IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT C.L. B –076 OF 1992

BETWEEN	*TONY BROWN*	*PLAINTIFF*
A N D	*G. A. (BOBBY) DIXON*	*1ST DEFENDANT*
A N D	*MARJORIE DIXON*	*2ND DEFENDANT*
A N D	*BOBMARJE CONSTRUCTION & DEVELOPMENT CO. LTD.*	*3RD DEFENDANT*

Mrs. J. Samuels-Brown for Plaintiff.

Mr. John Graham instructed by John Graham & Co. for Defendant.

HEARD: 9th, 10th, 11th October, 2000 & June 13, 2001

MARSH, J.

This action is founded in Contract. By Amended Statement of Claim the Plaintiff, a retired travel agent, claims from the Defendants sums of money, for their failure to honour an agreement made between them whereby the Plaintiff would travel to England "at the Plaintiff's own expense" to find prospective buyers for lots at Ambassador Heights in the

parish of St. Andrew, where Defendant were building houses. Further, it was agreed, that the Defendants should reimburse the Plaintiff for all his expenses and would pay him a commission of 5% of the Sale price of every lot sold.

Pursuant to the said agreement, plaintiff traveled to England, at his own expense and remained there canvassing prospective buyers; but because Defendant failed to send to Plaintiff Sales Agreements for the said lots, in breach of the agreement, Plaintiff had to refund deposits obtained from 21 prospective purchasers. Further or in the alternative, that the first or second Defendant had warranted to the Plaintiff that either of them had the authority of the third Defendant to enter into the said agreement on the 3rd Defendant's behalf; that neither of them had any such authority and that the 3rd Defendant had consequently refused to satisfy or be bound by the said agreement. Further or in the alternative the 1st or 2nd Defendant has/have wrongfully and/or with the intention of injuring the Plaintiff induced and or caused the 3rd Defendant to breach the said agreement.

The first and second Defendants each denies that there was any such agreement with Plaintiff as stated. Instead they state that the agreement with Plaintiff was that he would be paid a commission of 5% of the sale price of any house in the said development in respect of which purchasers were

'introducted" by the Plaintiff and a sale completed. As a further defence, they denied that any booking for Plaintiff to travel to England was made pursuant to any agreement with them, or that any booking so made was cancelled by any request of theirs at all.

It was also denied on behalf of the third Defendant that it was involved in any part of the development of houses on lots at Ambassador Heights, St. Andrew. Each of the allegations made against the third Defendant was roundly denied.

The Plaintiff's case rested solely on his own viva voce evidence coupled with agreed copies of letters to and from the first and second Defendants. He testified that he had first met the first Defendant when he came to him carrying money as payment for a bounced cheque which second Defendant had paid him for some items that she had purchased from him. This occasion was in February, 1990.

First Defendant next told Plaintiff that he had Ambassador Heights, a Phase II property and that he wanted him to sell lots for him. First Defendant had indicated to Plaintiff that he was having difficulty in borrowing funds and Plaintiff had suggested that it was possible for him to help him as there was money in England to be loaned.

First Defendant came for Plaintiff and took him to Ambassador Heights and showed Plaintiff the lots. He asked Plaintiff if he would go to England and sell lots of land for him. He would pay Plaintiff's expenses. At the time, although Plaintiff owned a house in England, he had already returned to live in Jamaica. There was no discussion then as to what the expenses would be.

It was agreed between Plaintiff and first Defendant that Plaintiff would go to England in May. May came and first Defendant informed Plaintiff that he was unable to find the fare and expenses. The trip was rescheduled to August. August came and again first Defendant could not find the required funds and he asked Plaintiff whether he could help to buy the ticket to and from England. This Plaintiff did and left for England on the 19th day of August 1990. Before leaving for England, Plaintiff had learned from the second Defendant that contracts for sale were not ready but that first Defendant would send them to him. Sale was to be of 32 lots.

The stay in England was from August 19, 1990 to the first day of January, 1991. Accommodation was at the Hotel Terra Nova in Birmingham.

The ticket to England cost $7,520 (inclusive of $80 departure tax). Board, laundry and office use at the hotel cost about $29,000.00 U.S.

Plaintiff borrowed $1375 U.S. as he had run out of funds. He has since repaid the hotel the sum borrowed.

There were several telephone calls to first Defendant from Plaintiff while he was in England.

Some 21 persons paid varying sums as deposits on the lots of land. Receipts were issued. However, when the promised contracts for Sale were not forthcoming and after obtaining legal advice, Plaintiff returned the sums collected as deposits to the people who paid them.

In January 1991, when Plaintiff had returned from England, on enquiry by the first Defendant, who was transporting him from the airport, Plaintiff indicated to him that expenses had come to about $60- $70,000 U.S.

First Defendant visited Plaintiff and told him of efforts to get funds to pay Plaintiff his expenses, that the acquisition of such funds had a bright prospect. Still no payment was quickly forthcoming; there were exchanges of letters, Second Defendant to Plaintiff, first Defendant to Plaintiff and three from the Plaintiff to first Defendant.

The first Defendant Gresford Dixon testified that he was a Building Contractor and was involved in building projects, 2 housing developments and was also involved in their marketing. He agreed that he had met Plaintiff through his (1st Defendant's) wife and that he and Plaintiff did have,

on an occasion, discussions re the sale of homes in Ambassador Heights. He had begun the development of Ambassador Heights, with his wife the second Defendant but had "run out of funding." He had told Plaintiff of this, where the project had reached and where it was located.

He denied that he had any such agreement with Plaintiff whereby Plaintiff would travel to England to find prospective buyers for house/lots in May.

Neither his wife, the second Defendant, or first Defendant himself was in a position to have had such an agreement with Plaintiff as there was a number of things yet to be done before title for the land could have been obtained and any sales pursued or before the land could be developed.

First Defendant never at anytime asked Plaintiff to buy ticket to go to England in August, nor did he ask Plaintiff to go to England to sell any lots or houses in Ambassador Heights. There was no agreement with the Plaintiff that first Defendant would reimburse him for his airfare to England or hotel accommodation there for the time he decided to stay.

First Defendant indicated that he has been involved in about 4 or 5 schemes and in none of them did he have to pay commission and expenses of the Real Estate Agent. When shown his letter Exhibit 2 – First Defendant testified that in that letter, the word 'units' means 'lots' and the word

'compensate' meant that he would give him a portion of the 5% compensation. Plaintiff 'had obviously gave up, did some work, canvassing etc. "and we found that he was due some compensation." He agreed that letter, Exhibit 1 dated 28th June 1990 written by his wife the 2nd Defendant, was written also on his (first Defendant's behalf and that he agreed with its contents.

SUBMISSIONS:-

Mr. Graham for the 1st Defendant submitted that this was a simple case of Contract – parties, terms, whether there has been breach, and if there is, whether any damage flows therefrom.

All the evidence led, relates to the first Defendant only. First Defendant had at all material times indicated to Plaintiff that he was without funds and had been seeking funding. It is fanciful to say that First Defendant had disenabled himself from performing, as indicated in Plaintiff's opening.

There were no sales so the question of 5% commission did not arise. Concerning Plaintiff's claim for reimbursement – this contract must have been made in February 1990. Plaintiff would have had to communicate to First Defendant that he would be bound for 4½ months of hotel bills, for there to be consensus. No mention made by Plaintiff that advertising was

necessary, that he was staying in a hotel, that he would be travelling to towns and cities of prospective purchasers.

Court should view all of this in the context that Plaintiff was going to England to do his own business.

First Defendant had no funds so where would the money come from to satisfy the expenses to be repaid to Plaintiff? Court should look at the reasonableness of the terms, whether evidence was cogent. Plaintiff lacked knowledge of the Real Estate business and this may well be the foundation for what happened. Special damages not particularized and strictly proven.

Mrs. J. Samuels-Brown for the first Defendant responded as follows:-

The evidence in the case (both Plaintiff's and Defendant's) has indicated that Plaintiff has established a case as per the pleadings so Plaintiff should have judgment in his favour.

There was no dispute in certain aspects of the case, as between Parties.

The main disputed areas are identified by questions:

(i) Was it part of the agreement that Plaintiff's expenses would be paid by the 1st Defendant?

(ii) Did the parties agree that the Plaintiff's contract to sell lots was

conditional on the receipt by Defendant of further financing for the Defendant?

(iii) Why was the Plaintiff unable to finalize the 21 Sales begun in England in August?

It was 1st Defendant who approached Plaintiff, on their first meeting, to sell the lots. No evidence, save an assertion that Plaintiff had traveled to England to do his own business.

Court to reject as unreasonable, unrealistic and disingenuous. First Defendant's saying he promised to pay only a portion of the 5% commission. Why, if Plaintiff went to England to get particulars as Defendant claimed, was he still trying to send Sales Agreement to Plaintiff.

It was first Defendant, by his conduct, who made it impossible for Plaintiff to carry out his obligations under the Contract. Plaintiff was therefore entitled to the 5% commission.

Court is to compare the demeanour of both witnesses.

It is trite law that before there can be a contract, there must be an offer and an acceptance. The Plaintiff must also establish the presence of consideration "either by proving that he had conferred a benefit upon the Defendant in return for which the Defendant's promise was given or that he himself had incurred a detriment for which the promise was to compensate."

(CHESHIRE & FIFOOT FURMSTONE'S LAW OF CONTRACT 13TH EDITION).

Where the promissor has, by his own act or default rendered his promise impossible of performance, he is not entitled to rely upon the impossibility which he has created and the promisee is entitled to treat the contract as discharged." A party is deemed to have incapacitated himself from performing his side of the contract not only when he deliberately puts it out of his power to perform the contract but also when by his own act or default circumstances arise which render him unable to perform the contract or some essential part thereof." (***Paragraph 1487 CHITTY ON CONTRACT 24TH Edition).***

In the opening of his case, Mr. Graham for the Defence stated that the Plaintiff was informed by 1st Defendant that if he were able to conclude Sales he, (Plaintiff) would be paid a 5% commission.

This agreement with Plaintiff was always made "subject to the condition that until the financing to complete the development was procured then it would be impossible for Sales to be completed." Plaintiff, however, Mr. Graham indicated, proceeded to England "on his own account, on his own business privately and any effort he may have made to sell anything was secondary and premature." Paragraph 4 of the Defence of first and

second Defendants is that the agreement was that "The plaintiff would be paid a commission of 5% of the sale price of any house in the said development in respect of which purchasers were "introducted" by the Plaintiff and a sale completed."

Was there an agreement between Plaintiff and first Defendant? Despite the `expressed denial of first Defendant that he had no agreement with Plaintiff, that Plaintiff was to have traveled to England to find prospective buyers for houses/lots in May, that he had had no discussion with Plaintiff about going to England re Sale of lots or houses in Ambassador Heights, a letter dated August 1, 1991, admitted by 1st Defendant to have been written by him to Plaintiff and tendered in evidence, reads thus:-

G. A. (Bobby) Dixon)
5 Belgrade Way
Kingston 19.

August 1st, 1991

Mr. Tony Brown
Cannon Road
Kingston 19.

Dear Mr. Brown

Re: Sale of Units in Ambassador Heights Development

In 1990 a verbal agreement was arrived at between both of us that you would be allowed to sell units in the above subdivision in England. As we know you visited England but was not able to finalise sales of some sixteen (16) units as indicated by your receipts.

It is our every intention to compensate you for your effort at that time, and to give you the go ahead to return to England and finalise the sale of the units. We however cannot do this until financing for the development is totally in place. Until then, we ask for your patience and understanding in this matter. I assure you that every effort is being made to get the financing in place as quickly as possible. We will contact you as soon as this is so.

Thank you for your kind co-operation.

Yours sincerely,

G. A. (Bobby) Dixon

The contents of this letter give the lie to 1st Defendant's insistence that not only was there no agreement, but also that there was never any promise to compensate Plaintiff. First Defendant's evidence was conflicting and not worthy of belief in several material particulars.

It is 1st Defendant himself, despite his denials, who testified that Plaintiff had offered to sell lots and that he had agreed to this offer.

It is an inescapable conclusion from the evidence as provided by both Plaintiff and 1st Defendant that there was an agreement between them. What were the terms of the Agreement? Was the Agreement conditional on financing being obtained by the 1st Defendant?

The exhibited letter for first Defendant to Plaintiff was quite clear that it was his intention to compensate Plaintiff 'at the time.' According to first Defendant's letter dated August 1, 1991 (and earlier outlined), it was first Defendant's intention to give .... "The go ahead to return to England to the Plaintiff." This would hardly be necessary if as, was suggested to Plaintiff, he had gone to England to do his own business. Plaintiff responded that he had no business in England. He had however promised to help First Defendant.

Plaintiff impressed as a witness of truth. His testimony, coupled with certain admissions made by first Defendant, impel me to find, on a balance

of probabilities, that not only was there an agreement that first Defendant would reimburse Plaintiff for the airfare and expenses, but that a commission of 5% of sale price would be paid to Plaintiff of all lots sold. There is no evidence provided by the Defendant from which it could be concluded that the agreement between parties was conditional on financing being in place.

It was a fact that Defendant was impecunious and this is why he jumped at the opportunity provided by Plaintiff's offer to sell lots for him, based on Plaintiff's knowledge of England. The proceeds of Sale would provide very necessary funds – pound sterlings as the target market was to be England.

I find as a fact that 1st Defendant was to have provided Plaintiff with Sales Agreements. Hence first Defendant's explanation of what was being referred to in the final paragraph of the letter dated 28th June, 1990. 'Delay' was delay in obtaining 'the Sales Agreement.' The inconvenience referred to was explained by first Defendant to me on that he had no documentation to show 'his purchasers or prospective purchasers.'

Plaintiff's stay in England to attempt to sell 32 lots of land is stated to be approximately four (4) months. I accept Plaintiff's evidence that this was partly caused by his awaiting the Sales Agreement from first Defendant and

found that in all the circumstances it was not an unreasonable length of time. The expenses incurred seem reasonable as expenses over the period.

The Invoice submitted as proof is unusual, but I cannot agree with Defendant's attorney that there is no documentary proof of stay in Terra Nova Hotel. Plaintiff has produced a typewritten document as exhibit. The total sum of invoice is $28,299 U.S. I make an award in this sum as claimed.

Plaintiff's testimony regarding the cost of the airfare is unsupported by any other proof. However, the Pleadings at paragraph 4 (a) of the Statement of Claim indorsed on Writ reads "that the Plaintiff should travel at the Plaintiff's own expense to England..." There is no averment of any promise of first Defendant to reimburse Plaintiff. I am not therefore minded to make any award for loss on cancellation of booking and airfare to England.

Liability for payment of Commission depends on whether, on the proper interpretation of the contract between the parties, the event has happened upon which the commission is to be paid. ***Per Upjohn L.J. in Ackroyd & Sons v. Harrison (1960) 2 Q.B. 144 at page 154.***

In the instant case, Plaintiff claims the 5% sales prices as commission for each lot on which he had taken deposits and further avers that "despite

repeated requests Defendant failed to send the Plaintiff the Sales Agreements for the said lots in breach of the said agreement; accordingly the Plaintiff had to refund the deposits to the said 21 prospective buyers."

There is no evidence that but for the failure to be furnished with the agreements for Sale there would have been actual sales of the lots. The people who made down payments on the lots were paying money down on land they had not seen, not even marked out on a plan. I am not satisfied on a balance of probability that the failure of Defendant to furnish Plaintiff with the sales agreement was a breach of an implied term of the contract.

The agent's right to claim that he has earned his commission only arises when the event on which payment of commission is t o be paid has happened.

Plaintiff claimed in the Amended Statement of Claim that Plaintiff's agreement with Defendant was that he, the Plaintiff "should travel to England ... to find prospective buyers for the said lots."

"It follows that general or ambiguous expressions, 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". ***Midgley Estates, Ltd. v. Hand 1 AER p. 1394 paras F and G.***

Plaintiff's claim for the sum of £57,000.00 for Loss of Commission on the said lots therefore fails.

Judgment is therefore entered for the Plaintiff against the first Defendant in the sum of U.S. ($28,299.00) Twenty Eight Thousand Two Hundred and Ninety Nine United States Dollars) with interest thereon of 8% per annum from the 2nd day of January, 1991.

Costs to be the Plaintiff's to be agreed or taxed.

Judgment for second and third Defendants against the Plaintiff with costs to be agreed or taxed.

Stay of execution for six weeks granted.