ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 9 OF 2003

BETWEEN:

TREVOR SANTOS

Appellant

and

ANIS YAZIGI

Respondent

Before:

The Hon. Mr. Albert Redhead	Justice of Appeal [Ag.]
The Hon. Mr. Adrian D. Saunders	Justice of Appeal
The Hon. Mr. Brian Alleyne	Justice of Appeal

Appearances:

Dr. E. Cort with Ms. C. Cort for the Appellant
Mr. G. Watt QC with Mr. H. E. Francis, Jr. for the Respondent

---

2004: February 3;
February 16;
April 13. [Re-issued]

JUDGMENT

[1] SAUNDERS, J.A. : This appeal arises from a re-trial. The first trial had been conducted by Mr. Justice Moe. In 1999, this court ordered a re-trial of the suit. The re-trial was heard by Madame Justice Joseph-Olivetti.

The parties

[2] Mr. Trevor Santos is the appellant, the defendant in the action. He was the owner of a property at Crosbies. In about 1994 he decided that, in light of financial difficulties he was experiencing, he should put the property up for sale. He engaged various estates agents to help him sell the property. Mr. Anis Yazigi, the respondent, was one of those whom he engaged. Mr. Santos agreed to pay Mr.

Yazigi a commission of 5% if the latter sold the property. In August, 1995, the property was sold to a Mr. Ryan for $1,824,946.23. Mr. Yazigi brought this suit claiming that he was entitled to his 5% commission on the sale. Mr. Santos denied that Mr. Yazigi was so entitled.

The pleadings

[3] Before examining the merits of the appeal, it is useful to look at the statements of case to consider the real issues that arose for determination. On the pleadings, it was conceded that Messrs. Santos and Yazigi had entered into a commission agreement and that Mr. Yazigi would have been entitled to a commission of 5% on the sale of the property if Mr. Yazigi had truly effected a sale. The Defence alleged however that Mr. Yazigi's claim should fail because Mr. Yazigi did not in fact secure the sale to Mr. Ryan and therefore was not the effective cause of that sale. It was also alleged that Mr. Yazigi did not perform his obligations pursuant to his oral agreement with Mr. Santos. In his *witness statement*, Mr. Santos alleged further that he had forbidden Mr. Yazigi from treating with Mr. Ryan but this important restriction on the admitted oral commission agreement was never pleaded. Nonetheless, the trial judge considered it important to resolve that issue.

The background to the re- trial

[4] The suit had originally been tried by Moe, J. In the course of that trial, Mr. Justice Moe had declined to admit into evidence a tape recording of a conversation between Mr. Yazigi and Mr. Ryan. The judge ultimately found for Mr. Santos. Mr. Yazigi appealed that judgment of Moe, J. We have seen the Notice of Appeal. The appeal was based principally on the judge's refusal to admit into evidence the tape-recorded conversation. The Court of Appeal, in an *ex tempore* oral decision, allowed the appeal and ordered a re-trial of the matter.

[5] The re-trial came on for hearing before Joseph-Olivetti, J. in February, 2003. The learned judge, as a preliminary point, heard argument on the matter of the

admissibility of the tape recording and decided to admit the tape into evidence. The judge later concluded, after hearing and examining all the evidence in the case, that Mr. Yazigi was indeed entitled to a 5% commission on the sale. Mr. Santos has appealed to this court.

The grounds of the present appeal

[6] The appeal by Mr. Santos against the judgment of Joseph-Olivetti, J. was based on two main grounds. Firstly, counsel takes strong exception to the decision of the trial judge to admit into evidence the tape recorded conversation. Secondly, it was submitted that the decision was against the weight of the evidence.

The weight of the evidence

[7] I think it useful to address this ground first because I consider its outcome to be decisive of this appeal. Dr. Cort, for Mr. Santos, submitted that the following circumstance weighed against the finding that Mr. Yazigi was the effective cause of the sale: Mr. Ryan had first been approached by Mr. Santos and since therefore Mr. Yazigi was not the person who introduced Mr. Ryan to the vendor, Mr. Yazigi's efforts were not such as could have made him the effective cause of the sale. The case of *Nahum v. Royal Holloway & Bedford New College*[1] was cited and relied on by counsel for Mr. Santos.

[8] I don't think *Nahum's* case assists Dr. Cort. That case emphasizes that in the context of commission agency contracts, the authorities suggest that the concept of introducing a buyer is not to be regarded as always decisive of the issue of being an effective cause of the sale, if indeed a sale eventually materializes. In that case, Waller, LJ quoted a passage from Nourse LJ in *Wood v. Dantana*[2] that highlights the point. Lord Justice Nourse stated:

[1] *QBENF 97/1143/1 (unreported)*
[2] *[1987] 2 EGLR 23 at 25*

> "……. the fact that one agent introduces a person who ultimately purchases after a later introduction by another agent will not necessarily entitle the first agent to commission. In such a case the court must determine which of the two agents was the effective cause of the transaction taking place."

Similarly, in this case, it matters not that the first contact with Mr. Ryan was made with Mr. Santos himself. One has to look at all the surrounding facts and circumstances and seek to discover whether Mr. Yazigi was an effective cause of the sale.

[9] It was also submitted that there was unchallenged evidence, given at the re-trial, of one Michael Westcott as to the steps a real estate agent was expected to follow in consummating a sale of a property, and that Yazigi did not conform to this pattern. I don't regard Mr. Westcott's evidence as being very helpful however. What is of far greater importance is the substance of the arrangement between Yazigi and Santos and whether it could fairly be said that, as the learned judge found, Mr. Yazigi was the effective cause of the sale.

[10] The evidence in this case was that in 1994 Mr. Santos first approached Mr. Ryan to discover whether the latter was interested in purchasing the property. Mr. Santos gave to Mr. Ryan plans, photographs and a profile of the property. The price being quoted was in excess of $3 million. Mr. Ryan was uninterested. The price being quoted was simply too high. Mr. Yazigi subsequently approached Mr. Ryan who reiterated his disinterest at that price but Mr. Yazigi kept behind him in an effort to find out at what price he would be prepared to purchase.

[11] The judge found that, to the knowledge of Ryan, Santos was pressed for cash and needed to sell the property. Ultimately, having gotten word from Mr. Santos that he would sell at $2 million, Mr. Yazigi concluded what he thought was a sale with Mr. Ryan for $2 million. Behind Yazigi's back however, Ryan negotiated that price downward to roughly $1.8 million. Counsel for Mr. Santos submitted that in these circumstances Mr. Yazigi was not the effective cause of the sale at $1.8 million.

[12] I disagree with this submission of Counsel. Case law does not support it[3]. In *Allan v. Leo Lines*[4], much the same submission was put before Devlin, J. (as he then was) and the learned judge stated in the course of his judgment:

> "In my judgment that is not right. One cannot look at the final end of the negotiations and see which was the more effective force in bringing about a particular figure. If it were otherwise it would make an agent's position hopeless. It is well known that in these matters there is a term implied that a principal will not do anything which might prevent his agent from earning commission…….. I cannot believe it to be the law that if an agent works very hard at bringing the parties close together so that only a thousand pounds or two separates them, the principal is entitled to say, "I propose to deal with the matter myself because I think I should be more effective than you in clinching the final figure," and when he has done that to say, "No, you never arranged a sale at that figure……"

As a matter of interest I should state that the reference to "a thousand pounds or two" by Devlin, J. is in the context of a sale price of roughly £63,000.00 in that case. In any event, the situation here is, paradoxically, one where the agent's arrangement with the purchaser was more favourable to the principal than what the principal ultimately agreed upon.

[13] Notwithstanding the fact that it was never pleaded, Mr. Santos testified that his arrangement with Mr. Yazigi prohibited Mr. Yazigi from treating with Mr. Ryan. Mr. Santos ought not to have been permitted to introduce this new and crucial departure from his pleaded case but no objection was made to its admission. The trial judge therefore considered it important to make a finding of fact on the issue.

[14] Among the witnesses appearing before her, the trial judge had the three principal actors in the transaction, namely Mr. Yazigi, Mr. Santos and Mr. Ryan. On each material issue of fact, the trial judge preferred the evidence of Mr. Yazigi over that of both Mr. Santos and Mr. Ryan. The judge had particularly harsh comments to

[3] *See: Allan v. Leo Lines (1957) 1 QB 127; Burchell v. Gowrie et al (1910) AC 614; and Price Davies & Co. v. Smith (1929) 141 LT 490*
[4] *See: Allan v. Leo Lines (1957) 1 QB 127*

make about Mr. Ryan's credibility. On the contrary, Mr. Yazigi impressed the judge as being a reliable and honest man.

[15] In his witness statement, Mr. Yazigi conceded that when he first approached Mr. Ryan to try to sell him the Crosbies property, Mr. Ryan indicated that he had already been approached by Mr. Santos but that he, Mr. Ryan, thought that the price being quoted by Mr. Santos was excessive.

[16] Financial pressure may have caused Santos to lower his asking price. And Ryan certainly was interested in obtaining the property at the lowest possible figure. But there was ample evidence before the court that it was the untiring efforts of Mr. Yazigi, who engaged himself in a relentless form of shuttle diplomacy between Santos and Ryan, that culminated in vendor and purchaser striking the eventual bargain at which they arrived. As the trial judge observed, Ryan himself conceded that Yazigi visited him on numerous occasions and was "like a bumble bee always buzzing around".

[17] An agreement of sale, expressed to be made between Santos and Ryan, and signed sometime in 1995 by Santos (but not Ryan) was exhibited. In this document, the property was to be sold to Ryan for $2 million. Clause 8 of the document plainly states that Mr. Santos "agrees to pay a real estate commission of five per cent (5%) of the purchase price to Mr. Anis Yazigi ….. for services rendered in effecting the purchase".

[18] Santos, faced with this hugely embarrassing piece of evidence, attempted to wriggle out of its implications by claiming that he was tricked into signing the document. The trial judge rejected this explanation and there is no basis for this court to reverse that rejection based as it was on the judge's assessment of the credibility of the witnesses. The same basis, the credibility of the witnesses, also underpinned the judge's finding that in the agreement between Yazigi and Santos,

there was no restriction on direct dealings with Mr. Ryan by Yazigi as alleged by Mr. Santos.

[19] In my opinion therefore, the decision of the trial judge that Yazigi was the effective cause of the sale is fully supported by the evidence. Given the natural advantage the judge would have had in seeing and hearing the witnesses, and even leaving aside the evidence contained in the tape recording, this court cannot conclude that the judge's decision was against the weight of the evidence. Accordingly, this ground of appeal, and hence, the entire appeal, must fail.

The tape recorded conversation

[20] Mr. Ryan, the purchaser of the property, gave evidence for Mr. Santos both at the original trial and also at the re-trial. During the first trial, as Mr. Ryan was being cross-examined by Mr. Yazigi's counsel, the latter set about contradicting some of the evidence Mr. Ryan was giving. It was sought to put to Mr. Ryan a cassette recording of a conversation (and a transcript of its contents) that had allegedly taken place between Mr. Ryan and Mr. Yazigi. The recording was made by Mr. Yazigi. At the material time Mr. Ryan was unaware that the conversation was being recorded. As stated earlier, the admissibility of this tape recording was the subject of a previous appeal to this court.

[21] At the first trial of this suit, Mr. Justice Moe did not admit the tape recording into evidence. I have had the benefit of perusing the notes of evidence of that trial as well as the written judgment of Mr. Justice Moe. The only reference made to the tape is during the cross-examination of Mr. Ryan. The relevant note states

> "Mr. Johnson…[i.e. then counsel for Mr. Yazigi]…makes application under Section 15 Evidence Act to introduce tape recording of conversation. Objection upheld….."

[22] No reasons were given by the learned judge him for upholding the objection. Neither at the time the objection was upheld nor in the written judgment that followed after the trial were reasons given. When the Court of Appeal met to

consider the appeal therefore, there was no material before the appellate court for it to determine whether Moe, J. had rightly exercised his discretion in upholding the objection. A re-trial was ordered.

[23] It seems that at the re-trial, there was great uncertainty as to the precise interpretation and effect of the order of the Court of Appeal. Apart from the bare order that the matter should be re-tried, there was nothing else to assist in interpreting the order. Did the order that the matter be re-tried therefore mean that the tape and transcript should, at the re-trial, be automatically admitted into evidence without more? Or alternatively, did the order mean that the tape was capable of being so admitted into evidence but, because the Court of Appeal could make no assessment as to whether Moe, J. had rightly exercised his discretion, a re-trial should be ordered? Of course this entire issue is now moot because, in light of what has been stated before, this appeal must fail in any event. It is my view however that the second of the two alternative interpretations posited is to be preferred.

[24] The law will admit tape recordings into evidence only if a particular foundation as to their authenticity is laid for their admission. A trial judge will first have to be satisfied that this foundation has been properly laid. If the Court of Appeal had no reasons whatsoever from Moe, J. as to the basis upon which he upheld the objection to the admissibility of the tape, then the appellate court could not have formed any view as to whether the judge had or had not rightly exercised his discretion. Moreover, Justice Moe's notes of evidence, kindly supplied to this court by the Registrar, do not suggest that any opportunity was given to lay the appropriate foundation. The Court of Appeal could not therefore have intended that its order should be interpreted in a manner as to suggest that such foundation had indeed been properly laid and that the requisite conditions were satisfied for the admission into evidence of the tape recording.

[25] For the re-trial, a transcript of the tape was appended to the witness statement of Mr. Yazigi that was filed on 23rd May, 2002. It does not appear that any objection was made to the admissibility of this transcript or of the tape until the outset of the re-trial. As soon as the re-trial commenced before Joseph-Olivetti, J., Dr. Cort lodged an objection to the admissibility of the tape recording. The response by Mr. Watt, counsel for Mr. Yazigi, was twofold. Firstly, it was said that it was now too late to make the objection and secondly, it was vigorously suggested (as it was before us as well) that the Court of Appeal's order should be interpreted as a definitive direction that the tape should be admitted.

[26] Madame Justice Joseph-Olivetti, J. ruled there and then, before any opportunity had been given of cross-examining Mr. Yazigi, that the tape should be admitted. Her ruling appeared to have been grounded on both limbs of Mr. Watt's response. In my respectful view, on each limb, she was in error. I have already indicated why I believe the order of the Court of Appeal ought not to have been interpreted as a directive that the tape should automatically be admitted into evidence. As to the other objection, in my view the learned judge could not properly have made a ruling without first permitting counsel for Mr. Santos to cross-examine Mr. Yazigi as to the authenticity of the tape. It could not have been sufficient only to have regard to what was said by Mr. Yazigi on that matter in his witness statement. In the circumstances, it is my view that the ruling to admit the tape was precipitately made. Nothing turns on this however.

Business Licence Act

[27] Another ground of appeal listed was that the learned trial judge was wrong in law in not finding that Mr. Yazigi was disentitled from claiming a commission fee as he had not complied with the Business License Act of 1994. It was submitted that pursuant to that Act, Mr. Yazigi had no license to transact business as a real estate agent. Dr. Cort, for the appellant, rightly did not press this ground in

argument as that Act was declared unconstitutional in the case of *Attorney General of Antigua v Ann Henry et al*[5]

Interest

[28] The learned Judge awarded interest at the rate of 8% on the monies due to Mr. Yazigi from the 20th November, 1995, being the date the writ was filed. The reason given by the judge for fixing this rate of interest was that this was a commercial transaction. Interest at 1% per month from 29th August, 1995 was claimed for in the writ and, in all the circumstances, I would not interfere with the judge's discretion to award interest at the rate of 8%.

Order of the court

[29] In all the circumstances I would dismiss the appeal and affirm the judgment of the learned trial judge. Mr. Santos will pay Mr. Yazigi's costs of these proceedings which I fix at $12,166.30 on the basis of prescribed costs.

Adrian D. Saunders
Justice of Appeal

I concur.

Albert Redhead
Justice of Appeal (Ag.)

I concur.

Brian Alleyne S.C.
Justice of Appeal

[5] *See Antigua Civil Appeal No. 10 of 1997*