28.4.81

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN ON THE 24TH MARCH 1981
BEFORE THE HONOURABLE SIR JOHN SUMMERFIELD, C,B.E., Q.C.

CAUSE NO. 443/80

BETWEEN	DOUGLAS EBANKS	PLAINTIFF
AND	JEAN S. SYMMES	DEFENDANT

Mr. O. L. Panton for plaintiff
Mr. S. McField for defendant

JUDGMENT

This is a claim for commission, as an agent, for the sale of land under instructions from the defendant. The land concerned is known as lot 64 situated at Cayman Kai.

In reaching my findings on fact I have preferred the evidence of the plaintiff to that of the defendant wherever there is a conflict. Although the plaintiff was confused about the chronological order of some events he gave his evidence in a straightforward, uncomplicated manner and was convincing although, as will appear, I have some reservations about his interpretation of the consequences of those events. The defendant was less satisfactory as a witness, although obviously a very intelligent and well educated woman. On occasions she would "talk round" a vital question and fudge her answer e.g. when questioned about the commission and aspects relating to it. This somewhat undermined my confidence in her as a witness wherever her evidence was in conflict with the plaintiff's.

The plaintiff and his wife have known the defendant and her husband for several years. The plaintiff performed a variety of tasks for the defendant and the two families became friends. The defendant and her husband normally live in Washington, or Plaines, Virginia, U.S. A. and only visit these Islands from time to time. While away,

the plaintiff who is a local resident, among other things, kept an eye on her property.

The plaintiff is not a licensed real estate agent. However, early in 1980 the defendant asked the plaintiff if he could sell lot 64 for her. There was more than one exchange about this proposition but the upshot was that the plaintiff verbally agreed to sell the property for the defendant. The price stipulated was U.S.$65,000 and the defendant was to get a 5% commission. The normal commission charged by a real estate agent is 10%, but the plaintiff agreed to 5% partly out of friendship and partly because he was not licensed as a real estate agent.

This loose oral agreement was, as one would expect, not precise in all its terms. For instance, it would appear that there was no clear understanding as to when the commission would become payable.

Pursuant to those instructions the plaintiff sought out prospective buyers and found a Mr. Grafiuido who showed interest in the property. The plaintiff arranged for Mr. Grafiuido to contact the defendant in the United States but nothing came of this prospect. This was at the beginning of March 1980.

As a result of a telephone conversation between the plaintiff and the defendant, and in order to place the arrangement on a more business-like footing, the defendant sent an undated letter, Ex.1a, to the plaintiff (the envelope post-marked 3 March 1980) in the following terms:

> "Mr. Grafiuido has not called or contacted me. I would be interested in selling at that price, but not at anything less. If someone else comes along, do not worry about whether you need to contact me first. Just have them contact me if they are coming back to the states and I will be happy to honor your commission. If they are staying for a while and you can get a deposit out of them that looks good, take it at $65,000. I am working on plans for a new and smaller house which I will put up if I can't sell it, so I'll be happy either way.
>
> I enclose a card that you can show to

> establish that you are my agent in G.C. I would be able to come down for a closing rather quickly if there were an authentic purchaser, but need a couple of days notice.".

The enclosed card, Ex. 1b, was in the following terms:

> "Mr. Douglas Ebanks is acting as my agent for the sale of my property, Lot 64, and may accept a deposit in my name. Asking price is $65,000.00 firm.".

The plaintiff received this letter and the enclosed card sometimes towards the end of March 1980.

The instructions in that letter would, of course, supercede the earlier verbal arrangement.

A second letter, Ex. 1c, was sent by the plaintiff to the defendant dated 9th March 1980. To the extent that this letter departed from the instructions in the earlier letter, the later instructions would prevail.

The second letter was in the following terms:

> "On each of your calls to me recently I have been unable to hear more than a few words. There is no point in calling me from the far side of the island. All I hear is static. On the day of your first call I spoke to Don Cosby later in the day with perfect clarity from Georgetown, so it must just be the phone at Rum Point that is difficult. At any rate, I see no point in any more $25.00 phone calls (the first one has just appeared on my telephone bill). If anything important comes up, send me a cable. Or, as I stated in my letter, just have them call me directly from the states or a better phone connection, if anyone is serious. Don't call me just to give me someone's name. Write. If we make a sale, I will honor your commission.".

There can be no doubt, despite anything the defendant said, that these two letters constituted the plaintiff her agent for the sale of lot 64. The exact effect of these two letters, especially as to when commission would become payable, will be discussed later. Although the amount of the commission was not specified in either letter, the earlier understanding that it would be 5% would have continued.

The instructions received by the plaintiff in these two letters were never revoked or amended before the transaction about to be related took place.

Armed with this authority, and believing the card, Ex. 1b, to be a power of attorney, the plaintiff continued his efforts to sell lot 64. In his own words, he introduced quite a few people to the defendant by telephone or letter.

Eventually, the plaintiff found a prospective buyer in a Mr. Handel Whittaker. On 26 September 1980, Mr. Whittaker, having seen the plaintiff's authority, Ex. 1b, to act as agent for the defendant for the sale of lot 64, made to the defendant a firm verbal offer of U.S.65,000 for that property, U.S.$5,000 to be paid by way of deposit forthwith and the balance on completion within 30 days thereafter, the purchaser defraying the stamp duty and legal fees consequent upon the transfer. Mr. Whittaker there and then gave the plaintiff a cheque made out in the defendant's name for U.S.$5,000, Ex.1e, by way of deposit.

The plaintiff thereupon telephoned the defendant at her home in the United States and told her that he had sold the property, outlining the terms described above. In passing, it may be observed that, although the defendant in evidence said that the terms were unsatisfactory, it is difficult to see how, having regard to her instructions and the necessity for her to travel from the United States for the closing, they could have been better. At all events, she made no comment about the terms when she received this telephone call.

The defendant appears to have been taken aback by the plaintiff's assertion that he had sold her property. She said that she would have to think about it. She then said she would have to consult her husband. The plaintiff reiterated that the property was sold. The call ended and a few minutes later the defendant telephoned the plaintiff to say that she was not selling the land. The plaintiff again told the defendant that he had sold the land to Mr. Whittaker. The defendant said that she wanted to contact Mr. Whittaker and was given his telephone number.

It appears that Mr. Whittaker also tried to get in touch with

the defendant but without success. The plaintiff told Mr. Whittaker what had happened. He was offered the return of the cheque for the deposit but refused it. He insisted that he wanted the property.

On the 15th October 1980 Mr. Whittaker sent a letter to the plaintiff, Ex.1d, referring to the discussion on 26 October 1980 and confirming the terms of his offer. He asked for a copy of this letter to be signed and returned as confirmation of acceptance but this was not done. Mr. Whittaker said he thought it had been done, but could not produce the duplicate. It is clear from the letter to the defendant by the plaintiff's own attorney, Ex. 5, sent on 23rd October, 1980 that this duplicate was never signed or returned by way of acceptance. In any event, the offer in writing in the letter of 15 October 1980, Ex.1d, was a meaningless gesture as Mr. Whittaker well knew that his earlier verbal offer had been rejected by the defendant. Mr. Whittaker's apparent purpose was in some way to hold the plaintiff responsible.

Meanwhile the defendant sent the plaintiff a conciliatory letter dated 11th October 1980, Ex. 4. In a rather more barbed letter to the plaintiff dated 12 November 1980, Ex.2, following a claim for the commission from the plaintiff's attorney, the defendant rebuked the plaintiff and revoked his instructions to act as her agent for the sale of lot 64.

The plaintiff in evidence claimed that he had verbally accepted, on behalf of the defendant, Mr. Whittaker's verbal offer of 26 September 1980. This must be a mistake on his part and I cannot accept it. It was only elicited at the end of his re-examination. It is quite inconsistent with the tenor of Mr. Whittaker's letter of 15th October 1980, Ex.1d, referring to the discussion and putting the offer in writing. That letter makes no reference to any verbal acceptance. It asked for written acceptance by signature on the duplicate. It is also equally clear from the letter of the plaintiff's attorney to the defendant dated 23 October 1980, Ex. 5, that there had been no acceptance of any kind by the plaintiff.

of Mr. Whittaker's offer. If there had been that letter would have recited that fact. It merely stated that an offer had been made and that the deposit had been paid.

On those facts it is plain that the plaintiff put the defendant in contact with a person who was ready, willing and able to purchase the property from the defendant at her stipulated price, that would-be purchaser having made a firm commitment to so purchase the property and to defray stamp duty and legal costs of the transfer. The plaintiff could do no more than he did to effect the sale on behalf of the defendant and in accordance with her instructions. It was the defendant who refused to go through with the sale.

The question, then, is: is the plaintiff entitled to his commission in those circumstances?

The position in law is neatly summed up in Halsbury's Laws of England 4th Ed. Vol. 1 para 801 at p. 479 as follows:

> "Estate agent's commission. A contract by which an owner of property puts it into the hands of an agent for letting or sale amounts to a promise binding upon the principal to pay a sum of money upon the happening of a specified event through the instrumentality of the agent[1]. It is not a contract of employment in the ordinary meaning of those words for, except where he is appointed as sole agent[2], the agent is under no obligation to do anything, and consequently no term can be implied in such a contract that the principal will not so act as to prevent the agent from earning his commission, as by disposing of the property himself or through another agent or by breaking off negotiations before the happening of the specified event[3]. ... What the event is, on the happening of which the money is payable, must depend upon the construction of the contract[5] and the clarity with which the event is defined by the contract[6] and there are no special rules of construction applicable to estate agency contracts. Normally, when that event is the finding of a purchaser, no claim for commission can arise until the purchase price has been received or would have been received but but for the default of the principal[7]; thus, if the

1 Luxor (Eastbourne) Ltd. v Cooper [1941]AC 108 at 124, 125, [1941] 1 All ER 33 at 43, 44 HL, per Lord Russell of Killowen.

2 E. Christopher & Co. v Essig [1948]WN 461; Mendoza & Co v Bell (1952) 159 Estates Gazette 372.

3 Luxor (Eastbourne) Ltd v Cooper [1941] AC 108, [1941] 1 All ER 33 JL; G Trollope & Sons v Martyn Bros [1934] 2KB 436, CA; G Trollope & Sons v Caplan [1936] 2 KB 382, [1936] 2 All ER 842, CA. Sadler v Whittaker (1953) 162 Estates Gazette 404, CA.

5 James v Smith (1921) [1931] 2KB 317n; Luxor Eastbourne) Ltd. v Cooper [1941] AC 108 at 120, 124, 130, [1941] 1 All ER 33 at 40, 43, 47, HL; Chamberlain and Willows v H.B.S. (Trust) Ltd (1962) 184 Estates Gazette 849, CA; F. P. Rolfe & Co. v George (1969) 210 Estate Gazette 455, CA; McCulloch Co of Canada v Lloyd G. Howe Industrial Real Estate Ltd [1960] OWN 224, 24 DLR (2d) 57

6 Midgley Estates Ltd v Hand [1952] 1 All ER 1394, CA; Sheggia v Cradwell [1963] 3 All ER 114, [1963] 1 WLR 1049, CA

7 Jones v Lowe [1945] KB 73, [1945] 1 All ER 194; Fowler v Bratt 1950] 2 KB 96 at 105; McCallum v Hicks [1950] 2 KB 271 at 274, [1950] 1 All ER 864 at 865, CA; Dennis Reed Ltd v Goody [1950] 2 KB 277 at 284, [1950] 1 All ER 919 at 923, CA; Jacques v Lloyd D. George & Partners [1968] 2 All ER 187, [1968] 1 WLR 625. CA; Blake & Co. v Sohn [1969] 3 All ER 123, [1969] 1 WLR 1412.

principal enters into a binding contract[8] with the purchaser, and the latter is able and willing to complete, a fact which the agent must establish[9], and the principal refuses to complete, the commission is payable[10]....

If the agent desires to bind the principal to pay commission, not only on sale but on the introduction of a person who makes an offer to purchase, as contrasted with who actually buys, he must use clear and unequivocal language to that effect[15]. In those cases the offer must be a firm offer, which by acceptance will give rise to a contractual relationship[16].".

8 Gregory v Fearn [1953] 2 All ER 559, [1953] 1 WLR 974, CA. Peter Long & Partners v Burns [1956] 3 All ER 207, [1956] 1 WLR 1083, CA; Sheggia v Gradwell [1963] 3 All ER 114, [1963] 1 WLR 1049, CA.

9 Martin v Perry and Daw [1931] 2 KB 310; James v Smith (1921) [1931] 2 KB 317n; Dennis Reed Ltd v Nicholls [1948] 2 All ER 914.

10 Luxor (Eastbourne) Ltd v Cooper [1941] AC 108 at 126, 128, 129, [1941] 1 All ER 33 at 45, 46, 47, HL; Fowler v Bratt [1950] 2 KB 96 at 99, 105, [1950] 1 All ER 662; Dennis Reed Ltd v Goody [1950] 2 KB at 277 at 285, [1950] 1 All ER 919 at 923, CA; John E. Trinder & Partners v Haggis [1951] WN 416, CA.

15 Luxor (Eastbourne) Ltd v Cooper [1941] AC 108 at 129, [1941] 1 All ER 33 at 47, HL; Jones v Lowe [1945] KB 73, [1945] 1 All ER 194; Dennis Reed Ltd v Goody [1950] 2 KB 277 at 288, [1950] 1 All ER 919 at 925, CA. Giddys v Horsfall [1947] 1 All ER 460; Dennis Reed v Nicholls [1948] 2 All ER 914; Bennett & Partners v Millett [1949] 1 KB 362, [1948] 2 All ER 929. In re E. P. Nelson & Co. v Rolfe [1950] 1 KB 139, [1949] 2 All ER 584, CA; Graham and Scott (Southgate) Ltd v Oxlade [1950] 2 KB 257, [1950] 1 All ER 856; Dennis Reed Ltd v Goody [1950] 2 KB 277, [1950] 1 All ER 919, CA; and Midgley Estates Ltd v Hand [1952] 2 QB 432, [1952] 1 All ER 1394, CA. See also

Ackroyd & Sons v Hasan [1960] 2 QB 144, [1960] 1960 2 All ER 254. CA; Lucas & Sons v Mayne (1954) 164 Estates Gazette 441; Drewery v Ware-Lane [1960] 3 All ER 529, [1960] 1 WLR 1204, CA Cf. Sheggia v Gradwell [1963] 3 All ER 114,[1963] 1 WLR 1049 CA; Barllett v Farmer and Jelley (1965) 194 Estates Gazette 279. See also Jaques v Lloyd D. George & Partners Ltd [1968] 2 All ER 187, [187, [1968] 1 WLR 625, CA,

16 Bennett, Walden & Co v Wood [1950] 2 All ER 134 Ackroyd & Sons v Hasan [1960] 2 QB 144 [1960] 2 All ER 254, CA; Bartlett v Farmer and Jelly (1965) 194 Estates Gazette 279. Boots v E. Christopher & Co [1952] 1 KB 89, [1951] 2 All ER 1045, CA.".

The difficulty here is that no where into the arrangement between the plaintiff and defendant can it be read that he would be entitled to his commission when he had put the defendant into contact with a person who was ready, willing and able to purchase the property at the stipulated price and had made a firm offer to that effect. He does not say so in his evidence. The first letter, Ex. 1a, is ambiguous as to when the entitlement to the commission arises. The ambiguity is clarified in the second letter of 9th March 1980, Ex.1c, where there is the clear statement: "If we make a sale, I will honor your commission".

This case, therefore, has much in common with the case of Luxor (Eastbourne) Ltd (In Liquidation) and Ors v Cooper 1941 (1) All E. R. 33, a House of Lords case. It is sufficient to set out the headnote:

> The appellant companies wished to dispose of certain property, and agreed to pay the respondent a commission on the completion of the sale to any purchaser whom he could introduce. He did in fact introduce a willing and able purchaser, but the appellant companies then determined to effect the transaction they had in mind by a sale of the shares of the companies, and not to proceed with the sale of the property. It was contended that there ought to be implied in the agreement with the respondent a term to the effect that the appellants would not without just cause so act as to prevent him from earning his commission:-
>
> HELD: there can be no implied term that the vendor will not refuse to go on with a proposed sale so long as matters are still in negotiation and no binding contract has been made between the vendor and the purchaser. There was, therefore, no breach of contract by the appellant companies and they were not liable to the respondent in damages. The question of just cause or reasonable excuse did not, therefore, arise.".

The defendant also relied on the case of Jones v Lowe

1945 (1) All E. R. 194. Again, it is sufficient to quote the headnote:

> "On July 30, 1943, the plaintiff, an estate agent, entered into a verbal agreement with the defendant to find a purchaser for her house. On the same day the plaintiff wrote a letter to the defendant confirming the agreement and stating "in the event of my introducing a purchaser I shall look to you for payment of the usual commission." In Feb., 1944 the plaintiff found a client ready and anxious to purchase the house at the agreed price but, before the contract was completed, the defendant withdrew the house from the market. The plaintiff brought an action claiming (i) commission due to him on the verbal contract, or (ii) alternatively remuneration for his services on a quantum meruit:-
>
> HELD: (i) commission payable on the introduction of a purchaser is payable only on the conclusion of a legal and binding contract of purchase and sale
>
> Luxor (Eastbourne), Ltd. v. Cooper (1) applied.
>
> (ii) since the terms of the verbal contract had been reduced into writing and had been accepted by the conduct of the defendant, no term could be implied other than those expressed and the plaintiff could not, therefore, claim on a quantum meruit
>
> (1) Luxor (Eastbourne), Ltd. v. Cooper, [1941] A.C. 108; [1941] 1 All E.R. 33, 110 L.J. K.B. 131; 164 L.T. 313
> (2) Trollope (George) & Sons v. Martyn Bros., [1934] 2 K.B. 436; Digest Supp.; 103 L.J. K.B. 634; 152 L.T. 88.".

Here there was no binding contract of purchase and sale. The plaintiff fairly admitted in evidence that he could not enter into a contract of sale with Mr. Whittaker and that only the defendant could do that. He also agreed in cross-examination that his commission was payable if the sale went through, but that the defendant refused the sale.

While I have sympathy for the plaintiff I have no alternative but to hold that his claim for commission must fail.

Some argument was also directed to the question of whether the plaintiff could, in any event, sue for commission because of his contravention of the Trade and Business Licensing Law 1971 in carrying on business as a real estate agent without being licensed to do so under that Law.

It was ably argued in his favour that this was a "one-off" transaction and that, therefore, he was not carrying on business as a real estate agent within the meaning of that Law. It was also argued that the Trade and Business Licensing Law was a revenue law and that the

illegality of having no licence did not taint the transaction by analogy with Smith v. Mawhood 1845 14 M & W 452 - see also Cheshire and Fifoot on the Law of Contract 7th Ed. p. 298.

Although only one piece of land was involved, the plaintiff made a number of attempts to find a purchaser for it. It was a continuing activity over several months resulting in several introductions of prospective purchasers and I am inclined to the view that this activity amounted to engaging in the business of a real estate agent. As this is specifically made an offence by section 14 of the Trade and Business Licensing Law I do not see how one can accept that the plaintiff can claim commission for what was an illegal activity on the ground that that Law is primarily a revenue Law.

However, having found against the plaintiff on the facts, I need not go into the question of the illegality of the transaction any further.

The claim fails. There will be judgment for the defendant with costs.

SIR JOHN SUMMERFIELD

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