

BARBADOS
[Unreported]

IN THE SUPREME COURT OF JUDICATURE
HIGH COURT
CIVIL DIVISION

No. 1984 of 2008

BETWEEN:

REALTORS LTD

CLAIMANT

AND

RONALD ANTHONY RAMSAY

DEFENDANT

Before the Honourable Madam Justice Margaret A. Reifer, Judge of the High Court

**Dates of Hearings: 2013 October 15th, 30th, 31st
2014 December 3rd**

Appearances:

Mr. Ramon Alleyne and Mrs. Richelle Nicholls of Messrs Clarke Gittens & Farmer Attorneys-at-Law for the Claimant

Mr. Larry Smith in association with Ms. Mawena Brathwaite Attorneys-at-Law for the Defendant

DECISION

[1] This case raises for the determination of this Court an interesting question of mixed law and fact.

The Pleadings

[2] This action was started by Writ of Summons in December 2008. The Plaintiff (hereinafter referred to as the Claimant), a Real Estate Agency and registered

company, seeks therein orders of the Court for the recovery of an unpaid real estate commission on the sale of Condominium Unit #103 at Haylie Brae in the parish of Christ Church.

- [3] It claims the sum of \$73,500, the major part of which is made up of a claim of \$64,000.00 being commission at 4% of the purchase price of \$1,600,000. 00, plus Value Added Tax. The Claimant seeks further relief by way of interest on this sum together with costs.
- [4] The core of the Claimant's claim is that pursuant to a (non-exclusive) written agreement between the parties, it found and delivered to the Defendant, in August 2007, 'a willing purchaser' (see agreement of July 31st 2007), Mr. Grenville Phillips (Mr. Phillips) and his wife, who are the persons who ultimately purchased the Unit under a Deed of Assignment dated November 14th 2007 and conveyance of later date.
- [5] In other words, the Claimant's case is, that it was the effective cause of the sale, and as such is entitled to the agreed commission.
- [6] The claim of the Claimant for payment of a commission was formally initiated after it was informed by this purchaser by letter, that the purchase and sale had been completed, and that he (the purchaser) had taken possession of the property towards the end of November 2007. The Claimant states at paragraph 8 of its Statement of Claim that it "intends to rely on the said letter at the trial ... for its full terms and effect."
- [7] The Defendant in this action was not the legal owner of this Unit, but in reality its equitable owner. He entered into an agreement on the 11th August 2006 to purchase the condominium unit at #103 Haylie Brae for the sum of six hundred and thirty-two thousand, five hundred dollars (\$632, 500.00). The transfer of the subject Unit to the Defendant was never completed. This explains why the Defendant did not convey the unit to Mr. Phillips, but rather executed the Deed of Assignment (supra).
- [8] The Defendant herein filed its Defence on January 28th 2009 denying that it was in breach of its agreement with the Claimant. The core of the Defendant's defence to this action can be found at paragraph 6 of this document. In essence, it submits that the Claimant did not introduce the willing purchaser, but rather the introduction of the willing purchaser was made by Sir Fred Gollop (who was at all material times the Attorney-at-Law for Mr. Phillips **and** the Defendant) on or about the 2nd November 2007, when he introduced the purchaser Mr. Phillips to the sale of the Defendant's property #103 Haylie Brae.
- [9] The following Witness Statements were filed on behalf of the parties: Witness Statement of Charles Hoad and Witness Statement of Grenville Winslow Phillips, both of July 27th 2010, for the Claimant; Witness Statement of

Ronald Ramsay and Witness Statement of Sir Fred Gollop QC, both of July 6th 2010, for the Defendant.

- [10] Attempts by the parties to settle this matter in 2012 having failed, and after several changes of attorney by the Defendant and case management of the action, the trial was scheduled and proceeded to completion in October 2013.

The Background to this Action

- [11] The chronology of events leading to the eventual sale/assignment of #103 Haylie Brae to Mr. Phillips is central to the issue for determination by this Court. This chronology of events is largely undisputed by the parties and is set out hereunder.
- [12] In July 2007 the Defendant listed the subject condominium for sale with the Claimant at an asking price of \$1,600,000.00. The agreement was a non-exclusive agreement. The property was listed with other real estate agents and placed in the press for sale: see Witness Statement of Ronald Ramsay. There has been no dispute of this fact.
- [13] It is clear from the Claimant's letter to the Defendant of August 16th 2007, that when attempts were being made by the Claimant on that date to show the property to interested purchaser Mr. Phillips, the Claimant was embarrassed to find out from a third party that the property had already been sold to a Mr. Worme and his wife. (see the Witness Statement of Ronald Ramsay that this proposed buyer was as a result/in response to the advertisement in the press). It is unclear from this letter if the property was shown on that date.
- [14] However, Mr. Phillips confirmed in his Witness Statement of July 27th 2010, and in his oral evidence to this Court, that he was shown the property by Mr. Hoad on August 16th 2007 and had instructed Mr. Hoad to make an offer on his behalf, but was informed a few days later by Mr. Hoad that the Unit was sold to a Mr. Worme.
- [15] This fact was confirmed by the Defendant in his letter to the Claimant dated August 17th 2007. In said letter the Defendant apologized for the embarrassment caused to the Claimant and confirmed the sale of the property to Mr. Worme. The full text of this letter is set out hereunder:

Neil's Plantation
St. Michael
17th August, 2007

Mr. Nick Parravicino
Realtors Limited
Holetown
St. James

Dear Nick,

Thanks for your letter dated 16th August. Although I am on vacation, my office is manned by a skeleton staff, there is usually someone at home and my cell phone is operational. I am therefore puzzled that Bill Hoad was unable to contact me or my wife.

Yesterday morning I received word that the deposit had been made by the prospective purchaser of #103 Mr. Malcolm Worme. Until then I was not in a position to convey information of this sale to any of our real estate agents.

Kindly convey to Mr. Hoad my regret for his embarrassment which, in the circumstances, would have been unavoidable.

With many thanks for your continued efforts on our behalf in respect of the sale of La Finca and the rental of #102 at Haylie Brae.

Regards,

Ronald A. Ramsey”

- [16] It is apparent to this Court that thereafter all attempts by the Claimant to sell this property ceased.
- [17] The sale to Mr. Worme fell through in early October 2007, but this fact was never communicated to the Claimant by the Defendant. In fact, the Defendant deposes in his Witness Statement that he never informed any of his real estate agents that the sale to Mr. Worme had fallen through. (We also glean from the correspondence exhibited that this failed transaction appeared, at that time, to be headed to the law courts.)
- [18] Instead, on November 2nd 2007 the Defendant’s attorney, Sir Fred Gollop (Sir Fred), advised him that he (Sir Fred) had a client who was interested in purchasing #103 Haylie Brae. The identity of the purchaser was not made known to the Defendant at this time, but Sir Fred informed the Defendant that no real estate fees would have to be paid as the purchaser came through him.
- [19] On November 6th 2007, Sir Fred informed the Defendant that the interested purchaser was proceeding. It was made known to the Defendant that the interested purchaser was willing to purchase the Unit without being shown it by the Defendant, having been informed that it was a ground floor unit. It was

made clear in the oral evidence of Mr. Phillips that he was prepared to purchase any Unit in that condominium development, but a ground unit was particularly attractive to him.

- [20] On November 7th 2007, the purchaser Mr. Phillips paid a deposit into the office of Sir Fred.
- [21] By Deed of Assignment dated November 14th 2008, the Defendant and his wife assigned to G. Phillips and his wife and Brentwood Corporation their rights in #103 Haylie Brae. The purchase price was \$1,600,000.00. By separate deed of conveyance dated November 20th 2007, Haylie Brae Inc. conveyed the subject Unit to Grenville Winslow Phillips et ux.
- [22] On the November 13th 2007 the Claimant wrote to the Defendant indicating their knowledge of the fact that the sale to Mr. Worme had fallen through, and very significantly in the Court's opinion, seeking the Defendant's permission to contact Mr. Phillips about the purchase of the Unit. No such permission was given by the Defendant. It is noted that this letter issued approximately one week after the payment of the deposit by Mr. Phillips to Sir Fred.
- [23] The Claimant produced a letter at page 121 of the record which letter is dated June 12th 2007. Given the undisputed chronology, this date is clearly erroneous, but was not challenged or corrected. By this letter, dated June 12th 2007 Mr. Phillips wrote to the Claimant outlining the facts surrounding the purchase by him of #103 Haylie Brae. This Court is of the view that this letter probably followed the event listed below, namely, Mr. Phillips' visit to the offices of the Claimant. In so far as the Claimant indicated in his pleadings that he was relying on this letter for its full term and effects, the said letter is reproduced hereunder:

“Dr. Grenville W. Phillips CBE. JP.
Mullins
St. Peter. BB 26026
BARBADOS

Email: phillips@caribsurf.com
Tel: (246) 422 4399

12 June 2007

The Managing Director
Realtors Limited
Holetown
St James

Attention Mr. Nick Parravicino

Dear Nick,

This letter is in response to your request for me to confirm the circumstances surrounding my purchase of 103 HAYLIE BRAE, a development with which you were associated, in order to facilitate resolution of an apparent misunderstanding.

I had sought to acquire a unit at Haylie Brae and was unsuccessful after two attempts through another real estate agency. At or around July 2007 I telephoned you at your home to ask if any units were available. As I recalled you were off from work recuperating from an injury but you said that you would ask Mr. Bill Hoad of your office to give me a call.

Mr. Hoad telephoned me to say that you had spoken to him and that he would get back to me if anything became available.

Subsequently (*and I cannot recall if Mr. Hoad initiated this second call or if I did*) Mr. Hoad informed me that a unit had become available but that he was awaiting a letter from the owner before showing me the unit.

Shortly thereafter Mr. Hoad called to say that he had received the letter and was now in a position to show me the unit and we arranged a viewing appointment. I met Mr. Hoad at Haylie Brae and was shown unit #103. This occurred in August 2007.

I instructed him to make an offer to the vendor. After not hearing from him for a few days I telephoned Mr. Hoad for an update. Mr. Hoad was rather embarrassed as he said to me Mr. Grenville I must apologise I am so embarrassed *said he*, the people after giving us instructions to sell had apparently sold the unit to Mr. Worme without our knowledge. I said well it does not appear that the gods intend for me to obtain a unit at Haylie Brae.

A few weeks later, after attending a meeting at the Hilton, Sir Fred Gollop, whom I knew had a unit at Haylie Brae, and I were chatting in the car park of the hotel. The conversation drifted to

Haylie and he commented how pleased he was with his unit and I expressed regret at my ill fortune.

He said that he was acting for a client on a matter which I interpreted as a failed sale of one of the units and which I deduced appeared to be heading for court. I said to him why is your client going that route? On which floor is the unit situated, I further inquired. He indicated that it was one on the ground floor. I said to him that I am prepared to purchase the unit. He said that he would speak to his client – whose identity he had not yet disclosed.

Sir Fred then got back to me and said that his client would be prepared to sell and that arrangements would have to be made for me to view the unit. I told him that would not be necessary as I had already seen two units on the ground floor. I had deduced from information then circulating that the unit in question was #103. I assured him that a deposit would be at his office by the following morning. The transaction was completed and I took possession towards the end of November 2007.

Having regard to the long professional relationship which existed between the writer and Realtors Limited I thought if appropriate to inform you as to the circumstances under which the purchase occurred and I so did.

Yours truly

Grenville Phillips”

- [24] On or about November 16th 2007 Mr. Phillips visited the offices of the Claimant (in what was clearly an attempt to effect damage control), and informed them that he had paid a deposit on #103 Haylie Brae. See letter of November 19th 2007 (below).
- [25] On November 19th 2007 the Claimant wrote a letter to the Defendant confirming its knowledge of the sale and claiming therein their entitlement to a commission.

“Realtors Limited

To: Dr Ronald Ramsay
FAX# 436 8564

From: Nick Parravicino
Date: November 19 2007

Dear Dr. Ramsay,

Further to our fax dated 13 November 2007 with regards to Unit 103 Haylie Brae and having received no reply from you we would like to advise the following.

Mr. Grenville Phillips visited our offices on Friday the 16th November and informed us that he had paid a deposit for the said unit at a price of \$1.6 million.

Please advise your attorney that on completion of the sale our commission would be 4% or the agreed selling price which amounts to \$64,000.00 plus 15% VAT of \$9,600.00 totalling \$73,600.00 which should be paid to Realtors Ltd.

Kindly confirm receipt of this correspondence and assuring you of our best services at all times.

We remain yours faithfully,

Best regards

CN Parravicino, BCH
Chairman”

[26] This was followed by the formal presentation of their invoice under cover of their letter of December 10th 2007 after they were advised by Mr. Phillips that the sale had closed.

“Realtors Limited

To: Dr Ronald Ramsay
FAX# 436 8564

From: Nick Parravicino
Date: December 10 2007

Dear Dr. Ramsay,

Further to our faxes dated November 13th and 19th to which we have not had the courtesy to receive a response.

Mr. Grenville Phillips contacted us on Friday afternoon and advised us that the sale has closed. Attached please find our invoice which amounts to \$64,000.00 plus 15% VAT of \$9,600.00 totalling \$73,600.00 which should be paid to Realtors Limited as soon as possible.

Should this commission not be paid within one week of this fax you will force us to seek collection.

We remain yours faithfully

Best regards

CN Parravicino, BCH
Chairman

cc: Mr. David Gittens, QC – Clarke Gittens & Farmer,
Attorneys-at-Law”

The Evidence

- [27] Sir Fred Gollop was not required by the Claimant to be cross-examined (counsel Mr. Alleyne indicated to the Court that he accepted that statement as is). Thus, the evidence provided in his Witness Statement is deemed to be unchallenged.
- [28] He deposed that he was at all material times the attorney-at-Law of the Defendant having conduct of the sale of Unit #103. He was also at all material times the attorney at law of Mr. Phillips.
- [29] He deposes to a conversation between himself and Mr. Phillips on November 2nd 2007 in which Mr. Phillips expressed his interest in purchasing a suitable apartment for retirement. Paragraphs 4 to 13 of his said Affidavit is reproduced hereunder:

“4. When Dr. Phillips mentioned this I advised him that there was a three bedroom Unit at Haylie Brae which was available at the price of \$1,600,000.00. Dr. Phillips indicated his interest in purchasing any Unit at Haylie Brae and said that he had already seen 2 Units on the ground floor but was advised that they had all been sold. I asked whether he wished to inspect the premises and he indicated that he had

already seen 2 Units and assured that would not be necessary. At no point during our conversation did I mention the Unit number of the vendors name to Dr. Phillips.

5. I telephoned Dr. Ronald Ramsay that same evening of the 2nd November 2007 and informed him that I had a prospective buyer, but I did not inform Dr. Ramsay of the buyer's name. I informed Dr. Ramsay in that same conversation that since there was no real estate agent involved there would be no commission due. Dr. Ramsay informed me that he would get back to me by the next day.
6. On the 3rd November 2007 Dr. Ramsay telephoned me and informed me that he agreed to the proposed transaction and it was only at this point did I tell him the prospective purchaser's name was Dr. Phillips.
7. I telephoned Dr. Phillips on the 4th November 2007 and informed him that his offer to purchase had been accepted and it was only at this point did I tell him that the vendor's name was Dr. Ramsay and the Unit number was 103.
8. Dr. Phillips delivered a cheque in the amount of \$160,000.00 representing the deposit on the next day being 5th November 2007 and on the 7th November 2007 my office issued a receipt and I immediately prepared a Contract/Assignment for his signature.
9. I was only informed of the involvement of Realtors Ltd. approximately 1 week later when Dr. Ramsay telephoned me to say that he had received a letter dated 13th November 2007 from them. (I refer to document number 4 found in the Defendant's bundle of documents).
10. I telephoned Dr. Phillips who informed me that it was Realtors Ltd had shown him the 2 Units at Haylie

Brae referred to in paragraph 3 above but he was later advised that none were available.

11. The transaction was completed in November 2007 when the parties signed the Deed of Assignment. (I refer to document number 5 found in the Defendant's bundle of documents)
12. When I realized that there was conflict with Realtors Ltd. regarding alleged commission due on the sale of Unit 103 I convened 2 meetings at my office with the concurrence of Dr. and Mrs. Ramsay who participated in both meetings – I with Dr. Phillips and the other with Realtors Ltd.
13. At the meeting Dr. Phillips confirmed that he had been shown Unit 103. At the meeting with Realtors Ltd (on March 18th 2008) they indicated that their position was that they were the official real estate agent for Dr. Ramsay and as they had shown Dr. Phillips the apartment they were entitled to the commission.”

[30] This Witness Statement confirms in several material respects the Witness Statement of the Defendant and that of Mr. Phillips. Strangely however, Mr. Phillips states at paragraph 10 of his Witness Statement the following:

“10. The sale transaction of the Property was completed and I took possession towards the end of November in 2007. On that occasion I was accompanied by Mr. Hoad who provided me with the security code for the Property.”

[31] Mr. Hoad was tendered for cross-examination by the Claimant. The following questions tendered and answered were instructive:

“Question (Mr. Smith): You agree with me that you had no contact with Dr. Phillips between when you informed him that the property was not available for sale and when Dr. Phillips came in approximately three(3) months later and said he had paid a deposit?

Answer: That is correct.”

[32] It was later put to the witness that having not communicated with Mr. Phillips for three (3) months he (the witness) could not have any knowledge coming from Mr. Phillips that he had a sustained interest in the property.

[33] The following set of questions and answers explained why he (the witness) accompanied Mr. Phillips to the Unit after purchase in November 2007:

“Question: Did you have instruction from Dr. Ramsay to deliver the security code for the gate to Dr. Phillips.

Answer: No, ma’am.”

[34] And in re-examination by counsel for the Claimant:

“Question: How did it occur that you were delivering the keys and security code at Haylie Brae?

Answer: Mr. Phillips informed us that the sale had closed and as lead agents for Haylie Brae, I met him on the premises and handed him the keys to Unit 103 and got the security code for entrance for him.”

[35] Purchaser Mr. Phillips gave evidence for the Claimant. He amplified his Witness Statement by agreeing, when it was put to him by the Claimant’s counsel, that he had a continuing interest in Unit 103 after it was shown to him by Mr. Hoad.

[36] In cross-examination by counsel for the Defendant, however, he admitted that Unit 103 was one of a number of units shown to him in the building and that he had a continuing interest in acquiring a unit in the building. In this cross-examination he expressed doubts as to whether Unit #103 had been shown to him by the Claimant.

[37] The Defendant was the only person who gave oral evidence for the defence.

The Issues Arising

[38] The question for the determination of this Court is whether the Claimant is entitled to the commission on the sale of Unit 103. There is no dispute that there was an introduction. The issue for determination is: Does an introduction to the property translate to the Claimant being the effective cause of the sale? Was the purchaser Mr. Phillips “a willing purchaser” “found” by the Claimant within the meaning of the Agreement between the parties.

Discussion of the Law

- [39] The Claimant urges the Court to find, on the authority of **Foxtons Ltd. v Pelkey Bicknell & Another [2008] EWCA Civ 419** that he is entitled to the relief sought. It invites the Court to find as a fact that it introduced Mr. Phillips to the property and to the sale.
- [40] The Claimant also relied, *inter alia*, on the following authorities in support of its submissions: **Halsbury's Laws of England, Vol 1 (2008), 5th ed. at p. 103; Burney v London Mews Co. Ltd [2003] EWCA Civ. 766; Bowstead on Agency, 15th ed. pgs. 220 and 227; Graham and Scott (Southgate) Ltd. v Oxlade [1950] 2KB 257; Dennis Reed Ltd v Goody [1956] 2 KB 277; Jenifer Jane Dashwood v Fleurets Ltd. [2007] EWHC 1610; Jemmot v Gale et al, BB 1963 HC3; Hawkins v Lorde et al. BB 2004 HC 20.**
- [41] The Defendant argues that the Claimant was not the effective cause of the sale and relies on the following authorities: **Luxor (Eastbourne) v Cooper [1941] AC 108; Jones v Lowe [1945] 1 All ER 194; John D Wood & Co v Dantata [1987] 2 EGLR 23; and Foxtons Limited v Pelkey Bicknell & Anr [2008] EWCA Civ 419; Bowstead and Reynolds on Agency (18th ed.).**
- [42] He takes the view that even if the Claimant introduced Mr. Phillips to the property, it certainly did not introduce him to the sale. In his view, Sir Fred introduced the property to Mr. Phillips and was the effective cause of the sale.
- [43] **Chitty on Contracts 28th ed. Vol. 2 at 32-140** expresses the following principle and it is this: where an estate agent claims that he has earned the right to commission, the test is whether upon the proper interpretation of the contract between the principal and the agent the event has happened upon which commission is to be paid.
- [44] In **Bowstead and Reynolds on Agency 18th ed.**, under the caption "Entitlement to Commission", the learned authors write at paragraph 7-017 that:
- "Whenever an estate agent claims his remuneration the court must determine, as a matter of construction of the particular agency contract concerned, whether the event has occurred upon which the agent's entitlement to remuneration accrues. 'No general rule can be laid down by which the rights of the agent or the liability of the principal under commission contracts are to be determined. In each case these must depend on the exact terms of the contract in question, and upon the true construction of those terms.'" (emphasis mine)**
- [45] In **Midgley Estates Ltd v Hand [1952] 2 QB 432 at 435-436 Jenkins LJ** went on to summarize the relevant principles:

“The question depends on the construction of each particular contract, but *prima facie* the intention of the parties to a contract of this type is likely to be that the commission stipulated for should only be payable in the event of an actual sale resulting. ... That is, broadly, speaking, the intention which, as a matter of probability, the court should be disposed to impute to the parties. **It follows that general or ambiguous expression, purporting, for instance, to make the commission payable in the event of the agent ‘finding a purchaser’ or ... ‘selling the property,’ have been construed as meaning that the commission is only to be payable in the event of an actual and completed sale resulting, or, at least, in the event of the agent succeeding in introducing a purchaser who is able and willing to purchase the property. That is the broad general principle in light of which the question of construction should be approached; but this does not mean that the contract, if its terms are clear, should not have effect in accordance with those terms, even if they do involve the result that the agent’s commission is earned and becomes payable although the sale in respect of which it is claimed, for some reason or another, turns out to be abortive.**” (emphasis mine).

[46] At one time it was frequent for estate agents to stipulate for their commission on some such event as “the introduction of a purchaser” or on “finding a purchaser” or “finding someone to buy”. Whenever the event is referable to a contract ultimately taking place, commission is not earned until that contract has been made.

[47] The position was expressed in these words at **paragraph 7-018 of Bowstead and Reynolds on Agency**:

“Sometimes the agent is merely asked to “find a purchaser” or to “find someone to buy”. In these cases there must, it seems, be a binding contract to purchase before there can be any question of entitlement to commission.”

[48] Bucknill LJ stated in **Dennis Reed Ltd v Goody [1950] 2 KB 277** at **283** that:

“... the Claimants’ claim to commission is not established merely by showing that the person whom they introduced was able and willing to purchase the property at any one particular moment of time: they must prove that he was ready, able and willing to purchase up to the time when

either an enforceable contract for the purchaser of the house is made between the parties or, alternatively, up to time when the vendor refused to enter into such a contract on terms on which the purchaser is willing to purchase and the vendor was at one time willing to sell.” (emphasis mine)

[49] In determining whether an estate agent has earned his commission, **Bowstead on Agency at paragraph 7-028 (p.271)** states as follows:

“Many agents are employed upon terms that if a certain transaction is brought about, they will be entitled to a commission calculated by reference to the amount of consideration passing in that transaction or to a stated fee. Sometimes the transaction is carried out but has not been brought about as a result of the agent’s efforts. Sometimes the agent has played a part in bringing about the transaction but only a small part, or he has only achieved a partial success ... Has the agent earned his commission?

The answers to these questions depend upon the express or implied terms of the relevant agency contract. **But a large number of them interpret the agent’s contract in connection with a sale on the basis that to be entitled to commission the agent must be the, or at least an, effective cause of the sale. This seems to result ‘from the use in the agency agreements or expressions such as ‘find a purchaser’ or introduce a purchase’ ... It would have been quite artificial to suppose that the parties intended that the agent should earn his commission simply by finding an individual who, independently of any further action by the agent, later agreed to buy the subject property.”** (emphasis mine)

[50] Thus, an agent employed to achieve a particular purpose will not be entitled to commission unless he is the effective cause of the purpose being achieved. Remuneration can be claimed only on transactions which are the direct consequence of the agency.

[51] The agent will normally be entitled to his commission if he causes a person to negotiate with his principal and contract, no substantial break in the negotiations having taken place. It appears that the agent does not have to complete or even take part in the negotiations, nor arrange any meeting nor

persuade either party to enter into the contract. It is not necessary that the agent should

actually complete the transaction, but he must show that it was brought about as the direct result of his intervention, see **Bowstead on Agency at 7-104.**

[52] In **Millar, Son & Co v Radford (1903) 19 TLR 575** the defendant instructed the Claimants to find a purchaser, or failing a purchaser, a tenant. The Claimants introduced a person who took a seven-year lease and were paid commission accordingly. After the tenant had been in possession for about 15 months, the tenant bought the freehold from the defendant. The defendant claimed this was the result of fresh and independent negotiations between him and the purchaser. The Claimants claimed the sale commission less the letting commission. They contended that they had a continuous retainer, not an alternative retainer, and that the only reason the purchaser had not purchased the freehold originally was that he did not have the funds at the time. The judge found no evidence of a contract, so the Claimants appealed.

[53] The Court of Appeal in dismissing the appeal held that the Claimant was not entitled to the commission since he had not brought about the sale and was not the effective cause of it taking place. **Lord Collins MR** said that there must be a contract to find a purchaser or a continuous retainer, but there was neither. He also stated that it was not sufficient merely to show that the agent's action was an indispensable cause. It was necessary to show that the introduction was an effective cause in bringing about the letting or the sale.

[54] Moreover, the fact that one agent introduces a person who ultimately purchases after a later introduction by another agent will not necessarily entitle the first agent to a commission. In such a case the court must determine which of the two agents was the effective cause of the transaction taking place: **Bowstead on Agency paragraph 7-029 at p. 281.**

[55] It follows therefore that, where several agents are concerned in negotiating a transaction between the principal and a particular third party, the agent entitled to remuneration is not necessarily the agent who first introduces the business to him, but the agent who is the effective cause of the transaction being completed: **Halsbury's Laws of England, Vol. 1 at paragraph 104.**

[56] In **Chasen Ryder & Co. v Hedges [1993] 1 EGLR 47** the vendor first instructed the Claimants to sell his residential home. They introduced several people, but no offers were made. The vendor went to another firm of agents. One of the original enquirers returned and eventually bought the property. The vendor paid the second agent only. The first agent sued, and the defendant appealed.

- [57] It was held that the test of whether an estate agent can sue for having introduced a purchaser is whether he has introduced the purchaser to the purchase transaction, not merely to the property.
- [58] The burden lay first on the agent to show that his introduction had been the effective cause of the purchase. The court might infer that causation from the introduction, but the defendant might show another effective cause of the sale. There the first introduction had not produced a result, but the second did. Therefore, the first agent was not the effective cause of the sale and was not to be paid.
- [59] See also the case of **John D. Wood Co v Dantata (1987) 2 EGLR 23** where Nourse LJ considered (page 25K-L) that the phrase “introduction of a purchaser” meant “the introduction of the person who ultimately purchases, not to the property but to the purchase ... to the transaction that takes place”. See also: **Foxtons Limited v Pelkey Bicknell and Another [2008] EWCA Civ 419**.
- [60] The case of **John D. Wood Co v Dantata** (supra) concerned claims for commission by two firms of estate agents alleged to be due from the vendor on the sale of the same property to the same purchaser. The issue to be decided was which of the two firms of estate agents had been the effective cause of the sale. The Court found that the other firm (the successful agents) which had made the first contact with the ultimate purchaser was the effective cause of the sale. Although this was not conclusive by itself, when it was combined with the firm’s subsequent achievement in persuading the purchaser to raise his figure to the amount acceptable to the vendor, it justified the judge’s finding.
- [61] Notwithstanding an agent’s right to receive commission if he effects a sale, the principal has the right to sell his property. That was the decision of the House of Lords in **Luxor (Eastbourne) Ltd & others v Cooper [1941] AC 108**. The House held that where an agent is promised a commission only if he brings about the sale which he is endeavouring to effect, a property owner is under no implied obligation not to deal with his property in such a way that the estate agent was deprived of the opportunity of earning the agreed commission.

Fleurets Distinguished

- [62] The case of **Fleurets Ltd v Dashwood [2007] EWHC 1610** can be distinguished from these circumstances as this court’s interpretation of the contract in this case differs substantially from the contract in **Fleurets**. **Fleurets** was cited by the Claimant, in support of the proposition that the Claimant need not be the effective cause in order to be entitled to commission

from the sale transaction. Fleurets removed the requirement for an estate agent to prove that it was the effective cause of the sale before that agent can legitimately claim a sale fee in circumstances where the parties are operating under a **sole selling rights agreement** (my emphasis). There, the Court of Appeal accepted that the terms clearly set out when the agent was entitled to its fee, and that those requirements were met. He therefore ruled that an agent did not have to introduce and negotiate in order to be entitled to the payment of a commission under the agreement.

[63] The contract in the instant case did not constitute the Claimant as the sole exclusive agent for sale, these being circumstances in which it would get a commission on a sale effected by them only.

[64] The rationalization/analysis of **Lynskey J. in Jack Windle Ltd. v Brierley [1952] ALL ER 398** makes interesting reading. He states as follows:-

“An agent is only entitled to commission if he introduces a ready, willing, and able purchaser. It is true that the Claimants introduced Mr. Greatorex, but at the time of the introduction and right up to May 17, **although Mr. Greatorex was a willing purchaser, he was not able purchaser. He had not the money. I am satisfied that on May 12 negotiations for the sale had ceased and the effect of the introduction, although to some degree it remained, was really no longer an operating factor in the sale of the property thereafter.**” (emphasis mine)

[65] This speaks to the courts construing these types of contracts to mean that the commission is only payable in the event of an actual sale or a purchaser who is able and willing to purchase the property.

Findings of Fact and Disposal

[66] It is, in the considered opinion of this Court, a significant factor that the property listing was not exclusive. There was an express contract for remuneration, but the event upon which the Claimant was entitled to remuneration was the Claimant finding a purchaser (who was able and willing to purchase the property).

[67] It is not reasonable to argue on a construction of the contract that the parties intended that the Claimant should ‘earn its commission simply by finding an individual who, independently of any further action by the Claimant, later agreed to buy the subject property’, especially in the context of a non-exclusive listing: see **Burgess JA in Systems Sales Ltd v Arletta Brown-Oxley, Civil Appeal No.10 of 2006** and in **E. Phil & Sons A/S v BrØndum**

A/S (Denmark) Civil Appeal No.24 of 2012 where he stated that “the basic principles which should guide our courts in the interpretation of contracts are those enunciated by Lord Hoffman in **Investors Compensation Scheme**, namely, the Contextual Approach.”. In that case Lord Hoffman stated:

“(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.”

- [68] In the opinion of this Court, the acceptance by all concerned of the Witness Statement of Sir Fred Gollop, who was not called to be cross-examined, speaks significantly to this Court’s findings of fact in this matter.
- [69] This Court finds as a fact that Mr. Hoad showed Mr. Phillips unit #103, but this court is of the view on a review of the law that this was not enough, as was argued by counsel for the Claimant.
- [70] This Court also finds as a fact that Mr. Hoad never communicated Mr. Phillips’ offer to the Defendant. In this regard, reference is made to his letter of August 16th to the Defendant in which he expressed his embarrassment after being told by “Rusty” that the unit had been sold; and paras. 2 to 4 of Mr. Phillips’ Witness Statement in which he stated that he instructed Charles Hoad to make an offer to the Defendant, but was informed that the Defendant had already sold the property to Mr. Worme.
- [71] Significantly, the Claimant was never in a position to make an offer on Mr. Phillips’ behalf to purchase the property or for that matter to enter into negotiations with Mr. Phillips on behalf of the Defendant either before the proposed sale to M. Worme or subsequent to its discovery that the sale to M. Worme had fallen through.
- [72] It is the Court’s finding that the purchaser Mr. Phillips had a continuing interest in purchasing a unit at Haylie Brae, and not specifically a continuing interest in Unit #103. He saw several units; but in any event, this case does not turn on that finding.
- [73] This Court finds that the Defendant’s letter of August 17th 2007 ended the Claimant’s agency with respect to Unit #103. That the Claimant was fully aware of this, is made clear by its letter of November 13th 2007 to the Defendant seeking his permission to show the unit to Mr. Phillips as they had become aware that the Worme transaction had fallen through.
- [74] Also, this Court finds that in handing over the keys and giving the code to Mr. Phillips in November 2007, Mr. Hoad was NOT acting as the agent of Dr. Ramsay, but rather, of Haylie Brae Inc.

- [75] In view of the fact that the Claimant never communicated Mr. Phillips' offer, it did not introduce a willing purchaser in Mr. Phillips to the Defendant.
- [76] Mr. Phillips' visits to the Claimant were by way of damage control given his long-standing and cordial relationship with the Claimant, and was not pursuant to the introduction made by Mr. Hoad.
- [77] The law is that the Claimant must be the effective cause of the sale of the property and I find as a fact that he was not 'the' effective cause of the sale or for that matter "an" effective cause of the sale. Sir Fred was the effective cause of the sale: the property was available for sale by anyone; the Claimant was not an exclusive agent; it was Sir Fred who informed the purchaser of the availability of the property; it was Sir Fred who contacted the Defendant and advised that he had a potential purchaser; it was Sir Fred who thereafter received the deposit on behalf of the Defendant and sold the property to the Purchaser.
- [78] In view of the foregoing, the Claimant's action is dismissed with costs to the Defendant, to be assessed, if not agreed.

MARGARET A. REIFER
Judge of the High Court