



In The Supreme Court of Bermuda

IN THE SUPREME COURT OF BERMUDA
CIVIL JURISDICTION
2009: No. 277

BETWEEN:

BRIAN ALKON

Plaintiff

-v-

WENDELL POND
(doing business as Global Realty)

Defendant

JUDGMENT (In Court)

Date of Trial: September 14, 2011

Date of Judgment: September 27, 2011

Mr. Taaj Jamal, Cox Hallett Wilkinson Ltd, for the Plaintiff

Mr. Christopher Swan, Christopher E. Swan & Co, for the Defendant

Introductory

1. By a Generally Indorsed Writ issued on August 17, 2009, the Plaintiff seeks \$27,000 representing the Plaintiff's share of the commission paid to the Defendant in respect of the sale of the property known as 'Purple Cow', Somerset Road, Sandy's Parish ("the Property"). It is common ground that this is the sum to which the Plaintiff would be contractually entitled under the 'Salesman Agreement' entered into between the parties on April 1, 2008 assuming the Plaintiff's rights in this regard were not either:

- (a) extinguished by virtue of the ‘Termination Agreement’ executed by the same parties on December 15, 2008’ as a matter of construction of the contract; or
 - (b) non-existent under the terms of the Salesman Agreement in any event on the factual basis that the sale and purchase agreement concluded prior to the sale of the Property was not concluded as a result of the Plaintiff’s efforts.
- 2. Although only the evidential limb of the Defence was formally pleaded, the construction point was raised in the Defendant’s Witness Statement and Mr. Jamal did not waste the Court’s time by taking a pleading point. After all, his client’s claim for \$27,000 as set out in the Generally Indorsed Writ was only marginally above the present Magistrates’ Court jurisdictional limit of \$25,000. However, the Statement of Claim made it clear that it was conceded that the Defendant was entitled to deduct \$2,025 from that gross figure in respect of Employment Tax. So the net claim was in fact \$24,025, within the Magistrates’ Court’s jurisdiction.
- 3. And at the commencement of the trial I queried whether counsel had not been able to and could not potentially still agree, with a view to saving costs, to proceed on the point of construction alone, as this appeared to me to be the crucial issue. In the event, the trial proceeded with both parties giving oral evidence and was completed within the one day fixed for the hearing.

Factual findings: substantially agreed facts

- 4. It was essentially common ground that the Property was sold to a Trust of which a Ms. Shirmika Brown was a beneficiary pursuant to a Sale and Purchase Agreement dated January 30, 2009 (“the SAPA”). Although Ms. Brown had first been shown the Property by a co-broker at some earlier date, she was shown it again by the Plaintiff in October 2008 after he had advertised it for sale on behalf of the Defendant’s firm. On October 8, 2008, the Plaintiff wrote Ms. Brown acknowledging receipt of a 10% deposit in respect of the Property.
- 5. The Plaintiff left Bermuda shortly thereafter leaving the Defendant in charge of the conclusion of the formalities relating to the sale of the Property. On December 8, 2008, however, the Defendant returned the deposit because the vendors withdrew the Property from the market. On December 15, 2008 the Termination Agreement was executed. This provided most pertinently: “...*any contracts entered into prior to the terminations [sic] shall be subject to the payment of commissions under the pre-existing Agency Agreement.*”
- 6. The “*pre-existing Agency Agreement*” referred to in the Termination Agreement was in fact the Salesman Agreement. The crucial provision in this agreement was the following clause:

*“2. Where the Salesman introduces to the Agency seeking a property for sale in the said Islands and **as a consequence of that introduction** the Salesman obtains a Vendor whose property is subsequently sold to that Purchaser THEN if and when ...all legal formalities relating to the sale have been completed the Agent shall pay to the Salesman Fifty Percent (50%) of the Commission the Agency has earned from such sale.” [emphasis added]*

Findings: construction of Termination Agreement

7. Reliance upon the interpretation of the Termination Agreement was seemingly first raised by the Defendant somewhat obliquely in the final paragraph of his July 16, 2011 Witness Statement:

“I would not deny the Plaintiff his commission if the commission arose from ‘any contracts entered into prior to the termination’ according to the termination agreement...”

8. It is somewhat curious that this compelling and clear-cut point was raised, almost apologetically, at the very end of the Defendant’s Witness Statement. Counsel perhaps had in mind the old adage: if a proposition looks too good to be true, it usually is too good to be true. In my judgment, however, it is impossible to sensibly construe the Termination Agreement in any other way than its plain and unambiguous terms demand. The agreement terminates the Plaintiff’s employment as of December 15, 2008, but preserves his right to receive commissions in respect of any contracts entered into prior to the date of termination. As the SAPA was entered into on January 30, 2009, after the termination date, no entitlement to the commission arises.
9. Mr. Jamal, meeting an argument which did not form part of the Defendant’s pleaded case but which was obviously a compelling one for the Defendant, bravely sought to contend that an alternative construction was fairly open to the Court. The analysis advanced by the Plaintiff’s counsel was, understandably, a strained one and implicitly asserted that the Termination Agreement did not have the effect of bringing the Salesman Agreement to an end.
10. I find that it is unarguably clear that the parties expressly agreed on December 15, 2008 to terminate the Salesman Agreement subject to, *inter alia*, the Plaintiff’s right to receive commissions in respect of sale agreements consummated prior to December 15, 2008 in respect of which he had introduced the vendor to the Defendant’s firm. On this legal basis the Plaintiff’s claim must be dismissed.

Findings: did the sale take place as a result of the Plaintiff's introduction?

The relevant legal principles

11. Mr. Jamal helpfully placed before the Court authorities which elucidated the legal approach to the issue of whether an agent may be said to have earned a commission in facts similar to those of the present case. Firstly, and more broadly, he referred to Article 57 in Watts & Reynolds, '*Bowstead on Agency*', 19th edition, at paragraphs 7.027, which formulates the general rule that an agent "*is not entitled to [a] commission unless his services were the effective cause of the transaction being brought about*". He submitted that the commentary on Article 57 made it clear that the mere fact that the consummated transaction completed by the principal was different to that initiated by the agent is not fatal to a claim for a commission. The Court must construe the relevant agency contract and determine whether on the facts the agent was the effective cause of the closing of the relevant transaction.
12. I accept these submissions, which were not in principle challenged by Mr. Swan. They have been adopted by this Court. In *Pudney-v-Villa Properties Limited*, Supreme Court Civil Jurisdiction 1985 No. 104, Judgment dated January 17, 1986, Melville J held that "*the plaintiff must have been the effective cause of the transaction taking place*".

Was the Plaintiff the effective cause of the Property's sale?

13. I accept Mr. Swan's submission that on the facts (a) the sale took place after the Property had been taken off the market in December 2008 and placed back on the market in 2009; (b) that the Plaintiff's only involvement was in September/October 2008 when he advertised the Property, showed it to Ms. Brown, and received a deposit from her; (c) that the Defendant placed the Property back on the market in January 2009 and consummated the SAPA without any further involvement on the Plaintiff's part; and (d) that the ultimate purchaser was a trust, not Ms. Brown whom was initially introduced to the Property by the Plaintiff.
14. On the other hand, I accept Mr. Jamal's submission that on the facts (a) the Plaintiff was contractually obliged to fund the costs of advertising the Property for sale; (b) that the Plaintiff alone advertised the Property in the local press, and initially (on behalf of the Defendant) showed the Property to Ms. Brown; (c) the Defendant merely called Ms. Brown as an existing (potential) purchaser in January 2009 when the Property was placed on the market again; and (d) any distinction between the legal identity of Ms. Brown in her own right and Ms. Brown as the beneficiary of the trust which ultimately purchased the Property is highly artificial and meaningless in the relevant contractual context. In addition, I take note of the fact the purchase price and deposit ultimately paid were the same as that initially offered by Ms. Brown in October 2008 when she paid a deposit to the Plaintiff.
15. I find that the Plaintiff was an effective cause of the sale of the Property in that the offer he procured from Ms Brown, who responded initially to advertisements the Plaintiff

placed, was ultimately accepted by the vendors. The fact that the Property was, in the interim, taken off the market for a few weeks for reasons which are obscure is in my judgment insufficient to break the chain of causation. The Salesman Agreement was designed to reward the Plaintiff for sales closed “*as a consequence of [his] introduction*”, obliged as he was to bear the advertising costs. It did not require the Plaintiff to be involved in the “*legal formalities*”. While I consider this to be somewhat of a marginal case, I consider on balance that the Plaintiff did just enough to earn his share of the commission. More significantly, the eventual sale was not so materially the result of intervening events that the chain of causation flowing from the Plaintiff’s initial introduction must be viewed as having been broken altogether.

16. Although this conclusion turns on the unique facts of the present case, other cases applying the same legal test to the question of whether an agent’s efforts entitle him to a commission when the relevant transaction is completed by someone other than himself do help to add flesh to the bare bones of the “effective cause” test. This Court rejected the agent’s claim where the plaintiff had merely introduced the purchaser to the relevant property, which was later sold by another agent altogether in *Pudney-v-Villa Properties Limited*. Melville J (at page 6) found the following crucial facts: “*From the evidence that I have accepted, it seems clear beyond peradventure, that whatever the plaintiff showed the Rays did not in any the least influence Mr. Ray in concluding the agreement with Mr. Smith about apartment C7.*” This is far removed from the facts of the present case.
17. The agent’s right to a commission was also rejected in *Millar, Son & Co-v-Radford* (1903) 19 T.L.R. 575, a case cited with approval by Melville J and summarised in ‘*Bowstead on Agency*’ at paragraph 7-029. There, the agents were entitled to a commission if they sold or rented the property. They rented the property and received a commission for this, thereafter having no dealings with the property. Fifteen months later the property was sold; the court held: “*Here, the plaintiffs fail to establish what is a condition precedent to their right to a commission-viz., that they have brought about the sale.*” Again, these facts are far removed from the present case where (a) the same firm sold the relevant property on substantially the same terms as those upon which the purchaser committed to buy on following the Plaintiff’s introduction, and (b) there was no intervening transaction.
18. Accordingly, the Plaintiff has demonstrated that his introduction was an effective cause of the sale. This conclusion is only dispositive as to the merits of the present action in the event that my primary finding that the claim must be dismissed on contractual interpretation grounds is held to be wrong. However the rejection of the sole pleaded defence has obvious significance as regards costs, which probably explains why the Defendant’s counsel was determined to pursue this matter at trial.

Summary

19. The Plaintiff's claim is dismissed on the grounds that he was not contractually entitled to receive commissions after his employment with the Defendant was terminated in respect of a sale which was contracted post-termination.
20. If this primary finding were found to be wrong, I would allow the Plaintiff's claim on the alternative grounds that the Property was indeed sold as a consequence of his introduction of the purchaser to it.
21. It follows that the Defendant has only succeeded on a legal ground which was not pleaded and which was only raised in his Witness Statement on July 16, 2011. My provisional view is that, it was unreasonable for the Defendant not to have advanced what amounted to a "slam/dunk" strike-out point at the earliest possible opportunity, in order assist the Court to achieve the overriding objective. Subject to hearing counsel (if required) as to costs, I would propose to make no order as to the costs of the action prior to July 17, 2011 and no order as to the costs of the trial hearing, the vast majority of which was preoccupied with investigating the evidential limb of the case which was resolved in favour of the Plaintiff. The remaining costs, however, would be awarded to the Defendant on the standard basis to be taxed if not agreed.

Dated this 27th day of September, 2011

KAWALEY J