

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ANTIGUA AND BARBUDA

CLAIM NO. ANUHCV2008/0041

BETWEEN:

ANTIGUA REAL ESTATES LIMITED

CLAIMANT

And

RUPERT KENLOCK

DEFENDANT

Appearances:

Mr. Kendrickson Kentish for the Claimant

Sir. Clair Roberts Q.C and with him, Ms. Andrea Roberts for the Defendant/Ancillary Claimant

2010: 26, April

2010: 12, October

JUDGMENT

1. **Harris, J.:** The Claimant is a Company under the Laws of Antigua and Barbuda and is a real estate agent carrying on business at Jolly Harbour, St. Mary's, Antigua.
2. At all material times the Defendant was the beneficial owner of all the issued shares of the company, Moonstar Holdings Limited, an International Business Corporation incorporated on the 4th day of May 2000 under the Laws of British Virgin Island ("the Company"). The Company was the registered proprietor of two (2) parcels of land properly identified in the Land Registry as Registration Section: South West, Block: 55 1186A, Parcels: 390 and 391.

3. On the 4th day of May 2007 the Defendant instructed the Claimant to sell on his behalf all the shares in the company Moonstar Holdings Limited, and agreed to pay to the Claimant a commission of US\$50,000.00 for doing so.
4. On the 31st day of May 2007, the Defendant executed a share purchase agreement in which all the shares of the Company were agreed to be sold to Watamu Holdings Ltd. c/o ATU General Trust (BVI), (hereinafter referred to as "the Purchaser ") of 3076 Sir Francis Drake Highway, Road Town, Tortola, BVI for the sum of \$1,250,000.00, a price agreed by the Defendant, and Watamu Holdings agreed to purchase the shares at the price.
5. Pursuant to the agreement between the parties, the Purchaser of the shares forwarded the full balance of the purchase price to Stuart Lockhart, the Purchaser Attorney. However the Defendant indicated that he had been offered a higher price by another person and therefore sought to increase the price by an additional One Hundred Thousand United States Dollars (US\$ 100,000.00), in breach of the share purchase agreement. The Defendant refused to complete the sale unless he was paid this further sum. The Purchaser refused to pay the extra sum and his payment was returned to him.
6. The Claimant contends that it fulfilled its obligation under the agreement with the Defendant when a share purchase agreement containing terms agreed upon by the Defendant was executed by the defendant. In the premises, the claimant alleges that there became due and owing to the Claimant the sum of US\$50,000.00 being the agreed commission. However, to date the Defendant has failed to pay the Claimant the outstanding sum or any part of it notwithstanding demands to do so.
7. On the 17th day of July, 2007, Mr. Steve Barker as the managing Director of the Claimant Company wrote to the Defendant demanding the commission and enclosing an invoice for the amount due. The Defendant has failed to pay the commission. Further on the 10th day of September, 2007 Roberts & Co, Attorney at Law for the Claimant wrote to the Defendant demanding the payment of the commission but the Defendant has not responded to the attorneys.

8. The Claimant contends that it is entitled to interest thereon at such rate and for such period as the Court deems just pursuant to section 27 of the Eastern Caribbean Supreme Court Act, Cap 143.
9. The Claimant denies that the purchase agreement is a deed within the definition set out in the Registration and – Records Act, Cap 375, as it was an agreement for the sale/purchase of shares in a company and not affecting or relating to lands¹. The Claimant also denies that the agreement is required to be registered under the registration and Record Act or at all or that the non-registration has the consequences contended by the Defendant, that is, that it is inadmissible or that it cannot be pleaded or relied upon by the Claimant.
10. Contrary to the allegations in paragraph 4 of the Defense, the Claimant denies that it acted without lawful authority in delivering the said agreement as stated therein or at all. In particular the Claimant denies that it delivered the agreement after the Defendant had informed it that he no longer wished to proceed with the contract with the Purchaser.
11. The Defendant contends that (i) the Claimant approached the Defendant, in or about Spring of 2007, and indicated that it had a Client who would be interested in purchasing the property identified at paragraph 2 of the Statement of Claim; (ii) The Claimant's Client made an offer to the Defendant to purchase the shares in Moonstar Holdings Limited, which offer the Defendant accepted; (iii) The Defendant agreed to pay the Claimant a Commission upon the completion of the sale of the shares to the Claimant's Client and not otherwise².
12. The claimant contends strongly that the Share purchase agreement referred to in paragraph 4 of the Statement of Claim is not registered as a Deed in accordance with the Registration and Records Act Cap 375 and as such is inadmissible and cannot be pleaded or relied upon by the Claimant.

¹ See paragraph 3 of the Defense.

² See para 3 of the statement of claim for the defendants allegations.

13. The Defendant contends that (i) he executed and delivered an undated copy of the aforesaid sale agreement to the Office of the Claimant on or about 16th May 2007 (ii) On the 16th May 2007 the Defendant wrote to the Claimant via e-mail instructing them, inter alia, to hold the aforesaid purchase agreement **to his order** pending execution of the agreement by the purchaser and delivery of the agreed deposit (iii) The Defendant never gave the Claimant instructions to release the aforesaid agreement (iv) The Claimant without lawful authority delivered the said agreement to the aforesaid Client of the Claimant but only after the Defendant had informed them that he no longer wished to proceed with the contract with the Claimant's Client.³
14. The Defendant denies paragraph 6, 7 and 8 of the Statement of Claim and contends that the Defendant is not liable to the Claimant as the Defendant did not enter into an agreement with the Claimant's Client.

ISSUES

15. The issues arising from the facts of this case are as follows⁴: (i) was there a valid contract between the parties for the payment of a commission; (ii) Did the preconditions for the payment of the commission arise; (iii) Is the defendant liable to the claimant for payment of the commission.

CLAIMANT'S CASE

16. The claimant contends simply, that it fulfilled its obligation under the agreement with the Defendant when a share purchase agreement containing terms agreed upon by the defendant was executed between the purchaser and the defendant.
17. Further, the claimant's claim is supported by the fact alleged that it was the defendant who by his deliberate breach of the purchase agreement in refusing to pay the purchase price prevented the completion of the sale.

³ The defendant denied paragraph 5 of the Statement of Claim.

⁴ The issues as set out in the defendant's Pre-Trial Memorandum is preferred. Determining these issues do require for the most part answering the questions raised by the claimant in his Pre-trial memorandum.

18. The claimant contends that the defendant breached the agency agreement - the subject of this action – by failing to pay the agreed commission in the amount of US\$50,000.00 to the claimant when it became due under the agreement.
19. Having put its case broadly, the claimant contends as follows;
20. With respect to the first issue above; that claimant contends that there was a valid agency contract between the parties. The claimant relies on the conduct of the parties, several e-mails culminating in the e-mail of the 30th April 2007⁵:

“From: Rupert Kenlock
To: Peter Antigua Estates;
Subject: RE: Palm beach Plot #262
Date: 30 April 2007 09:44:38

Hi Peter

Sorry for not coming back earlier.

As discussed, I would consider selling at offers in excess of USD\$1.2m. The land is the sole asset a BVI company and so the company shares could be transferred instead of the property. I don't want the land formally marketed as its not officially for sale, however if your introduction led to a sale from a specific applicant then I would be happy to pay you 5% fee.

I look forward to receiving the site layout plan for Kelly Heights which I viewed before I left.

Regards

Rupert.”

⁵ See also e-mail of the 4th of May 2007 at pp 4 of trial Bundle B , the e-mail of the 16th may 2007 at pp10 of TBB and the series of e-mails thereafter.

21. The claimant is contending that the evidence supports the creation of a contract – the parties are identified; the subject of the contract is clear; the offer, acceptance and consideration are all determined – for the purposes contended. The court agrees. I can see no real dispute over this issue.
22. On the second issue, the claimant contends that the preconditions for the payment of the commission did arise. The claimant submits that there was a concluded contract between the Defendant and the purchaser. The purchaser and the vendor, Rupert Kenlock, were both represented by Attorney at law, Mr. Stuart, in the transaction. The claimant says that the defendant executed the contract sent to them for execution by the purchaser. Before the purchaser executed the written contract, the vendor, Mr. Kenlock, demanded an increase in the price and ultimately when the increase was not forthcoming prevented the receipt into his bank account the payment of the original purchase price by the solicitor of the vendor. Ultimately Mr. Kenlock sold the property to another purchaser from whom it appears, he had a pending offer.
23. The claimant says that the act of the of the defendant executing the share purchase contract satisfied the precondition for the payment of the commission, but further, if the court were to find that that contract had not been concluded, that it should find that this was a result of the defendant's breach in failing to comply with the terms of the share purchase agreement.
24. The claimant contends that there is no room for denial that there was a valid purchase agreement between purchaser (the claimant's client) and the Defendant. The claimant refers to the e-mail of the 21st May 2007 headed "Final Version of Agreement"⁶ and it reads as follows:

"From: *Stuart A Lockhart Legal Services [clerks@sallegalservices.com]*

Sent: *21 May 2007 12:02*

To: *Rupert Kenlock*

Subject: *RE: Final version of agreement*

⁶ See pp 17 of the Trial Bundle B.

Dear Rupert

I agree in respect of the final version. We can simply remove the signed page and append it to the latest copy.

I will need to confer with the Purchaser's Accountant in respect to the other points, but I don't see that as being problematic. I will forward your queries and e-mail you when we have a respond.

Please forward your AOB details and I will transfer the funds minus the US\$40,000 for your agent as agreed. We have received a substantial amount from the BVI and the remainder is due presently.

Please advise how and when you will deliver the Bearer Shares.

Best Wishes

Stuart Lockhart

.....

Dear Stuart,

Many thanks for the final version of The Share Purchase Agreement.

Is it possible for me to confirm in writing via e-mail my acceptance of these final amendments? You already have my signature on the last page of the earlier unbound draft version and it seems long winded to have to provide yet another signature and then have to arrange for the document sent out by Fed Ex.

Also, you have a receipt for the Moonstar annual company fees of \$700USD, which are paid up until May 2008. The Jolly Harbour Community Charges are paid until the end of April 2007. In light

of the fact that your client will be benefiting from a year of paid annual company fees, is it OK to be a month in arrears on JH charges of circa \$220USD?

I can let u have details of the AOB Company Bank Account when we have exchanged and I would kindly ask that you wire the money over.

I look forward to hearing from you.

Yours sincerely

Rupert Kenlock"

25. The claimant submits in effect that there was an implied term of the agency contract founded upon the presumed intention of the parties that Mr. Kenlock will not deprive the agents of their commission by committing a breach of the contract between Mr. Kenlock himself, and the purchaser (represented by Attorney at Law, Mr. Stuart Lockhart) which in effect prevents or releases the purchaser from paying the purchase price.⁷ Lawton LJ in the ***Alpha Trading*** case said this: "*Once the signing has been done, the agent is in a different position altogether, because by that time the principle has accepted the benefit of the agent's work. In those circumstances, he ought not to be allowed to resile from his obligations to the agent. As a matter of business efficiency, if principals in that sort of situation could behave in the way described by Templman LJ in his judgment, agents would not work for them. In other words, the whole relationship of principal and agent depends on the principal accepting his obligations to the agent once the agent has done his work and the principal has accepted the benefit of it*"
26. The claimant submits further, that if Kenlock acted to prevent the completion of the performance of the agency contract, then the claimant can recover damages for a breach of contract. The court notes that there are two contracts here; one between the claimant and the Defendant – the agency agreement; and the other between the Defendant and the purchaser (not a party to this action) –

⁷ See Templman LJ. In *Alpha Trading Ltd. V Dunshaw-Patten Ltd* [1981] 1 ALL ER 484

the share purchase agreement. The claimant cites from Chitty on Contract⁸ at para 1404 thereof, the following in support of this proposition⁹; *If the other party to the contract wrongfully prevents the plaintiff from completing his performance, the plaintiff may either recover damages for breach of contract or alternatively sue upon a quantum meruit to recover reasonable remuneration for his part performance.*

27. The claimant has in its closing submission relied on several authorities not least of which is Luxor Ltd v Cooper 1941 All ER 44(45). The statements of the law by Lord Russell and Lord Wright cited by the claimant I think very instructive and I set it out below. At pp 45 Lord Russell stated: *"The position will no doubt be different if the matter has proceeded to the stage of a binding contract having been made between the principal and the agent's client. In that case, it can be said with truth that a "purchaser" has been introduced by the agent. In other words, the event has happened upon the occurrence of which a right to the promised commission has become vested in the agent. **From that moment, no act or omission by the principle can deprive the agent of that vested right"** (emphasis supplied).*

28. Lord Wright stated: *"It may well be, as I have already stated, that, as soon as a building executor contract is effective between the employer and the purchaser, a different state of things arises. The property is transformed in equity, and the seller can be specifically ordered to complete. The agent may then fairly claim that he is entitled to his commission, or at least to substantial damages, and, as at present advised, I think that a term of that nature may be implied in the contract. It cannot have been contemplated that, when a binding contract with the purchaser has been made on the agent's meditation, the principal can, as between himself and the agent, break that contract without breaking his contract with the agent. I understand that this was the view of SCUTTON LJ and, though the question does not arise in this case, I am, as at present advised, in agreement with it. In that case, it may fairly be said that the employer perverted the fulfillment of the condition, and was in default under the commission agreement just as much as under the agreement for sale. While the matter is still in negotiation, however, it is a different matter."* The claimant in the instant case,

⁸ General Principles, 25th Ed.

⁹ See also Halsbury's laws of England 4th Ed. Volume 9 at para 359; the claimant also cites George Trollope & Sons v Martyn Bros [1934] 2KB 436 CA.

Antigua Real Estate Ltd, suggests that the executed share purchase contract was such that the purchaser could have sued upon it for the defendant's (Mr. Kenlock) breach. The claimant disparages any suggestion that the terms of the agreement were still in negotiation.

29. The claimant submits that on the evidence and the authorities, the defendant is liable to it for the commission of \$50,000.00. It contends that the loss and damage for the breach of contract is that which in effect amounts to a vested right to the \$50,000.00.

30. This is the gravamen of the case for the claimant.

31. Finally, in reply to the defense that the claimant cannot rely on the Agreements in this case because they are not registered in accordance with the Records and Registrations Act, the claimant submits that the agreements are not concerned with the sale of land but with the sale of shares, therefore do not require registration.

DEFENDANT'S CASE

32. The Defendant agreed to pay the Claimant a Commission upon the completion of the sale of the shares to the Claimant's client and not otherwise.

33. The share purchase agreement referred to in paragraph 4 of the Statement of Claim is not registered as a Deed in accordance with the registration and Records Act Cap 375 and as such is inadmissible and cannot be pleaded or relied upon by the Claimant.

34. The Defendant denies paragraph 5 of the Statement of Claim and contends that (i) he executed and delivered an undated copy of the aforesaid sale agreement to the office of the Claimant on or about 16th May 2007 (ii) On 16th May 2007 the Defendant wrote to the Claimant via e-mail instructing them, inter alia, to hold the aforesaid purchase agreement to his order pending execution of the agreement by the purchaser and delivery of the agreed deposit (iii) The Defendant never gave the Claimant instructions to release the aforesaid agreement (iv) The Claimant, without lawful authority delivered the said agreement to the aforesaid client of the Claimant but only after

the Defendant had informed them that he no longer wished to proceed with the contract with the Claimant's client.

35. In the circumstances, the Claimant is not entitled to any damages, interest, costs, or to any other remedy

FINDINGS AND CONCLUSION

36. That there was an agency agreement between the parties is in the court's view not in dispute. The terms of that agreement are as alleged and proved by the claimant.

37. At the onset, let me deal with the proof and the argument with respect to the effect of the Registration of Records Act (the Act). There is a dearth of authority in support of the defendant's contention that the claimant cannot rely on the written agreement in support of its case. This prohibition if you will does not extend to the subject matter of the document/deed. The Act does not preclude reliance on evidence other than documentary evidence. The question to be resolved here on this point is whether the claimant has led sufficient evidence of the terms of this contract other than the documentary evidence. Looking at the evidence in chief and cross examination of Peter Magliocco, Stuart Lockhart and the Defendant himself, and without recourse to the subject documentary evidence in the bundles, there is sufficient evidence of the terms of both contracts in this matter so as to render the effect Act somewhat irrelevant.

38. The legal authorities cited in this case are supportive of the claimant's contention that once the party completes its obligation under an executed agency contract he is entitled to the fruits of that contract. The court accepts this as the prevailing law. The defendant contends however, that the SUBSTANTIVE purchase agreement had not been concluded with his authority. The facts are that he had signed the purchase agreement. He agreed to the final version in his e-mail of the 21st May 2007.¹⁰ The defendant contends in effect, that he had sent the signed contract for sale of the shares in the company that owned the property to the claimant, with the instructions to hold it until he gave instructions to exchange it.

¹⁰ See page 17 of the Trial Bundle B

39. The Defendants instructions that the claimant hold the transfer documents “to my order”, are buttressed by the further instructions that the documents be dated accordingly **‘upon receipt of the prospective purchasers signed agreement’**¹¹. This in my view directs the claimant that after receiving the purchasers signed purchase agreement and cleared deposit funds, hold on to the defendant’s transfer documents. A series of communications take place between the claimant and the defendant concerning the wording and content of the purchase agreement culminating in the e-mail of the 21st of May 2007 where Stuart Lockhart, Attorney at Law, agrees with the final version of the agreement in an e-mail to the defendant.
40. The defendant replies; *“is it possible for me to confirm in writing via e-mail my acceptance of these final amendments?”* Presumably, at the time of responding to the e-mail from Mr. Lockhart he had not yet accepted the final amendments for he would have confirmed this in the said e-mail. In his e-mail of the 16th May 2007,¹² Mr. Kenlock, in the courts view, in effect requested that he be contacted in his office when the claimant proposed to exchange contracts. There is no evidence that this took place. Further, there is no evidence that the defendant ordered the closing of the transaction. There is no evidence that Mr. Kenlock confirmed his acceptance of the final amendments¹³. The e-mail of the 18th from the claimant makes it abundantly clear that the claimant understood his limitations as having to await instructions from the defendant for the release of at least the other transfer documents.
41. In my view the defendant did not commit himself to the sale. He advised his agents, in effect, to hold back completion until he said otherwise. The court so finds. It appears that he may have been motivated by the prospect of another higher offer which at an earlier point the claimant may not have been aware of. The terms of the purchase agreement and breach thereof (if that is what took place at all) are between the defendant and the prospective purchaser. The terms of the agency agreement between the claimant and defendant revolve around the central condition set out in the e-mail from the defendant to the claimant of the 30th April 2007¹⁴; **“...if your introduction led to a sale from a specific applicant then I would be happy to pay you a 5% fee.”** The introduction

¹¹ The evidence does not on a balance of probabilities establish that the purchasers signed agreement had already been exchanged. The terms of the agreement were not entirely settled.

¹² See pp 10 of the TB-B

¹³ See also e-mail of the 18th May 2007 from Kenlock to Claimant at pp 11 of TB-B

¹⁴ See pp 1 of the Bundle- B

did not lead to a concluded sale. There is insufficient evidence for the court to determine that the contract between the defendant and the prospective purchaser had been concluded, or even that the prospective purchaser was of the view that a contract had been concluded between them. The prospective purchaser was neither a party nor witness in this action. The court is not satisfied that the prospective purchaser would have a cause of action against the defendant for breach of contract and a remedy in specific performance. Even if the prospective purchaser did have a cause of action against the defendant he did not pursue it. In the end, if contrary to the defendant's instructions the sale had gone through, the defendant would have had a cause of action against the claimant¹⁵.

42. For the claimant to succeed on this action, the claimant must show that the defendant unlawfully prevented the purchase agreement from being concluded. For if the purchase agreement had been concluded, the conditions for the enforcement of the agency agreement would have existed. The Court does not believe that the claimant has proved that fact on the balance of probabilities. The claimant may feel that he did much work in bringing the prospective purchaser and the defendant to the stage that they were this is not unusual in matters of this nature. The agreement in the court's view does not allow for the quantification of a quantum meruit claim either.

JUDGMENT ORDER

FOR THE REASONS PROVIDED ABOVE, IT IS HEREBY ORDERED AS FOLLOWS:

- i. Judgment for the Defendant
- ii. The claim is dismissed in its entirety
- iii. Costs pursuant to the Prescribed Cost Scale



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JUSTICE DAVID C HARRIS
ANTIGUA AND BARBUDA

¹⁵ The agent would arguably have had the ostensible authority to conclude the sale.