

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

**ANTIGUA AND BARBUDA
CLAIM NO. ANUHCV2019/0508**

BETWEEN:

TBS REALTIES INC.

Claimant

and

PHILLIP SHOUL

Defendant

Appearances:

Ms. E. Ann Henry and Ms. Mandi A. Thomas for the Claimant
Mrs. Stacey Saunders-Osbourne for the Defendant

2023: September 26th
November 28th

JUDGMENT

[1] **BYER J:** By Claim Form filed on 19th September 2019 the Claimant brought an action for sums owed to it by the Defendant together with interest. The Claimant's claim is for:

- a. \$135,000.00, being the amount due for real estate commission due from the Defendant to the Claimant.
- b. Interest thereon at the rate of 5 per centum per annum from the 30th November, 2018 as well before as after Judgment until payment or at such other rate or for such other period as to the Court may seem just.
- c. Such further or other relief as the Court may deem fit.
- d. Costs.

[2] The claim is supported by the witness statements of Trevor “Teddy” Santos filed on 18th January 2021 and that of Franklin Maynard filed on 5th February 2021 however Mr. Maynard was not called as a witness at the trial of the matter. Mr. Maynard’s witness statement was therefore not considered by this court.

[3] The Defendant filed a defence on 23rd October 2019 and a witness statement on 19th February 2021.

[4] From the evidence and pleadings filed it is apparent that there are three issues this court must address, namely:

1. Whether there was an intention to create legal relations between the parties.
2. If there was such an intention, what were the terms of the contract between the parties?
3. And if there was a contractual arrangement as between the parties, whether the Claimant is entitled to commission on the sale of parcels 12 and 68.

Relevant Background and Evidence of the parties

[5] The Claimant is a limited liability company which has been engaged in the business of providing real estate services in Antigua and Barbuda for over 31 years. Its business includes the rental and sale of residential and commercial properties around Antigua. The Claimant Company is represented by its owner and Managing Director, Mr. Trevor Santos, in these proceedings.

[6] The Defendant was the registered proprietor of 4 parcels of land which are recorded on the Land Register as follows:

Registration Section:	Potters & Belmont
Block:	613 1891D
Parcels:	12, 66, 68 and 103

[7] Parcel 68 was owned jointly by the Defendant and his wife.

[8] The Claimant contended that in or about May 2015 the Defendant contacted Mr. Santos asking him to find a tenant or buyer for several properties owned by the Defendant and the Defendant's wife. They further contended that the parties entered into an oral agreement whereby Mr. Santos would act as the Defendant's real estate agent with his fee for finding a buyer amounting to five percent of the achieved sale price and the fee for finding a tenant to rent would be in the amount of one month's rent. The Claimant further contended that the agreement also covered the payment of a five percent commission on the sale of either of the premises that were leased to a tenant who had been introduced to the Defendant by the Claimant.

[9] It is the evidence of the Claimant that these terms of engagement were agreed and that, in pursuance of the Agreement, the Defendant provided him with valuations from Mr. Addison Workman and Mr. Wayne Martin which showed the values of the four properties¹.

[10] Ultimately, the Claimant was able to introduce the principals of Amalgamated Security Services (Antigua) Limited ("the Amalgamated Group") to the Defendant.

[11] It is the evidence of the Claimant that, once he started communicating with the Amalgamated Group, he routinely sent emails all of which he copied to the Defendant and which clearly demonstrated the efforts made by him to sell or alternatively, to rent the properties of the Defendant.

[12] In the latter part of 2015, the Claimant prepared for execution, a Lease Agreement for parcel 68 and a portion of parcel 66 which were to be leased to the Amalgamated Group.

[13] Pursuant to what was agreed the Defendant paid the Claimant \$XCD 25,000.00 as the sum representing one month's rental income, for securing the lease of the two parcels of land.

[14] Contained in the said lease agreement drafted by the Claimant into which the Defendant and the Amalgamated Group entered, was a clause in the following terms ("the Clause"):

"Real Estate Agency Fees/Commission

¹ Pages 1- 30 of Core Trial Bundle of documents filed 27/9/2022

- (1) The Lessor hereby agrees to pay TBS Realities Inc the sum equivalent to the first month's rent in respect of its Real Estate Agency Fee/Commission for services rendered herein
- (2) The Lessor hereby agrees, in the event the Demised Premises is sold to the Lessee, the Lessor shall pay to the Real Estate Agent, TBS Realities a Real Estate Agency Fee/Commission of five percent (5%) of the achieved sale price."

[15] In or about the month of November, 2018 the Defendant sold parcels 12 and 68 to the Amalgamated Group for a purchase price of \$XCD 900,000.00 and \$XCD 1,800,000.00 respectively. The total sales amount being \$XCD 2,700,000.00

[16] Subsequent to the sale of the said properties, the Claimant demanded payment of its real estate commission at the rate of five percent of the sales price. However, the Defendant has not paid.

[17] The Defendant contended that the Claimant is not entitled to the five percent real estate commission on the sale of the two parcels of land as there was never any discussion or agreement for such payment in the event the Claimant's client decided to buy the Defendant's property.

[18] In his defence, the Defendant further contended that in any event he never reviewed the Lease Agreement as prepared by the Claimant as he was in the throes of an extremely stressful and emotional time and that knowing that he had a longstanding relationship with Mr. Santos he trusted him.

[19] The Defendant further says that once he became aware of the presence of the Clause, he immediately voiced his objection to the same and notified the Claimant of his objection.

[20] The Defendant has also contended that in any event the Claimant could not rely on any terms of the said Lease Agreement as it was not a party to those contractual obligations and neither did the Lease Agreement contain an option to purchase in favour of the said Amalgamated Group.

[21] The Defendant therefore denied that he is liable to the Claimant for real estate agent commission fees.

[22] The Court will now examine whether and to what extent the Claimant has made out its claim.

Whether there was an intention to create legal relations between the parties.

[23] Guidance on the fundamentals of this is found in the decision of **Montpellier Farm Ltd v Antigua Commercial Bank**² where the Court of Appeal stated that *“whether or not parties intend an agreement between them to give rise to legal relations between them will depend on the circumstances of each case and must be judged objectively. Contracts are not lightly to be implied by a court. Having examined what the parties said and did, a court must be able to conclude with confidence, both that the parties intended to create contractual relations and that the agreement was to the effect contended for. In reaching this conclusion, the court must first find that there is an agreement of the type pleaded.”*

[24] Additionally in **Gregory Gordon v Jacqueline Havener**³ the Court of Appeal stated that when deciding issues of contractual intention between parties *“It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words and conduct, and whether that leads to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Traditionally in the case of agreements in a commercial context, there is generally a presumption that parties intend to be legally bound.”*

[25] The communications between the parties and their conduct are thus critical in resolving this issue.

[26] The court was presented with emails between the Claimant and the representatives of the Amalgamated Group copied to an email address of the Defendant. The accuracy of the email address was not disputed by the Defendant at trial, but his contention was that he was never in receipt of the said communications. For the avoidance of doubt on this issue this court does not accept this contention by the Defendant in relation to the non-receipt of the said emails. This is especially so

² ANUHCVP2011/0007

³ ANUHCVP2015/0030

when at trial, counsel for the Claimant produced an email communication which had been sent to the Defendant as part of an email trail with the Amalgamated Group which he then purported to deal with directly. That, being said, it is important in this context to reproduce relevant portions of the said emails for the purpose of providing context to the discussions the Claimant had engaged in. In these emails, the address used and accepted by the Defendant basicblue@candw.ag is clearly stated.

Email #1⁴

From: "TBS Realities Inc." <tbs@lbsrealitiesinc.com>

Subject: Airway Bill Number

Date: May 14, 2015 at 10:36:21 PM GMT-4

To: Chairman <Chairman@assl.com>

Cc: "stbs@tsrealitiesinc.com»" <tbs@tbsrealitiesinc.com>, phillip <basicblue@candw.ag

Dear Mr. Aboud,

I trust you have received my emails with photos of this property at Scotts Hill owned by Phillip Shoul.

I sent you the related appraisal report for your review and consideration via Federal Express Airway Bill #:8676 1425 9745 and ask that you kindly acknowledge receipt of same at your earliest convenience.

I await your further communication.

Thank you.

Best Regards,

Teddy

⁴ Page 37 of the Core Trial Bundle of Documents

EMAIL #2⁵

From: "tbs@tbsrealitiesinc.com" <tbs@tbsrealitiesinc.com>

Subject: Re: ASSL properties Antigua - Building known as "Big Deal" at Scotts Hill.
Antigua.

Date: October 19, 2015 at 11:04:48 PM GMT-4

To: Ramsey Brian <BRamsey@assl.com>

Cc: phillip <basicblue@candw.ag>

Dear Mr. Ramsey,

Thank you for your emails and comments related to the captioned subject matter.

On behalf of Mr. Phillip Shoul, I advise that he is willing to lease ASSL the captioned property with an option to purchase same within the requested term. The present asking rental rate is approximately EC\$6.50 per sq. ft. and Mr. Shoul is willing to negotiate on this rental rate.

Also, Mr. Shoul advised that he measured the building and discovered that the actual, accurate square footage is 8,400 sq. ft. I will fax (or scan & email) the measurements to you tomorrow for your review.

Here are my instructions pertaining to the lease of the property:

- 1) Term of lease: five (5) years with an option to renew for an additional lease term to be negotiated;
- 2) Option to purchase: ASSL will have an option to purchase the property within the aforementioned five (5) year term;

⁵ Page 39-40 of the Core Trial Bundle of Documents

3) Rental Rate of the captioned building: EC\$6.50 per sq. ft. (negotiable) you may make an offer on this rental rate;

4) Rental Rate of requested 4,220 sq. ft. of uncovered space for vehicle parking and dog kennels;

Mr. Shoul would like you to make him an offer for the lease of this area;

Mr. Shoul also advises that he is also still willing to sell you this property and/or any of the adjacent properties should you decide to purchase instead of leasing; however, either way is fine with him.

Kindly contact me to clarify any of the foregoing and/or any further required information.

Thank you.

Best Regards

Teddy

EMAIL #3⁶

From: TBS Realities Inc. [mailto:tbs@tbsrealitiesinc.com]

Sent: Saturday, November 21, 2015 12:46 PM

To: Brian Ramsey

Cc: phillip <basicblue@candw.ag>

Subject: Re: Property Rental Antigua

Dear Mr. Ramsey,

⁶ Pages 41-43 of the Core Trial Bundle of Documents

Thank you for your email.

First of all I appreciate your comments as stated in your email and here are my responses to your concerns:

[Mr. Santos then goes on to clarify various details about the properties]

Also please remember that you can make an offer to purchase either or all of the properties, which in my humble, I strongly encourage you to reconsider as the total value in rental payments over the years you intend to lease could very well be invested in owning your own property...will very likely have a significant increased value which you can lease or sell and enjoy a profit!

I look forward to your responses and remain optimistic that we can come to a comprise (sic) to achieve an agreement (rental or sale) with mutual benefits.

EMAIL #4⁷

From: "tbs@tbsrealitiesinc.com" <tbs@tbsrealitiesinc.com>

Subject: RE: Draft Lease

Date: December 21, 2015 at 10:48:45 PM GMT-4

To: phillip <basicblue@candw.ag>

Cc: "TBS Realities Inc." <tbs@tbsrealitiesinc.com>

Hi Phillip,

Sorry for getting this to you so late. Please see attached the amended Lease Agreement with all the changes as discussed in the earlier emails, however, please review the entire

⁷ Page 44 of the Core Trial Bundle of Documents

agreement (and also please note the areas highlighted in red which is what we last discussed) and advise if it meets with your approval.

Thanks again.

Best Regards

Teddy

[27] Having looked at the emails it is apparent that the Claimant through Mr. Santos was clearly communicating with Amalgamated Group based on instructions received from the Defendant and kept the Defendant apprised of the negotiation process by copying him in the email communications. The emails verify much of the work which was done by the Claimant to find and secure the Amalgamated Group as a tenant for the Defendant's properties.

[28] Both parties agree that the Claimant was engaged by the Defendant to find tenants for his various properties. They also agreed that through the Claimant's efforts two of the Defendant's four properties were leased to the Amalgamated Group. The Defendant however further contends that the Claimant having completed this task was paid for his services.

[29] In considering the conduct of the parties and what transpired in terms of the performance by the Claimant, the court finds that there was a commercial agreement between the parties whereby the parties intended to create legal relations. The more important question however at this point must be what was the extent and scope of that relationship.

What were the terms of the contract between the parties?

[30] What the court must now determine are the precise terms of this contract.

[31] The major point of contention between the parties is the Claimant's entitlement to a five percent commission on the sale of parcels 68 and 12.

[32] The Claimant has asserted that the Defendant provided it with valuations for all of his properties and as such this amounted to evidence of the fact that they had entered into an agreement for the Claimant to undertake the task of selling and/or renting all the properties of the Defendant. The court is not persuaded by this argument as this in and of itself does nothing to establish the terms of the contract made between the parties.

[33] In **Devani v Wells**⁸ Lord Kitchin JSC stated as follows “*Lord Neuberger of Abbotsbury PSC, with whom Lord Sumption and Lord Hodge JJSC agreed without qualification, explained (at paras 26–31) that (i) construing the words the parties have used in their contract and (ii) implying terms into the contract, involve determining the scope and meaning of the contract; but construing the words used and implying additional words are different processes governed by different rules. **In most cases, it is only after the process of construing the express words of an agreement is complete that the issue of whether a term is to be implied falls to be considered. Importantly for present purposes, Lord Neuberger PSC also made clear (at paras 23 and 24) that a term will only be implied where it is necessary to give the contract business efficacy or it would be so obvious that “it goes without saying”.***” (my emphasis)

[34] In the absence of an express term, based on the learning of Lord Neuberger cited above, the court is not in a position to imply a term that the Claimant would have been entitled to a fee if the tenant then proceeded to purchase any of the properties and in particular the property that had been initially rented. In this court’s mind such a term would not “go without saying”.

[35] From the emails and the parties conduct it appears to this court that the agreement between the parties was that the Claimant would seek out a tenant or buyer for the Defendant’s properties and would be paid the first month’s rent if a tenant leased the properties or a five percent commission on the sale price if the properties were sold. It was therefore a contract where payment to the Claimant would amount to the first month’s rent or a commission but not both. The Defendant in compliance with this arrangement paid the Claimant its fee of \$XCD 25,000.00 for securing the leases. Further in the words of the Claimant’s representative Mr. Santos to the Amalgamated Group he accepted that the arrangement he was negotiating with them was for either rental or sale.⁹

⁸ [2020] A.C. 129

⁹ Email #3 noted above

[36] For the court to have found that the Claimant's payment under the contract included both a fee of the first month's rent and a five percent commission on the sale price if a sale was achieved within five years of the start of the lease such terms would have had to have been explicitly stated in writing. In the absence of an express term to that effect the court is unable to imply such a term into the agreement that was reached between the parties.

[37] This court is even more fortified in this view when it considers that the Claimant's position as it relates to the extent of the contractual terms shifted from reliance on the Clause in the Lease agreement to the concession contained in the submissions at the close of trial that "*...as he was not a party to the Lease Agreement, he cannot sue on the basis of that clause, [but it is] **the Claimant's case [that] the clause memorialized the agreement reached between the Claimant and the Defendant if either of the properties were sold to Amalgamated Group.***" However, a close examination of that Clause relied upon by the Claimant in this court's mind clearly shows that it was to one of the stated happenings at the time of the Agreement that was to take effect.

[38] This determination is also again supported by the very words of the Claimant's representative Mr. Santos when he agreed on cross examination that "*... nowhere in the witness statement I stated that the duration of my agreement with the defendant was for a period of five years*". He also agreed there was generally a lack of detail in the agreement he had with the Defendant as he trusted him.

[39] Additionally, this court must consider all the circumstances surrounding the Claimant and the Defendant. In the Claimant's pleadings, it was made clear that it had been involved in the business of real estate management in Antigua and Barbuda for a period of 31 years. When this statement is considered, this court finds it difficult to accept that its Managing Director failed to properly negotiate and more importantly document, the terms of the agreement with the Defendant due to the friendship which existed between the parties. Indeed this court also accepts that the Defendant left all the business of the negotiations to the Claimant. Only ever making his voice heard when the Amalgamated Group sought to offer him a rent which he believed was insulting.¹⁰ The court therefore prefers the evidence of the Defendant and accepts that the terms of the agreement which was concluded between the parties were that the Claimant would seek out a tenant or buyer for the

¹⁰ Evidence elicited on cross examination at the trial of the matter.

Defendant's properties and would be paid the first month's rent if a tenant leased the properties or a five percent commission on the sale price if the properties were sold by the Claimant.

[40] As a result of the foregoing, once the Defendant paid the Claimant its fee of one month's rent in the amount of \$XCD 25,000.00 the contract was at an end as both parties had discharged their obligations in accordance with their agreement.

Whether the Claimant is entitled to a commission on the sale price of parcels 12 and 68.

[41] Having in fact found in terms as stated above, there is really no need for the Court to consider this final issue since this court has already found that the Claimant was fully paid for the services rendered.

[42] However, if I am wrong in that regard I wish to make it clear that in any event there was absolutely no contemplation that the sale of Parcel 12 would have netted any sums to the Claimant. The very Clause which the Claimant has sought to rely on as "memorializing" the agreement as between the parties, clearly stated that it was in relation to the "demised" premises. Those premises under the Lease Agreement were Parcel 68 and a portion of Parcel 66.

[43] The clear evidence before the court is that the sale of parcel 12 was negotiated without the Claimant's input. At trial Mr. Santos conceded that he was "*nowhere around when Amalgamated Security made the offer to the defendant to buy the properties, as he went behind my back*".

[44] On examination of what was originally pleaded by the Claimant in its Statement of Case its position in essence is that having introduced the Amalgamated Group to the Defendant the Claimant became entitled to a commission from the sales of any and/or all parcels, which eventually materialized merely by virtue of the introduction that was made three years prior.

[45] In **Peter Nahum v Royal Holloway and Bedford New College**¹¹ Justice Prosser QC stated as follows regarding the position on introductions:

*"I would seek to summarise the position as follows. First, subject to there being no express words of a contract requiring a different interpretation, the word introduction of a buyer carries with it a causative element, indeed an effective causative element in the words of Nourse LJ, in the "bringing in of the purchaser to that transaction"; I do not think that is any different from the test of Jacobs J of establishing "whether the actions of the agent really brought about the relation of buyer and seller". Second, I have used the indefinite article above. I doubt whether it makes any difference whether it is "an" or "the" effective cause except possibly where there are two agents with agreements that they are entitled to commission if they introduce a purchaser. Third, thus what Mr Nahum was obliged to establish in relation to the Constable was that it was **his** actions that really brought about the relation of buyer and seller between the College and the buyer."* (my emphasis added)

[46] In the House of Lords decision of **Luxor (Eastbourne) Ltd v Cooper**¹² Lord Russell had this to say:

*"I have already expressed my view as to the true meaning of a contract to pay a commission for the introduction of a purchaser at a specified or minimum price. **It is possible that an owner may be willing to bind himself to pay a commission for the mere introduction of one who offers to purchase at the specified or minimum price; but such a construction of the contract would in my opinion require clear and unequivocal language.**"* (my emphasis added)

[47] In the present case the court is not persuaded that introduction by the Claimant was the effective cause of the sale which occurred. Three years passed between the introduction and the sale and in Mr. Santos' own words he was not involved in the sale. Additionally, there is no clear and unequivocal language contained in the agreement between the parties that the Claimant would be paid a commission fee for an introduction to the buyer who ultimately purchased the Defendant's properties.

¹¹ [1998] EWCA Civ J1112-12

¹² 1941 A.C. 108

The court therefore finds that the Claimant is not entitled to commission on the sale of either parcel and, in particular parcel 12.

Conclusion

[48] As a result of the foregoing the order of the court is as follows:

- a. The Claimant's claim is dismissed in its entirety;
- b. Prescribed Costs to the Defendant on the sum of \$135,000.00 as claimed.

Nicola Byer
High Court Judge

By the Court

Registrar