

**EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES**

IN THE HIGH COURT OF JUSTICE

CLAIM NO SVGHCV2012/0093

BETWEEN:

**[1] DIAN ANN-MARIE PATTERSON
[2] MICHAEL ANTHONY PATTERSON**

Claimants

and

DON PROVIDENCE

Defendant

Appearances:

Mr. Jaundy Martin for the Claimants

Mr. Ronald Marks and Ms. Patricia Marks for the Defendant

.....
2015: June 9: 2016: December 21;
2018: April 18
.....

JUDGMENT

Introductory and Relevant Background

- [1] **LANNS, J. [AG]:** This is a claim for damages for breach of a contract of agency. The claimants are seeking to recover the sum of \$44,800.00 being a portion of a deposit of \$56,000.00 received by the defendant on behalf of the claimants, and the defendant has counterclaimed for \$29,342.76 for commission and expenses.
- [2] The claimants are owners of property situate at Ruthland Vale, Layou, in the parish of St Patrick, in Saint Vincent and the Grenadines. The defendant is a real estate agent, trading under the business name "A.1 Real Estate".

- [3] In August 2009, the claimants entered into an agency agreement with the defendant to sell their property situate at Ruthland Vale as aforesaid. The terms of the agreement were contained in a letter dated 11th August 2009 (the agency agreement). By the agency agreement, the claimants gave the defendant 'full power and authority' to enter into contracts on their behalf to do the following: (1) to sell their property situate at Ruthland Vale; (2) to accept deposits of money on such contracts on their behalf; (3) to execute any contract, receipt or other document on their behalf leading to, or in pursuance of such contract, save and except the deed of conveyance by which the said property was to be conveyed to the purchaser.
- [4] Under the terms of the agency agreement, the defendant was entitled to be paid 5% of the selling price of the land for finding a willing purchaser. However, if the claimants change their minds, the defendant was entitled to be paid only a 2% fee for expenses; or 90 days' notice to find a willing purchaser.
- [5] The defendant, in pursuance of the agency agreement, and relying on the assurances therein, found purchasers, and on 27th April 2011, he executed an agreement for sale (the sale agreement) of the claimants' property. The sale agreement was expressed to be between the claimants Michael Anthony Patterson and Dian Ann-Marie Patterson (by their duly authorised agent Don Providence); of the one part; and Raphael Caswal Samuel and Rebecca W. Buyers Samuel, as purchasers (the Samuels) of the other part. The sale agreement provided for the usual 10% deposit, which deposit the defendant received from the Samuels. The defendant has not handed over the deposit to the claimants. He has retained it, and as will be seen later, sought to use it in an unauthorised manner.
- [6] Curiously, the sale agreement contained a clause which entitled the Samuels to a refund of their deposit, less \$14,125.00. This clause became a bone of contention between the claimants and the defendant.
- [7] In an undated letter (described as an email) to "Don" and "Julian" (presumably Don Providence and Julian Jack¹, the Samuels purported to terminate the sale agreement and requested refund of the portion of the deposit that was refundable under the terms of the sale agreement executed by the defendant and the Samuels. This letter, along with the sale agreement was eventually brought to the attention of the first named claimant, (Mrs. Patterson). Mrs. Patterson took issue with paragraph 6 of

¹ Mr. Jack is said to have prepared the agreement for sale

the sale agreement which concerns the deposit. The insertion of clause 6 in the sale agreement, the retention of the deposit, and the failure of the claimants to pay the defendant 5% commission, have led to the dispute between the Pattersons² and Mr. Providence, culminating with the institution of these proceedings.

Claimants' Case

- [8] On the 21st March 2012, Mr. and Mrs. Patterson commenced proceedings in the High Court alleging among other things that Mr. Providence, without authority, and or consultation, incorporated a clause (clause 6) in the sale agreement, which was to the prejudice of the claimants. Clause 6 in relevant parts reads as follows:

“In the event ... the Purchasers shall fail to make final payment within three months of the date of this Agreement or such further period as the parties ... shall in the meantime mutually agree in writing, the Vendors shall have the right to declare this agreement cancelled and all the rights of the Purchasers ... shall stand forfeited and of no force whatsoever, save that and it is hereby agreed that the Purchasers shall be entitled to the return of their down payment without interest and the Vendors shall be entitled to the sum of Fourteen Thousand One Hundred and Twenty Five Dollars (\$14, 125.00) and no more in respect of any expenses of whatsoever nature he may have incurred in any way relating to the transaction the subject matter of this Agreement.”

- [9] The claimants contend that they never authorised Mr. Providence to contract outside the normal contract of sale terms, and in particular, they never authorised him to enter into a contract to reduce the normal provisions for forfeiture of the deposit upon the purchaser's repudiation of the contract to less than 10% of the sale price. Further, the claimants contend that Mr. Providence acted without authority and in breach of the agreement with the claimants by unilaterally reducing the amount of the deposit recoverable by the claimants in the contract upon the intended purchasers' breach, to \$14,125.00.

- [10] In their prayer for relief, the claimants seek special damages in the sum of \$44,800.00³, damages for breach of contract, interest; further or other order relief as the court deems fit; and costs.

Defendant's Case

² Mr. Patterson has not pursued the claim; so the claim is proceeding by Mr.s Patterson only.

³ Being \$56,000.00 less \$11,200.00 (being 2% of \$56,000.00)

- [11] By way of defence, the defendant denies that he executed the sale agreement without authority, and avers that the claimants never requested that he operates in any manner contrary to his usual operations. Further, the defendant denies that the Samuels repudiated the sale agreement by email causing the claimants to suffer loss. He says that the claimants were aware that the Samuels faced some difficulties which led to them sending the email which repudiated the contract. This is a contradiction of the defendant's previous averment denying that the Samuels repudiated the sale agreement. The defendant avers further that after the email, all parties met at the office of the defendant and Mrs. Patterson agreed to continue the contract but she never made herself available to show the property. Additionally, the defendant denies that he breached the agency agreement and has retained the deposit for his sole use, or has since forwarded the same to the Samuels or a portion of it to them. He claims that he has in his possession the deposit made by the Samuels, he having been advised by his legal counsel not to disburse same to the parties until the matter was settled. The defendant has purportedly counterclaimed for the sum of \$29,342.76 without setting out any particulars in respect of the purported counterclaim, to alert the claimants of the case they have to meet. The purported counterclaim merely states:

“COUNTERCLAIM”

“Defendant's Invoice dated 23rd June, 2011

\$29,342.76.”

The Reply and Defence to Counterclaim

- [12] The core of the reply is that the defendant incorporated an unusual term in the contract without consultation and to the prejudice of the claimants' interests. The claimants denied that Mrs. Patterson agreed at a meeting to continue the sale of the property after the Samuels expressed their intention to 'break' the sale agreement with the claimants. Mrs. Patterson averred that what she insisted on at the meeting was a renegotiation of the contract, because of the delay in completion and because of the email terminating the original sales agreement, and because of clause 6.
- [13] By way of defence to the counterclaim, the claimants repeated their entire reply and denied that they were presented with any invoice. They further denied that they were indebted to the defendant. They claim that the counterclaim is unfounded, frivolous and ought to be dismissed.
- [14] At a case management conference held on 20th June 2012, Master Taylor-Alexander referred the matter to mediation, but the parties failed to reach agreement and thus, a trial took place on the 9th

June 2015. At the conclusion of the trial, the parties were required to file closing submissions within 14 days, and the decision was reserved pending receipt of the submissions. On the 21st December 2016, while on duty in Antigua, I received the file containing the submissions of the defendant only. To date, I have had no written submissions from the claimant, and I have not seen any application for an extension of time within which to submit same from the claimant. I shall proceed to determine the matter on the material before me.

The Issues

[15] The issues for determination are:

- (a) Whether the defendant was authorised to enter into a contract with purchasers (~~s~~) for sale of the claimants' land;
- (b) Whether the defendant did enter into a contract for the sale of the claimants' land
- (c) Whether the agency agreement empowered the defendant to enter into a contract which includes a term that was prejudicial to the claimants' interest;
- (d) Whether, the claimants are bound by clause 6 of the contract for the sale of the claimants land;
- (e) Whether Mrs. Patterson is entitled to the sum claimed. If not what amount is she entitled to recover?
- (f) Whether the defendant entitled to ~~the~~ 5% commission plus expenses incurred?

The Evidence

[16] There were only two witnesses called at the trial namely, Mrs. Patterson, and the defendant Mr. Providence.

(a) Mrs. Patterson's Evidence

[17] In her witness statement, Mrs. Patterson gave evidence that in 2009 she and her husband (now ex-husband) decided to engage Mr. Providence, as their agent, to sell their property. The terms of the engagement were contained in a letter dated 11th August 2009. The letter authorised Mr. Providence to enter into contracts on their behalf and to accept deposits of money on their behalf. Mr. Providence was also authorised to sign receipts leading to the conveyance of the property on their behalf. The agreement included a remuneration clause whereby Mr. Providence was to receive a 5% fee for

finding a willing purchaser or 2% if they (the Pattersons) wished to change their minds; or 90 days' notice to find a willing purchaser.

- [18] Mrs. Patterson stated that in 2011 Mr. Providence informed the Pattersons that he had entered into a contract with the Samuels for sale of the property for a price of \$560,000.00, and that the Samuels had paid a deposit of \$56,000.00. They (the Pattersons) surmised that Mr. Providence was holding the deposit on their behalf.
- [19] The Samuels made several visits to the Pattersons' house and expressed interest in purchasing their furniture, and they agreed to sell them some of the furniture. The Samuels delayed in completion of the transaction and returned overseas and failed to keep in contact.
- [20] According to Mrs. Patterson, she was subsequently informed by Mr. Julian Jack, counsel for the Samuels, that the Samuels were no longer interested in purchasing the property. Mr. Jack presented Mrs. Patterson with a copy of the 'email' message which he received from the Samuels. It was undated. The undated 'email' alerted Mrs. Patterson about a request for a refund to the Samuels in accordance with the sale agreement. She discussed the matter with Mr. Providence since she was of the view that if the Samuels decided to change their minds, the deposit was to be paid over to the Pattersons and not to the Samuels.
- [21] At a meeting with Mr. Providence to discuss the deposit issue, Mr. Providence told Mrs. Patterson that she cannot get the deposit as he has to get his commission, and he insisted that he was entitled to his full 5% commission on the full purchase price of the property.
- [22] She obtained a copy of the contract that Mr. Providence entered into with the Samuels and noted that clause 7 (sic)⁴ entitled the Samuels to a refund of their deposit less \$14, 125.00. The Pattersons did not authorise Mr. Providence to contract outside the normal contract of sale, and Mr. Providence did not inform the Pattersons that he was going to insert a clause in the contract that was not in the interest of the Pattersons. Mr. Providence was never authorised to change the normal position respecting forfeiture of the deposit of 10% on the purchaser's default. He never notified the Pattersons that he was going to incorporate a clause which was prejudicial to them.

⁴ The reference to clause 7 ought to read clause 6

- [23] Mr. Providence arranged a meeting between Mrs. Patterson and the Samuels to get the transaction complete. But this was after the completion date agreed to in the contract of sale. By then, the value of the property had increased. Mrs. Patterson indicated to Mr. Providence that any discussion on the matter would have to be on new terms, but Mr. Providence ignored instructions and insisted that the matter should proceed on the same terms, and despite a letter requesting that he hand over the deposit to Mrs. Patterson, Mr. Providence has refused to hand over the deposit..
- [24] In cross examination, Mrs. Patterson said that she returned to St. Vincent after Mr. Providence entered into the contract with the Samuels; that the Samuels came to her home several times in Layou; that during the time the Samuels were going to buy the property she had the keys for the property; that the meeting at Mr. Providence's office was held after the email from the Samuels was received, indicating that they had changed their minds; that Mr. Providence and Mr. Jack had requested that she make the house available for inspection and she did that. It was suggested to Mrs. Patterson that she did not make the house available for inspection and that is why the Samuels changed their minds from purchasing the property. Mrs. Patterson answered 'Absolute nonsense. They came in the night and they came in the day and I let them in.' It was further suggested to Mrs. Patterson that the reason why the sale did not come off was because of her lack of cooperation and Mrs. Patterson replied thus: "Absolutely not. My husband was living in the UK. Mr. Jack had already prepared the documents. They were sent to the UK for my husband to sign. He did not realise he had to have a lawyer with him to sign; so he sent back the documents and Mr. Jack had to prepare new documents and send them back, and then they (the Samuels) changed their minds."
- [25] Mrs. Patterson admitted that at the meeting at Mr. Providence's office, she attempted to renegotiate the contract and asked for a higher price. She stated further that she attempted to do so because it was months after the first agreement which had an unusual clause in it; that the Samuels wanted to go on with the same price, and she said no; they broke the first contract because they had personal problems that had nothing to do with her. She said that after she suggested that they pay a higher price, the Samuels refused to pay more and the house has not been sold.
- [26] During reexamination, Mrs. Patterson told the court that Mr. Providence was to get into contact with her and her husband before he signed any agreement that was prejudicial to them. But there was no consultation with the Pattersons before Mr. Providence signed the sale agreement.

[27] That was the case for claimant.

(b) Mr. Providence's Evidence

[28] Mr. Providence described himself as the CEO of A1 Real Estate. He says that during the year 2009 he was approached by the claimants to sell their property at Ruthland Vale. To this end, the claimants signed a letter authorising him to act as their agent with full power and authority. He signed the letter as well. As time progressed, he found willing buyers in the persons of Ralph and Rebecca Samuel with whom he entered into a contract for the sale of the property. The contract is dated 27th April 2011. In accordance with the contract, the Samuels paid the deposit of \$56,000.00. Some time after, Mr. Providence received an email from the Samuels expressing that they were not able to move forward with the purchase. He brought the email to the attention of Mrs. Patterson. Later, a meeting was held at his office with Mrs. Patterson, the Samuels, and him (Mr. Providence), at which meeting it was agreed that the sale would continue. Mrs. Patterson was to let him know when it would be convenient for the Samuels to view the property. After the meeting, he made several requests of Mrs. Patterson to facilitate viewing of the property and its contents. Mrs. Patterson began asking for more money as a result of which, the sale was not concluded. The sale was also not concluded because of lack of cooperation on the part of Mrs. Patterson. According to Mr. Providence, the delay was also occasioned because the deed had to be resent to the UK for Mr. Patterson's signature. . In June 2011, he submitted his invoice for payment.

[29] Mr. Providence says the agreement entered into with the Samuels outlines what was to be done with the deposit where the purchasers did not make a final payment. According to Mr. Providence, that is the standard agreement he usually enter into on behalf of his clients.⁵ He asserts that under the agency agreement, he is given full authority to act on the Patterson's behalf, and he is entitled to 5% for finding a willing buyer which he did. He says he is also entitled to expenses incurred. Mr. Providence, further stated that the Samuels are entitled to a refund of the deposit less the sum of \$14, 125.00 as stated in clause 6 of the agreement for sale.

[30] Mr. Providence gave evidence that as of the date of trial, he continues to hold the deposit pending the outcome of the proceedings.

⁵ No documentary evidence of that assertion

- [31] Under cross-examination, Mr. Providence stated that he had been a real estate agent for over 30 years; that he had entered into lots of contracts for sale of property; that normally if the purchaser defaulted, he or she would lose the deposit; but if the fault was on the part of the owner, the purchaser would be refunded the deposit. Mr. Providence stated that he understood the agency agreement to say that he could incorporate any (Underline mine) clause into the contract without conferring with the Pattersons even if it meant refunding the entire deposit.
- [32] It was put to Mr. Providence that the Pattersons permitted him to execute contract on their behalf, but not without their consent as to unusual terms, and Mr. Providence replied that there was nothing to say he had to come back to them; that the contract was done by an attorney-at-law using a template that he (Mr. Providence) would normally use.⁶ He stated that ordinarily, when he executes contracts on vendors' behalf, he does not confer with them because they entrust confidence in him. Asked how he arrived at the figure of \$29,342.76 referred to in the purported counterclaim, Mr. Providence replied that that is his commission and expenses for sale. He said the Pattersons refused to go ahead with the sale, and since he had found a willing purchaser, he is entitled to his fees. Mr. Providence was shown the 'email' from the Samuels wherein they indicated that they had changed their minds and asked for a refund. When asked what he took the email to mean, Mr. Providence said that he did not view it as a change of mind because one person cannot unilaterally change his or her mind. He stated that at the meeting which was held at his office, all parties decided to carry on the sale, but he did not think it was necessary to put that decision in writing, although it was an agreement for the sale of land. No minutes were taken at the meeting, Mr. Providence stated.
- [33] Mr. Providence, in further cross-examination, re-confirmed that he received \$56,000.00 as a deposit. He said that he visited the property many times. He could not remember when he did, but he recalled visiting the property with the Samuels, but he does not recall how many times they did so. When they did visit, however, they would have sat down in the dining area or outside on the porch in the presence of the Pattersons. Asked whether he visited the property after the meeting at his office, Mr. Providence said he did not because he could not get Mrs. Patterson to cooperate for him to go back.

⁶ No evidence to substantiate this averment

- [34] Asked about the status of the deposit, and where it was held, Mr. Providence stated he has the deposit, less what the Samuels would have used for rent. He admitted he did not discuss this arrangement for payment of rent with the Pattersons. He said he was not sure how much he took out for rent, and he had no receipts in proof of payment for rent. As to the balance of the deposit, Mr. Providence told the court that the deposit is held at the Bank of Nova Scotia; that it was not in an interest bearing account and that he did not know the balance of the deposit.
- [35] In answer to a question posed by the court, Mr. Providence stated that the Samuels had to rent a house at \$1500.00 per month because they could not get into the Patterson's house; that he did not recall the actual duration of the rental; that he had to pay rent for the Pattersons because they had no idea that the house was not available; that he agreed with them to pay their rent and he paid it out of the deposit. No receipts were passed, he said; only a statement. He does not have the statement nor does he have details of the balance of the deposit written down or recorded anywhere, and he does not know how much out of the deposit is available.
- [36] That was the case for the defendant

Findings

- [37] From the admitted and undisputed facts, I find that the claimants are owners of property situate at Ruthland Vale, Layou; that the claimants and the defendant entered into a contract of agency for the sale of the claimants property; that the defendant was contracted to find a willing buyer and to enter into 'any' contract of sale with the buyers found; that the defendant's remuneration was dependent on whether or not the defendant found a willing buyer; that the defendant did find buyers (the Samuels) for the purchase of the claimants' property for the price of \$560,000.00; that the defendant entered into a contract of sale which included a clause which was prejudicial to the Pattersons, and cannot be said to have been in their best interests; that the Samuels paid to the defendant 10% deposit of \$56,000.00; that the defendant did not pay over the deposit to the claimants; that the defendant used the deposit in an unauthorised manner; that the contract with the Samuels was not performed as they were not willing to complete the sale due to circumstances beyond their control; and thus, they cannot be regarded as 'willing buyers'

The Deposit Issue: Is the Claimant Entitled to Recover the Full Deposit or a Portion Thereof?

- [38] The main issue to be determined is whether Mr. Providence as agent was under a duty to pay over the deposit to the Pattersons, or whether he was entitled to deal with it in the way he did?
- [39] The corollary issues are whether there was a fiduciary relationship between the Pattersons and Mr. Providence; and if so whether Mr. Providence breached that duty; whether there is a duty on the part of an agent to keep relevant accounts; and whether there is a duty on the part of an agent to keep his, and his principal's money separate.
- [40] All these sub-issues can conveniently be dealt with together, and call for a discussion of clause 6 of the sales agreement.

The Sales Agreement: Clause 6

- [41] The position of Mr. Providence and his counsel was that he had full authority by virtue of the authority vested in him under the agency agreement, even if it meant refunding the entire deposit to the Samuels. He was of the view there was no limit to his authority save and except that he was prohibited from executing the deed of conveyance to the buyer (s) This exception in the agency agreement is quite telling and is in keeping with the principle that the claimants expected the willingness of the purchaser to continue to the end; to complete the transaction, and having so completed, they themselves would execute the relevant deed of conveyance.
- [42] Learned counsel for Mr. Providence in her written submissions concedes that as agent, Mr. Providence had a duty to exercise reasonable care and skill in the circumstances. In my judgment, he failed to exercise such reasonable care and skill in relation to clause 6. Counsel was of the view that Mr. Providence acted well within his scope of authority under the agency agreement. Counsel further submitted that the agency agreement expressed no condition that Mr. Providence was to consult the claimants before executing the contract. It was counsel's further submission that the claimants trusted Mr. Providence based on his years of experience, and he acted appropriately at all times. Counsel, in my view, cannot seriously say that Mr. Providence acted appropriately at all times in a trustworthy manner. Mr. Providence, in my opinion, breached that 'trust' in several ways: (a) when he incorporated clause 6 in the contract which was against the interest of the claimants; (b) when he failed to inform the Pattersons that he was inserting an unusual clause and needed to get their consent on it; (c) when he failed to hand over the deposit, and used and dealt with it in an unauthorized manner. His

contention was that he used his standard form sales agreement, but he produced no evidence apart from his mere say so in proof of that assertion. In any event, even if that was his customary form of sales agreement, it must be a reasonable form of agreement.⁷ An agent has no implied authority to act in accordance with an unreasonable custom or usage unless the principal has notice of the custom or usage and agrees to be bound by it.

[43] I do not find any merit in the argument of Mr. Providence or his counsel that he acted reasonably as the agency contract allowed him so to do. By inserting clause 6 in those terms, without notifying the Pattersons that he was incorporating an unusual term/clause in the sale agreement, one that was prejudicial to the Pattersons, Mr. Providence acted unreasonably and outside the scope of his authority. I find and hold that when Mr. Providence inserted clause 6, he ought to have alerted the Pattersons that he was doing so, and explained the true effect to them, making it clear that it goes beyond the usual understanding in these matters. He did no such thing. Instead, he proceeded to execute the sale agreement when he knew fully well that clause 6 was disadvantageous to the Pattersons. Even though the agency agreement authorised Mr. Providence to enter into 'any contract' this did not mean or assume that the sale agreement should contain anything unreasonable or oppressive or illegal or dishonest. And since it was found afterwards to contain a term which was wholly unreasonable or totally uncertain or dishonest, Mr. Providence cannot be heard to say that the Samuels are entitled to their deposit in accordance with clause 6 of the sales agreement; or that the Pattersons are not entitled to the deposit until he gets his commission.

[44] Based on the authorities, I think that clause 6 of the sales agreement so far as it seeks to entitle the Samuels to a refund was wholly unreasonable and totally uncertain and unenforceable, and it can and should be rejected, leaving Mr. Providence to account for the full deposit.

⁷ Halsbury's Laws of England/Agency (Volume 1 (2008), paragraph 44, page 45.

The Legal Principles

- [45] It is the law that all moneys received on the principal's behalf must be paid over or accounted for to the principal upon request, unless the agent has for some lawful reason repaid them to the person from whom he received them.⁸
- [46] Mrs. Patterson has requested Mr. Providence hand over the deposit to her. For reasons which are unclear, she has not claimed the entire \$56,000.00. The difference between \$56,000.00 and \$48,500.00 is \$11,200.00. Seemingly, \$11,200.00 represents 2% of \$560,000.00 which was supposed to be the purchase price of the subject property. As said before, Mr. Providence gave evidence that on the advice of his counsel, he has retained the full deposit pending the outcome of these proceedings; yet his cross examination on the status of the deposit was riddled with inconsistencies and was appalling. First, he said the deposit is held at the bank mixed with his own funds. Then he said he paid rent for the Samuels out of it; next he said he was unaware of the duration of the rental; that he has no receipts in respect of the rental; that he is unaware of the balance remaining on the deposit; that he keeps no account of the dealings with the deposit. For someone who has been in this business for over 30 years, this is appalling, and it would not surprise me if Mr. Providence has been sued by other clients in respect of matters of a similar nature; or has brought suit against clients in respect of similar matters.
- [47] It is the duty of an agent to keep accurate accounts of all his transactions and to be prepared at all times to produce them to his principal. If he fails to keep proper accounts, every presumption consistent with the facts will weigh in favour of the principal⁹. Thus, where as in this case, Mr. Providence improperly mixes the Pattersons' property (the deposit); where he cannot show what balance remains on the deposit, this, to my mind is a breach of his fiduciary duty to the Pattersons¹⁰

⁸ Halsbury's Laws of England/Agency Volume 1 (2008), paragraph 85

⁹ Halsbury's Laws of England/Agency (Volume 1 (2008) paragraphs 82 and 84.

¹⁰ See *Parker v McKenna* (1874) 10 Ch App 96; Halsbury's Laws Halsbury's Laws of England/Agency (Volume 1 (2008), para 73.

The agent in some cases, commonly where property or money has been placed in the hands of the agent for a specific purpose, the agent becomes a trustee for his principal. In all cases the agent owes duties of a fiduciary character to the principal, for example to keep accounts, to disclose any conflict of interest and not to receive any secret commission or bribe. In performing his activities as commercial agent the agent must look after the interests of his principal, and act dutifully and in good faith. Similarly, in his relations with his commercial agent a principal must act dutifully and in good faith. No derogation from these requirements is permissible.

- [48] Where money is entrusted to an agent by his principal or received by him on his principal's behalf, it depends upon the terms of the agency whether the agent is bound to keep the money separate or is entitled to mix it with his own. In the former case the agent will be a trustee. In the circumstances of the instant case, it appears that Mr. Providence was a trustee. He was not authorised to deal with the deposit in the way he did. He was under an obligation to keep the money safe and have it ready to hand over on demand. Mrs. Patterson would have been well within her rights to claim and receive the full deposit and not a portion thereof. Mr. Providence ought not to benefit from his own wrongdoing.

Measure of Damages

- [49] Upon an agent's breach of duty, the principal's remedy is, as a rule, to claim damages for breach of contract.¹¹ In the instant case, the claimants have claimed damages for breach of the agency contract in the sum of \$44,800.00.
- [50] Where an agent is sued by his principal for breach of contract, the measure of damages is the measure recoverable under the general law of contract, which is the full amount of the loss actually sustained, and no more, provided that such loss is the natural and probable consequence of the breach of duty, or such as was within the contemplation of the parties. This may include profit which has actually been lost, but not merely expected profits which might have been made if the agent had performed his duty.
- [51] In the present case, it is arguable that Mr. and Mrs. Patterson are entitled to the sum of \$54, 657.24, being \$56,000.00 less expenses of \$1342.76 incurred by Mr. Providence for his work. However, the Pattersons seem to be prepared to yield \$11,200.00, and thus there will be judgment for the Pattersons in the sum of \$44,800.00.

Interest

- [52] Interest is payable by an agent in respect of money received by him on his principal's behalf, under a contract express or implied, or where there has been some default on his part, such as a dealing with the money in breach of duty, or a failure to pay it over at the principal's request, in which cases interest is payable from the date of default.¹² However, CPR 8.4 provides that a claimant who is seeking interest must (a) say so expressly in the claim form; and (b) include in the claim form or statement of

¹¹ Halsbury's Laws of England/Agency Volume 1(2008) paragraph 86

¹² Halsbury's Laws of England/Agency Volume 1(2008) paragraph 88.

claim, details of the -- (1) basis of entitlement; (ii) rate; and (iii) period for which it is claimed. The claimants have run afoul of this rule and thus, no interest is payable except statutory interest.

(a) Costs

- [53] The general rule is that the loser pays the winner his or her costs. However, in the exercise of my discretion, I propose to order that the parties pay their own costs.

The Purported Counterclaim

(a) Is the Claimant Liable to the Defendant on his Purported Counterclaim?

- [54] I have already stated that the counterclaim, in its present form, is not in keeping with the requirements of CPR 8.6. It is not properly before the court and does not contain sufficient information to alert the claimants as to the case they have to meet. It lacks particularity. Notwithstanding that observation, it appears to me that the pleadings of the parties (statement of claim, defence and reply, and defence to counterclaim) the witness statements and their amplification, as well as the evidence elicited at cross examination, and the answers to questions posed by the court, provide/contain sufficient information for the court to assume or treat the purported counterclaim for commission as a claim to which the Pattersons have provided a fulsome defence thereto.

- [55] As I previously stated, the purported counterclaim states:

“COUNTERCLAIM”

“Defendant’s Invoice dated 23rd June, 2011

\$29,342.76.”

- [56] It is to be remembered that Mrs. Patterson denied receiving an invoice from Mr. Providence. However, I have seen an invoice listed and exhibited as a document which was disclosed. The invoice is itemised as follows:

(a)	Consideration	\$ 560,000.00
(b)	Commission 5%	\$28,000.00
(c)	Valuation Report	\$ 1,037.16
(d)	Federal Express	\$ 305.00

Total	\$ 29,342.76
Less retention as per contract Samuel/Providence	\$ 14,125.00
Amount due to A.I. Real Estate	\$ 15,217.76

The Commission Issue: Is Mr. Providence Entitled to 5% Commission

(a) The Legal Principles

- [57] The applicable legal principles are set out in many cases on estate agency agreements. Thus in **John D. Wood & Co (Residential and Agricultural Ltd) v Edward Craze [2007] EWHC 2658 QB**, Justice Swift DBE citing Jenkins LJ in **Midgely Estates Ltd v Hands [1952] 2 QB 432**l stated:

“The purpose of engaging the services of an estate agency to market a property is to achieve an advantageous sale of the property. Thus it has been said that, in the absence of some other clear expression of intent, the intention of the estate agent and vendor when entering into an agreement concerning the sale of a property is likely to be that the commission stipulated for should be payable only in the event of an actual sale resulting¹³

- [58] To the same effect is the opinion of Harman L.J in **Sheggia v Gardwell [1963] 3 All E.R. 114** at 118, letters G-I:

“Estate agents live on commissions of which they are frequently baulked at a late stage, although they have done all their work, because the parties change their minds or the bargain goes off for some unforeseen reason, and naturally estate agents have been anxious to protect themselves as far as they can by ensuring that their commission is payable once the prospective vendor and purchaser have been brought together whatever the upshot. They have, therefore, adopted various devices, chiefly in the form of printed conditions written on the back of the applicant’s particulars so as to bring this about. The courts have frowned on these efforts because it is clear in general a would-be seller does not expect to have to pay a commission except out of purchase money when he receives it. It has come to be the law that references to “sale” or “purchase” as a condition of earning commission are taken to mean that these are payable when there is a complete purchase or sale and not before.”

- [59] Harman L.J continues

“The authorities are ... best summed up by Jenkins L.J. in **Midgly Estates, Ltd v Hand**. The Lord Justice said: “As has been pointed out over and over again in the reported cases, an agency

¹³ See Mr.s. Justice Swift DBE in **John D. Wood &Co (Residential and Agricultural Ltd) v Edward Craze [2007] EWHC 2658 QB**, citing Jenkins LJ in **Midgely Estates Ltd v Hands [1952] 2 QB 432**

contract of this sort just like any other contract must be construed according to its terms. One has to look at the contract, and see whether, according to its terms, construed in accordance with the ordinary principles of construction, the event has happened in which the commissions is expressed to be payable. So far as the general principle is deducible from the authorities, their effect may I think be thus summarised. The question depends on the construction of each particular contract, but prima facie, the intention of the parties to a transaction of this type, is likely to be that the commission stipulated for should only be payable in the event of an actual sale resulting. The vendor puts his property into the hands of an agent for sale, and generally speaking, he contemplates that, if a completed sale results and not otherwise, he will be liable for the commission, which he will then pay out of the purchase money. 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 expressions, purporting 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. That is the broad general principle in the 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 the effect in accordance with those terms even if they do involve the result that the agents commission is earned and becomes payable although the sale in respect of which it is claimed for some reason or the other turns out to be abortive..”

- [60] One of the earliest cases on the issues is **Jacques v Lloyd D George & Partners, Ltd** [1968] 2 All E.R. wherein Denning, MR stated at letter C:

“We have had many cases on commission claimed by estate agents. The common understanding of mankind is that commission is only payable by the vendor when the property is sold. It is payable out of the purchase money; but some agents have sought by their printed forms, to get commission even though the property has not been sold or the purchase money received.

- [61] Lord Denning continued at letter G:

“The principles which, in my opinion, are applicable are these: When an estate agent is employed to find a purchaser for a business or a house, the ordinary understanding of mankind is that the commission is payable out of the purchase price when the matter is concluded. If the agent seeks to depart from that ordinary and well understood term, then he must make it perfectly clear to his client. He must bring it home to him so that he makes sure he agrees to it. When his representative produces a printed form and puts it before the client to sign, he should explain the effect to him, making it clear that it goes beyond the usual understanding in these matters. In the absence of such explanation, a client is entitled to assume that the form contains nothing unreasonable or oppressive. If he does not read it and the form is found afterwards to contain a

term which is wholly unreasonable or totally uncertain ... then the estate agent cannot enforce it against the innocent vendor. Applying this principle, I think that the clause in this case was wholly unreasonable and totally uncertain. It can and should be rejected, leaving the agent to his commission on the usual basis, namely that, if the sale goes through, he gets his commission. “

Applying the Principles

(a) The Commission

- [62] As previously stated, the agreement for the commission was contained in a letter dated 11th August 2011, addressed to Mr. Providence. However, it was signed by the Pattersons and Mr. Providence on the same date. The commission was expressed in the following terms: “As a reward, we would pay you five (5%) for finding a willing purchaser.” Mr. Providence and his counsel take the position that he (Mr. Providence) is entitled to his full commission because he found a willing purchaser who signed a sales agreement; therefore these actions triggered the commission. This is an attractive position, but based on the applicable principles, I think the person who signs the sales agreement must be a willing purchaser, and that no commission was payable unless that willingness continued until completion and the purchase money paid. In the present case, the Samuels signed the sales agreement, paid the deposit, but they did not complete, and thus, no commission is payable to Mr. Providence.
- [63] Mr. Providence seeks to put the blame at the feet of Mrs. Patterson. However, there is no evidence upon which I can make a finding that the fault was that of Mrs. Patterson. Mr. Providence himself stated that the Samuels were experiencing financial difficulties. And Mrs. Samuels withdrew from the sale ‘due to circumstances beyond her control’. That was a bald statement which needed to be fleshed out or explained. I accept the evidence of Mrs. Patterson on this issue wherever it differs from that of Mr. Providence.
- [64] Coming back to the invoice. Curiously, the invoice is dated 23rd June 2011. This date assumes importance especially when it is considered that the sales agreement is dated 27th April 2011, and the closing date was stated to be on or before 23rd July 2011. Significantly, (and as previously stated), the email sent by the Samuels to Mr. Providence and Mr. Jack terminating the sales agreement, and requesting a refund of their deposit in accordance with the terms of clause 6, was surprisingly and oddly undated, and does not assist the court in determining at what date did the Samuels terminate the sale agreement. Additionally, it must be remembered that the reason given by Mrs. Samuel for such

termination was simply "Due to circumstances beyond my control." It does not say that the reason for withdrawing from the sale was attributable to the fault of the Pattersons. As I previously stated, I do not find the Samuels to have been willing buyers simply because they paid a deposit, and signed the sale agreement. As I have said, the authorities establish that the person who signs the sales agreement must be a willing purchaser, and that no commission was payable unless that willingness continued until completion and the purchase money paid. In the present case, the Samuels signed the sales agreement, paid the deposit, but they did not complete, and thus no commission is payable to Mr. Providence.¹⁴

Conclusion

[65] It follows from the findings I have made that I am not in agreement with the submissions put forward by counsel for the defendant. I find that notwithstanding the agency agreement authorised Mr. Providence to execute any contract on behalf of the Pattersons, inherent and implied in the agreement was a requirement to act reasonably. Mr. Providence was required to be reasonable and act in the best interest of the Pattersons; especially when he inserted clause 6 in the contract. In my judgment, this clause was prejudicial to the Pattersons and in this regard, Mr. Providence should have told the Pattersons that he was departing from the norm in relation to forfeiture of the deposit; that he intended to insert clause 6, the effect of such insertion, and seek their consent before he inserted it. I find Mrs. Patterson to be a witness of truth, who gave her evidence in a forthright manner. She remained unshaken during cross examination, unlike Mr. Providence who was most unimpressive and appalling as a witness for the most part. Wherever his evidence conflicts with that of Mrs. Patterson, I accept the evidence of Mrs. Patterson in preference to that of Mr. Providence.

[66] I have deliberately refrained from making any finding as to the outcome of the meeting held at the office of Mr. Providence following the email from the Samuels indicating no further interest in the purchase and sale of the subject property, as it seems to me that that was potentially an entirely new arrangement which cannot be enforced unless evidenced by a document or memorandum in writing, and there is no sufficient evidence forthcoming that there was an agreement for continuation of the original contract of sale, which on the evidence had already been terminated by the Samuels.

¹⁴ I reiterate however, that the Pattersons have claimed \$44,800.00, yielding the balance of \$11,200. It is assumed that this amount is to cover the 2% of \$56,000.00 of which the agency agreement apparently provided for. It is not entirely clear to me as to how to classify the \$11,200.00, so notwithstanding my findings on the commission issue, I will be content to award Mr. Providence the sum of \$11,200.00 to include his claim for valuation report and Federal Express charges.

Notably, the Samuels are not parties to these proceedings, and were not called by either party to give evidence.

[67] The result is that for all the reasons stated above, there will be judgment for the claimant in the sum of \$44,800.00. And there will be judgment for the defendant on his counterclaim in the sum of \$11,200.00 being the sum which the defendants are not claiming including reimbursement for charges /expenses which he reasonably incurred for valuation report and Federal Express charges , which sum (\$11,200.00) is to be set off against the damages awarded to the claimants.

[68] For all the reasons stated above, it is ordered that

(1) The defendant Don Providence do within 3 months of the date of delivery of this judgment, pay to Mrs. Patterson the sum of \$22,400.00, less \$5,600.00.

(2) The defendant Don Providence do within 3 months of the date of delivery of this judgment, pay the sum of \$22,400.00, less \$5,600.00 into court on behalf of Mr. Michael Anthony Patterson; and in this connection, the Registrar of the High Court is ordered to place this money into an interest bearing account in a bank in St Vincent & the Grenadines, until an order of the court to pay out the said money to Mr. Patterson or to someone designated by him.

[3] The claimants Dian Ann-Marie Patterson and Michael Anthony Patterson do within 3 months hereof pay to the Defendant the sum of \$11,200.00, which sum is to be set off against the damages awarded to the claimants.

[4] Success was divided; so the parties shall bear their own costs,

[69] Neither counsel has presented me with any authorities to assist me in this matter. So I was left to my own devices.

[70] Numerous authorities have commented on the difficulties and inconsistencies in this area of the law. This case is no exception in terms of difficulty.

Pearletta E. Lanns
High Court Judge [Ag]

By the Court

Registrar