

Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. F.055 OF 1992

BETWEEN

ERROL FINDLAY

A N D

C.D. ALEXANDER REALTY COMPANY
LIMITED

PLAINTIFFS

A N D

ROBERT SMITH

DEFENDANT

Mr. David Henry instructed by
Miss Gloria Hendricks for Plaintiffs

Mr. Anthony Pearson instructed by
Messrs Playfair, Junior Pearson &
Company for Defendant

Heard: 19.3.96, 21.3.96, 27.3.96 &
4.10.96

Judgment

McCalla J, (Ag)

In this matter by a Writ of Summons filed on the 10th of April, 1992 the Plaintiffs sought to recover the sum of Ninety thousand dollars (\$90,000.00) against the Defendant pursuant to an oral agreement concluded between the first Plaintiff and the Defendant.

The first Plaintiff was at the material time a real estate agent employed to the second named Plaintiff which is a limited liability Company involved in the purchase and sale of real estate.

In the statement of claim as amended the Plaintiffs averred that by this oral agreement the Defendant Robert Smith agreed to contract the services of first Plaintiff Errol Findlay as a servant of the second Plaintiff C.D. Alexander Realty Company Limited in finding a suitable purchaser for his premises situated at No. 3 Devon Close in the parish of St. Andrew at a price of not less than 1.8 million dollars. The Plaintiffs further averred that pursuant to the oral contract the defendant agreed to pay 5% of the purchase price as remuneration for the services of Mr. Findlay.

The Plaintiffs pleaded that Mr. Findlay found a willing purchaser in the person of Mr. Patrick Byles, that the Defendant entered into an agreement to sell the said premises to Mr. Byles but made no arrangements in the agreement for sale for payment of the commission despite their protests.

The Plaintiffs contend that the Defendant effected a transfer of the said premises to Mr. Byles at a price of 1.7 Million dollars having entered into the negotiations for sale as a result of the services rendered by them and has refused or neglected to pay a commission of 5% of the sale price.

It is pleaded further and/or alternatively at para. 10 of the Further Amended statement of claim that implied terms of the contract entered into between the Plaintiffs and the Defendant were as follows:

- i) The Defendant would not negotiate with a party introduced by the Plaintiffs to the Defendant for sale of the said premises at a price less than 1.8 Million dollars without first advising the Plaintiffs and giving the Plaintiffs the opportunity of negotiating and concluding the said sale at 1.8 Million dollars.
- ii) The Defendant would permit the Plaintiffs to conduct negotiations of the sale price with persons introduced by the Plaintiffs to the Defendant.
- iii) The Defendant would not do any act which would prevent or make it less probable for the Plaintiffs to receive the commission on the sale.

The Plaintiffs' complaint is that the Defendant in breach of this contract conducted negotiations with Patrick Byles to their exclusion and concluded the sale of his premises to Mr. Byles at ^a price less than 1.8 Million dollars but failed to inform them of the sale and thereby deprived them of the opportunity of negotiating the sale price with the purchaser. The Plaintiffs claim the sum of \$90,000.00 being 5% commission on the sale of 1.8 Million dollars, damages and interest.

In the Amended Defence it is denied that any commission is payable to the Plaintiffs.

Para. 2 of the Amended Defence reads as follows:

"The Defendant says that he agreed to pay to the Plaintiffs a 5% commission on the sale price on premises No. 3 Devon Close **PROVIDED THAT THE SALE PRICE WAS NOT LESS THAN 1.8 MILLION DOLLARS** and

Para. 3 "Para. 4 of the Amended Statement of Claim is denied and the Defendant says that Patrick Byles was not a willing Purchaser for that he refused to pay a sum greater than \$1.7 million which sum was eventually agreed to by the Defendant.

Para. 4 "Para. 5 of the Amended Statement of Claim is denied and the Defendant says that an agreement for sale with Patrick Byles was not entered into until after the Defendant's wife showed to Mr. Byles the premises and discussed with him ideas as to its improvement."

By para. 9 of the amended defence the implied terms are denied. The Defendant contends that the only agreement between Plaintiffs and Defendant is as pleaded in para. 2. He denied that the Plaintiffs are entitled to the reliefs claimed or to any relief at all.

The circumstances giving rise to the Action are as follows:

Mr. Findlay gave evidence that on the 27th of January, 1992 having seen an advertisement in a newspaper in relation to Mr. Smith's property, he telephoned a number which was listed in the advertisement and subsequently visited the property at the invitation of the Defendant and spoke to him. He inspected the property and entered into a discussion with Defendant but the Defendant declined to enter into a written agreement. Mr. Smith stipulated that he would only agree to a transaction if two conditions were met:

- a) If Mr. Findlay should find a suitable purchaser willing to pay 1.8 Million Dollars,
- b) and such purchaser would pay by cash without the protracted transaction of a mortgage.

Mr. Findlay testified that he introduced Patrick Byles to the property, showed him in and around the house, as having met the requirements stipulated by Defendant. He subsequently became aware that a sale of the premises had been effected to Mr. Byles. At no time had he had been advised by Mr. Smith that he was negotiating with or selling the property to Mr. Byles.

Mr. Findlay was cross-examined as to whether he had posed as a purchaser, seen all the rooms and met Mrs. Smith on the first occasion he visited the premises. He denied that the first time he told Mr. Smith that he was a Real Estate Agent was when he presented documents for Mr. Smith's signature. He agreed that Mr. Smith told him he would pay a commission if he found a buyer that could pay 1.8 Million Dollars for his house and that Mr. Smith specified it was to be cash and not by mortgage. He agreed that the price paid to the Defendant for his house was 1.7 Million Dollars.

The agreement for sale and the certificate of the Commissioner of Stamp Duties were tendered and admitted in evidence.

Mr. Findlay agreed under cross-examination that the Defendant told him that his mother and father lived across the road from No. 3 Devon Close but could not recall the Defendant telling him that that was the reason why he did not employ an agent but wanted to sell his house himself.

The Defendant Paul Smith gave evidence that he advertised his premises for sale as his family was growing and he needed additional space. His parents lived at No. 4 Devon Close. He did not wish to utilise the services of a Real Estate Agent. Mr. Findlay came to his house. He could not recall having spoken to him before that as he had spoken to many persons concerning his advertisement. Having shown his house to Mr. Findlay it was only on completion of viewing that Mr. Findlay told him he was a Real Estate Agent from C. D. Alexander Company. Mr. Findlay produced a contract which he refused to sign as he felt he had been deceived and had no interest in using an agent.

His state of mind notwithstanding, Mr. Smith entered into discussions with Mr. Findlay concerning the sale of his property. His evidence on this point is as follows:

"He asked me to allow him to represent me in the sale of house. He asked also that if he represented me he would require a commission. I explained to him if he is going to require a commission I would need 1.8 Million Dollars or more so that I could be able to facilitate my deal with new home and be able to pay a commission also."

The Defendant also told Mr. Findlay that he would require a cash purchaser. He explained to Mr. Findlay the reason why he wanted to "Hand pick" a purchaser. He grew up in the neighbourhood and knew everyone on the road and his parents also lived on the road and it would only seem right to pick a suitable purchaser. He entered into an agreement to sell Patrick Byles his house. He met him when he saw him viewing his house. Mr. Findlay was not present. He entered into an agreement to sell Mr. Byles his house for 1.7 Million Dollars.

Cross-examination by Mr. Henry elicited from him that he was aware before signing the sale agreement that Mr. Byles had visited the premises with the first Plaintiff. The agreement for sale was made on the 28th of February, 1992. He denied that when Mr. Findlay first came to the premises he had introduced himself as a real estate agent.

It was not his view that merely by not signing the Estate Agency contract he would not be required to pay a commission. However he agreed that prior to signing the agreement for sale he knew that the Plaintiff had introduced the property to Mr. Byles. His evidence on this point is as follows:

"Yes, when negotiating with Byles, well knew property introduced to him by Mr. Findlay."

Q. "In fact you had retained Mr. Findlay to act as your agent to sell the property for 1.8 Million Dollars?"

A. Or more.

Q. "Did you make any attempt to contact Mr. Findlay in relation to intended sale to Mr. Byles after you become aware that he was interested in purchasing?"

A. "No."

The Defendant could not recall whether prior to signing the agreement for sale Mr. Findlay had made a demand for a commission. When exhibits 3 and 4 were put to him he agreed that he was aware of the claim being made but that the position he maintained was that he was ^{not} obliged to pay a commission as the sale was at a price less than \$1.8 Million Dollars. The sale was concluded in about eleven (11) days and Mr. Byles was an ideal purchaser.

The Defendant agreed that there was one small hitch in dealing with Mr. Byles; namely the real estate commission. When Mr. Byles made offer of \$1.7 Million Dollars he did not consider it necessary to contact Mr. Findlay but his understanding was that when Mr. Findlay subsequently contacted Mrs. Smith it was in relation to his commission. He agreed that he never advised Mr. Findlay of the intended sale to Mr. Byles and had conducted negotiations with respect to the sale but denied excluding Mr. Findlay from those negotiations.

Evidence presented which was not disputed and was accepted by the Court was as follows:

Orally the Defendant agreed to retain the services of the first Plaintiff to sell his premises on condition that he found a purchaser for a price of not less than 1.8 Million Dollars and such a purchaser was willing to pay cash or enter into a transaction which could be expeditiously concluded.

The property was introduced to the purchaser by the first Plaintiff and he was an ideal purchaser. Prior to the sale being concluded the Defendant was aware of a demand being made for payment of a commission but he took no steps to contact the Plaintiffs in relation to the intended sale.

'Plaintiff's counsel placed reliance on the case of James T Burchell and Gowrie and Blackhouse Collieries Ltd. 1910 A.C. P. 614 and made reference to Friedman's Law of Agency 3rd Edition at P. 141 and the principles therein stated in support of his submission that the obligation to pay the estate agent's commission exists by virtue of contract express or implied between principal and agent; that the agent will have earned his commission if he is the direct, effective or efficient cause of the event upon the occurrence of which the principal has agreed with the agent. Even if the actual sale has not been concluded by the agent, if the relationship of buyer and seller has been brought about by him, ^{he} is entitled to his commission.

It was submitted that in this case the first Plaintiff was excluded from negotiations for the sale and the Defendant's act in so doing has prevented or made it less probable for Plaintiffs to receive the commission pursuant to the agreement.

Plaintiffs' counsel further submitted that although the purchaser has not been called as a witness no inference ought to be drawn that he was not willing to pay more than \$1.7 Million Dollars and that even if he offered a lesser amount the vendor was not entitled to shut out the agent from the negotiations for sale.

Mr. Henry urged the Court to imply the terms pleaded based on the presumed intention of the parties in order to give business efficacy to the transaction and to find that the agent is entitled to his commission.

Defence counsel for his part relied on the case of Howard Houlder & Partners vs. Manx Isles Steamship No. 1923 IKB P. 110 and submitted that where the parties have made an express contract for remuneration the amount of remuneration and conditions must be ascertained from the terms of the contract.

He submitted further relying on the case of Luxor (Eastbourne) Ltd. (In Liquidation), 1941 1 All E.R. P. 33 that there could 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 vendor and purchaser. However in this case a binding contract of sale has been effected between vendor and purchaser.

He also placed reliance on the case of Jones and Lowe 1945 IKB P. 194 where it was held that the commission payable on the introduction of a purchaser is payable only on the conclusion of a legal and binding contract of sale. He submitted that the conditions of the express contract not having been fulfilled, that is, a sale at a price of 1.8 Million Dollars or more, the issue of the effective cause of sale does not arise.

On the evidence presented the Court found that the Defendant had advised Mr. Findlay that he wanted to sell his property himself for reasons as stated by him in evidence.

The Defendant, after becoming aware that Mr. Findlay was an estate agent nevertheless agreed to retain his services to sell his property for 1.8 Million Dollars or more in order that the 5% commission could be paid without financial detriment to himself.

In the circumstances the Defendant having admitted that there was a verbal agreement with the first Plaintiff to sell his property the issue arises as to whether there should be an implied term that he would not negotiate with a party introduced by the Plaintiffs for sale at a price less than 1.8 Million Dollars without first advising and giving them an opportunity of negotiating and concluding at 1.8 Million Dollars or more.

In my Judgment, the Defendant having agreed to retain Mr. Findlay's services for the purpose stated, it was necessary for Mr. Findlay to have been allowed the opportunity to conduct negotiations with a person introduced by him with a view to selling the property, otherwise how could he have effectively performed his part of the agreement?

Indeed the agreement must have contemplated that the Defendant would have permitted the first Plaintiff to participate in negotiations with persons introduced by him to the property.

On the evidence presented I find that the effort of the first Plaintiff was the real and effective cause of the sale to Patrick Byles with whom the Defendant conducted negotiations to his exclusion. There was no evidence adduced to support the Pleadings at paragraphs 4 and 7 of the amended defence to the effect that but for the discussions between the Defendant's wife and Mr. Byles he would not have purchased the premises.

On the express terms of the oral contract a commission is not payable on a sale at price less than 1.8 Million Dollars. The agreement is silent on the question of a sale to a person introduced by the first Plaintiff at a price less than 1.8 Million Dollars. It is in these circumstances the Court is urged to uphold the implied terms pleaded.

In deciding what must have been the common intention of the parties I considered the following facts which I found established:

- (a) The Defendant had advertised his property for sale as he wanted to conduct negotiations himself in order to hand-pick a purchaser for reasons stated by him and conveyed to the first Plaintiff.

- b) He wanted to obtain a price of not less than 1.7 Million Dollars in order to meet his financial obligations and this he also communicated to the first Plaintiff.
- c) Notwithstanding the above, he entered into an agreement with the first Plaintiff to pay a 5% commission on a sale to a suitable purchaser introduced by the first Plaintiff at a sale price of not less than 1.8 Million Dollars.
- d) The first Plaintiff introduced a suitable purchaser with whom the Defendant concluded the sale of the premises at a price of 1.7 Million Dollars without contacting the Plaintiffs.

In these circumstances the Court found that the common intention of the parties must have been in the terms as pleaded, the express terms of the oral contract withstanding.

When Mr. Findlay introduced Mr. Byles to the Defendant's property he was aware of the conditions stipulated by the Defendant. In excluding the Plaintiffs from the negotiations for sale the Defendant thereby prevented the Plaintiff from attempting to negotiate a sale at a price of 1.8 Million or more in order to earn the commission.

It must have been within the contemplation of the parties that the Plaintiffs would have negotiated with a prospective purchaser at a price of 1.8 Million Dollars or more failing which the Defendant might himself settle for a lesser figure.

In these circumstances the Court finds the Defendant to be in breach of the implied terms of the oral contract as pleaded. No evidence was led as to the market value of the premises but on the evidence presented the property was sold for 1.7 Million Dollars. On the express terms of the oral contract the claim for payment of a 5% commission fails but the Plaintiffs are entitled to damages for breach of the implied terms of the oral agreement.

The Court assesses the damages flowing from the breach of the implied terms of the oral agreement in the sum of \$90,000.00 and Judgment is entered for the Plaintiffs accordingly.

I have considered the matter of interest in light of the rate of interest being claimed. An award of interest is made at the rate of 10% per annum from the 28th February, 1992 to date of Judgment with costs to the Plaintiffs to be agreed or taxed.