8-04-13

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. G0281 OF 2011

BETWEEN	CAYMAN REALTY CONSULTANT SERVICES LIMITED	PLAINTIFF
AND	SIMBA LIMITED (T/A REMAX CAYMAN ISLANDS)	1ST DEFENDANT
AND	BOGGY SAND ROAD LAND COMPANY LIMITED	2ND DEFENDANT

IN CHAMBERS
BEFORE THE HON. ANTHONY SMELLIE, CJ
THE 5TH AND 6TH FEBRUARY, 2013; 8TH APRIL, 2013

APPEARANCES: Mr. James Kennedy of Samson & McGrath for the Plaintiff

Mr. Mac Imrie and Mr. Stephen Alexander of Maples and Calder for the Defendants

JUDGMENT

1. The Plaintiff ("CRC") sues both in contract and in equity for unpaid commission claimed in respect of the sale of a very valuable residential property called "Sea Forever". CRC acted as purchasers' agent in the transaction.

2. Sea Forever was sold by the second defendant as registered owner acting through the first defendant ("Remax"), as its vendor's agent. Remax is a member of the Cayman Islands Real Estate Brokers Association ("CIREBA") and marketed the property for sale by way of CIREBA's multiple listing system.

3. CRC acted by its representative Mr Duke Tibbetts in the sale transaction and Remax was represented by Miss Kass Coleman, one of its sales consultants.

4. Miss Coleman and Mr. Duke Tibbetts both testified and gave witness statements as to their respective roles. Their respective principals Mr. James Bovell of Remax and Mr. Luke McCoy of CRC were also involved in secondary roles in the transaction. Mr. Bovell did not testify but Mr. McCoy did.

5. So also did Mr. Gregory Walton, the developer of Sea Forever. He and his wife were together the principals of the then registered owner and vendor, the second defendant.

6. The facts of the case are largely uncontentious with the narrow area of disagreement being over what representations were or were not made as between Miss Coleman and Mr. Tibbetts in relation to the sharing or "splitting" of the sales commission generated on the transaction. This is the central issue to be resolved in arriving at my decision in this case.

7. That commission, contractually an obligation of the vendor to pay, was set at what is described as the standard rate of 5% of the sale/purchase price; in this case 5% of USD6,600,000 or USD330,000. It is common ground that as a matter of the contract between the vendor and the purchasers, the vendor agreed to pay the commission intending that it be shared between the vendor's agent (the listing agent) and the purchasers' agent.

8. CRC claims, moreover, that there was an agreement between CRC and Remax that the commission be split 50/50. Remax claims otherwise; that as a consequence of being bound by CIREBA rules, it agreed only the payment to CRC of a "referral fee" of USD30,000 or 20% of what would otherwise have been a one-half share of the

total commission; that is: USD165,000. Remax admits, however, that it would otherwise have been willing to and obliged to pay to CRC that one-half share of the commission, but for having been bound by CIREBA rules.

9. CRC as a former CIREBA member itself, acknowledges that the CIREBA rules seek to prohibit CIREBA members from agreeing a full 50/50 split of commissions on a sale involving a non-CIREBA member as co-broker, which was the situation here.

10. CRC's case, supported by the evidence both of Mr. McCoy and Mr. Tibbetts; is that it had nonetheless insisted upon a full 50/50 split of the commission when the property was being shown to its clients the purchasers, by Miss Coleman. Mr. Tibbetts' evidence is that he then made it plain to Miss Coleman that "*the only way this deal would work was if the commission was a co-broker 50/50 split*" and that she undertook "*to work it out*" with her principal Mr. Bovell. This was with specific reference to and despite the strictures of the CIREBA rules.

11. CRC also points to Clause 19 of the final written purchase agreement, asserting that it was expressly concluded with provision in it for a 50/50 split of commissions between CRC and Remax as co-brokers.

12. Against that background summary of the dispute, I now turn to examine the evidence of the witnesses in some detail, coming to focus upon the narrow area of disagreement.

13. Mr. Luke McCoy was the first witness.

14. He is the sole director and shareholder of CRC and a realtor of some seven years experience. He confirmed that CRC is duly licensed as a real estate broker under the laws of the Cayman Islands. He was at one time a member of CIREBA but upon

establishing CRC he decided not to remain a member, a position he has since recanted because of CIREBA's near monopolization of the real estate market. He had relinquished membership because he regarded CIREBA's rules as being too inflexible. For instance, by contrast as a non-CIREBA member, he could agree rates of commission with listing clients at levels below the 5% minimum (which has come to be the standard set by CIREBA for its members), thus helping to offer clients and the buying public a more competitive market.

15. As a former CIREBA member he was aware of its rules at the time of the Sea Forever transaction but being outside its membership, did not consider himself, CRC or its representative agents, to be bound by them. He regards the CIREBA rules to the extent they prohibit equal sharing of commission with non-CIREBA members who co-broke on transactions, to be grossly unfair and as merely an attempt to prohibit competition from realtors who do not wish to join CIREBA.

16. It has been since this transaction unfolded that CRC re-entered into CIREBA membership because as he states: "*I could not afford to allow this situation to occur again. CIREBA controls the majority of the real estate in the Cayman Islands and as such often we come into contact with CIREBA agents. We had another situation similar to the one that led to this case recently and if we had to litigate again then I am afraid that my company would have ceased to exist. Despite joining CIREBA I continue to believe that commission should be split fairly between CIREBA and non-CIREBA agents. On any sale that involves another realtor, whether they are CIREBA or not, we believe that it is only fair that both realtors get paid fairly and equally for their work. On that basis, we always offer and seek that commissions are split 50/50*

with other realtors....Whilst I intend to abide by CIREBA rules as a member, I will be advocating for a review of this rule."

17. Mr. McCoy was insistent in his testimony that having found and presented the buyers on the Sea Forever transaction, he was adamant that CRC should share the commission equally with Remax as the vendor's broker and had made this known to Mr. Tibbetts.

18. This, he said, was in turn made clear by Mr. Tibbetts to Miss Coleman. Mr. Tibbetts had assured him of this.

19. He testified that despite knowing of the CIREBA restriction upon Remax, he was aware having himself been involved in them as a non-CIREBA broker, of other real estate transactions with CIREBA members in which the commissions had been split 50/50.

20. He cited two specific examples – George Town Block 14C Parcel 265 H5 and Newlands Savannah Block 27C Parcel 153 – in which that had been the case. Remax, he said, was itself the co-broker with CRC on the Savannah transaction. This assertion came however, to be disputed by Remax through Miss Coleman.

21. Mr. McCoy explained his understanding of the circumstances surrounding the Sea Forever transaction in his witness statement.

22. In March 2011 Duke Tibbetts had informed him that he had potential buyers (a wealthy Texan couple) for a "high end" residential property and was going to take them to view a number of properties.

23. Duke Tibbetts kept him informed of the viewings and he was aware that the buyers had become particularly interested in purchasing Sea Forever and that an offer was to be made on the property which was listed for sale at USD6.95 million.

24. A first offer to purchase was made at USD6.1 million on or about April 2nd 2011 by way of a formal written offer on what Mr. McCoy describes as CRC's "*standard form*". This is a form based on the CIREBA standard form and so very familiar to himself, Duke Tibbetts and Miss Coleman.

25. Under Clause 3 "Manner of Payment" at sub-clause (d) it is provided that:

> *"All deposit monies paid by the Purchaser shall be held by the Vendor's authorised Broker Remax 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 of Purchase) until completion, at which time all such monies shall be paid over to the Vendor."*

26. As already noted at paragraph 7 above, among the "conditions of purchase" written into Clause 5 of the form of contract is the following:

> *"4. Vendor agrees to pay 5% commission in total to listing and selling brokers."*

27. Further, at clause 19 under the heading "*Delivery of Documents*" the following appears (that provision to which CRC points in support of its contractual claim but later altered as explained below):

"The Vendor also agrees to pay to the broker for services rendered in securing sale of the Property the commission of 5% which will be paid upon closing."

28. The first offer of USD6.1 million was not accepted. It was followed by a second offer of USD6.4 million which was also rejected; then a third of USD6.6 million – that which was accepted and which became the price for the ultimate sale.

29. On each occasion the offer to purchase was conveyed by way of the CRC form containing the above noted conditions as to the deposit sum and payment of commission.

30. The form of offer to purchase, on none of those occasions, contained provision for the split of commission between the brokers.

31. The second form – that conveying the offer of USD6,400,000 – was amended and initialed by the purchasers by substituting the increased and final offer of USD6,600,000 (along with other manuscript consequential amendments as to the deposit and final balance payments). Bearing the date "*4th April 2011*", this form of offer was signed by the purchasers and presented by Mr. Tibbetts on their behalf to Miss Coleman on behalf of the vendor. That same day it was presented to Mr. & Mrs. Walton who, acting on behalf of the vendor, signed and initialed in counter-part to the purchasers.

32. It is common ground that there then came into existence a binding contract of sale as between the vendor and purchasers calling for the payment of deposit of USD330,000 (5% of the purchase price) within 5 business days (hereinafter "the Sale Agreement").

33. On the 5th April 2011, the Sale Agreement was sent back to Mr. Tibbetts by Miss Coleman asking that a "*clean version*" be prepared for the final execution of the parties. This, it is also common ground, was understood to be simply a tidying up of the various manuscript notations which had appeared during the negotiations.

34. It was acknowledged by Mr. McCoy and Mr. Tibbetts, that Miss Coleman would not have expected any substantive changes to arise from this tidying up exercise.

35. The document was given over to Mr. McCoy by Mr. Tibbetts who, notwithstanding that implicit understanding, inserted at the end of Clause 19 the following sentence:

> *"In case of a co-broker sale, 50% of the total commission shall be paid to both brokers at closing."*

36. Being mindful that upon return of the document to Miss Coleman it would be necessary and fair to bring that added sentence specifically to her attention, Mr. McCoy testified that he instructed Mr. Tibbetts to do so.

37. This was, after all, the addition of a single sentence in a finely printed six-page document inserted at the end of a paragraph where it could easily have been overlooked and was likely to be overlooked as no such changes were expected or anticipated.

38. Mr. Tibbetts, for his part, admitted that he did not specifically bring the additional sentence to Miss Coleman's attention, despite having been so advised by Mr. McCoy.

39. Instead, as he explained, Mr. Tibbetts had in mind that as a very experienced broker, Miss Coleman was required to and would read over the document carefully. His view was that if, as it turned out, she failed to do so despite having had three full days

before it came to be finally executed, she (and her principal Remax) should be bound to honour it nonetheless.

40. He further stated that the additional sentence was plainly written on the face of the document and was inserted only to express the position he had fully explained to Miss Coleman on behalf of CRC to be its "*non-negotiable equal share of commission*".

41. The purported effect of the additional sentence, it must be acknowledged, is clear enough: instead of the payment of the referral fee proposed by Miss Coleman (to be explained more fully below), it purported to require the equal 50/50 split of the commission payable as to USD165,000 to each broker.

42. For her part, Miss Coleman testified to not having seen the additional sentence. She testified that had she seen it she would not have moved her client the vendor to execute the document.

43. While Remax and herself – and CRC and Messrs McCoy and Tibbetts for that matter – were not themselves actual parties to the Sale Agreement, (they did not sign it); to the extent the provisions related specifically to commission are sought to be ascribed to her and Remax, she asserts that they are not bound by them. She pleads *non est factum* and mistake: citing through Mr. Imrie, ***Chitty on Contracts 31st Edition, Chapter 5, paras 5-102 – 5-105.***

44. Mr. Imrie also argues that, in any event, CRC, as a non-party, non-signatory to the Sale Agreement, cannot rely on it.

45. In the circumstances of this case, where there is to be no challenge to the validity of the Sale Agreement itself (the sale having been completed), I regard this argument of

Mr. Imrie's as amounting to a denial of the existence of an agreement as between the agents themselves for the sharing of the commission.

46. From the further narrative that follows it will become clear, as I have found, that there was indeed an absence of *consensus ad idem* as between the agents and so no binding contract was formed as between them.

47. As to Mr. McCoy's reason for inserting the additional sentence in Clause 19, he testified that he did this because through Mr. Tibbetts, CRC's position as co-broker had been made plain to Miss Coleman. For their services in finding and introducing the purchasers and showing the property, CRC was not prepared to accept anything less than a 50/50 split of the commission. This had become industry practice and would automatically have applied had CRC been a CIREBA member and he could see no reason why the same should not apply when CRC provided exactly the same services. Mr. Tibbetts was fully aware of CRC's policy and of its position in relation to the Sea Forever transaction and had made this clear to Miss Coleman.

48. For his part, Mr. Tibbetts, as already mentioned, was indeed adamant that from the start of the negotiations over Sea Forever, Miss Coleman had been aware that he was no longer a CIREBA member and that he had made CRC's position known to her. That, although formerly an individual member of CIREBA, he had resigned because it was no longer in his interest to be a member and had so informed her, to the best of his recollection, in a telephone conversation some 4 or 5 days after the first viewing by his clients of Sea Forever. He accepted that Miss Coleman had then raised the issue of the commission split, citing the CIREBA rules and saying that Remax could not pay more than a referral fee of 20% of one-half the commission without breaking

the rules. His response, however, was to make it clear that he and CRC would not be accepting less than an even split of the commission. He explained that he was aware that this would be the most valuable house sale to have taken place in the Islands since 2006 and there was *"no way"* he would have accepted a referral fee of only 20% of the commission ($33,000) "*for a deal like this*".

49. He knew that a deal could not happen unless it came from CRC and Miss Coleman was very much aware of this: she called him every day after the first viewing seeking to make sure that his clients made an offer.

50. It was during one of those calls that he confirmed to her that he was employed with CRC. He did not recall her then saying to him that "*she thought he was nuts to have introduced the buyer*", nor that, because of having left CIREBA, "*he would not be able to get more than a referral fee*".

51. His evidence on this crucial issue of the split of commission was that when Miss Coleman cited the CIREBA rules as the impediment to paying more than the referral fee and he explained his and CRC's non-negotiable position, Miss Coleman responded that she would talk to James Bovell ("her boss") – "*to see what kind of deal could be worked out.*"

52. Despite it having been put in cross-examination by Mr. Imrie to Mr. Tibbetts that he *"must have known that she (Miss Coleman) could not agree to pay* (him) *more than the 20% referral fee*" because of the CIREBA rule, Miss Coleman eventually came to confirm in her testimony that she did propose to Mr. Tibbetts to speak to Mr. Bovell to "*try to work something out*".

53. In her evidence in Court, Miss Coleman testified further however, that she then also advised Mr. Tibbetts that she would *"get back to him if anything had changed"* and that she never did get back to him. Thus, laying the foundation for the argument later deployed before me by Mr. Imrie; that as she never got back to Mr. Tibbetts (a fact which she and Mr. Tibbetts both confirmed in their respective testimony), there was an implicit acceptance by Mr. Tibbetts (and through him by CRC) that the Sea Forever transaction would proceed on the basis of a referral fee only being paid to CRC. According to Miss Coleman, as Mr. Bovell had rejected outright the proposal for an equal split of commission, she thought that that was the end of the matter.

54. When this premise for the transaction was suggested in cross-examination to Mr. Tibbetts, it was strongly rejected by him.

55. He was adamant that in failing to revert to him on her discussions with Mr. Bovell, Miss Coleman would have understood that CRC's position remained the same and would be insisting on its equal share of the commission.

56. This, too, was the understanding on which Mr. McCoy testified that he had proceeded. According to him, as Miss Coleman had not returned from her undertaking to discuss the matter with Mr. Bovell (of which Mr. Tibbetts had advised him) and being aware that some CIREBA members (according to him including Remax) had in the past ignored the CIREBA rule; he inserted the additional sentence at Clause 19 feeling entitled so to do and as a precaution to protect CRC's interests.

57. I break the narrative here to note that I accept the evidence of both Mr. Tibbetts and Mr. McCoy on this issue relating to the terms on which Miss Coleman undertook to speak to Mr. Bovell. Their accounts on this aspect of the narrative were more

compelling and consistent than that of Miss Coleman. It is also remarkable that that crucial aspect of her testimony in which she said she had left the discussion with Mr. Tibbetts on the basis that she would get back to him "*only if anything had changed*" following her talk to Mr. Bovell, was raised only for the first time in court. It was not included in either of her two earlier witness statements.

58. In fact, in her first witness statement at paragraphs 17 and 18 where the conversation with Mr. Tibbetts about the commission is addressed, Miss Coleman makes no reference to her having agreed to discuss the matter with Mr. Bovell. Rather, the impression is given there that she had been adamant with Mr. Tibbetts that only the referral fee could be paid:

> *"I recall him mentioning, in particular, that Mr. McCoy had told him that CRC had previously entered into transactions with Remax whereby CRC had received more than 20% commission. I told Mr. Tibbetts that I did not believe this to be the case. I explained that Remax would* <u>never</u> *participate in arrangements, contrary to the Rules, whereby a non-CIREBA Member receives more than 20% commission. I also told* him *that he was "nuts" to have left a CIREBA company [(ERA – his former employer)] where commission issues of this nature would not arise"* (Emphasis added).

59. According to her first witness statement, she ended that discussion with the burden of the problem being left squarely on Mr. Tibbetts to resolve. He, as to the issue of commission, according to her, had simply repeated as he had earlier maintained, "*that he was confident that Mr. McCoy could "perform" for him and obtain more than*

20% commission". The implication being that Mr. Tibbetts and Mr. McCoy had assumed the responsibility of themselves working something out with Mr. Bovell, relying on past transactions between non-CIREBA and CIREBA members to which they could point.

60. This, it must be emphasised, is diametrically opposed to Miss Coleman's eventual acknowledgement in her testimony in court, that it was she who had undertaken to speak with Mr. Bovell.

61. She related her conversation with Mr. Tibbetts which she claimed took place no later than 20th March 2011 during the second viewing of Sea Forever, not some 4 or 5 days later as Mr. Tibbetts recalls. (If she is correct, this timing factor simply supports Mr. Tibbetts' recollection of having raised the issue of commission at the earliest stages of the transaction). She said:

> *"...we were talking about various things and I was astonished he would have left a CIREBA company especially with clients like this with a big ticket home sale it makes a huge difference and he said that he had left ERA and thought that this new broker could do a better job, and that was it. And I said well, this is going to be a hard one, you're going to be really mad; you could only get a referral because you are not in CIREBA and again he reiterated that James Bovell – my broker – and his broker – Luke McCoy, had worked together and they had been dealing with Remax and I said, 'Oh, highly unlikely, I can't imagine that; James sits on the real estate board with CIREBA and that's definitely against the rules but I'll check and see.' Otherwise*

there is no way... I did check with Mr. Bovell... he said, 'You've got to be kidding, no...' I had told (Duke Tibbetts) that I would get back to him if there was any ability to do anything different...."

62. This admission in testimony of an undertaking to speak with James Bovell was also inconsistent with Miss Colman's second witness statement. There, at paragraphs 6.5 and 6.6, she traversed the allegation of the undertaking (as it was asserted in Mr. Tibbetts' witness statement) by simply denying that she had said to Mr. Tibbetts that she would speak to Mr. Bovell *"...to make this deal work"*.

63. And further, at paragraph 6.7 of her second witness statement –

"Mr. Tibbetts did not say to me [(as recorded in his witness statement)] that the "only way this deal would work was if the commission was a co-broker 50/50 split. Equally, I never stated that I "...would work it out". The content of our conversation is set out at paragraph 18 of my first statement."

64. But, as noted above, paragraph 18 of her first witness statements does not comport with her eventual admission to having spoken to Mr. Bovell about CRC's proposed split of the commission and that his response was "*...you have got to be kidding, No*". Still less does either of her witness statements fit with her account, that having spoken to Mr. Bovell and having had such a response from him, she would have felt herself under no obligation to inform Mr. Tibbetts that there was to be no change in Remax's position.

65. I accept Mr. Tibbett's account of the discussions with Miss Coleman on this issue; including that she did indeed offer to speak to Mr. Bovell to "*work something out*".

There is no other rational explanation even if the matter is examined by reference only to what Miss Coleman was prepared to admit in her testimony in Court. What else would the purpose have been of "*checking to see*" with Mr. Bovell if not about sharing the commission? What would she "*get back to*" Mr. Tibbetts about, "*if there was any ability to do anything different*", if not about that? And how could there have been an undertaking for a discussion with Mr. Bovell over the commission in the first place, if there had been on her part, as she insisted in both her witness statements, an understanding of an invariable and inflexible adherence to the CIREBA rules?

66. I accept Mr. Tibbett's evidence that Miss Coleman had undertaken to discuss the matter with Mr. Bovell and revert to him. I reject her accounts, first in her witness statements that there was no undertaking to discuss the commission and latterly in her testimony, that the undertaking was only to revert if anything had changed. I find that she gave an undertaking to discuss the matter with Mr. Bovell to "work something out" and to revert. Failing to do so, she brought about an inconclusive position – a lack of *concensus ad idem* - as between herself and Mr. Tibbetts.

67. I therefore conclude that there was no meeting of the minds as between CRC and Mr. Tibbetts on the one hand and Miss Coleman and Remax on the other, as to the sharing of commission.

68. As mentioned above, neither CRC nor Remax (by their representatives Mr. Tibbetts and Miss Coleman) were parties to the Sale Agreement, which was executed exclusively as between the vendor and purchasers.

69. There was, however, as shown above, the provision in Clause 19 requiring the vendor to pay commission to "*the broker*" for services rendered in securing the sale of the property. As CRC is identified along with Remax on the face of the Sale Agreement respectively as "*selling broker*" and "*listing broker*" (along with Mr. Tibbetts and Miss Coleman as their respective agents) this allowed Mr. McCoy to express the view that the vendor had thus undertaken an obligation to pay CRC's commission as much as it had Remax's commission. Indeed, it is on this basis that the second defendant was joined as a party to the action.

70. It was not surprising therefore that Mr. Gregory Walton testified on behalf of the second defendant. He explained that Sea Forever had been originally listed for sale with Cayman Luxury Property Group Limited ("CLPG") but later Remax was joined in a co-broker arrangement with CLPG, as joint listing agents.

71. He had agreed on behalf of the vendor to pay a maximum of 5% of the sale price to cover both the listing and selling agents' commission and this had been made plain to Remax in his agreement with them as appears on the face of the Sale Agreement.

72. It had become clear to him that CRC was to be the purchasers' agent because CRC had been referenced in that capacity in the Sale Agreement from the time of the first offer. He also appreciated and acknowledged that Duke Tibbetts had been instrumental to the achievement of the sale. He had first become aware that there was a problem over the sharing of commission when Miss Coleman so advised him in writing on 11th or 12th April 2011, citing the fact that CRC was a non-CIREBA member, a fact of which she had earlier advised him sometime in March.

73. Despite the then apparent potential disagreement over commission sharing, Mr. Walton said he proceeded on behalf of the 2nd defendant to accept the offer presented by CRC.

74. However, when the tidied up version of the Sale Agreement was ultimately presented to them for execution, he and his wife signed on behalf of the vendor not being aware of the additional sentence included in Clause 19.

75. Not himself being a real estate professional, had he noticed the additional sentence he would have been confused by the reference in it to "both brokers" because he would have had in mind that a third – CLPG – had also been engaged as a co-listing broker.

76. At all events, the sale having been agreed, he felt obliged (no doubt also being anxious to ensure completion of the sale transaction) to offer Mr. Tibbetts a gratuitous bonus of USD50,000.

77. As he explained: *"I had never met Mr. Tibbetts but from what I had been told by Miss Coleman, I thought that he should have gotten more money but for the CIREBA rules – so I offered the bonus of US50,000."*.

78. Thus, through Miss Coleman, Mr. Tibbetts was offered that bonus of USD50,000 as well as the USD33,000 referral fee offered to CRC by Remax.

79. This offer was conveyed in an email of 21st April 2011 sent by Miss Coleman to Mr. McCoy and Mr. Tibbetts. That the situation had become tense between them was already plain from earlier letter and email exchanges of 12th April 2011, when Mr. McCoy had refused to send the purchasers' 5% deposit on to Remax as stakeholder as required by Clause 3 of the Sale Agreement, instead withholding one half of it (that is: USD165,000) as security for CRC's share of the commission.

80. In this regard, Mr. McCoy wrote to Miss Coleman in his letter of April 12th 2011 as follows:

> *"Dear Kass*
>
> *This communication to you is in regards to the sale of the above named property and on advice from CRC's legal advisors.*
>
> *Whereas this does not reflect on you at all but rather "CIREBA" in relation to my commission my lawyers have rightfully advised that it is not Remax or CERIBA (sic) that pays the commission but rather the "vendor". To this regards and to secure CRC's fair share we will be retaining 50% of the deposit within our escrow account until closing.*
>
> *Even thou (sic) the contract covers commission payments payable by the vendor pass (sic) experience with certain CIREBA members, where I have had to assert my position through lawyers and won 50/50 split, it does cost me time and money and delays closing.*
>
> *Thank you for your understanding and your cooperation."*

81. Miss Coleman's response was in these terms in her email of 12 April 2011:

> *"Hi Duke and Luke*
>
> *I received the partial deposit funds cheque along with your letter. The contract states that Remax 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, 5 business days after acceptance which brings us to today April 11, 2011. You are not entitled by the existing Contract to disperse or hold funds as*

you wish. There is a back up offer on the property and you are making your client's position vulnerable with your actions. I expect the remainder of the deposit funds today."

82. The Sale Agreement having been executed and become binding and doubtless chastened by the threat of the opportunity being lost to his clients because of there being a "back up offer", Mr. McCoy replied within the hour as follows:

"Hi Kass

Your email noted below. I have spoken to my Attorney's office and they are satisfied that CRC's interest is protected. I have cut the cheque for the balance and will send to your office. The cheque is dated 12 April 2011 CNB #1055. USD165,000. Thank you much ..."

83. That being the background, it may be thought that Miss Coleman's subsequent email of 21 April 2011 to Messrs. McCoy and Tibbetts set out below, and in which she conveyed Mr. Walton's offer of the bonus of USD50,000 to Mr. Tibbetts, was unduly optimistic:

"Hi everyone

All is going well with the upcoming closing. The Vendor and Purchaser sides are fine and dandy.

There has been a commission /referral concern. The rules and regulations which we as CIREBA members are bound to adhere to are clear with paying out of referrals and commissions. For the record, the Purchasers were introduced to the Property under the understanding that Duke was with ERA which is a CIREBA company.

No one knew any different and certain things would have been laid out from the beginning if the vendor and myself had known this, for clarity purpose when it comes to CIREBA and Non-CIREBA dealings."

I note in passing here that it was not explained by Miss Coleman in her testimony what "*certain things would have been laid out from the beginning*" that had not actually been discussed after it had become clear that Mr. Tibbetts was no longer a CIREBA member. This was after all, on all accounts, common knowledge well before the date of closing of the transaction; and on Miss Coleman's evidence, no later than 20th March 2011.

84. This email of 21st April 2011 nonetheless proceeded to set out the breakdown of the commission and referral fee as proposed by Remax which, with the USD50,000 bonus to Mr. Tibbetts, proposed a payment of $83,000 to the "*Buying Side with Duke (CRC)*".

85. The email continued by explaining:

"The vendor feels that Duke should be compensated for the outstanding job he has done, therefore he is going to present a cheque to Duke Tibbetts directly as a bonus at closing for USD50,000."

These are my instructions from the vendor. Remax and I have entered into a listing contract with the purchaser and the vendor. The vendor wishes that CRC sign off on agreement to this as not to effect (sic) closing. Please revert as soon as possible."

86. As matters transpired CRC and Mr. Tibbetts rejected this offer and that aspect involving the offer of the bonus, came in turn to be withdrawn by Mr. Walton. This

all occurred, however, after the sale had proceeded to closing as between the vendor and the purchasers on 5th May 2011, in keeping with the Sale Agreement.

The Law

87. The absence of *consensus ad idem* between the parties to this action resulted in there not having been a binding contract on the subject of commission sharing.

88. No authority need be cited for that trite proposition but what I find to flow from it is a matter on which reference to the case law is required.

89. An appropriate starting point is the dictum of Lord Atkin in his speech on behalf of the House of Lords in ***Way v Latilla [1937] 3 All. E.R. 759 at 764***:

> *"There are many employments the remuneration of which is, by trade usage invariably fixed on the commission basis. In such cases if the amount of the commission has not been finally agreed, the Quantum Meruit would be fixed after taking into account what would be a reasonable commission, in the circumstances, and fixing a sum accordingly. This has been an everyday practice in the courts for years. But if no trade usage assists the court as to the amount of the commission, it appears to me clear that the court may take into account the bargaining between the parties , not with a view to completing the bargain for them, but as evidence of the value which each of them puts upon the services."*

90. This dictum is clearly applicable and admits of two approaches to a problem like that presented in this case. First, in the absence or failure of contract an award may be

made by reference to "trade usages". The other approach would involve making of an award assessed by reference to "*the bargaining between the parties*".

91. In this case where no contract had been concluded as to the sharing of commission, there is nonetheless ample evidence of what the "trade usages" would have been in respect of commission. There is also ample evidence from their "bargaining", of what value would have been placed – as between CRC and Remax – upon the services rendered by CRC in bringing about the Sale Agreement.

92. The evidence is clear on all sides that, but for the CIREBA rules, CRC and Remax would have followed the trade usage in the real estate field and shared the commission equally as co-brokers. This, according to Miss Coleman, would have been subject only to whether there was some other obligation to share with CLPG as well. But as to this, I am not persuaded that any such other obligation existed. Despite references to a share of commission for CLPG in the calculations in her email of 21st April 2011 to Mr. Tibbetts; Miss Coleman failed to confirm, despite being asked, that CLPG was in fact paid a commission on the Sea Forever transaction. To the contrary, in cross-examination, she confirmed that the sentence added to paragraph 19 of the Sale Agreement by Mr. McCoy "*affected only CRC and Remax as the brokers*" to the transaction. Further, that "*unless otherwise agreed*", the earlier arrangement between Remax and CLPG was to the effect that, in the event one of them as the co-listing brokers sold the property, the selling broker would receive the total commission. No agreement to the contrary was explained or presented to the Court and rather to the contrary, Miss Coleman acknowledged that CLPG did not attend the final closing of the transaction.

93. Mr. Walton, for his part, took the matter no further by way of confirming that CLPG was in fact paid anything.

94. I therefore conclude that in this case, the "*trade usage*" as to the equal sharing of commission would have been followed as between CRC and Remax. But for the reliance by Remax upon the CIREBA rules, the result would have been an equal split of the commission between CRC and Remax, respectively as purchasers' broker and vendor's broker.

95. Taking another view of the matters – that which perhaps more closely comports with the modern case law – the evidence is also clear as to what was the substantive value of Mr. Tibbetts' services. His services were implicitly regarded by Miss Coleman as worthy of the equal share of commission. Both Miss Coleman and Mr. Walton testified that but for the CIREBA rules, they would happily have paid CRC one-half the commission on account of Mr. Tibbetts' services in finding, introducing and completing the purchase of Sea Forever on behalf of the purchasers. They both acknowledged that his services were indispensible to the successful transaction of the sale.

96. There is recent case law in this jurisdiction that supports the assessment of a *quantum meruit* following upon a repudiatory breach of contract, on the basis of an assessment of the value of the services rendered by the plaintiff and received by the defendants: ***Construction and Supply Ltd. v Chase and Faith Bodden***[1]. That outcome complies with Lord Atkin's dictum in ***Way v Latilla***, although not expressly cited in that case.

[1] G.C. Civil Cause No. 599 of 2009, written judgment delivered on 19th September 2012.

97. In this case, where Remax sought to stand behind the CIREBA rules as a shield against the commission claimed by CRC and where, as I have found, there was no meeting of the minds on the subject of commission, it is important to emphasise that the award that I make is not made in contract but in equity, by way of *quantum meruit* as a species of relief from unjust enrichment.

98. In the absence of a contract, Remax may not be allowed to stand behind the CIREBA rules to prevent the award of a *quantum meruit* and so as to allow it to keep the full commission for itself. Apart from anything else, CRC was not at the time of the transaction itself a member of CIREBA and the CIREBA rules can contractually bind only its members who subscribe to them.

99. Nor is there any reason in the public interest to justify invoking the CIREBA rules to block a *quantum meruit* award that is otherwise justified.

100. The CIREBA Rules and Regulations, while designed to promote and protect the interests of its members (and avowedly to enforce ethical behaviour among its members in the public interest) in so doing nonetheless operate in restraint of trade with non-CIREBA members. This restrictive and one-sided nature of the covenant within the rules is patent. To take a pertinent example:

> ***"Section 9.2 Property exclusively listed by a Non-member***
>
> *A member may represent a buyer who is interested in purchasing property that is listed by a non-member. In this situation the member should approach either the non-member agent/broker or the seller directly at his discretion and advise that a potential buyer is available. He should explain that a member of CIREBA cannot co-broke with a*

non-member (only a 20% referral fee allowed); therefore if the buyer purchases the property the CIREBA member shall be fully compensated according to the CIREBA commission structure. Any agreement between the seller and his own non-member agent/broker shall be the seller's responsibility."

101. Thus, even in a situation the converse of that which occurred in this case, the CIREBA member must be paid its full compensation in keeping with the CIREBA commission structure when dealing with a non-CIREBA member.

102. And, as to the rule directly invoked by Remax here:

"Section 9.3 Buyer referred by a non-member:

In the event a non-member has a buyer for a CIREBA listing, before any information is provided by the CIREBA member it should be made clear and agreed that the commission split in the event of a sale can be no more than 20% of the side referred to the non-member agent/broker. Any member paying any fee or commission greater than 20% to a non-member:

Penalties: Class A (i.e.: First Offence - CI$5,000
Second Offence - CI$10,000
Third Offence - Expulsion (lifetime)"

103. While such covenants enforced by penalties may be effective as amongst CIREBA members in restraining dealings between CIREBA and non-CIREBA members, they can hardly be regarded as likely to foster competition in the public interest. In my

view, they present no such or any other fair basis for denying a just award in this case.

Assessment of the quantum meruit

104. The law of restitution, of which the award of a quantum meruit as a remedy for unjust enrichment is a sub-branch, has moved on since Lord Atkin's judgment in ***Way v Latilla*** (above). The latest developments appear to come from the English Court of Appeal judgment in ***Benedetti v Sawiris and others***[2].

105. At paragraph 2 of her judgment in that case, Lady Justice Arden explained:

> *"The law of restitution provides remedies in particular situations where there has been some unjust enrichment of a party but there is no liability in contract or tort for breach of trust (see generally* ***Westdeutsche Landesbank Girozentrale v Islington London Borough Council*** **[1996] AC 669** *and* ***Westdeutsche Landesbank Girozentrale v Islington London Borough Council [1999] 2 AC 349*****).** *One such remedy is the award by way of quantum meruit (which literally translated means "as much as he deserves"). A quantum meruit may be awarded where services have been rendered but there is no contract establishing the price to be paid for those services. If it is awarded, the court has to place a value on the services that have been provided."*

106. The Court of Appeal in ***Benedetti*** also explained that ***Way v Latilla*** (above) – despite the reference in it to the "*bargaining between the parties*" – does not support

[2] [2010] EWCA Civ 1427

any proposition that an award in quantum meruit must derive from an implied term of contract that would propose that fair compensation would be payable. Such an award arises in equity, not in contract.

107. And, specifically in the context of a putative relationship of agency for the brokerage of land, the case law is clear and specific that a quantum meruit can be awarded to compensate for work done only where it is in fact found that no contract existed: ***Luxor (Eastbourne) Ltd. and Others v Cooper*** ***[1994] AC 108*** per Lord Russell at 125.

108. As Lord Justice Etherton stated in his judgment at paragraphs 141-142:

> *"The common law cause of action for a quantum meruit, like other restitutionary claims, was formerly perceived to rest on the theory of an implied contract. That theory was rejected implicitly in* ***Lipkin Gorman****....****In BP Exploration Co (Libya) Ltd. v Hunt (No.) [1979] 1 WLR*** ***783*** *Robert Goff J expressly characterised a quantum meruit claim for services as a claim, founded on the principle of unjust enrichment, which is concerned with restitution in respect of the benefit obtained by the defendant. The historical development and demise of the implied contract theory were described in* ***Sempra Metals Ltd. v Inland Revenue Commissioners*** ***[2007 HLUK 34, [2008] 1 AC 561*** *by Lord Nicholls at paragraphs [105] and [107] and Lord Walker at paragraph [174].*
>
> *In assessing an award of restitution in such a case, it is the defendant's benefit which must be identified and valued.*

Concentration is on the defendant's benefit rather than the expense, loss or other personal aspect of the claimant's condition: ***BP*** *at* ***pp839-840****. In* ***Sempra*** *Lord Hope said that, for restitution, it is the gain that needs to be measured, not the loss of the claimant; that the claimants' remedy is the reversal of the defendant's gain; and that the process is one of subtraction, not compensation:* ***[28] [33]****. That gain is to be measured objectively, that is to say, what a reasonable person would pay for the benefit in question; and so where there is a market, by reference to market rates:* ***BP*** *at* ***p.840;*** ***Sempra*** *at* ***[45] [103], [116]****."*

109. I conclude that no contract was formed as to the sharing of commissions or payment of a referral fee, either by reference to the CRC form of contract (incorporating the additional sentence to clause 19) or on the representations made as between Miss Coleman and Mr. Tibbetts.

110. I conclude, however, and as the evidence clearly indicates and justifies, that CRC is entitled to a quantum meruit.

111. By application of the approach required by the modern case law, one asks the question what benefit did Remax derive by way of unjust enrichment at CRC's expense and the answer is clear: one-half of the 5% of commissions paid by the vendor on the Sea Forever transaction. This amount – CI$165,000 – is the amount which Remax would not have been able to keep but for its unjustified reliance upon the restrictive CIREBA rule in the circumstances of this case.

112. In my judgment, Remax is obliged to disgorge that amount and pay it over to CRC as a quantum meruit for Mr. Tibbett's services.

113. That is the award I make on CRC's claim in this matter, along with interest under the Judicature Law and costs to be taxed if not agreed, also as claimed.

Hon. Anthony Smellie
Chief Justice

8th April, 2013