakeholders.

12. Completion duly took place on 3 May, 2011. On the following day, Re/Max sent a cheque to CRC for US$33,000 in purported settlement of CRC's share of the commission share: that sum being the maximum which Re/Max were permitted to share out of the commission under the terms of the CIREBA rules. But that, of course, failed to give effect to the obligations imposed by the terms on which Re/Max held the US$330,000 deposit under the relevant offer to purchase document.

13. In the meantime, on 21 April 2011, Mr and Mrs Walton, having become aware of the problem to which the CIREBA rules gave rise, sought to buy off the CRC commission claim by paying directly to Mr. Tibbetts a US$50,000 bonus for the job that he had done. They, at least, recognised that the services provided by CRC as buying agents - and for which they were expecting to pay under the agreement with the Simpsons which they had signed - were worth something.

14. CRC took the view that the amount to which they were entitled was not US$83,000 (the aggregate of US$£33,000 from Re/Max and US$50,000 from the Waltons) but US$165,000, representing a one-half share of the total commission payable in respect of the sale and purchase. So it refused Mr. Walton's cheque; paid US$33,000 into Court; and commenced these proceedings..

15. In form this dispute concerns the difference between US$165,000 claimed and US$$83,000 offered. That difference – US$$82,000 - has been advanced as of sufficient importance to Re/Max, as real estate brokers dealing with a property transaction worth US$66 million, to necessitate a visit to the Court of Appeal. The cynic might, perhaps, think that the real purpose of this litigation is to protect and seek to enforce the cartel which CIREBA wish to operate on the islands. As the law stands it may be open to members of CIREBA to refuse to deal with non-members of CIREBA except upon the terms of the CIREBA rules; under which the non-member cannot expect more than a share of commission equal to 1% of the purchase price. But, if that commission sharing arrangement is not agreed between the CIREBA member and the non-member, then the CIREBA member is faced with a choice: either it must refuse to accept the introduction from the non-CIREBA member (and accept the need to explain to its client, the vendor, why it is doing so) or it must explain to the vendor that, if he wants that introduction, he will have to instruct a non-CIREBA member in order to get it. What the CIREBA member cannot do is to accept the benefit of the introduction and then (absent agreement) to refuse to make a proper payment for it. Absent agreement, the CIREBA member cannot insist on imposing the CIREBA rules on a non-member. That is what Re/Max it has sought to do in this case.

16. The Chief Justice approached the matter on the basis that CRC was entitled to payment *quantum meruit* for the services which Mr Tibbetts had provided. Mr. Imrie, on behalf of Re/Max and Boggy Sand Road Land Company Limited, asserts that the Chief Justice fell into error: in that the services of CRC were not provided to either Re/Max or Boggy Sand Road Land Company Limited, but were provided solely to Mr. and Mrs. Simpson. That, as it seems to me, is an incomplete

analysis of the transaction of this case. In cases of this nature the vendor wants the purchaser to have the services of a buying agent who will introduce the vendor's property: and the vendor is content to pay the buying agent's commission in order to ensure that that is achieved.

17. Be that as it may, I think that the appeal can be determined on a simpler basis: not involving reliance on principles of *quantum meruit*. The appeal can be determined on the basis that US$330,000 was paid to Re/Max as stakeholders, upon a trust the terms of which are found in the terms of the offer to purchase document. That document, which was signed on behalf of the vendor, contained terms which provided for 50% of the total commission to be paid to each of the brokers on completion. The persons interested under the trust on which that sum was held were the brokers and the vendor and the two brokers. The vendor's selling agent could insist on retaining its share of commission when accounting to the vendor. There is no suggestion in this case - and it would be quite unreal to suggest - that Re/Max would have paid over the US$330,000 to Boggy Sand Road Land Company Limited without first having retained from that sum its own share of commission. Equally, as it seems to me, it would be unreal to suggest that, had CRC been a CIREBA member, Re/Max would have paid over the balance of the US$330,000 to the vendor company without also discharging the obligation the vendor's obligation (owed to the purchasers under the offer to purchase agreement) to pay commission to CRC, as the purchasers' buying agent. There is no reason, in principle, why the obligations of Re/Max under the trust upon which it held the deposit monies as stakeholder should be different in a case where the buying agent is not a CIREBA member. Indeed, the obligation of Re/Max to satisfy the share of commission to which (on its own view) CRC was entitled was recognized in the payment to CRC of US$33,000 out of the balance of the deposit. The only issue is as to the amount required to discharge that obligation under the trust. For the reasons which I have explained, the amount required to discharge that obligation was 50% of the total commission; an amount (US$165,000) equal to the balance of the deposit monies.

18. As I have said, the three parties who were interested in the deposit monies held by Re/Max as stakeholders subject to the trust obligations were the two brokers and the vendor. That is why these proceedings are properly brought by the CRC against both Re/Max and Boggy Sand Road Land Company Limited. The issue for the Chief Justice was to whom should the monies subject to the trust be paid.

19. On the basis of the material that has been put before this Court it beyond argument, in my view, that the deposit monies must be paid out by Re/Max in the manner which gives effect to the terms of the offer to purchase document; that is to say, as to 50% to Re/Max and 50% to CRC. Those payment exhaust the fund and there is no balance for the vendor.

20. For those reasons, I would hold that the Chief Justice was correct to take the view that Re/Max were required to account to CRC for one half of UD$330,000; that is to say, US$165,000. I would uphold his order directing payment of that sum by Re/Max to CRC (after giving credit for the US$33,000 which had been paid into Court) with interest.

21. The Chief Justice no order as to costs in respect of Boggy Sand Road Land Company Limited. That company appeals against the Chief Justice's refusal to order costs in its favour. In my view, the Chief Justice was entitled to take the view that Boggy Sand Road Land Company Limited was a proper party to these proceedings – in that it was potentially interested under the trust affecting the deposit monies - and that, in the circumstances that it did not accept CRC's claim but chose to make a common cause with Re/Max (in relation to which there was a clear conflict of interest, which seems to have gone unnoticed by those representing it) the judge was right to make the order which he did.

22. Accordingly, I would dismiss the appeal.

Elliott Mottley, Justice of Appeal:

23. I agree with the judgment.

Ian Forte, Justice of Appeal:

24. For the reasons advanced by the learned President I would dismiss the appeal and affirm the judgment of the Court below.