

CJ

OPEN COURT

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO: 44/1997

5-05-00

BETWEEN : CAROLYN CUPIDON

Plaintiff

AND: RE/MAX FIRST REALTY OF CAYMAN LTD.

First Defendant

AND: KIM DOUGLAS LUND

Third Defendant

Appearances:

Ms. Samuels-Brown and Mr. Peter Polack for the Plaintiff
Ramon Alberga Q.C. and Mrs. Linda Dacosta for the Defendants

Before Sanderson, J.

RULING

On the morning of the first day of trial the Plaintiff brought application pursuant to GCR Order 24 Rule 10 (1), for further discovery of the Defendant's documents. The application was not supported by any affidavit material but rather reference was made to the pleadings, the parties' documents and correspondence. During the course of her submissions, Plaintiff's counsel, expanded her application to include an application pursuant to GCR Order 24 rule 12.

Her notice listed 11 documents or classes of documents, production of which she sought.

They were as follows:



- “1. Franchise Agreement correspondence and documents between RE/MAX International Inc. and First Realty of (Cayman) Ltd. and/or Kim Lund and/or Brenda Lund requested 15th February 2000.
2. Copies of all invoices, correspondence and documents relating to rent, office overhead, furniture and equipment leases, utilities, telephone bills, secretarial and administrative expenses, janitorial and other professional services, local and international advertising and the like for the period 29th November 1993 to 31st March 1994 requested 15th February 2000.
3. Copies of any correspondence and documents relating to the RE/MAX Dispute and Resolution Commitment policy or Practice under No. 7 of the agreement of 29th November 1993 requested 15th February 2000.
4. Proof of payment of the Plaintiff's membership affiliation with RE/MAX International Inc. under No. 4(b) of the Independent Contractor Agreement of 29th November 1993 requested 15th February 2000.
5. Copies of any cheques, deposit slips, receipts or documents in regard to commissions paid to the Defendants in respect of the following sales requested the 28th February 2000:-
 - (1) Palms No. 9
 - (2) Commonwealth No. 9
 - (3) Avalon No. 23.
6. Copies of any inter-office notices or other memos, documents to Real estate agents by the Defendants between 29th November 1993 and 31st March 1994 requested 25th February 2000.
7. John Pitrun first offer of purchase on or about 24th December 1993 Re: Palms No. 9 requested 25th February 2000.
8. C.I.R.E.B.A. status change form for Palms No. 9 sale in March 1994 requested 21st March 1998.
9. C.I.R.E.B.A. status change form for Avalon No. 23 sale in July 1994 requested 21st March 1998.
10. Correspondence and/or documents in proof of my client's



membership affiliation with RE/MAX International Inc. requested 17th February 2000.

11. Plaintiff's files and documents retained by the Defendants on or about 31st March 1994 requested 25th February 2000."

With respect to her application under Order 24 rule 10, she submitted that the documents referred to in her Notice, were all referred to in the pleadings either indirectly or inferentially and, therefore, producible as of right.

She referred to the Supreme Court Practice 1999 at page 477 and quoted from the effect of the rule section as follows:

"Where documents is not specifically mentioned in an affidavit or pleadings or witness statement, but an assertion made in the affidavit or pleading or witness statement gives rise to the inference of the document must or might exist, "reference is made" to it in the affidavit or pleading or witness statement for the purpose of ordering its production only if, on the fair meaning of the words and there contexts, the document is directly eluded to in the affidavit or pleading or witness statement, and not if the reference arises merely by inference;"

Plaintiff's counsel submits that the documents referred to in paragraph 1,2,3,4 and 10 of her Notice are inferentially referred to in the pleadings, in part because they are eluded to in the contract between the parties dated November 29th, 1993. The contract of November 29th, is specially referred to in the pleadings but the documents enumerated



in the paragraph cited above are not. They are only mentioned either directly or inferentially in the November 29th Agreement.

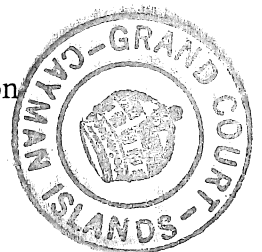
Documents described in paragraph 1 of Plaintiff's Notice

Dealing with the Plaintiff's request for document number 1 – the franchise agreement, it is not referred to in the pleadings, affidavits or witness statements. There is a reference in both the Statement of Claim and Statement of Defence to the November 29th 1993 agreement between the parties. That document referred to the fact that the first Defendant is an independently owned and operated franchise of Remax International. That is all.

I do not think that this reference is sufficient to include the franchise agreement, within the meaning of Order 24 rule 10. I think the rule was intended to cover the situation where a party has made a clear reference either directly or by inference to a document that is in some way relevant to the proceeding. No such reference exists here, in my opinion.

The application pursuant to Order 24 rule 10 for production of the franchise agreement is therefore dismissed.

Alternatively, the Plaintiff claims production of the franchise agreement pursuant to Order 24 rule 12. Mr. Alberga argues that this is not the appropriate form of application but rather that it should be made pursuant to order 24 rule 3 or order 24 rule 7. He



submits that if rule 7 is invoked it must be supported by affidavit. No affidavit being filed in this case he submitted it was fatal to such an application.

I believe that it is possible, particularly during trial, for a judge to order, pursuant to Order 24 rule 10, production of further specific documents, to the Court, if;

1. They are in the possession, custody or power of a party, and
2. They relate to any matter in question; and
3. The Court is of the opinion that the order is necessary either for disposing fairly of the cause or matter or to saving of costs.

It is accepted that any such order is discretionary .

With respect to document number 1, the franchise agreement, I am not persuaded that it is relevant to the issues in this law suit as defined by the pleadings. The pleadings focused on whether or not the Defendant has acted improperly or in breach of their duties to the Plaintiff in respect of entering into the amending agreement or termination of the November 29th Agreement or finally whether or not there was any interference with contractual relations.

I am also not persuaded that it is necessary for that document to be produced in order to fairly dispose of the cause or matter in this case. I therefore dismissed the Plaintiff's application for production of the franchise agreement under order 24 rule 12.



Documents described in paragraph 2 of the Plaintiff's Notice

With respect to the documents referred to in paragraph number 2 of the Plaintiff's Notice, namely, invoices, correspondence, and other documentation relating to the costs of running the business, I note again that there is no reference in the pleadings to any specific documents on these matters. There is reference in the pleading, only to the November 29th Agreement. I conclude, therefore, that such documents are not producible pursuant to Order 24 rule 10.

With respect to the Plaintiff's application pursuant to Order 24 rule 12, Mr. Alberga submits, that there has been no issue raised on the pleadings, because with respect to those amounts or costs, the Plaintiff agreed to pay them and she has not alleged she did not receive consideration for them.

I also observe that even if the documents show that the costs of shared office expenses did not equal the amount actually paid by the Plaintiff that would not necessarily mean that she had a legitimate claim. A party may make an estimate of its costs or indeed simply say what they will charge for certain costs and the actual costs may be irrelevant.

I am satisfied that the Plaintiff has failed to establish that the production of these documents are necessary or indeed relevant to the issues pleaded. The Plaintiff's application for these documents is therefore dismissed.



Documents described in paragraphs 3 of the Plaintiff's Notice

The third category of documents of which the Plaintiff seeks production pertain to the Remax dispute resolution procedure. They are not referred to in any pleading directly or by clear inference and the application pursuant to Order 24 rule 10 is therefore dismissed.

With respect to the application for production pursuant to Order 24 rule 12, I am not satisfied that these documents are relevant or necessary for these proceedings. They may be desirable if the parties wanted to arbitrate the dispute, but it is clear that the Plaintiff has chosen her forum and the Defendant has accepted that. Having done so, there is no lis or issue on that matter. I decline to order production of these documents.

Documents described in paragraphs 4 and 10 of the Plaintiff's Notice

With respect to the documents described in paragraph 4 and 10 of the Plaintiff's Notice, namely, proof of membership of the plaintiff in Remax International, I conclude again, that this does not fall within Order 24 rule 10 as the documents, so far as I can tell, are not referred to in the pleadings, but only in the written contract. The application pursuant to Order 24 rule 10 is, therefore, dismissed.

With respect to Order 24 rule 12 the Plaintiff says that she has claimed return of this \$1,000.00 membership fee. The basis of her claim is that the Defendant have breached their agreement with her and acted in breach of their duties in getting her to sign the amending agreement.



Mr. Alberga agreed, that if the \$1,000.00 was not paid to Re Max International, the Plaintiff would be entitled to its return. I, therefore, direct the Defendants to produce documents referred to in paragraph 4 and 10 of the Notice, if they have them in their possession, custody, or power. If they say they do not have them, they may be subject to cross-examination on that issue.

Documents described in paragraph 5 of the Plaintiff's Notice

In respect to the documents referred to in paragraph 5 of the Plaintiff's Notice, I dismiss the Plaintiff's application which was made pursuant to order 24 rule 10 for the same reasons as previously stated.

With respect to the Plaintiff's application under order 24 rule 12 for production of these documents, which relate to the actual amount of commissions paid and the documents supporting those amounts, Mr. Alberga submits that the plaintiff has never challenged the amount of commissions paid or suggested impropriety. He says, therefore, these documents do not relate to any issue raised by the pleadings. He says that it is outrageous that such an allegation be made at this stage with little or no foundation. There may be significant merit in this submission which may ultimately be reflected in the award of costs but I have, nevertheless decided to exercise my discretion in favour of the Plaintiff.

She has claimed entitlement to certain commissions. In the context of these proceedings I think it is necessary that the documents showing the amount of the commissions



actually paid be produced. Again, only if they are in the Defendants' possession, custody, or power.

Documents described in paragraph 6 of the Plaintiff's Notice

The documents referred to in paragraph 6 of the Plaintiff's Notice were conceded by the Plaintiff to probably not be producible and so the Plaintiff's application is denied.

Documents described in paragraph 7 of the Plaintiff's Notice

With respect to the documents referred to in paragraph 7 of the Plaintiff's Notice, namely an offer to purchase the Commonwealth number 9 property, which was executed prior to the offer that was ultimately accepted, no such reference is made in the pleadings to any such document and I therefore dismiss the Plaintiff's application pursuant to Order 24 rule 10. With respect to the Order 24 rule 12 application the Defendant has said that there was no such document and that it does not have any such document.

The evidence offered by the Plaintiff does not support a conclusion that such a document exists. I, therefore, decline to exercise my discretion in favour of the Plaintiff and her application for those documents is dismissed.

Documents described in paragraph 8 and 9 of the Plaintiff's Notice

With respect to these documents they have been produced and so no order is required.



Documents described in paragraph 11 of the Plaintiff's Notice

With respect to these documents the Plaintiff seeks production of what she described as her listing files which she claims were kept by the Defendant. These documents are referred to in the pleadings and in particular in paragraph 14 (7) (9) of the Statement of Claim and paragraph 12 (7) (9) of the Statement of Defence. In view of the Plaintiff's claim for loss sales and interference of the economic relations by the Defendant I am satisfied that these files are producible. To the extent that they are in the possession, power or custody of the Defendant I direct them to be produced.

I also direct that the aforementioned documents which are producible, be produced by close of business by Tuesday April 11, 2000.

With respect to the matter of costs I note that the Plaintiff's application as filed was based upon production of documents pursuant to Order 24 rule 10 and all but one of those applications was dismissed. During the course of her oral submissions Plaintiff's counsel made further submissions that some documents should be produced pursuant to Order 24 rule 12 and some of those applications were allowed. However, no notice had been given of those applications and no steps had been taken prior to the commencement of trial for production of those documents.



In view of the foregoing I order that the Defendant pay to the Plaintiff $\frac{1}{2}$ of the taxable costs of this application, payable in any event of the cause.

Dated 5th May, 2000

Sanderson

D. Sanderson
Judge of the Grand Court

