NMLS

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 34/2003

BEFORE: THE HON MR. JUSTICE PAUL HARRISON, J.A.
THE HON MR. JUSTICE PANTON, J.A.
THE HON MRS. JUSTICE McCALLA, J.A. (Ag.)

BETWEEN:	C.D. ALEXANDER COMPANY REALTY LTD.	APPELLANT
AND	PALACE AMUSEMENT COMPANY (1921) LTD.	RESPONDENT

Donald A. Scharschmidt, Q.C., for appellant

Ransford Braham, Joseph Jarrett, and Miss Torna Samuels, instructed by Joseph Jarrett and Co., for the respondent

January 17, 18 19 and July 29, 2005

PAUL HARRISON, J.A:

Having read the judgment of my brother, Panton, J.A., in this appeal, I agree with his reasoning and conclusion. These are my further comments.

The substance of the appellant's complaint as contained in its grounds is that the learned trial judge was incorrect to find that the introduction of the Odeon complex to the appellant by the respondent's agent was the "effective" cause of the sale and therefore the respondent was entitled to the commission of 5% because the first introduction had

evaporated. In addition it was unreasonable to find that Ravers Ltd was not paid a commission.

The authors of ***Bowstead and Reynolds on Agency, 16th edition (1996)*** at paragraph 7-029 page 301, referring to the commission payable to an estate agent said:

> "Apart from the general principle that in the absence of other indications the agent must be the effective cause of the transaction taking place, no clear principles can be easily derived from the many cases on this topic ...
>
> The agent will normally be entitled to his commission if he causes a person to negotiate with his principal and contract, no substantial break in the negotiations having taken place. It appears that the agent does not have to complete or even take part in the negotiations, ..."

The test is what action of the agent brought about the sale. The authors in discussing the test, recognized that it has been variously described as "an effective cause" or "the effective cause", and observed at paragraph 7- 029 at page 300:

> "There is doubt as to whether the rule is more helpfully formulated by requiring that the agent's act be " the effective cause ..."

Mrs. M. Cole-Smith, J., found on page 106 of the record:

> "From the minutes, Exhibit 7, and the date of the contract, exhibit 1, it is quite evident that the first introduction had evaporated and the meeting that Georgia Stewart had with Major Brown was the 'effective' or 'efficient' cause of the sale."

In ***Chasen Ryder & Co. v Hedges*** [1993] 8 EG 119 the Court of Appeal (England) allowed an appeal by the defendant vendor who had paid a commission to a second firm of the estate agents instead of the plaintiff. The plaintiff had introduced a purchaser who had made no offer nor effected a purchase. The second firm of estate agents had contacted the same purchaser some eleven (11) months later and a purchase of the property was completed. Staughton, LJ, at page 120 said:

> "The burden is on the plaintiff to show that his introduction in any case was the effective cause of the purchase. If, however, he shows that he was the first to introduce the purchaser, and that a purchase followed, and if no other facts are established, then it may well be that the judge will infer that the plaintiff was the effective cause. It can therefore be said that the evidential burden in such a case passes to the defendant whether the other agent or the vendor, to prove more facts which displace that inference. But, even in such a case, I do not think that the further facts which the defendant then has to prove must be such as to show that interest aroused by the first introduction has evaporated, that is to say, entirely disappeared. It will be a matter for consideration in each case as to how far the defendant has to go before he has displaced an inference which might arise from the mere fact of the introduction followed by the purchase."

The court did not endorse the dictum of Forbes, J in ***John D Wood v Dantata*** [1987] 2 EGLR 23 that an agent who did a second introduction to a purchaser, in order to be entitled to his commission, had necessarily to

prove that the interest of the purchaser in respect of the first introduction had evaporated, making the second introduction the effective cause of the purchase.

Each case has to be decided on its own particular circumstances.

The issue frequently arising is which of the two tests should be employed, namely, "an effective cause" or "the effective cause" of the purchase, in determining the commission payable, where competing claims exist.

In ***Burchell v Gowrie*** [1910] A.C. 614 their Lordships in the Privy Council held that an appellant agent was entitled to his commission on the sale of property, although it had been sold behind his back on different terms, because he had brought the vendor company in relation to the actual purchaser. The test was that the agent's introduction was "an efficient cause" of the sale. The Board held, (per Lord Atkinson), at page 624:

> "There was no dispute about the law applicable to the first question (whether the acts of the agent was an 'efficient' cause of the sale). It was admitted that, in the words of Erle C.J. in ***Green v Bartlett*** (1), "if the relation of buyer and seller is really brought about by the act of the agent, he is entitled to commission although the actual sale has not been effected by him." Or in the words of the later authorities, the plaintiff must shew that some act of his was the *causa causans* of the sale (***Tribe v Taylor*** (1876), 1C.P.D. 505, 510) or was an efficient cause of the sale (Millar v Radford (1903) 19 Times L.R. 575)."

and further on page 624 continuing on page 625:

> "On this question of fact there was, their Lordships think, ample evidence to sustain the conclusion at which the referee presumably arrived, namely, that the appellant's acts were an effective cause of the sale which actually took place. In their Lordships' view it was the right conclusion, and the finding to that effect ought not, they think, to be disturbed."

The later authorities prefer the term "an effective cause" instead of "efficient cause."

The Court of Appeal, in ***Brian Cooper & Co. v Fairview Estates (Investments) Co.*** [1987] 1 EGLR 18, was not prepared to imply in all commission agreements, a term that the agent is "an effective" cause of the transaction. Woolf,LJ (as he then was) was of the view that:

> "It could create problems where there are two or more effective causes, each of which could be the subject of a claim for commission."

"The effective cause" test is a more decisive test referable to the direct consequences which brought about the sale. It is however, a more onerous test than "an effective cause" of the sale. The latter test recognizes the existence of one or more effective causes. There can exist in a transaction other events which could have influenced the sale and be effectively labeled as "effective causes." The test "the effective cause" is akin to an absolute state of affairs. "An effective cause" countenances the variables that can occur culminating in the ultimate purchase. On the state of the authorities, the test "an effective cause" as

preferred in– ***Burch ell v Gowrie***, supra, should be followed, unless the particular circumstances otherwise so mandate.

In the instant case, the initial introduction of the property by the appellant in 1998, to the Transport Authority produced no sale. Consequently, the appellant approached the respondent in May 1999, and signed a listing agreement, exhibit 1.

The appellant is not claiming that it was its own introduction that brought about the sale.

In answer to interrogatory 8, namely:

> "8. That other than the plaintiff, which other person (s) did the defendant contract with for the disposal of the Odeon Complex, with the names and dates?"

the appellant said:

> "Answer
>
> Property Consultants Limited – May 7, 1999; Ann-Marie Ramtallie – June 28, 1999; Violet E. Miller – July 22, 1999; David Pennant (Succs) Ltd. – August, 1999; Barbara McNamee – December, 1999; and Ravers Limited – January, 2000."

No commission was claimed nor payable to Property Consultants Ltd. which was contracted by the appellant in May 1999, as was the respondent.

There is no evidence of any activity nor interaction with the purchaser, the Government of Jamaica, Transport Authority, by any of the said named estate agents other than the respondent. The only effective

introduction to the said property since 1999, was therefore the respondent.

The learned trial judge quite correctly found:

> "I reject the evidence of Mr Graham that he paid Ravers Limited 3% commission and I find that his answer to the Court contradicts his answer to question five in the Interrogatories. There is no documentary evidence to show that 3% was paid to Ravers Limited and I find it strange."

There is no evidence of any contractual agreement nor any interaction nor activity between Ravers Ltd. and the Transport Authority to cause a commission to be payable to the former. Certainly, in the interrogatories, signed by Charles Douglas Graham on October 17, 2001, he said that:

> "The commission was payable and none has been paid to anyone as a result of the 1998 introduction."

The only introduction in 1998 was by the appellant who was not "claiming a commission." No such commission could be payable to Ravers Ltd.

The evidence of the said Charles Douglas Graham, to the Court, namely:

> "After the meeting on August 12, 1998 some months later I contracted Ravers Limited."

is imprecise and misleading. Ravers Ltd, on the interrogatories, was contracted in the year 2000.

His further evidence to the Court that:

> "I heard from the Financial Officer of the Ministry as a result of discussions that had taken place between Ravers and themselves."

is hearsay and inadmissible.

The respondent was the direct cause that brought about the purchase of the Odeon Complex by the Transport Authority and therefore was properly entitled to its commission, as the learned trial judge found. Its action was, in the circumstances of this case, the effective cause of the ultimate purchase.

This appeal ought to be dismissed with costs to the respondent.

PANTON, J.A.

1. This is an appeal from the decision of Mrs. Justice Cole-Smith wherein she held that the respondent was entitled to a commission of five percent of the sale price, inclusive of Government Consumption Tax, in respect of the sale of the Odeon complex by the appellant to the Government of Jamaica. She ordered the payment of interest at the rate of 12% per annum from the 8th February, 2001, to the 7th April, 2003.

2. The grounds of appeal, filed on May 6, 2003, and amended on January 19, 2005, read thus.

> (1) the findings of the learned trial judge that the first introduction of premises known as Odeon Complex had evaporated and the meeting between the plaintiff/respondent's agent, Ms. Georgia Stewart, and a representative from the Transport Authority was the "effective" or efficient cause of the sale is unreasonable and is unsupported by the evidence;
>
> **(2)** the findings of the learned trial judge that the defendant/appellant did not pay a commission to Ravers Limited is unsupported by the evidence;
>
> **(3)** the learned trial judge erred when she ordered that the plaintiff/respondent was entitled to 5% commission from the sale of the Odeon Complex;
>
> **(4)** the learned trial judge erred when she found that it was the plaintiff/respondent who had made the introduction to the Odeon Complex.

These grounds are based on the concluding portion of the reasons for judgment of the learned judge at pages 106 and 107 of the record of appeal, where she said:

> "From the minutes Exhibit 7 and the date of the contract Exhibit 1 it is quite evident that the first introduction had evaporated and the meeting that Georgia Stewart had with Major Brown was the 'effective' or 'efficient' cause of the sale.
>
> I reject the evidence of Mr. Graham that he paid Ravers Limited 3% commission and I find that his answer to the Court contradicts his answer to question five in the Interrogatories. There is no documentary evidence to show that 3% was paid to Ravers Limited and I find it strange".

3. It is unchallenged that on May 13, 1999, Mrs. Georgia Stewart, for the respondent, and Mrs. Melonie Graham, for the appellant, signed a contract authorizing the respondent to sell property known as "Odeon Complex" on Half-Way-Tree Road, with a commission of five percent inclusive of GCT being payable on the completion of such sale. The price contemplated at the time of the contract was a minimum of two hundred and fifty million dollars ($250,000,000.00) but the respondent was authorized to submit offers. The contract (exhibit 1) which is at page 18 of the record reads:

> "Should you introduce someone ready and willing to buy at the above price or a price acceptable to me or should the property be sold at any time before the date mentioned above or subsequently to a purchaser introduced by you I/we hereby irrevocably authorize my/our attorney(s)-at-law, on completion of the sale, to deduct the commission due and payable to you hereunder (together with the applicable general consumption tax thereon) from the proceeds of the sale and to forward same to you in settlement thereof prior to the disbursement of the net proceeds of sale to me/us".

The property was to be advertised at the expense of the respondent.

4. Mrs. Stewart introduced the property to the Transport Authority. She did so by letter dated October 12, 1999, addressed to that body for the attention of its managing director. The letter requested the Authority to contact her for further information if it "might be considering this option," "for a location for the purpose of a Transport depot". By letter dated December 2, 1999, Mrs. Stewart, signing on behalf of the respondent, thanked the Transport Authority for the interest that it had shown in the property. The letter further states:

> "It is understood that Parliament has first to approve any plans to purchase. As such we would appreciate any information you can supply regarding your progress with Parliament".

That letter was copied to Major Desmon Brown at Metropolitan Management Transport Holdings Ltd. It is interesting to note that six days after Mrs. Stewart's letter, Lt. Cdr. John McFarlane wrote to her advising that all future correspondence should be referred to the said Major Brown. At the time of writing the earlier letter (December 2), Mrs. Stewart had also written to the appellant, for the attention of Mrs. Graham, informing that she had introduced the Odeon Complex to the Transport Authority. The letter stated that the introduction had "generated positive interest and as such (Mrs. Stewart) will inform you as there are further developments".

5. There are three other letters of importance to these proceedings. They are at pages 26, 27 and 28 of the record and are from the respondent to the appellant in respect of the payment of the commission. There was no response to any of these letters although they were all addressed for the attention of Mrs.

Graham. The first, dated March 16, 2000, and signed by the respondent's Sales Manager, referred to an article in the Gleaner of the said date under the heading "Transport Ministry to buy Odeon for Traffic Centre". It reads thus:

> "We would take this opportunity to remind you that C.D. Alexander Company Realty Limited introduced this property to the Transport Authority, through our agent, Mrs. Georgia Stewart, acting on a Listing contract signed by you ... We look forward to hearing from you regarding Commission payable, in the event the sale is finalized".

The second letter, dated May 8, 2000, was also signed by the Sales Manager, and it referred to the March 16 letter, indicating that a reply would be appreciated. The third letter, dated December 22, 2000, was signed by the Managing Director of the respondent. It reads:

> "In the Jamaica Observer dated December 12, 2000 we were pleased to read that the Cabinet had approved the purchase of the Odeon Complex for $172,000,000.00.
>
> We would refer to our previous correspondence and look forward to hearing from you with regard to the commission payable to ourselves.
>
> We urge you to furnish us a reply by December 31, 2000'.

6. The claim, defence and reply were all filed during the month of February, 2001. The respondent's case was based on the claim that "Mrs. Stewart introduced the property to the Government of Jamaica as a suitable location for a Transport Depot for use by the Jamaica Urban Transit Company" (see paragraph 4 of the special endorsement to the writ). On the other hand the

appellant denied that there was this introduction of the property, and said that the property had been introduced to the purchaser in 1998, and that the discussions and negotiations then culminated in the sale. In its reply, the respondent listed the various things it did to introduce the property, and to facilitate the sale to the Transport Authority. Unusually, the respondent also indicated that it would have been "calling upon the relevant officials from the Government and its Transport Authority to give evidence at the trial". As it turned out, no such official was called and this became the source of complaint by the appellant in the arguments before us although there was no ground of appeal to that effect. At this stage, it is sufficient to say that there is no doubt that a party is entitled to call such witnesses it wishes to call in support of its case, and the Court is required to adjudicate on the evidence that is presented, not on what was promised, hoped, or intended.

7. The main bone of contention in this appeal is the question of the introduction of the property to the eventual purchaser. Was the introduction done by the appellant, or was it done by Mrs. Stewart on behalf of the respondent? There is evidence at page 83 of the record of appeal indicating that Mr. Charles Michael Douglas Graham, Chairman and Managing Director of the appellant had spoken to Major Desmon Brown prior to May 19, 1998, on the matter, as a meeting was arranged to take place between them on May 19. That meeting did not materialize; neither did another subsequently arranged meeting. Indeed, Mr. Graham said that this subsequent meeting clashed with another

engagement and he chose to attend the latter. Mr. Scharschmidt Q.C. submitted that there being evidence of this introduction of the property to the purchaser in 1998, there was a burden on the respondent to prove that the introduction had evaporated. Further, he said, that there was evidence of a Mr. Alteus Williams of the Ministry of Transport having been in contact with the appellant in 1999, hence it could not be said that the introduction had evaporated. The respondent had failed, Mr. Scharschmidt Q.C. said, to show that the negotiations started in 1998 had been broken off and that the advent of Mrs. Stewart had resulted in a revival or rekindling of interest. There was no onus on the appellant to prove anything. The onus was on the respondent to show that it was entitled to a commission. The evidence of the purchaser, he said, would have been decisive and it was for that reason that the respondent had pleaded that it would have called officials to give evidence at the trial. In not calling such officials, and not giving an explanation for the failure, the respondent should have had an inference drawn against it that the officials of the Government and the Transport Authority would not have given evidence to support the respondent's case. By not drawing that inference, the learned judge, according to Mr. Scharschmidt Q.C. was in error.

8. Mr. Scharschmidt Q.C. cited a passage from **"The Law Of Evidence In Civil Cases"** by John Sopinka and Sidney N. Lederman, both of the Ontario Bar, in support of his submission as to the drawing of the abovementioned inference.

At pages 535 to 536 of this work under the heading "Effect of Failure to Call Witness or Party", the following words appear:

> "In **Blatch v. Archer** (1774) 1 Cowp. 63 at p.65, Lord Mansfield stated:
>
> > "It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted".
>
> The application of this maxim has led to a well-recognized rule that the failure of a party or a witness to give evidence, which it was in the power of the party or witness to give and by which the facts might have been elucidated, justifies the court in drawing the inference that the evidence of the party or witness would have been unfavourable to the party to whom the failure was attributed"- **Murray v. Saskatoon** [1952] 2 D.L.R. 499 at 505-506."

9. Mr. Braham, in his submissions, referred to the voluminous work of John Henry Wigmore **"Evidence in Trials At Common Law"** Volume 2, pages 192 to 209 in particular. The relevant passages are set out below:

> "The failure to bring before the tribunal some circumstance, document, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so; and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavourable to the party. These inferences, to be sure, cannot fairly be made except upon certain conditions; and they are also open always to explanation by circumstances which make some other hypothesis a more natural one than the party's fear of exposure. But the propriety of such an inference in general is not doubted". (page 192)

AND

> "It is commonly said that no inference is allowable where the person in question is *equally available* to both parties; particularly where he is actually in court; though there seems to be no disposition to accept such a limitation absolutely or to enforce it strictly. Yet the more logical view is that the failure to produce is open to an inference *against both parties*, the particular strength of the inference against either depending on the circumstances".(pages 204 to 208)

10. Mr. Braham contended that in the instant case the witnesses were available to the appellant if it wished. They were, he said, more available to, and more in the power of, the appellant than was the case with the respondent. He said further that there was no evidence of contact between the respondent and Mr. Alteus Williams, whereas the appellant had been in touch with him. In the circumstances, he submitted that the inference that Mr. Scharschmidt was urging to be drawn against the respondent should, instead, be invoked against the appellant.

11. It was unusual of the respondent to have indicated in its pleading that it intended to call officials of the Government and the Transport Authority to give evidence as to the transaction. Such a statement has no place in a pleading. A party has a responsibility to produce evidence, oral or written, to substantiate his claim. The failure to call a witness that was promised does not automatically result in a disallowing of the claim. Conversely, the production of such a witness would not automatically result in judgment being awarded in favour of the party

producing the witness. The case has to be assessed primarily on the basis of the evidence presented, not on evidence not presented.

12. The learned judge had ample evidence to arrive at the conclusion at which she arrived. No good reason has been offered as to why the appellant, having introduced the property to the eventual purchaser, should have thereafter entered into a contract with the respondent to secure a sale of the same property. In the absence of a sensible reason coming from the appellant, it is reasonable to conclude that it had no confidence or faith in the steps it had taken prior to the engagement of the services of the respondent. Further, there was no response by the appellant to the letters from the respondent on the subject of the commission. It is hardly likely that the appellant would have ignored the letters, if it felt it was under no obligation to pay the commission. On the question of witnesses not being called, it would seem that the appellant was the one who needed to call an official of the Ministry or Transport Authority to support its position that the property had not been introduced by Mrs. Stewart, as claimed. In the circumstances, the learned judge was justified in concluding that the earlier introduction had evaporated and that it was the introduction by Mrs. Stewart that resulted in the purchase of the property by the Transport Authority.

13. The conclusion above effectively disposes of grounds 1, 3 and 4 in favour of the respondent. The remaining ground 2 seems to be of little relevance to the appeal as it is acknowledged that more than one person may be entitled to

payment of commission in respect of one sale transaction. On that basis, it would not be of much significance if Ravers Ltd. was also due a commission. The position of Ravers Ltd. would depend on the existence of a contract between it and the appellant, and the satisfactory execution of the terms of that contract. Ravers' entitlement to a commission has not been shown to have excluded the respondent's entitlement to one. However, as discussed earlier in relation to the earning of the commission, the learned judge had to make a determination on the basis of the evidence presented. In a matter of this nature, it would have been quite easy for the appellant to produce proper evidence of payment – if any existed. It chose not to do so. Hence, there was no room for the judge to have even had a query in her mind as to the substance of the claim by the respondent to a commission. The learned judge was justified in making the observation and the finding that she made. In the circumstances, this ground of appeal also fails.

14. The appellant having failed on all the grounds filed, the appeal ought to be dismissed, the judgment of the court below affirmed and the respondent to have the costs of these proceedings; such costs to be agreed or taxed.

McCALLA, J.A. (Ag.)

I have read in draft the judgments of Harrison and Panton JJA and I agree with their reasons and conclusions.

HARRISON, J.A.

ORDER

1. The appeal is dismissed.
2. The judgment of the court below is affirmed.
3. Costs of these proceedings to the Respondent, to be agreed or taxed.