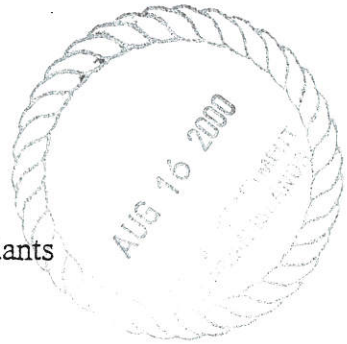
Legal Dept 15.8.2000

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN
CAUSE NO: 441/1997

BETWEEN: CAROLYN CUPIDON — PLAINTIFF

AND: RE/MAX FIRST REALTY OF CAYMAN LTD — FIRST DEFENDANT

AND: KIM DOUGLAS LUND — THIRD DEFENDANT



APPEARANCES:
Ms. Samuels-Brown and Mr. Peter Polack, for the Plaintiff
Mr. Ramon Alberga Q.C. and Mrs. Linda Dacosta, for the Defendants

BEFORE MR. JUSTICE SANDERSON
June 5th,6th,7th, and 9th,2000
July 17TH,18TH,19TH and 20TH,2000

REASONS FOR JUDGEMENT

The Plaintiff Carolyn Cupidon was a real estate agent. Prior to involvement with RE/MAX she was employed by Cayman Islands Realty as a real estate agent for approximately one year and for approximately one year prior to that she had her own business called as Island Living Limited which was involved in finding rental properties for tourists and the occasional property for purchasers.

In July 1993 her son Dean was involved in a serious motor vehicle accident. He had been an athlete of prominence in the Cayman Islands and it is obvious that this accident and his resulting injuries

had a serious impact on his life as well as the Plaintiff. In September of 1993 the Plaintiff's employment with Cayman Islands Realty was terminated. Her employer suspected that she was involved in some sort of clandestine arrangement with Brenda Lund whereby the two of them were acting contrary to the interests of Cayman Islands Realty.

Kim and Brenda Lund had a franchise with RE/Max International which authorized it to operate under the RE/MAX name in the Cayman Islands. It also provided for certain other benefits, such as international advertising and promotion. The owner/brokers of RE/MAX First Realty of Cayman Ltd in 1993 was the Defendant, Kim Lund and his late wife Brenda Lund. Subsequent to these proceeding being commenced Brenda Lund passed away.

Shortly after the Plaintiff's dismissal from Cayman Islands Realty, Brenda Lund discussed with the Plaintiff, the possibility of the Plaintiff going to work with RE/MAX as an independent contractor. The Plaintiff met with Kim and Brenda Lund in October and she was offered a position as an independent contractor with RE/MAX. Ms. Lund gave a form of contract to the Plaintiff for her review and consideration. The Plaintiff indicated that she wanted to consider the contract and have it reviewed by her attorney. Approximately three weeks past and Brenda Lund, telephoned the Plaintiff to find out if she was agreeable to the proposal. As a result of that call, there was a meeting between the Plaintiff and Mr. and Mrs. Lund on November 29th, 1993, when the agreement was signed.

The November 29th, 1993 agreement provided in part;

> "WHEREAS RE/MAX is an independently owned and operated franchise of RE/MAX International, Inc. (hereinafter "Region") and is operating as

a real estate brokerage business in the Cayman Islands at the above address: and

WHEREAS Contractor is desirous of availing himself of the services, facilities, programs and opportunities offered by RE/MAX:

1. INDEPENDENT CONTRACTOR.

A. Contractor shall be deemed to be an Independent Contractor. Contractor shall be free to devote to his real estate sales efforts such portion of his entire time, energy, effort and skill as he sees fit and to establish his own endeavors. Contractor shall not have mandatory duties except those imposed by law or regulation and those specifically set out in this Agreement. Nothing contained in this Agreement shall be regarded as creating any relationship (employer/employee, joint venture, partnership, shareholder) between the parties other than the Independent Contractor relationship as set forth herein.

2. RE/MAX RESPONSIBILITIES.

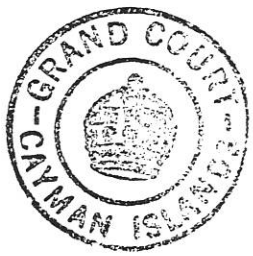
RE/MAX agrees that in consideration of the services of and the fees and expenses to be paid by Contractor, it shall, while this Agreement remains in force: (a) make available to Contractor on a non-exclusive basis an office or desk space and a reception area, together with access to listings, forms, advertising, telephone and other communications means; and (b) transmit to Contractor promptly the difference between One Hundred Percent (100%) of all commissions received by RE/MAX as a result of the efforts of Contractor and amounts, if any, belonging to RE/MAX pursuant to paragraph 5.

3. CONTRACTOR'S RESPONSIBILITIES.

A. Contractor shall act as a real estate sales agent subject to the supervision and control of RE/MAX International, Inc., the Broker/Owners responsible for the RE/MAX office management, the bylaws of the local board, and all applicable MLS rules.

4. FINANCIAL OBLIGATIONS.

A. **Security Deposit**. A non-interest bearing security deposit, the receipt of which RE/MAX hereby acknowledges, in the amount of three hundred and fifty C.I. Dollars ($350) to secure the full and faithful performance of Contractor's obligations hereunder and to insure the return to RE/MAX, upon termination of this Agreement, of all materials, plans, programs, documents, manuals, keys, signs, and the like which may, from time to time during the term of this



Agreement, come into the possession of Contractor.

B. **Initiation Fee**. A nonrefundable one-time charge ("Initiation Fee") of one thousand C.I. Dollars (CI$1000), which includes Contractor's first year's nonrefundable membership in RE/MAX International, Inc..

C. **Administration Fee.** A monthly administration fee to RE/MAX of one hundred C.I. Dollars (CI$100).

D. **Shared Office (Fixed) Expenses**. Contractor's pro rata portion of the shared expenses, which expenses shall be deemed to include, without limitation, rent, office overhead, furniture and equipment leases, utilities, telephone bills, secretarial and administrative expenses, janitorial and other professional services, local institutional advertising, and the like, shall be at a monthly cost of thirteen hundred C.I. Dollars (CI$1300).

5. **Miscellaneous Share Expenses.** Contractor's pro rata share of other additional expenses for services and materials incurred at the request of a majority of the RE/MAX Sales Associates then under contract with RE/MAX and/or for services and materials that are deemed appropriate by RE/MAX for the proper, efficient management and operation of a real estate brokerage office.

6. **Personal Expenses.** The full cost of certain additional services and materials which Contractor may authorize, request or avail himself of, including but not limited to long distance telephone and telecommunication services; copying and reproduction services; advertising and promotional brochures; personalized stationery; postage; yard signs for his listings; rental of calculating, accounting or bookkeeping equipment; and other services and materials as made available by RE/MAX at such rates and on such terms as RE/MAX shall establish.

7. **Institutional Advertising.** A nonrefundable monthly minimum of one hundred C.I. Dollars (CI$100) to the Regional Institutional Advertising Fund and to the International Creative and Promotion Fund may be increased from time to time. The Regional Institutional Advertising Fund may be increased from time to time to enhance media presence and offset increases in media advertising costs on a regional basis. All funds paid for regional institutional advertising and for international creative and promotion become the property of the Regional Institutional Advertising Fund and the international Creative and Promotion Fund, respectively, and under no circumstances shall any amount be refunded.

H. **Annual Membership Dues**. Nonrefundable annual membership dues of three hundred U.S. Dollars (US$300) on the anniversary of the date Contractor became employed by RE/MAX ("Membership Anniversary Date"), as additional consideration for this Agreement and for Contractor's membership

affiliation with RE/MAX International, Inc., payable to RE/MAX International, Inc. The annual membership dues for the first year are paid to RE/MAX International, Inc., by RE/MAX from Contractor's initiation fee. Contractor's annual membership dues may, from time to time, be increased by RE/MAX International, Inc. in order to offset the cost of increased benefits and operating expenses. Any increase shall not be applicable to Contractor until his Membership Anniversary Date.

I. **Late Payment Charges.** All payments required under Paragraph 4C, 4D, 4E, 4F, and 4G. Such charges shall be due and payable on the date of presentation to Contractor by RE/MAX of the pertinent bill, expense statement or invoice. Contractor agrees to pay a One Hundred C.I. Dollars (CI$100) late payment charge which shall be added to all monthly bills, expense statements or invoices not paid in full by the last day of the month for which the bill was presented, and Contractor further agrees to reimburse for any reason, in the event annual membership dues are not received on or before Contractor's Membership Anniversary Date a 20 percent late payment charge shall be added to the delinquent dues amount. Furthermore, an additional amount shall be added to the dues statement equal to any and all costs incurred as a result of any check returned for insufficient funds of other reasons or not honored because a stop payment has been ordered for any reason.

5. NONPAYMENT REMEDIES

Contractor shall be deemed entitled only to 100 percent of the amount by which commissions generated by Contractor's efforts exceed past due financial obligations imposed by the terms of paragraph 4 of this Agreement. That portion of commissions which does not exceed past due financial obligation shall be deemed to belong to RE/MAX and shall be used by RE/MAX first to offset arrears owed by Contractor.

8. TERM/TERMINATION.

A. **Term.** Except as otherwise provided in this Paragraph 8, this Agreement shall extend for a period of one (1) year from the effective date written above. The independent contractual relationship may be renewed for additional one (1) year periods by mutual agreement, provided, however, that the then current Independent Contractor Agreement form is signed by Contractor and that all fees and dues required to be paid by Contractor under the terms of this Agreement shall have been paid in full as of the date of such renewal. If Contractor does not wish to renew the independent contractual relationship, he must so notify RE/MAX in writing at least sixty (60) days prior to expiration of this Agreement.

B. **Termination.** This Agreement may be terminated (1) by RE/MAX for cause,

immediately and without notice, in the event Contractor defaults or otherwise fails to conduct his business in accordance with the terms of this Agreement or engages in

conduct which is disloyal or disrupts the office or is likely to bring discredit to the RE/MAX name, or (ii) by either party without cause, at any time, upon the giving of sixty (60) days advance written notice to the other.

The agreement did not provide the amount of commissions that the Plaintiff would be entitled to in various circumstances. It seems common ground, however, that the commission arrangement was as follows;

1. That if the Plaintiff obtained a listing for a property that listing would be put in the name of RE/MAX because that was required by the CIREBA Rules. If the Plaintiff was both the listing agent and selling agent she would be entitled to receive 100 percent of the real estate commission. Her only obligation would be to pay the monthly expenses outlined in the contract with the Defendant.;

2. If the Plaintiff obtained a listing for a property but a different realtor or real estate agent found a purchaser for the property, then the Plaintiff and the other realtor (the selling agent) would share the commission 50% each;

3. If the Plaintiff found a buyer for any property that had been listed by another agent/ or broker- she would be entitled to receive fifty percent of the earned commission.

There does not seem to be any real dispute between the parties regarding the arrangement referred to above. There is, however, a significant dispute between the parties as to what the arrangements were to be in other circumstances, which will be detailed later.

When the Plaintiff signed the agreement on November 29th the Defendants indicated that the office premises would not be available until approximately December 15th. The Plaintiff agreed that she

was not put under any pressure or duress in respect of signing the November 29th agreement and further that she had not taken the opportunity offered to her, to have the agreement reviewed by her lawyer.

On December 15th ,1993 the Plaintiff commenced her working relationship with the Defendants. As a result of the injuries sustained by her son in the automobile accident they were required to travel to Miami for various medical treatment. The Defendant Kim Lund indicated that he was aware that the Plaintiff's son had been injured and that he had undergone surgery. He said that he understood he was recovering from surgery but did not know that the Plaintiff's son and the Plaintiff would need to travel to Miami, early in the 1994 year, as often and for such extended periods of time as it turned out to be the case. I accept the Defendant's evidence on this point. The Plaintiff testified that she made her son's medical condition and the necessity of being away with her son, well known to Brenda Lund. The Defendant, Kim Lund testified that he was unaware of this and that if his wife had been made aware of these facts she most certainly would have told him. For reasons which I will detail more fully, later in these reasons, I accept the Defendant's evidence on this matter.

As a result of the injuries sustained by the Plaintiff 's son she traveled to Miami with him and was away during the following periods of time ;

1. January 3rd to 9th; 1994
2. January 13th to January, 20th, 1994
3. January 29th to March, 30th 1994

On January 12th 1994 the Defendant called a staff meeting to discuss some issues and to formalize certain existing practices within the RE/MAX office. The Plaintiff and the other real estate agents attended this staff meeting. A memorandum of January 13th, 1994 summarizes what was discussed at the meeting and it stated as follows;

"DO's

-Must record all faxes
-No long distance calls are to be made from SafeHaven
-Always follow up with clients, very important

It was agreed at the January 12th, 1994 meeting that if an agent assists a RE/MAX associate with a showing, due to the agent being tied up, a 15% referral fee will be honored on the associate's commission, if a sale transpires.

If an agent assists another agent, while they are off island, a referral fee of 50% on the agents commission is paid to the assisting RE/MAX agent (on the listing and/or selling side).

Every Tuesday morning at 8:00 AM there will be a sales staff meeting. If you do not arrive prior to the meeting starting, then you will not be able to go in after it has begun.

SafeHaven shift on Sunday is split. it has been changed to a one agent shift 10:30 – 3:30. The purpose was to give the sales staff more Sundays off and/or time to work with clients.

Please note that all fees for the office, must be paid within 72 hours of receiving the bill. At the next meeting a penalty will be discussed, per day for a late chare.

Everyone have a fantastic selling Winter season!

B and K"

On the same day the Plaintiff and the Defendants signed a letter of Agreement amending the November 29th,1993 agreement. That letter provided ;

"January 12, 1994

Carolyn Cupidon
RE/MAX First Realty

Re: Agreement to Repay Office Expenses

Dear Carolyn:

On any commissions earned by you or earned from your customers and clients, from January 1st, 1994 to June 30, 1994, RE/MAX First Realty will deduct 50% from these commissions. You will receive the other 50% share in your commissions.

Any costs incurred by you directly, for signs, telephone, advertising, faxes, etc. will still need to be paid when billed to you at the end of each month.

If you decide to change back over to the RE/MAX system, where you will keep 100% of your commissions and pay your own office expenses, we will require a 30 day notice.

The undersigned agree that this agreement is acceptable.

Carolyn Cupidon

Brenda Tibbetts Lund Kim Douglas Lund

For Mr. and Mrs. Farrow's purchase, an additional US$100 will be given to Carolyn."

The Plaintiff alleges that this amendment to the agreement was entered into on the basis of;

a. duress;
b. fraud
c. misrepresentation
d. conspiracy between the Defendants to defraud the Plaintiff of her rights.

The Plaintiff claims that on the basis of the foregoing, this amendment is void.

On March 31st 1994 there was a meeting between the Plaintiff and the Defendants. The Plaintiff and Mr. Lund gave conflicting evidence about that meeting but it is agreed that the meeting ended by Mr. Lund advising the Plaintiff that the November 29th 1993 agreement was terminated and that the Plaintiff was to leave the premises.

The following issues arise for determination;

1. The Plaintiff asserts that the January 12th, 1994 amendment is void on the basis outlined above. If this amendment is void then the parties will be bound by the original provisions of the November 29th , 1993 agreement;
2. The Plaintiff claims that she has not been paid all the commissions to which she is entitled, pursuant to the terms of the November 29th , 1993 agreement. In particular she claims that she was the selling agent in respect of two properties, namely the Palms no.9 and the Commonwealth no. 9.and that the Plaintiff has not paid her the full commissions owing to her in respect of those sales. The Plaintiff further claims that she is entitled to additional commission in respect the sale of a condominium described as Avalon no. 23. The Plaintiff asserts that she was the listing agent for this condominium and was only paid 20% of the commission whereas she was entitled was 50% of the commission.
3. The Plaintiff alleges that the Defendant was not entitled to terminate the November 29th, 1993 agreement . The Defendant asserts that it was entitled to terminate for cause and did so on March 31st 1994. If the Defendant was not entitled to terminate for cause then I must determine

what damages, if any, has the Plaintiff suffered as a result of the wrongful termination of the agreement.

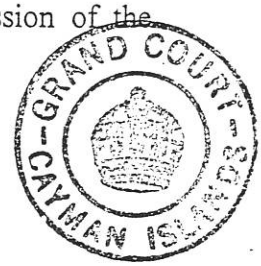
4. The Plaintiff alleges that the Defendants interfered with certain contractual relations and, claims damages as a result of that interference.
5. The Plaintiff claims return of expenses incurred.

ISSUE NO.1

Is the Agreement of January 12th, 1994 void?

The determination of this issue depends largely on whose evidence is accepted regarding the circumstances leading up to and the events that occurred during the meeting on January 12th. The Plaintiff argues that if her evidence is excepted the Court can infer that there was duress, undue influence, fraud and conspiracy on the part of the Defendants.

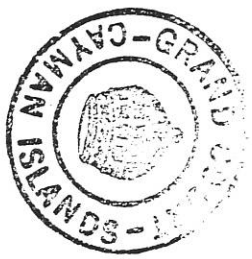
I found the evidence of the Plaintiff on these issues quite difficult to accept. For example, when she was asked in cross-examination why she signed the Agreement she testified it was to avoid the payment of the late penalties which had been discussed at the earlier staff meeting on January 12th. Mr. Alberga in cross examination pressed this matter and asked her why she would be concerned about payment of these late fees when she had previously testified that she had ample cash and was not in the position where she had to worry. She was unable to answer this question but maintained her position and was adamant that she signed the Agreement because she felt pressured to do so due to the fact that if she did not pay her monthly expenses on time she would be subject to late fees. This was just one example of how her evidence on this important meeting and the prior and subsequent discussions did not ring true. In the end I prefer the evidence of Mr. Lund over the evidence of the Plaintiff with respect to their meeting. Further, my overall impression of the



Plaintiff as a witness was not favourable. I found her to be evasive on occasions and often unable to provide a responsive answer to fairly straightforward and direct questioning and cross-examination. Often times she would give lengthy responses to question which did not bear relevance to the question being asked. Overall where the evidence of the Plaintiff differs with the evidence of Mr. Lund I accept the evidence of Mr. Lund. I do not say this lightly and I have reviewed carefully my notes of all of the evidence of the parties and I was unable to conclude that there was any occasion where I preferred the evidence of the Plaintiff over that of Mr. Lund where there was a conflict in their evidence.

My conclusion that the evidence of the Defendant Lund is to be preferred over that of the Plaintiff is supported somewhat by the fact that the Plaintiff did not complain about this Agreement being signed under duress or fraudulent circumstances until some three years, later when these proceedings were commenced. Correspondence was exchanged between the parties and no complaint was raised during that correspondence. The Plaintiff had ample opportunity to do so and was in fact corresponding with the Defendants in respect of unpaid commissions and other unsettled matters. In particular I refer to the letter written by the Plaintiff to the Defendants on August 12th, 1994. which provided in part;

> "Under the terms of our original agreement I had to pay a fee of $1500.00 per month towards office expenses but then I kept the whole of my commissions from my listings. We then signed another short variation on that agreement on the 12th of January this year which was valid until the 30th June, under which you took half of my commissions rather than having a contribution towards office expenses. This was obviously good for you as well as freeing me to deal with Dean." (emphasis added)



In fact, the January 12tth 1994 agreement did have advantages for the Plaintiff. Under the November 29th agreement and in accordance with the policy adopted and approved at the staff meeting on January 12th, the Plaintiff would be required to pay one half of any commissions generated, to the agents who assisted her in the sales while she was away,. That is, during the months of January, February, and March during the time she was away in Florida for considerable periods of time, if a sale was generated by the Plaintiff but required the assistance of a agent in the Cayman Islands then one half of the commission that would have been payable to Ms. Cupidon would go to that agent. This was exactly the arrangement that was formalized by the January 12th amendment. However, that amendment had one significant advantage for Ms. Cupidon in that she would no longer be required to pay her monthly share of the expenses. In fact a bill was presented on January 6th 1993 in the amount. of $1,500 and this bill was never paid by Ms. Cupidon. No bills were sent to the Plaintiff for the months of February or March. The January 12th, 1994 amendment had the advantage to freeing her from paying the monthly expenses to RE/MAX, having the RE/MAX sales staff available to assist her in selling property while she was off the Island and she still remained entitled to retain one half of her share of the commissions.

I will not dwell further on the issue of Ms. Cupidon's credibility nor the reasons why I accept the evidence of Mr. Lund. From the evidence of Mr.Lund and the evidence of Ms. Cupidon where it does not conflict with Mr. Lund, I conclude that the following occurred on January 12th 1994;

1. The Lunds called a staff meeting for the purpose of discussing certain issues, obtaining agreement of the realtors in their group and issuing certain directions. Those agreements and directions are referred to in the minutes of the January 12th meeting.

2. After that meeting Ms. Cupidon approached the Defendants and asked if she could meet with them to discuss the possibility of an arrangement being made with the Defendants which would assist the Plaintiff in her particular circumstances. Namely, her desire to travel to Miami with her son Dean so that he could seek and obtain appropriate medical treatment, and for the Plaintiff to avoid the monthly expenses of the RE/MAX office while she was away
3. As a result of those discussions the amendment of January 12th was prepared, more as an accommodation to Ms. Cupidon than anything else.

In addition to the claim of duress the Plaintiff advanced an argument that the Defendants procured the other sale agents to agree to this arrangement which was to Ms. Cupidon prejudice. She also argued that the amendment was obtained by fraudulent misrepresentation and was all part of a scheme to deprive her of her economic entitlement. I find on the evidence that these allegations are completely without merit. I find little or no evidence which could support any reasonable conclusion that the Defendants mislead or attempted to conspire with anybody to injure the Plaintiff in any way. Having found that the amendment of January 12th, 1994 is a valid amendment to the November 29th ,1993 agreement then the next issue for determination is whether the Plaintiff has been paid all of the commissions to which she is entitled.

ISSUE NO. 2

What commissions was the Plaintiff entitled to receive?

COMMONWEALTH NO: 9

The Plaintiff was the selling agent on this property. She was the real estate agent that was responsible for introducing the purchasers to this property and acting on their behalf in the sales transaction. The people who purchased this property were Mr. and Mrs. Farrow and were clients of the Plaintiff, before she signed the November 29th ,1993 agreement. However, because of the Plaintiff 's absence from the Cayman Islands she was not able to do all of the work necessary to complete the sale and required the assistance of Mr. and Mrs. Lund . Mr. and Mrs. Lund, in the Plaintiff's absence in January 1999 showed the Commonwealth no. 9 property to Mr. and Mrs. Farrow and prepared the offer to purchase that was ultimately accepted.

The Defendants were also the listing agents for the property. They were, therefore, entitled to keep one half of the commission as a listing agent. If Mr. and Mrs. Lund had not assisted her Ms. Cupidon would have been entitled to keep the other one half of the commission. However, because she was out of the country the Lunds assisted her in her capacity as selling agent and they were, therefore, pursuant to the terms of the January 12th , 1994 amendment, entitled to share equally in her commission as selling agent.

The property was listed with the Defendants for a listing price of $1, 225,000.00. The commission specified in the listing agreement was 5% of the full sale price. There is a dispute between the Plaintiff and Kim Lund as to whether or not the Plaintiff presented an offer orally to Mr. Lund in the amount of $1 million . The Plaintiff says that she indicated to Mrs. Lund that the Farrows were not prepared to spend more than $1 million for the purchase of Commonwealth no. 9. She further testified that Mr. Lund called her into his office later that day and told her that the vendor would not be prepared to accept $1 million and that she should try and get them to increase the amount they were prepared to offer. She says she spoke with the Farrows subsequently and then advised the

Defendants that the Farrows were not prepared to go any higher than $1 million. The Plaintiff asserts that the Defendants knew that the vendors were prepared to sell for $1 million but kept that information from her and used it as a form of leverage in the re-negotiation of the agreement on January 12th,1994.

Mr. Lund, on the other hand, testified that he did not recall receiving any oral offer or having any discussion with Ms. Cupidon regarding the $1 million proposal. He said that he did not seek instructions from his client on this amount. I accept the evidence of Mr. Lund in this matter.

After the Plaintiff left the Island Mr. Lund showed the Farrows the Commonwealth No. 9 property as well as other properties. Ultimately he was responsible for preparing an offer for the amount of $1 million which the vendors accepted. Under the listing agreement the Defendant was entitled to charge a commission of 5% on the selling price. This would be $50,000.00 for this sale.

However, the vendor was not prepared to sell his property for $1 million if he had to pay a commission of $50,000.00. Mr. Lund testified that because the vendor was selling for a figure which was well below his asking price he advised Mr. Lund that he would only accept the $1 million offer, if the commission was reduced. Mr. Lund and the vendor agreed that the commission would be reduced from the contractual amount of $50,000.00 to an agreed upon amount of $35,000.00. Ms. Cupidon says she was not consulted about this reduction and that she was entitled to be. Mr. Lund says he could not recall whether or not he was able to speak to Ms. Cupidon but that it would have been his practice to discuss this matter with a selling agent.

The Plaintiff, who amended her claim during the coarse of the evidence, claims entitlement to $15,250,00 in damages in respect of the commission on the Commonwealth no. 9. In her initial statement of claim she claimed the amount of $15,075.00 . That was amended in April of 2000 to claim $23, 815.29 and was subsequently amended to $15,250.00 during the coarse of her evidence. Her claim is arrived at by taking the initial figure of $50,000.00 commission and dividing it by two. She says that she is entitled, as selling agent, to one half of the commission stated in the interim agreement, irrespective of how much commission was actually received. From the $25,000.00 figure she deducts the amount that she actually received from the Defendants. That amount was $9,750.00. This leaves her claim in the current amount of $15,250.00 in respect of Commonwealth No. 9.

The Defendants had paid Ms. Cupidon $9,750.00 using the following methodology. The Plaintiff actually received the amount of $35,000.00 in commission. One half of that or $17,500.00 was paid to the Defendants because they were the listing agents. The remaining $17,500.00 was again divided equally with 50% or $8,750. going to the Plaintiff and 50% going to the Defendant. The Defendant asserts that since they assisted Ms. Cupidon in her duties as selling agent they were entitled to share in her sales commission. This arrangement was confirmed at the staff meeting on January 12th and was agreed to by the Plaintiff. It was also agreed to by Ms. Cupidon specifically in the January 12th amendment. The Plaintiff in her calculation does not take into account the fact that the Defendants were entitled by virtue of this amendment to share equally in the selling agents commission. The Defendant having correctly calculated that the Plaintiff was entitled to $8,750.00 commission on this sale, further agreed on January 12th that she would be paid an additional $1,000.00 . Ms. Cupidon claims that this was agreed to because she had done most of the work on the sale and it was virtually a sure thing. The Defendant says that it was agreed to, as kindness to

Ms. Cupidon in order to assist her with the expenses she was incurring in respect of her son. I accept the evidence of the Defendant in this regard. In the end, the Plaintiff was paid the amount of $ 9,750.00 total commission for this sale.

The main issue is whether or not the Defendant was entitled to agree with the vendor to reduce the commission from the contractual rate of $50,000.00 to $35,000.00 without obtaining the agreement of the Plaintiff. In my opinion the Defendant was entitle to do so. The parties to a contract are always at liberty to amend that contract by mutual agreement. The parties to the listing Agreement in this case, were the Defendant and the vendor. A Plaintiff was not a party to that listing Agreement and the vendor is under no obligation to pay any money directly to the selling agent. The obligation of the listing agent to pay commission to the selling agent was agreed upon as being 50% of the actual commission. However, there was no agreement as to what would happen if the commission was reduced from a contractual rate because the full listing price was not achieved.

Mr. Lund said that he was entitled to negotiate a lower commission and pay the selling agent one half of the commission actually received. Ms. Cupidon stated in her evidence that it was a practice in the industry for the selling agent to be consulted and he or she must agree before the commission could be reduced. She went so far as to say that if the selling agent did not agree then the sale could be blocked. In final argument Plaintiff's counsel, however, specifically advised that she was not relying upon a practice or custom in the industry. Rather she said that the Plaintiff was relying upon the admissions contained in pleadings and upon the evidence of Ms. Ebanks who was called by the Defendant. The pleadings in this case do not prove or admit the point which the Plaintiff seeks. Further, the evidence of Mr. Lund and Ms. Ebanks was that the basic way of allocating commissions was 50% to the selling agent and the 50% to the listing agent. If the selling

agent required assistance from another agent in selling the property then the selling agent commission would be split between those two agents, and the amount of the split depended on whether or not the selling agent was actually out of the country or whether or not the selling agent simply assisted in the showing. Neither Mr. Lund nor Mrs. Ebanks testified that it was necessary to obtain the consent of the selling agent before the listing agent could re-negotiate the commission.

Further, a witness called by the Plaintiff, Ms. Donna Sjostrom, who is the manager of the CIREBA office in Grand Cayman, testified that the commission that was agreed upon in a listing agreement could be changed, but only at the time of sale. She testified that the listing agent could ask the selling agent but the listing agent could not unilaterally vary the commission. However, on cross examination she resiled from that position and testified that the listing agent could agree to take a lesser commission and there was no rule or practice which prevented the parties to the agreement from re-negotiating the commission at the time of sale. She said there was nothing wrong with the vendor and listing agent re-negotiating the commission at the time of sale and that there was no rule of CIREBA which require the vendor and the listing agent to consult with the selling agent in re-negotiating a commission. She then said that there was a rule that the selling agent would receive 50 % of the commission and so the selling agent would have to be asked if they would be prepared to agree to a lower rate.

Her evidence on this subject was not helpful to the court for three reasons. First she is not a realtor and has no actual selling experience. Her experience was limited to that of managerial or executive function with CIREBA. Secondly, she gave somewhat conflicting and unclear evidence of the practice in the trade or business and thirdly this position was specifically abandoned by Plaintiff's counsel in argument.

As a matter common sense it seems to me that if the selling agent wants to secure a particular commission then the selling agent should complete the appropriate portion of the standard form of offer which provides that the vendor of the property will pay a particular percentage to the selling agent. That is a standard clause in the CIREBA form of offer, which was not completed by the Plaintiff in this case.

Secondly, it seems to me unsound and impractical that a selling agent would be in a position of effectively blocking a sale by refusing to agree to reduce her share of the commission. A selling agent has no entitlement to claim any commission directly from the Plaintiff. Her agreement, if any, is with the listing agent and it cannot be that a selling agent can block a sale in such circumstances. Accordingly, I reject the Plaintiff's claim for increased commission in respect to the Commonwealth sale.

If I am incorrect in the foregoing analysis then there are three further factors to consider. The first is that the Plaintiff in cross-examination conceded that if she had been consulted by Mr. Lund and asked to reduce her commission she would likely have done so. She testified that she would not have blocked the sale in order to insure that she received the higher commission . She did testify that she would have employed other techniques to try and persuade the vendor to sell for the $1 million and still pay the full commission but I am not satisfied on the evidence that she would have been successful. I therefore conclude that the Plaintiff, on her own evidence, has not suffered any damage.

Secondly, as I previously stated the Plaintiff's claim for $15,250.00 is premised on the incorrect assumption that the January 12th 1994 amendment is inapplicable. Her claim assumes that she is entitled to one half of $50,000.00 or $25,000.00. That is incorrect. Under the January 12th amending agreement she would only be entitled to one half of the $25,000.00 payable to the selling agent because she had agreed to share her selling agent's commissions with the Lunds. Her net claim would therefore be $12,500.00 less the $9,750.00 already paid to her, leaving the amount of $2,750.00 as the most she could claim, even if her argument on the commission issue was successful.

Finally, I am satisfied on the evidence before me that Ms. Cupidon agreed with the allocation of commissions in respect of the Commonwealth no. 9 at the time it was made. On January 26th, 1994 Brenda Lund wrote a letter at the request of the Plaintiff to a Mr. Athlee Ebanks. In that letter Ms. Lund stated "the amount of US$4,500.00 is due on the 14th February and US$9,750.00 is due on the 31st March, 1994, pending closing. The $9,750.00 was the commission payable in respect of Commonwealth no 9. There is no written record of any objection being made by Ms. Cupidon at the time that letter was written. One would expect that if she was unhappy with the commission she would have made her objection known and in writing. Ms. Cupidon first complained about her commissions in a letter written on July 29th, 1994. In that letter she complained that she had only been paid $5,000.00 commission in respect of the Avalon no. 23 but made no complaint about her commission previously paid in respect of the Commonwealth no 9. In his reply of August 2nd, 1994 Mr. Lund, stated as follows,

> " may we also remind you that we paid you an additional US$1,000.00 above what we had all agreed on, for the Commonwealth no. 9 sale, while you were employed with RE/MAX First Realty. Since you were off Island with Dean, our intention was to try to offer some additional help".

This was not disputed subsequently by the Plaintiff. She replied on August 12th and stated;

> " I am also angry at your suggestion that you gave me an extra $1,000.00 on the Commonwealth sale out of consideration for Dean. It was always agreed that I would have that extra $1,000.00 as the sale was a sure thing and I would, if absolutely necessary, have returned from Miami to handle the closure."
> Under the terms of our original Agreement, I had to pay a fee of US$1,500.00 per month towards office expenses but then kept the whole of any commission from my listings. We then signed another short variation on that Agreement on the 12th January this year which was valid until the 30th June, under which you took half of my commission rather than having a contribution towards office expenses. "This was obviously good for you as well as freeing me to deal with Dean" (emphasis added).

I did not see any written record before the court where the Plaintiff complained about the manner in which the Commonwealth commission had been calculated. It was only when these proceedings were lodged several years later that this was raised for the first time. Further, I accept Mr. Lund's evidence that he did not receive any oral complaint from Ms. Cupidon in respect of Commonwealth no. 9 or Palms no. 9.

From this I have concluded that it was agreed between the parties that the amount of $8,750.00 plus an additional $1,000.00 would be paid by the Defendant to the Plaintiff in respect of the Commonwealth no.9 sale.

PALMS NO. 9

Again, the Plaintiff was the selling agent involved in finding a buyer for this particular property. The circumstances of the Plaintiff acquiring this client were complained about by the Defendant and are somewhat relevant in the determination of whether or not there was cause to terminate the contract. The Plaintiff met Mr. Pitrum outside the RE./MAX office. She was outside smoking a cigarette when he happened be walking by and she struck up a conversation with him. She then

brought him in the office and he became her client. Ultimately he made an offer to purchase the property which was accepted. The Defendant's evidence was that there was a system in place at the RE/MAX office whereby potential clients or customers who came in off the street were to be assigned on a rotational basis to various real estate agents. The Defendant Mr. Lund testified that the agents in the office were rotated on a daily basis and that if a new customer came in to the office they would be assigned to the agent who had been allocated for that day. There were apparently complaints made by other agents that Ms. Cupidon was going outside and effectively wrongfully taking their business. In any event this is how the meeting between the Plaintiff and Mr. Pitrum occurred and ultimately led to a sale.

The Defendants were the listing agent for the condominium known as Palms no. 9. Mr. Pitrum presented an offer of $435,000.00 to purchase the Palms no. 9 and the Plaintiff was the selling agent. Since she was away in Miami during the conclusion of the transaction she engaged the services of another RE/MAX agent, Ms. Kass Coleman, who had agreed with her that she would be paid 40% of the Plaintiff's commission with the Plaintiff keeping 60%. The property sold for a price of $435,000,00. The listing Agreement provided for commission payable of 7 %. The Plaintiff calculates her claim on the basis of her entitlement to one half of the 7% sales commission of $30,450,00. Her one half of that is $15,225,00. She claims she is entitled to 60% of that commission or $9,135.00 with a balance of 40% going to Cass Coleman. She received $7,153.35 from the Defendant and claims a short fall of $1,981.65. The evidence in the case was that the amount owing to Cass Coleman was subsequently paid directly by the Defendants to Ms. Coleman.

The Defendant, however, testified that the amount of commission that was received by him was not $30,450.00 as would have been required under the agreement. The vendor in this case also accepted

an offer that was less than the listing price and he negotiated a reduction in commission with Mr. Lund. Mr. Lund testified that the total commission received on this sale was $14,450.00 and that is the figure he negotiated with the vendor. However, for the purposes of his allocation of the commission he used a rounded up figure of $15,000.00. He allocated one half of that commission or $7,500.00 to the Plaintiff as selling agent. From the amount of $7,500.00 he deducted $346.65. The basis for this deduction was that the vendor was required to pay additional stamp duty on the assignment of the purchase contract. The additional stamp duty was $1,143.29 and the vendor said in order for the sale to go through at a reduced price he was only willing to pay $450.00 of that stamp duty and that Mr. Lund would be required to pay the balance of $693.29. Mr. Lund agreed to this and split it equally between himself and the Plaintiff. There was no evidence that he discussed this with the Plaintiff or that the Plaintiff agreed to it. When he provided the cheque to Ms. Cupidon upon her termination on March 31st, 1994 he gave her a brief note outlining why this $346.65 was deducted from her share of $7,500.00 commission. There seem to be two issues arising from the sale of the Palms no. 9.namely;

(1) was the Defendant entitled to agree to a reduced commission and;

(2) was the Defendant entitled to deduct from the Plaintiff's commission the amount of $346.65 being one half of the stamp duty that he agreed to pay.

As previously stated I am satisfied that the Plaintiff was entitled to agree with the vendor for a reduced commission. Further I accept the evidence of Mr. Lund that the Plaintiff agreed to the reduction of this commission. I again, observe that the Plaintiff made no written complaint to the Defendant regarding the ultimate commission that was received by the Defendant and split with the

Plaintiff. For these reasons and the reasons advanced with respect to the Commonwealth sale I conclude that the Defendant is entitled to agree to a reduction in the sales commission.

However, I do not think that the Plaintiff is entitled to deduct from the Plaintiff's share of commission any amount in respect of stamp duty. There was no agreement between the Plaintiff and the Defendants that this stamp duty would be deducted from her commission. The Defendant, in order to achieve a sale agreed to pay a portion of the stamp duty but he could not agree that the Plaintiff would also pay a portion of it. Accordingly, I allow the Plaintiff's claim in the amount of $346.65.

AVALON NO: 23

The Plaintiff initially obtained the listing for the condominium property known as Avalon no. 23. It was the property that was owned by Mr. and Mrs. Farrow, who were the purchasers of Commonwealth no. 9. The Farrow's having bought Commonwealth no. 9., decided that they wanted to sell Avalon no. 23. There is no dispute that the Plaintiff secured the listing Agreement but that the listing Agreement had to be in the name of the corporate Defendant since it was a member of CIREBA. There is also no dispute, that if the Plaintiff continued in her relationship with RE/MAX and the property was sold while she was at RE/MAX she would be entitled to one half of the total commission as listing agent. However, the relationship between the Plaintiff and RE/MAX was terminated on March 31st. It was sometime after that, that the property was sold and the Defendants paid to the Plaintiff 20% of the commission earned rather than the usual figure of 50% of the total commission earned.

When the Avalon no. 23 property was ultimately sold, the selling agent was Rainbow Realty and it was entitled to one half of the total commission with the remaining one half of the commission to go to the listing agent. The Defendants claim that they were entitled to all of that one half but paid 20% of the commission to the Plaintiff on the basis that she was responsible for the initial listing and had influenced it. The Defendant and all of the other witnesses that testified on this matter indicated that a fee of 20% would be paid by the listing agent to a realtor who referred the listing or influenced the initial listing. This is commonly referred to as a referral fee and is contained in one of the CIREBA Rules.

It was uncontradicted that when Ms. Cupidon left her former real estate company she left listings behind. It was also the evidence of Ms. Ebanks that when she left her former real estate company the listings that she had secured but were in the name of that company remained there. The evidence of Ms. Sjstrom was that the real estate listings were the property of the real estate company. The Plaintiff claimed that she was entitled to the commission payable to the listing agent even after her contract had been terminated. There was no evidence or authority offered in support of this proposition. The evidence was to the contrary and has been stated above. I conclude on the evidence before me, that the Defendant was entitled to keep the commission payable to the listing agent and limit its payment to the Plaintiff to a 20% referral fee referred to in the CIREBA Rules. The plaintiff claim for commission on the sale of the Avalon no. 23 is therefore dismissed.

ISSUE NO:3 BREACH OF CONTRACT

The Plaintiff claims that the Defendant wrongfully terminated the contract on March 31st, 1994. Clause 8, D, of the November 29th 1993, Agreement provided that the Agreement may be terminated;

1. "by RE/MAX for cause, immediately and without notice, in the event a contractor defaults or otherwise fails to conduct his business in accordance with the terms of this Agreement or engages in conduct which is disloyal or disrupts the office or is likely to bring discredit to RE/MAX name,;
2. by either party at any time upon the giving of 60 days advanced written notice to the other."

Counsel for the Plaintiff agreed that the conduct referred to in sub-clause 1 would include the common law events which would justify dismissal for cause in a master/servant relationship. For example, if the independent contractor was dishonest that conduct would be included under sub-clause 1 of paragraph 8, D.

The Defendant argued that the contract was terminated for cause. Mr. Alberga submitted that the Plaintiff had failed to conduct her business in accordance with the Agreement and was disruptive of the RE/MAX office. The particulars he offered were;

1. she was soliciting customers outside of the office and;
2. she made an arrangement with Kass Coleman which provided that she would only receive 40% of the commission on the sale of Palms no. 9 whereas office policy required 50%.

He further submitted that these factors taking into consideration with the other complaints justified termination of the Contract.

Considering all of the evidence surrounding the termination of the Plaintiff on March 31st, 1994, it is apparent that the Defendant was unhappy with the conduct of the Plaintiff and as a result of that unhappiness called a meeting to discuss various issues with her. That meeting did not go well for either side. The Plaintiff became agitated and somewhat combative. From her demeanor in the witness box I conclude that she can be somewhat forceful and at the same time somewhat defensive. During that meeting she no doubt became agitated and voices were raised probably on both sides of the table. I think it is fair to conclude that a heated debate if not a argument resulted and Mr. Lund at that point indicated that the arrangement could no longer carry on. It was not Mr. Lund's intention to terminate the Agreement at the commencement of the meeting but rather to discuss certain matters with her. I think that is significant because if the factors which he now relies upon to justify the termination were so significant he would have gone into the meeting with the intention of terminating the contract. That was not the case. The Defendant did not consider the Plaintiff's conduct prior to the meeting sufficient to terminate the Agreement.

The conduct complained of, is not in my opinion sufficient to justify termination. The essentials of the complaint in addition to the 2 items previously mentioned are;

1. The soliciting of business off the street;
2. Somewhat aggressive attitude;
3. Failure to return calls;
4. An unwillingness to provide information to other agents.

These factors taken together do not in my opinion justify termination of the contract. They do not fall within the language of paragraph 8, D, of the November 29th agreement. I cannot say that the

Plaintiff's conduct could be considered disloyal or disruptive of the office or is likely to bring discredit to the RE/MAX name, to the extent that it would justify termination of the contract. I also note that the Plaintiff was not giving any warning or indication of the seriousness with which the Defendant viewed her conduct. If the Defendant did consider this conduct to be so serious as to warrant a termination of the Agreement I would have expected a warning being given prior to actual termination. I believe that what happened on March 31st was that the parties got into an argument and in the heat of that argument Mr. Lund terminated the Agreement. I therefore conclude that the Agreement was terminated without cause by the Defendant.

The question then becomes what damages, if any, has the Plaintiff sustained as a result of that termination. Clause 8, D, provides that the parties may terminate the Agreement upon 60 days advance written notice. The measure of damages suffered by the Plaintiff is therefore the amount of money that could put her in the same position she would be in had the Defendant given her 60 days notice of intention to terminate the Contract. It is difficult if not impossible to be precise in assessing what income the Plaintiff would have earned during that 60 days period. There is a possibility that she could have obtained purchasers for real estate properties and earned commission as a selling agent. She did not have significant number of prospects in this regard.

It is also possible she could have obtained a possible purchaser for the Avalon no. 23 property. A purchaser was obtained and by a letter June 29th, 1994 the Defendants wrote to Mr. and Mrs. Farrow indicating that an offer had been obtained for a price of $798,000.00. That offer was apparently accepted sometime in July 1994. If the Plaintiff had been given 60 days notice at the end of March, 1994 she would still not have been entitled to 50% commission on this particular sale. She did nevertheless lose the opportunity of finding a buyer for this particular property.

I have considered the evidence led by the Plaintiff that in the 12 months prior to January 25th , 1994 she claims to have earned $75,000.00 in income. In fact she had Brenda Lund write a letter to that effect in order to help her secure rental accommodation in Miami.

I note that the injury to the Plaintiff's son and resulting medical treatment he required detracted from the Plaintiff's ability to earn income. After her dismissal from Cayman Islands Realty until her arrangement with RE/MAX she does not appear to have been engaged in any real estate transactions. During the winter of 1994 she spent most of her time involved with and assisting with her son's recovery and medical treatment. I think it was unlikely that she would have earned significant income in April and May 1999. I think it would be fair to conclude that she lost the opportunity of earning up to perhaps $10,000.00 during that two months period. That is, she potentially could have made $5,000.00 per month for April and May 1999 but that opportunity to earn that money was taken away to a certain extent. I think a realistic assessment of the damage that is most likely sustained by the Plaintiff during this two months period would be to discount the $10,000.00 figure by 30%. I think she lost the opportunity of earning up to $10,000.00 and I discount that to $7,000.00 being my best estimation of what she would likely would earn had she remained in the relationship with RE/MAX.

That above figure of $7,000.00 must of course be reduced by what the Plaintiff could have earned had taking reasonable steps to mitigate her loss. There was no evidence that the Plaintiff did anything during that two months period to reduce her damages. In fact over the next several years she made little effort to seek alternative employment in the real estate field but that fact does not concern me since I must only examine the two months following the wrongful termination of the

contract. Even though the Plaintiff made little or no effort during that period to seek employment there was no evidence before me that even if she had done so it would have made much of a difference to her particular situation. The fact of her termination no doubt became quickly and widely known and even if she had made efforts to become an employee or an real estate agent with another real estate company it seems to me unlikely that she would have had a chance to made any significant income during that two months period. Accordingly, I make no deduction from the award of $7,000.00.

ISSUE NO: 4

Did the Defendants interfere with any contractual relations the Plaintiff had with any other person. This point was not pressed by the Plaintiff's counsel in her oral argument. There was little if any evidence to support a claim for interference with contractual relations or any resulting damage. Accordingly, this claim is dismissed.

ISSUE NO: 5 PLAINTIF'S CLAIM FOR RETURN OF EXPENSES INCURRED

The Plaintiff has claimed return of the $1,000.00 that she paid to become a member of RE/MAX International and certain other minor expenses for the purchase of various material such as letter heads, stationary, RE/MAX umbrella and other material bearing the RE/MAX logo.

In view of the manner in which I have decided this case these amounts are not recoverable. In order to put the Plaintiff in the same position she would be had the Contract not been breached I have awarded her $7,000.00 in general damages. That is, if the Defendant had given the Plaintiff 60

days notice of its intention to terminate the contract the Plaintiff would have had the opportunity to earn income during that 60 days period. That amount I have assessed at $7,000.00. The Defendant was then legally entitled to terminate the contractual arrangement and the only measure of damages to which the Plaintiff is entitled is the lost income during that period. Accordingly, I do not allow any claim for expenses which the Plaintiff has incurred.

With particular reference to the $1,000.00 paid to become a member of RE/MAX International I am satisfied upon the evidence that Plaintiff and Defendant agreed that the $1,000.00 would be paid to the Defendant in order that the Plaintiff would become a member of this International organization and receive the benefits as a result of that affiliation. I am well satisfied on the evidence that the Plaintiff did become a member of RE/MAX International although there was no evidence as to how much the Defendant actually paid the International organization. In my judgment it does not matter what that precise figure was since the Plaintiff and the Defendant agreed pursuant to the terms of the November 29th , 1993 Contract that that membership would be $1,000.00.

COSTS

With respect to the question costs I have carefully considered this issue and the discretion available to the Court . The trial of this action occupied 8 days in total with 2 or 3 of those days having extended sitting hours.

The Plaintiff made a number of serious allegations such as fraud, conspiracy, and malice which in my opinion were unfounded and without merit. The bulk of the Plaintiff's claim was unsuccessful. I believe that the portion of the Plaintiff's claim that was successful could have been completed in

two days. Accordingly, I order that the Plaintiff recover costs for preparation and conducting two days of trial. The Defendant on the other hand was largely successful on the issues that required and occupied most of the Courts time. I estimate that those issues occupied six of the eight days and would accordingly order that the Defendant be entitled to recover costs from the Plaintiff for preparation and for conducting six days of trial. The net result is that the Plaintiff should pay to the Defendant the costs of preparing for and conducting four days of trial. The judgment of $7,396.65 awarded against the Defendant will be deferred for 30 days to allow the Defendant the opportunity of preparing and submitting its bill of costs for the four days trial. Those costs are to be set off against the amount of the judgment in the Plaintiff's favour.

Dated this 15th day of August, 2000.

Dale Sanderson
Judge of the Grand Court

GRAND COURT CAYMAN ISLANDS