[2011] JMCA Civ 38

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 134/2008

BEFORE: THE HON MR JUSTICE HARRISON JA
THE HON MR JUSTICE MORRISON JA
THE HON MISS JUSTICE PHILLIPS JA

BETWEEN	**HUBERT WRIGHT**	**1st APPELLANT**
AND	**SHERON PAULINE WRIGHT**	**2nd APPELLANT**
AND	**PROPERTY LINK JAMAICA LTD**	**RESPONDENT**

Debayo Adedipe for the appellants

Hugh Hyman for the respondent

1, 2 February 2010 and 10 November 2011

HARRISON JA

[1] I have read in draft the reasons for judgment of my learned brother Morrison JA and I agree with his reasoning and conclusions. I have nothing further to add.

MORRISON JA

[2] At the conclusion of the hearing of this appeal on 2 February 2010, the court ordered that the appeal should be dismissed, with costs to the respondent to be agreed

or taxed. We apologise for the inordinate delay in providing the promised reasons for this decision.

[3] The appellants (who are husband and wife) challenged Brooks J's judgment dated 18 July 2008, in which it was ordered that they should pay to the respondent the sum of $466,000.00, together with interest at 14% per annum on the amount of $400,000.00, for the period 2 November 2003 to 18 July 2008. The learned judge also made an order for costs in the respondent's favour.

[4] In this matter, the respondent, which carried on business as a real estate dealer, claimed against the appellants the sum of $400,000.00, representing a sale commission of five percent allegedly due to it, pursuant to a non-exclusive listing agreement dated 2 February 2000 between the appellants and the respondent. By the terms of this agreement, the respondent was engaged and authorised by the appellants to find a purchaser who was ready, willing and able to purchase, at a price of $8,000,000.00, the appellants' property which consisted of a new dwelling house on 920 square meters of land, described as Lot #9, part of 28c Greenvale Road, Brumalia, Mandeville, in the parish of Manchester ('the property').

[5] There was no dispute between the parties as to the fact of a sale of the property to the purchasers at a price of $8,000,000.00 or as to the fact that the appellants had agreed in those circumstances to pay to the respondent a commission of five per cent of the purchase price, these matters having been agreed on the pleadings.

[6] The respondent's case was that, pursuant to this agreement, it found purchasers who were ready, willing and able and who did in fact enter into a written agreement to purchase the said property from the appellants at the price of $8,000,000.00. However, the appellants refused to pay the commission claimed by the respondent, on the basis that the respondent did not in fact find the said purchasers or introduce them to the appellants. Rather, the appellants averred, at all material times they had had a 'for sale' sign prominently displayed on the said property and the purchasers had made contact with them independently of the respondent.

[7] The case therefore gave rise to a simple question of fact, which Brooks J described in his oral judgment, a draft of which was made available to us, as being "whether [the respondent] is the effective cause of the conclusion of the sale of the property by [the appellants]..." The judge heard evidence from two witnesses on behalf of the respondent, both of whom were at the material time sales agents in its employ. They both gave detailed evidence of having introduced one of the purchasers to the property and to the 1st appellant. They also introduced the prospective purchasers to Mr Lindel Smith, attorney-at-law, who acted for the purchasers in the transaction and saw to its completion. Mr Smith also gave evidence on behalf of the respondent and confirmed that the sales agent had maintained contact with his office throughout the transaction and that he understood them to have been in touch with the 1st appellant throughout.

[8] The 1st appellant gave evidence on behalf of both himself and the 2nd appellant. His evidence was that he had erected a 'for sale' sign, with his telephone numbers written on it, on the property and that one of the purchasers had in fact made direct telephone contact with him about the property. Thereafter, that prospective purchaser came to the property to inspect it (by prior arrangement with him) and, by a pure coincidence, the sales agents also arrived on the property independently.

[9] The learned judge rejected the 1st appellant's account, describing it as "untenable", "untrue and unreliable". Of the evidence given by the respondent's sales agents, Brooks J concluded that, "The detail in the testimonies and their credibility tips [sic] the balance of probability in favour of the [respondent]." In the result, the judge concluded that the respondent had made good its entitlement to a commission and gave judgment in its favour accordingly.

[10] From this judgment the appellants appealed on two grounds, as follows:

> "i. The learned Judge erred in finding that the Claimant had introduced the purchaser to the property and had thereby earned a commission.
>
> ii. The learned Judge erred in law in finding as he did that the price on which commission was payable was $8,000,000.00 because there was no evidence as to the price of the land as distinct from the value of the contract to complete the house. The learned Judge had himself observed that there was no documentary evidence of these matters."

[11] When the appeal came on for hearing, Mr Adedipe for the appellants abandoned the first ground. However, on the second ground, he submitted forcefully that, in the

absence of any documentary evidence (in the form of an agreement for sale), having been put forward on behalf of the respondent establishing the price on which the commission was payable, the judge had erred in awarding the respondent anything more than nominal damages. Mr Hyman for the respondent, on the other hand, pointed out that these matters had been admitted on the pleadings and that there had therefore been no need for any evidence in this regard.

[12] In my view, Mr Hyman was clearly correct in this contention. In its particulars of claim (para. 3), the respondent had pleaded that the appellants had engaged its services "to find a purchaser ready, willing and able to purchase" the property at a price of $8,000,000.00, or nearest offer, in consideration of which the appellants had agreed to pay the respondent "a brokerage fee of five percent (5%) of the sale price of the said property, plus General Consumption Tax thereon". Further (para. 4), that the respondent had found for the appellants purchasers who were ready, willing and able to purchase the property at the asking price of $8,000,000.00 and who had actually "entered into a written agreement with the [appellants] to purchase and duly purchased the said property…for $8,000,000.00". And further still (para. 6), that the purchasers had in due course been registered as proprietors of the property. In their defence, the appellants' only denial of any of these pleaded facts related to the single issue of whether the purchasers were in fact found and/or introduced to them by the respondent's sales agents, or whether the purchasers had in fact been found and secured by the appellants' own efforts. Save for this, the other matters pleaded by the

respondent, viz. the commission agreement, the completion of the sale of the property to the purchasers and the consideration for the sale were, as the judge observed, "not in issue".

[13] In the text, A Practical Approach to Civil Procedure (10th edn, by Stuart Sime, para. 13.01), the functions of a statement of case are stated to include "Defining the issues that need to be decided", thus, among other things, helping "to reduce the length of trials". These salutary goals were met in this case by the particulars of claim and the defence, which narrowed the issues in the case to the single one identified and decided by Brooks J, that is, whether the property was introduced to the purchasers by the respondent. In these circumstances, it seems to me that the appellants cannot now be allowed, as they have sought to do in this appeal, to broaden the issues beyond those identified by the parties in the pleadings.

[14] It is for these reasons that I concurred with my brother and sister in the judgment given on 2 February 2010 (as set out at para. [1] above).

PHILLIPS JA

[15] I too have read the reasons for judgment of Morrison JA. I agree with his reasoning and conclusions. There is nothing further I wish to add.