

SAINT LUCIA

IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim No: SLUHCV2008/0405

Between:

Martin Devaux

Claimant

and

- (1) Theresa Goddard**
- (2) Mark Goddard**
- (3) Roebuck Properties (St. Lucia) Ltd.**

Defendants

Appearances:

Mr. George F. Charlemagne for the Claimant
Mr. Tonjaka D. Hinkson for the Defendants

2010: February 9th
October 7th.

JUDGMENT

- [1] **WILKINSON, J:** The Claimant by amended claim form and amended statement of claim filed 5th August 2008, claimed the following relief:
1. Damages for breach of contract.
 2. A declaration that the Claimant is entitled to and that the Defendants jointly and/or severally pay to the Claimant the sum of US\$485,000.00 on or before the completion of the sale of Parcels by the Defendants to Roebuck Properties (St. Lucia) Ltd.
 3. Further or alternatively a declaration that the Claimant be paid damages for services rendered on a quantum meruit basis.

4. Such further order or relief as the Court may deem just.
5. Interest on the sums found due and owing to the Claimant for such period and at such rate as to the Court seems just.
6. Costs.

[2] The Defendants filed a counterclaim 1st October 2008, and therein claimed the following relief:

1. Damages for breach of contract.
2. Costs.
3. Interest at the statutory rate.
4. Such other relief as the Court may deem fit.

[3] Before the start of the trial, I proceeded to hear an application filed by the Second Defendant on 17th February 2009, wherein he sought removal of the First Defendant from the suit she having passed away late December 2008, and he being the only remaining executor of the Estate of John Bertram Goddard. I had observed prior in the case management order of 24th November 2008, that it was recorded that the First Defendant was deceased. Upon hearing both counsel and reading the affidavit evidence of the Second Defendant in support of the application, I ordered that the First Defendant be removed from the proceedings and that they proceed with the Second Defendant as the sole defendant. For the sole purpose of simplicity having regard to the pleadings, I will however continue to refer to the Deceased as it relates to her actions, correspondence, and the conversations attributed to her, as the First Defendant.

[4] The Claimant's claim against Roebuck Properties (St. Lucia) Ltd., the purchaser in the transaction in dispute, was discontinued on 9th December 2008.

[5] It was also ordered on 28th May 2008, that EC\$1,423,726.50 /US\$485,000.00 of the purchase price plus prescribed costs of EC\$106,030.00 be paid by Roebuck Properties (St. Lucia) Ltd. or its agents into an interest bearing account at the Bank of Saint Lucia and the monies were only to be paid out on order of the Court.

ISSUES

[6] 1. Whether on interpretation, the Second Agreement is an agreement that can stand on its own without the need to add the implied term suggested by the Claimant to give it efficacy.

2. Whether on interpretation of the Second Agreement, the Claimant can be deemed to have “found a potential purchaser”, namely, Roebuck Properties (St. Lucia) Ltd.
3. Whether on interpretation of the Second Agreement the Claimant is entitled to the sum of US\$485,000.00.
4. Whether the Claimant terminated the Second Agreement by his email of 8th July 2007, wherein he informed the Defendant that he was now in a better position to proceed with the sale of the properties “under new conditions of sale”, and that he had in the interest of selling the property brought in “new buyers”.

Claimant's evidence.

- [7] The Claimant is a real estate agent and resides at Cap Estate, Gros Islet. In or about 2006, his wife who is from Ireland introduced him to a group of Irish Investors who had an interest in purchasing land at the south of Saint Lucia. He showed a representative of the group various areas which he recommended for their investment. The group subsequently incorporated the company, Roebuck Properties (St. Lucia) Ltd. He was introduced to the Chief Executive Officer, Mr. Neal Sweeney.
- [8] After the introduction he visited land at both Honeymoon Beach at Vieux Fort, and Black Bay at Laborie. Black Bay was specifically requested by Roebuck Properties (St. Lucia) Ltd. as the company decided that it needed calm waters for the hotel resort and the golf course could be on the East coast not more than 20 minutes away. The land at Laborie was the property (hereinafter called “the property”) of Mr. John Goddard, deceased.
- [9] The Claimant made several visits to the property, and on several of these visits he invited Mr. Tedburt Theobalds, a land valuer, along for his advice, and his professional services. He also introduced Mr. Theobalds to both the Defendants, and Roebuck Properties (St. Lucia) Ltd.
- [10] The Claimant was familiar with the Defendants' property because when Mr. John Goddard was alive, he had visited the property with him. He had originally approached Mr. John Goddard about looking for a buyer for the property. When Roebuck Properties (St. Lucia) Ltd. indicated their interest and preference for land in the location of, and of the topography as Mr. John Goddard's, he immediately thought of that property.

[11] He contacted the Defendants at the Republic of The Gambia where they resided with a view to acting on their behalf as real estate agent, for the sale of the property to Roebuck Properties (St. Lucia) Ltd. The First Agreement was executed between the Defendants and himself at 6th August 2006. It provided:

"Dated 6th day of August 2006

BETWEEN: Theresa Goddard and Mark Goddard (Executors of the Estate of John Goddard) (herein after called THE VENDOR) of the first part
AND

MARTIN DEVAUX real estate agent of Saline Point Cap Estate (hereinafter called THE AGENT) of the second part

Whereas:

- 1) THE VENDOR has agreed to sell their Property known as BLOCK 0818B Parcel No.2 and adjacent to this said Block and parcel No. the 16 acre parcel belonging to the Vendors to be shortly registered and both totaling 29 acres situated in the Quarter of Laborie (hereinafter referred to as "the Property").
- 2) It is agreed that THE AGENT has found and brought forward to THE VENDOR for negotiations ROEBUCK PROPERTIES (ST. LUCIA) LTD., the proposed purchaser of the Property.

In consideration of the foregoing the VENDOR and THE AGENT wish to enter into this formal Commission Agreement. It is agreed as follows:

- 1) THE VENDOR is to receive a sum of US\$2,985,000.00 (Two Million Nine Hundred and Eight(y) Five Thousand United States Dollars) for the sale of the Property.
- 2) THE AGENT agrees that the amount will be paid to THE VENDOR through the Purchaser's attorney, Mc.Namara & Co.
- 3) THE AGENT shall be entitled to a sum representing 5% of the aforementioned purchase price of the Property.
- 4) The sums payable to THE AGENT shall be paid by the Purchaser's attorney upon execution of the Deed of Sale and simultaneously to the transfer of the purchase price (less the commission & vendor's tax) to THE VENDOR.

SIGNED in agreement for
Theresa Goddard
M Goddard

[12] He provided a further breakdown of expected monies on the sale by an email dated 1st November 2006. That email read as follows:

" Hi Theresa & Mark,

Though I am still waiting on the name change I may have some good news for you.

I am trying to incorporate your sale into exemption from paying the vendors tax because of the investors application.

If this is the case you will get an additional approx. US\$148,324 or there about so if all goes well you should end up with US\$2,400,000. + US\$148,324 +US\$2,548,324 in your hand.

When I can confirm this McNamara's cheque to you should be US\$2,687,426 +US\$148,324 = US\$2,835,750
– US\$287,426 (Private payment to me) +US\$2,548,324

As follows:

<u>Selling Price</u>	=US\$2,985,000
<u>Minus 5% Commission</u>	=US\$2,835,750
<u>Minus (Private Payment) of US\$287,426</u>	=US\$2,548,324

I will confirm this information as soon as I can arrange this for you.
Please go over these figures to satisfy yourself.

Regards,
Martin Devaux"

[13] In pursuance of the sale the Claimant says that he corresponded by email with the Defendants. He also communicated with Roebuck Properties (St. Lucia) Ltd. via email. He was asked by Roebuck Properties (St. Lucia) Ltd.'s chief executive office, Mr. Neal Sweeney, to issue the contracts for sale of all the land for which he was real estate agent and these included the Defendants' property at the price of US\$2,985,000.00. The Claimant exhibited an email dated 1st May 2007 from Neal Sweeney which read as follows:

" Hi Martin,

I trust that you are well.

The lands will be closing this month, but I need contracts on the following soon;

- All Boreil Lands including Anne
- Goddards Lands - where are contracts with amount agreed US\$2,985,000
- Can you influence NDC on block and Parcel number.

Can you let me know status as I need them all in or Project won't Happen....

Regards

Neal Sweeney"

[14] Under cover of email dated 28th October 2006, an agreement for sale was forwarded to the Defendants. The Defendants executed the agreement for sale and returned it to the Claimant shortly thereafter. It provided amongst other things the following:

- 2) Subject to the terms and conditions hereinafter mentioned THE VENDOR will sell and THE PURCHASER (or the purchaser's nominee) will buy THE PROPERTIES described in the 2nd Schedule hereto (hereinafter called "THE PROPERTIES") free and clear of all encumbrances for a total purchase price of TWO MILLION NINE HUNDRED AND EIGHT FIVE THOUSAND UNITED STATES DOLLARS (US\$2,985,000.00) subject to the following terms and conditions:

- 3) At the date of signing hereof THE PURCHASER shall deposit the sum of US\$149,250.00 (representing 5% of the purchase price into the client's account of "Escrow Agent"(the detail of where are:MCSI OFFSHORE LTD...) to be held in escrow in accordance with the terms of this Agreement.
- 4)
- 5) THE VENDOR agrees to grant to THE PURCHASER 60 days to conduct all necessary due diligence and background checks on THE VENDOR, THE PROPERTIES and its environs. At the same time the VENDOR shall satisfy THE PRECONDITIONS set out in Schedule 1 hereto.
- 6)
- 7)
- 8)
- 13) The completion of the sale Of THE PROPERTIES shall take place on THE COMPLETION DATE at the office of McNamara & Co..
- 14) On THE COMPLETION DATE THE PURCHASER shall pay to THE VENDOR the balance of the purchase price (US\$2,835,750.00) and the parties shall execute a Deed of Sale transferring THE PROPERTIES to THE PURCHASER or the PURCHASER'S Nominee.

FIRST SCHEDULE

1. "THE COMPLETION DATE" means the 30 days after the issuing of Aliens licence by Government of St. Lucia to THE PURCHASER or such later date as the parties may agree to in writing."

[15] He said that because of his frustrations with Roebuck Properties (St. Lucia) Ltd., and realizing the amount of work that he had already done, and the amount still to be done, and the costs involved, he had the firm of McNamara & Co. prepare the Second Agreement with the Defendants. In the Second Agreement the Defendants agreed to pay him a larger commission because he had many commitments to individuals who worked with him on the sale of the property, and still had an obligation to work with him to make the sale to Roebuck Properties (St. Lucia) Ltd. happen. The Second Agreement as executed by the Defendants at 12th July 2007, provided:

"Commission Agreement

BETWEEN: Theresa Goddard and Mark Goddard (Executors of the Estate of John Goddard) (herein after called The VENDOR) of the first part

AND: MARTIN DEVAUX real estate agent of Saline Point Cap Estate (hereinafter called THE AGENT of the second part)

Whereas

- (1) The Vendors have agreed to sell their property registered in the Land Registry as Block 0818B Parcel 2 and adjacent to this said Block 0818B parcel No. 5 the 16 acre parcel belong to the Vendors totaling approximately 29 acres situated in the Quarter of Laborie.
- (2) The Agent has represented that the Agent has found a potential purchaser for the Properties in the name of Roebuck Properties LTD. (hereinafter referred to the "Potential Purchaser").
Now These presents Witness As Follows:
 1. **The Agent shall negotiate and agree with the Potential Purchaser a sale price for the Properties.**
 2. **The Agent shall pay out of the sale price all sums due by the Vendors in connection with this transaction, including Vendor's Tax (hereinafter referred to as the "Disbursements").**
 3. **The Agent shall pay over to The Vendors Theresa Goddard and Mark Goddard hereinafter referred to as The Vendors, the sum of TWO MILLION FIVE HUNDRED THOUSAND United States Dollars (US\$2,500,000.00).**

4. **The Agent shall be entitled to retain as commission, all sums remaining after the payment of Two Million Five Hundred Thousand United States Dollars (US\$2,500,000.00) by the Agent to the Vendor, the Agent shall present Deed of Sale of the properties to the Potential Purchaser. (Emphasis is mine)**
5. This agreement relates only to a sale by the Agent to the Potential Purchaser.
6. The benefit of this agreement is not assignable or transferable by the Agent.
7. This agreement is deemed to have come into effect on the 12th day of July 2007, with the understanding that time is of the essence.

[Signed]Therese Goddard

[Signed] Mark Goddard"

- [16] He said that on the instructions of the Defendants, he instructed Mr. Theobalds to conduct a valuation on the Defendants' property, and a valuation report was prepared dated 9th January 2008.
- [17] The original surveyor of the Defendants' property was Mr. Paul Boland of Laborie, and on the instructions of the Defendants he contacted Mr. Boland, and requested him to provide one of the survey plans for the 2 parcels forming the property. This plan was not registered with the Survey Department because of a Privy Council ruling pertaining to the parcel. He also on behalf of Roebuck Properties (St. Lucia) Ltd. had a survey of the Defendants' property carried out by Mr. Boland, and he arranged for Roebuck Properties (St. Lucia) Ltd. to pay Mr. Boland's fee.
- [18] Mr. Kenneth Monplaisir Q.C. and the Claimant spent approximately two and a half years trying to arrange with the National Development Corporation to transfer one of the parcels comprised in the Defendants' property to them, and which they obtained due to the ruling of the Privy Council at 1st February 1993. The Corporation was reluctant to transfer that parcel of land because it only wanted to lease that parcel of land. He had to plead with the Chairman of the Corporation, Mr. Michael Chastanet to intervene.
- [19] Mr. Kenneth Monplaisir Q.C. was very helpful to him, and advised him on the correct procedures to conclude the sale of the Defendants' property. He also reviewed the First and Second Agreements before they were forwarded to the Defendants for execution.
- [20] The Claimant also said that many of the other vendors to Roebuck Properties (St. Lucia) Ltd. were frustrated by the delays of the company and one of the vendors who had instructed him, cancelled his agreement for sale with the company. He also knew that the company lost its deposit on three

properties. The delay and excuses tendered by Roebuck Properties (St. Lucia) Ltd. for non completion caused him to be discredited amongst the vendors for whom he was acting.

[21] He said that without his knowledge and consent the Defendants and Roebuck Properties (St. Lucia) Ltd. executed an agreement for sale prepared by McNamara & Co. at 26th March 2008 for the property. The executed agreement for sale amongst other things provided the following:

- " (iii) The PURCHASER is an "alien" for the purpose of the Alien's Landholding Licence Act No.20 of 2002
- a. In these presents the words and phrases in capitals letters shall have the meanings assigned to each of them as follows:
- (i) THE PRICE means TWO MILLION FIVE HUNDRED THOUSAND DOLLARS UNITED STATES CURRENCY (USD\$2,500,000.)....
- (ii)
- (iv) The CLOSING DATE means thirty [30] days from the date of the signing of this agreement, unless extended by the VENDOR, such extension not to be unreasonably withheld, but not to exceed an additional thirty [30] day period....
3. The sale is conditional upon the following:
- (i) The PURCHASER obtaining an Alien's Landholding Licence or an exemption therefrom to allow it to purchase hold and own the PROPERTY.
- (ii) The PURCHASER providing evidence to show that it has obtained a waiver of the requirement to pay vendor's tax on the sale of the PROPERTY....
7. The PURCHASER shall be responsible for all its legal costs, stamp duty and other charges in connection with the preparation, execution and registration of the Deed of Sale.
8. The PURCHASER having secured a waiver of the Vendor's Tax on these conveyances, shall pass on this benefit to the VENDOR who shall consequently not bear any liability for paying Vendor's Tax on these conveyances. However, any legal costs incurred by the Vendor in the execution of these conveyances shall be borne by the Vendor. "

[22] After discovering that the Defendants and Roebuck Properties (St. Lucia) Ltd. had executed an agreement for sale he caused a caution to be registered against the property until the matter of the First and Second Agreements had been litigated. The stay of registration was recorded in the Land Registry as Instrument No.2108/2008 and dated 14th April 2008.

[23] The Claimant said that his first experience with the Second Defendant which caused him to become concerned was when the Second Defendant went to the firm of Mc Namara & Co. seeking information about Roebuck Properties (St. Lucia) Ltd.

[24] Under cross-examination the Claimant said that he established the selling price of US\$2,985,000.00 after negotiating with Roebuck Properties (St. Lucia) Ltd. and getting their

agreement. He was asked whether he would agree that part of his responsibility was to finalize a sale for the amount of US\$2,985,000.00? He stated that this would be correct. When the Claimant was asked if he was tasked with presenting a deed of sale between the Defendants and Roebuck Properties (St. Lucia) Ltd., he responded on the satisfactory conclusion that there was a sale taking place, and at the time there was no sale but a potential sale. He said that there was a potential sale because Roebuck Properties (St. Lucia) Ltd. had not as yet raised the funds and so nothing could proceed. He said that there was no deposit paid to the Defendants in relation to the Second Agreement because Roebuck Properties (St. Lucia) Ltd. did not have funding available.

[25] The Claimant when asked if he would say that the First Agreement lapsed or expired, he responded that it had lapsed and was superseded by the Second Agreement, and the Second Agreement was performed subsequently. He also said that there was no sale before the Second Agreement and the Second Agreement depended on a successful sale.

[26] He said that the matter of an agreement for sale had no bearing on the Second Agreement under which he was to be paid his commission, the Second Agreement was an enforceable agreement. He said that he agreed that it said that he should negotiate, and agree to the price, and he had agreed the price of US\$2,985,000.00, and pursuant to the Second Agreement he was to keep the amount in excess of US\$2,500,000.00.

[27] The Claimant said that because he was getting the Defendants more money than they had asked for, he considered it prudent, and in his best interest, to get larger than the 5 percent usual commission for himself and this is why there are two different sums shown on his email dated 1st November 2006 to the Defendants.

[28] Under cross-examination the Claimant said that there was nothing in the Second Agreement which prevented the Defendants from dealing directly with Roebuck Properties (St. Lucia) Ltd., and he admitted that it did not give him exclusivity.

[29] When asked if Roebuck Properties (St. Lucia) Ltd. approached the Defendants directly, whether they could have dealt with company directly, he responded that this would be double dealing and untrustworthy.

- [30] When it was put to the Claimant that Roebuck Properties (St. Lucia) Ltd. no longer wanted to have any business relationship with him and that all correspondence between himself and Roebuck Properties (St. Lucia) Ltd. had ceased at or about May 2007, and certainly by the end of the year 2007, he responded that he was not aware that the company held such a position.
- [31] The Claimant was asked if he would not agree that the private payment jeopardized the sale? He responded that the agreement for sale was drawn up on Roebuck Properties (St. Lucia) Ltd.'s instructions, and had nothing to do with him, and the agreement for sale was not prepared by him.
- [32] A witness for the Claimant was Mr. Tedburt Theobalds. He is a certified valuation surveyor with over 25 years experience. He is also on the list of recognized valuers issued by the Inland Revenue Department and the Comptroller of Inland Revenue of Saint Lucia. He said that the First Defendant informed him that the Claimant was acting as her real estate agent in the sale of the Defendants' property to Roebuck Properties (St. Lucia) Ltd. He was present with the Claimant on his many visits to the Defendants' property with the company's representative.
- [33] He was instructed by the First Defendant to do a valuation of the property. He received his instructions by email, and via telephone conversations between the First Defendant and himself. She agreed to pay him on completion of the valuation. On completion he presented the valuation to the Claimant to forward to the Defendants. To date the Defendants had not paid his bill for the valuation despite repeated demands, and visits to their attorneys-at-law.
- [34] The exhibit of Mr. Theobalds' appraisal/valuation report dated 9th January 2008, fixed the estimated then current market value of 29 acres at US\$2.00 per square foot for a total value of US\$2,530,000.00. He said that he had noted that the figure used for the sale of the property by the Defendants to Roebuck Properties (St. Lucia) Ltd. was the same figure in his valuation.

The Defendants' evidence

- [35] The only evidence for the Defendants was from the Second Defendant. He is an executor of the Estate of the John Bertram Goddard, and he lives at the Republic of The Gambia.
- [36] He said that on or about June 2006, the Claimant contacted the Defendants and notified them that there were persons interested in purchasing the property. The Defendants informed the Claimant

that they wanted US\$2,500,000.00 for their property and he upon their instructions to was to endeavour to secure a sale of the property at that price. On 22nd June 2006, the Claimant informed them that he was not able to secure the sale price they wanted and he was only able to negotiate a price of US\$2,000,000.00 and there would added US\$100,000.00 from his own fees as part of the deal. They did not accept the amount being offered as it was well below the price they wanted and they were not in a hurry to sell. In August 2006, the Claimant returned to the Defendants with a better offer, and on 6th August 2006, the First Agreement between the Claimant and the Defendants was executed.

[37] In the First Agreement, it was agreed that the Defendants would receive approximately US\$2,500,000.00 and the Claimant would see to all expenses. He was informed subsequently that Roebuck Properties (St. Lucia) Ltd. had made an application to the Government for the property to be deemed a special development area, and therefore all purchases of land in the area would enjoy exemptions from the payment of all taxes including vendor's transfer tax. The Claimant never informed the Defendants of the Roebuck Properties (St. Lucia) Ltd. application until 1st November 2006, when the Claimant told them that he was trying to incorporate in the sale an exemption from paying vendor's transfer tax. The Defendants were only happy that their asking price would be agreed to, and the sale could potentially be concluded on the terms they wanted. The Claimant's email of 1st November 2006, suggested that they would received an additional amount as a result of the exemption in vendor's tax, and an additional private payment was to be made to him. He assumed at this point that both parties had something to gain from the exemption and he simply brushed this part of the deal off as he was not interested in the calculation of figures but merely in getting the price he wanted. He was living in Africa, and far removed from Saint Lucia.

[38] The Second Defendant said that at 1st September 2006, the Claimant confirmed that he would keep the exempted vendor's transfer tax, as well as the agreed commission, and the Defendants would receive approximately US\$2,500,000.00. The Claimant was adamant that this part of the deal was to remain secret and again out of trust, the Second Defendant did not question him. He imagined that the Claimant expected that they would have had to pay the Vendor's transfer tax in any event and since it was already added to the purchase price as expenses, he could keep it.

[39] On 28th October 2006, the Second Defendant received an email from the Claimant and attached thereto was an agreement for sale for US\$2,985,000.00. The Defendants were instructed to sign

the agreement for sale and return it to the Claimant. At this juncture the Second Defendant says that he understood that he would receive approximately US\$2,400,000.00 net of all payments including the exempted vendor's transfer tax which would go to the Claimant as part of the transaction. The Defendants executed the agreement for sale and returned it to the Claimant but Roebucks Properties (St. Lucia) Ltd. never executed the agreement for sale for US\$2,985,000.00.

[40] At October 2006, the Defendants executed the Second Agreement with the Claimant. By this Second Agreement, the commission amount was changed so that the Claimant would receive all amounts in excess of US\$2,500,000.00, which sum would be payable to the Defendants.

[41] At 8th July 2007, the Claimant contacted the Second Defendant and informed him that the Purchaser had run into financial difficulties, was stalling and had not affected the agreement for sale by paying the deposit. At this time the Second Defendant says that he was becoming impatient since more than one (1) year had passed since Roebuck Properties (St. Lucia) Ltd. was brought to them as a potential purchaser.

[42] On 9th July 2007, the Claimant informed the Second Defendant that a sale of the property was imminent and that he would be sending him the agreement for sale and necessary documents to complete the sale. The email read as follows:

"Sunday, July 8, 2007.

Hi Therese,

I am now in a better position to proceed with the purchase of your two properties under new conditions of sale.

I will in the next couple of days forward a new draft of the agreement between us.

In the best interest of selling your property **I have brought in new buyers. The other clients have run into financial difficulty and have been continually stalling and have up to now not affected an agreement for sale by paying the required deposit** and the fact that they will want to purchase your property by alien licence could take this sale another 6 months or more to complete that is if they come up with the money to complete. (Emphasis is the mine.)

The new clients have agreed to purchase by setting up a St. Lucian IBC company which means that they do not need to apply for an alien licence (which they have agreed to do later to get all the concessions) to purchase which is perfectly legal and they have been with me this weekend discussing it with their attorney. I have told them that is the only way the Vendors, yourselves are prepared to sell the land.(Emphasis is mine.)

You will not be exempted from paying the Vendors tax of approx. 5% so I have added it to the price so I will arrange it that you get in your hand US\$2,500,000 and I will pay the vendors tax and all commissions and additional expenses which will be reflected in the agreement between us.

It has been exhaustive and frustrating and I want to see a conclusion to this sale as soon as possible.

I will update you when I have confirmation this week of these clients moving forward when the attorney is in receipt of setting up fees of the IBC company.

Hope you are all well.

Martin"

- [43] At the time of the Claimant's email, the Defendants had other investors interested in the property and they informed the Claimant that he needed to speed up the transaction.
- [44] Nothing happened for several months after this, and thereafter the Defendants decided to fend for themselves. As the time approached two years, the Defendants travelled from Africa and visited the Claimant at his residence. He showed the Second Defendant some emails between the Claimant and Roebuck Properties (St. Lucia) Ltd. and said the company was not interested in the property anymore and they would take it if the Defendants just left everything up to the Claimant. The Defendants continued to wait for the Claimant to bring closure to the sale.
- [45] The Second Defendant was contacted by Ms. Paula Calderon, his half-sister. After speaking with her the Defendants contacted Mr. Neal Sweeney of Roebuck Properties (St. Lucia) Ltd. The Second Defendant contacted the Mr. Sweeney at a telephone number provided by Ms. Calderon. The Second Defendant inquired of Mr. Sweeney whether the Claimant had anything to do with the transaction and he was informed that the Claimant had nothing to do with Roebuck Properties (St. Lucia) Ltd., and the company did not want to do business with the Claimant. The Second Defendant said that he did not have any documentation between himself and Roebuck Properties (St. Lucia) Ltd. to support this statement.
- [46] The Defendants agreed a price with Roebuck Properties (St. Lucia) Ltd. and at that time Mr. Desmond Le Roche of Roebuck Properties (St. Lucia) Ltd. told the Defendants that the company had found out about the Claimant's attempt at keeping the exempted vendor's transfer tax, he was doing this for all the land in the area being sold to Roebuck Properties (St. Lucia) Ltd. and this was driving up land prices. The company was therefore no longer doing business with the Claimant.
- [47] An agreement for sale between the Defendants and Roebuck Properties (St. Lucia) Ltd. was executed for US\$2,500,000.00. At the time they were told that Roebuck Properties (St. Lucia) Ltd.

was awaiting approval from Cabinet for a number of tax exemptions including an exemption of the vendors tax for all persons selling land at Black Bay to the company.

[48] The Second Defendant said that shortly after speaking with Ms. Calderon he spoke with the Claimant and informed him that he was going to go ahead and try to sell the property himself as the First Defendant's health was failing, and the family needed the money. At this time, the Claimant stated to the Second Defendant that they could not do that to him, and that he had worked on the sale for two years, and he depended on this deal for his livelihood. The Second Defendant apologized to the Claimant, and said to him that after two years, they could not continue with anymore delays.

[49] The Second Defendant said that the Defendants had left everything in the hands of the Claimant and he had not been able to secure an executed agreement for sale. It was the Claimant by his own actions who had brought an end to Second Agreement.

LAW

[50] **The Civil Code:**

Article 945 provides:

"When the meaning of any part of a contract is doubtful, its interpretation is to be sought rather through the common intent of the parties than from the literal construction of the words"

Article 951 provides:

"In cases of doubt, the contract is interpreted against him who has stipulated, and in favour of him who has contracted the obligation."

The Land Registration Act Cap. 5:01¹ section 37.2 provides:

"This section shall not be construed as preventing any unregistered instrument from operating as a contract, **but no action may be brought upon any contract for the disposition of any interest in land unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing, and is signed by the party to be charged or by some other person thereunto by him or her lawfully authorized.**" (Emphasis is mine.)

[51] In Chitty on Contracts² it is states:

"2607 Right to remuneration. It is the duty of the principal to pay his agent a commission or other remuneration agreed upon. **When there is an express term as to the payment of remuneration, the right to payment and the amount will depend on that term.** Thus if the contract provides that the amount of remuneration is left to the discretion of the principal, the court cannot determine the basis and rate of

¹ Revised Laws of Saint Lucia December 31st 2001.

² Vol.II 27th edi. (1989).

commission, since to do so would be making a new agreement between the parties and transferring to the court the discretion vested in the principal. **There is an implied agreement to pay remuneration whenever a person is employed to act as an agent under circumstances which raise the presumption that he would, to the knowledge of the principal, have expected to be paid. The amount of the payment and the conditions on which it is payable will depend on the circumstances.** If there is a custom or usage of the particular trade regulating the payment or remuneration, there is a presumption, in the absence of any express agreement to the contrary, that the parties contracted for the payment of the remuneration in accordance with this custom or usage. But if there is no proof of such custom and no express agreement, then a reasonable remuneration is payable. In estimating what is a reasonable remuneration, evidence of the bargaining between the parties is admissible as showing the value put upon the agent's services by the parties. (Emphasis is mine.)

2608 Commission. The remuneration of the agent frequently takes the form of a commission, being a percentage of the value of the transaction the agent is to bring about for the principal. In such cases the agent does not become entitled to his commission until the event has occurred upon which his entitlement arises. What this event is must be ascertained from the terms of the agency contract. In most cases where the agent is engaged to find a third party to enter into a contract with the principal there will be little difficulty because the event will occur when the principal and the third party enter into the contract which the agent was engaged to bring about. The agent's task is then successfully completed. (Emphasis is mine.)

2609 Estate agents. There is a great many cases concerning the commission payable to such agents. **They turn on the words used in the particular agreement. The difficulties have arisen because estate agents have frequently considered that their task is completed and that they should therefore be entitled to commission when they introduce to their principal (the potential vendor) a person who shows a real interest in buying.** This stage is normally reached when the potential purchaser makes an offer "subject to contract," or "subject to survey" or subject to some other condition. But in law such an offer, even if accepted, does not create a contract between the potential vendor and the potential purchaser. The contract is not made, according to normal conveyancing practice, until the parties exchange contracts. There is a third stage to the transaction, completion, at which the vendor hands the title deeds to the purchaser in exchange for the purchase price. The agent is engaged to bring about a sale, but he generally wants his commission before sale, i.e. at the "subject to contract," stage. **He is free to stipulate whatever event he wishes in his agency contract, but it is the "common understanding of men that the agent's commission is payable out of the purchase price," and it requires clear and unequivocal words to entitle the agent to commission if no sale is made.** In all cases however the question is whether the event upon which it is stipulated that commission is due has taken place. (Emphasis is mine.)

2610 Commission on the introduction of a purchaser. At one time it was frequent for estate agents to stipulate for their commission on some such event as "the introduction of a purchaser," or on "finding a purchaser" or "finding someone to buy." In one case commission was payable "in the event of business resulting." **Whenever the event is referable to a contract ultimately taking place, commission is not earned until the contract has been made. Thus, if the agent introduces a person who makes an offer "subject to contract" which is accepted, he does not become entitled to commission, because such transaction is not in law a contract at all. The agent's entitlement cannot, in such a case, arise until the parties have entered into a contract of sale. For example, if the event is the introduction or finding of a "purchaser," the person introduced or found is not a "purchaser" until he actually purchases by entering into a contract. Moreover, if the person introduced withdraws after contract but before completion, whether rightfully or wrongfully vis-à-vis the vendor, the agent is no longer entitled to commission, because ex hypothesi the person he introduced was not a "purchaser" since he never purchased. But it seems that if the vendor wrongfully (vis-à-vis) the purchaser withdraws, the agent's entitlement to commission may not be lost, though this must depend on the precise words used, and his right may sometimes be one for damages for breach of an implied term.** (Emphasis is mine)

[52] In *George Trollope & Sons v. Martyn Brothers*³ the real estate agent, plaintiff found a purchaser for the defendants' property, and the defendants agreed in the exchange of communication between themselves and the plaintiff to complete the sale 'subject to contract'. The defendants were to pay commission based on the usual scale of commission. The defendant refused to execute the contract for sale. The plaintiff filed a claim for their agreed commission or in the alternative damages for breach of an implied term that the defendant would do nothing to prevent the plaintiff from earning their commission. It was held that although in an agreement "subject to contract," the matter, as between vendor and purchaser, must be deemed to remain in negotiation until contracts are exchanged, there must, as between the plaintiffs and the defendants, be implied a term that if the purchaser introduced by the plaintiffs was ready and able to complete the contract, the defendants would not by refusing to complete prevent the plaintiffs from earning their commission, and as the defendant had, without just excuse, refused to complete, they were liable to the plaintiffs in damages, the proper measure of which in the circumstances was the amount of commission the plaintiffs would have earned had the transaction been completed. Scrutton L.J. wrote a dissenting judgment and it was approved by the House of Lords in *Luxor (Eastbourne) Limited & Others v. Cooper*.⁴ Scrutton L.J. said:

"There is no dispute that the sale did not "materialize," nor was it "satisfactorily completed." Signed contracts were never exchanged, though the purchaser had signed his engrossed part. There is no dispute that Howard was a ready, willing and able purchaser, introduced by Trollopes, in that Martyns could have given a good title if they had wanted to. But there is no dispute that on the contract as expressed in writing the event had not happened which entitled the agents to their commission. Mc Cardie J. in *Houlder v. Manx Steamship Co.*⁵ collected a series of authorities in which in such circumstances the agent failed to recover his commission. I refer to them without repeating them. How then can the agent recover his commission? The suggestion is on a quantum meruit. The answer to this is that there is a contract in writing, and as Lindley L.J. said in *Lott v. Outhwaite*⁶: "It was said that there was an implied contract to pay the agent a quantum meruit for his services. The answer was that there could be no implied contract when there was an express contract." Mc Cardie J. collects in *Houlder's* case⁷ a series of authorities to that effect and repeats them in *Bentall, Horsley & Baldry v. Vicary*⁸... It must be noted that in *Prickett v. Badger*⁹ it was the defendant's "inability" to proceed that caused the difficulty: he had no title to the land he purported to sell. In *Appleby v. Myers*¹⁰ where an accidental fire prevented work being completed on the premises on which the work was to be done, Blackburn J. used this language: "If by any default on the part of the defendant, his premises were rendered unfit to receive the work, the plaintiffs would have had the option to sue the defendant for this default, or treat the contract as rescinded, and sue on a quantum meruit." The same

³ [1934] 2 K.B. 436.

⁴ [1941] 1 A.C. 108.

⁵ [1923] 1 k.b. 110,113,114.

⁶ (1893) 10 Times L.R. 76, 77

⁷ [1923] 1 K.B. 110,113,114

⁸ [1931] 1 K.B. 253, 262.

⁹ 1 C.B. (N.S.) 296

¹⁰ (1867) L.R. 2 C.P. 651, 659

language was used by the Privy Council in *Forman & Co. Proprietary Ltd. V. The "Liddesdale"*¹¹, when the plaintiff in a lump sum contract for repairs did work he was not employed to do, and, I should add, did not do work he was employed to do, and it was held he could not recover for the work he had done within the terms of his authority. **The Court referred to Blackburn J.'s judgment in *Appleby v. Myers*¹² which, they said, mentioned two conditions under which a contractor for a lump sum who had not performed the stipulated work can recover something under his contract. He can do so if he has been prevented by the defendant from performing his work, or if a new contract has been made that he shall be paid for the work he has actually done....** Prevention where the defendant has no, or a defective, title is one thing, but some "preventions" clearly give no right to the agent.... **Lord Esher expresses the rule in *Hamlyn & Co. v. Wood & Co.* (3)¹³:" I have for a long time understood that rule to be that the Court has no right to imply in a written contract any such stipulation, unless, on considering the terms the terms of the contract in a reasonable and business manner, an implication necessarily arises that the parties must have intended that the suggested stipulation should exist.** It is not enough to say that it would be a reasonable thing to make such an implication. **It, must be a necessary implication in the sense that I have mentioned.**" I myself have given a long judgment in the cases involved in *Lazarus v. Cairn Line*.¹⁴ **In my opinion the proposition that if the employer prevents the agent from earning his commission he is liable, is much too wide. The prevention must be a fault or a default, in the sense that it is a breach of an express contract, or of some that must of necessity be implied, as where the employer has no title to the property he contracts to sell, or in breach of contract does not perform a term of the contract. In my opinion the "prevention: by the employer must be "wrongful," a "default," a breach of his contract with the purchaser to entitle the agent to base an action upon it...."**(Emphasis is mine.)

FINDINGS

- [53] It is observed that although the Claimant gave evidence of works carried out in pursuance of the Second Agreement, he however led no evidence as to its value. A similar comment is made about the Defendants who led no evidence about any expenses they had incurred.
- [54] Also observed is that the Claimant gave no explanation for how it is he requested the Defendant to execute the agreement for sale for US\$2,985,000.00, approximately six months prior to the email for Mr. Neal Sweeney dated May 1st 2007 requesting the agreement for sale.
- [55] There was some conflicting evidence by the witnesses. Some of the marked conflicts are the Claimant said he retained the services of Mr. Theobalds. Mr. Theobalds however said that he had been retained by the First Defendant and there is disclosed an email dated 10th November 2007 supporting this fact. Mr. Theobalds then stated that the First Defendant agreed to pay him, however in an email dated 12th December 2007. Mr. Theobalds said to the First Defendants: "I have discussed the question of fee with Martin and he has indicated that he will take care of that."

¹¹ [1900] A.C. 190

¹² (1867) L.R.2 C.P.651,659

¹³ [1891] 2 Q.B. 488,491

¹⁴ (1912) 17 Comm. Cas 107.

- [56] The first finding of the Court both on the evidence of the Claimant and the Defendant, is that from on or about June 2006 until about the end of 2007, the Defendants gave the Claimant free reign to do whatever was necessary to bring about execution of an agreement for sale between Roebuck Properties (St. Lucia) Ltd. and the Defendants. Indeed it was the Claimant, and not the Vendor's lawyer, as is customary, who forwarded to the Defendants the agreement for sale for US\$2,985,000.00 for execution by them and it was to the Claimant that the Defendants returned the executed agreement for sale. The Defendants' only interest which was repeated time and again in correspondence between the Claimant and the Defendants was to receive a stated sum of money clear of all taxes and disbursements for their property. The Defendants expressed no interest in how the money they wanted in hand was going to be achieved.
- [57] The first task of the Court is to interpret the Second Agreement. Notwithstanding the Claimant's pleading that he relied on both the First and Second Agreements, at the trial he said that he relied only on the Second Agreement because the First Agreement had been superseded by the Second Agreement. The Second Agreement was drawn by or at the behest of the Claimant, and from all indications before the Court, the Defendants requested no changes to the document, and they made none when it was sent to them via email for execution by them. They executed it and returned it to the Claimant. Curiously, the Second Agreement made no provision for signature by the Claimant.
- [58] Having concluded that the Second Agreement was drawn at the behest of the Claimant and there being no evidence of input in the document from the Defendants, the contra proferentem rule will apply in interpreting the Second Agreement. This common law principle is codified in the Civil Code at article 951.
- [59] The language of the Second Agreement is to my mind very precise. The Claimant in drawing the Second Agreement knew exactly what he wanted to achieve. What he wanted to achieve in short was full control so as to ensure he obtained the maximum amount of commission possible on the sale, and without any issue arising to his payment. He being resident at Saint Lucia and being in the business of selling real estate, would I believe, have been the most knowledgeable amongst the parties about the kind of prices per square foot that land in, and around Saint Lucia could attract. He therefore burdened himself with not only finding the "Potential Purchaser" with whom he undertook to negotiate the price, but he also burdened himself to pay all sums due on the sale

including vendor's tax, pay the Defendants \$2,500,000.00 from the sale price, and thereafter he was to retain the balance of monies from the sale price as his commission. His wanting to pay the vendor's tax (which is usually deducted from the sale monies) and make the payment to the Defendants are usually matters for the attorneys-at-law in the real estate transactions. Indeed I believe I am fortified that the Claimant deliberately burdened himself in the Second Agreement as by comparison with the First Agreement, the burdens which he assumed in the Second Agreement were reserved for the attorneys-at-law. Further I am assured that my interpretation is correct as under cross-examination the Claimant said that it was correct that a part of his responsibility was to finalize the sale for the amount of US\$2,985,000.00. Following the ratio of Scrutton L.J in **George Trollope & Sons v. Martyn Brothers**¹⁵ and the learning from **Chitty's** cited I find there is no need to imply any terms for efficacy. I therefore find that the Second Agreement can stand on its own.

[60] I address now the second and third issues together as I believe that they are interrelated. The Claimant having assigned these burdens to himself in the Second Agreement, it seems to me that in order to earn his commission the Claimant must release himself of each, and every one of the burdens which he assigned unto himself before he can earn any commission. He was clearly required to do more than find a potential purchaser. Further on reading the Second Agreement, it clearly anticipated that the sale monies would be the monies out of which the Claimant would be paid. His admission under cross-examination, and to which I have referred prior, that it was correct that part of his responsibility to finalize the sale for US\$2,985,000.00 clearly shows that he knew he had to do more than find a potential purchaser.

[61] On the evidence it is clear that the Claimant was in control of negotiating the sale price, and out of those negotiations he delivered to the Defendants an agreement for sale for the sum of US\$2,985,000.00. The Defendants duly executed the agreement for sale, and returned it to him for execution by Roebuck Properties (St. Lucia) Ltd. It is a fact that this agreement for sale was never executed by Roebuck Properties (St. Lucia) Ltd. This being the case, the Claimant was never able to relinquish the burdens which he had placed on himself so as to earn as his commission of "all sums remaining after the payment of US\$2,500,000.00". As I observed earlier, the agreement for sale was delivered to the Defendants approximately six months before Mr. Neal Sweeney's email of 1st May 2007, requesting that it be issued. As stated in Chitty paragraph 2609

¹⁵ [1934] 2 K.B. 436

"it requires clear and unequivocal words to entitle the agent to commission if no sale is made by his efforts". Support is also found at Chitty's paragraph 2610, no commission arises until the parties have entered an agreement for sale.

[62] I therefore find that the Claimant's claim must fail because he never relinquished the burdens which he placed upon himself. He was duty bound to not only find the potential purchaser, but also carry out his burdens to earn his commission.

[63] I find that even if I were to look at the Claimant's claim for commission from a second angle, I come away with the same results. The Claimant on realizing the he had no viable executed agreement for sale for the sum of US\$2,985,000.00 has said that his commission of US\$485,000.00 is based on the email of Mr. Neil Sweeny dated 1st May 2007, and wherein Mr. Sweeny makes reference to the sale price of US\$2,985,000.00, and intimates that the company will be buying at that price. The email cannot be viewed as an agreement for sale of any kind because it does not meet even the basic requirements of an agreement for sale, it is not signed off in anyway by the Defendants. It does not bind the Defendants, or Roebucks Properties (St. Lucia) Ltd. At best it can only be viewed as one of the pieces of correspondence in the negotiations. This position is buttressed by the Land Registration Act section 37.2.

[64] Looking at the Claimant's claim from even a third angle, I again come to the same results, he must fail. He has stated that the Defendants and Roebuck Properties (St. Lucia) Ltd. in effect came together and deliberately agreed between them to reduce the sale price so as to cut him out of the transaction. As stated prior, it is clear from the evidence that the Claimant was in control of the transaction from on or about June 2006 and until about the end of 2007. At 3rd November 2007, he emailed the First Defendant requesting her to instruct Mr. Theobalds to carry out a survey, and this she did as Mr. Theobalds in an email dated 12th December 2007, responded to the First Defendant accepting her instructions. At 8th January 2008, the First Defendant wrote an email to the Claimant notifying him that the Defendants had received a telephone call for a real estate group concerning the property. During the approximate one and a half years that the Claimant was in clear control of the transaction for the sale of the property at US\$2,985,000.00, while he complained about Roebuck Properties (St. Lucia) Ltd., he could lay no complaints about lack of cooperation at the feet of the Defendants. They executed the agreement for sale that the Claimant submitted to them, checked with him intermittently for status, reminded him from time to time that they had other

investors interested in the property but all the while clearly continuing to give the Claimant an opportunity to bring to fruition the sale in which he was to be instrumental.

[65] I think that it is fair to say that the Claimant had himself given up on the sale for US\$2,985,000.00 between the Defendants and Roebuck Properties (St. Lucia) Ltd. My assessment is made having regard to his email dated 8th July 2007 to the Defendants. Therein he says he has brought in "new buyers", that the Defendants demand of US\$2,500,000.00 exempt from disbursements will be met, and that he would pay the vendor's tax, all commissions, and additional expenses would be reflected in an agreement between them. He did not disclose who the "new buyers" were. This email to my mind had the effect of terminating the Second Agreement by the Claimant. Once again the Defendants left matters in the hands in the Claimant and waited on the Claimant. I therefore find that the Claimant having given up on a sale to Roebuck Properties (St. Lucia) Ltd. the Defendants were free some nearly two years later after first being approached by the Claimant, to pursue a sale of their own property as nothing in the Second Agreement prevented them from doing so, and the Claimant had terminated the Second Agreement.

[66] There was no evidence led which indicated that the "new buyers" ever signed an agreement for sale and or paid a deposit to the Defendants.

[67] Reverting now to the Defendants' counterclaim, since I have determined that on interpretation of the Second Agreement that it was necessary for the sale as negotiated by the Claimant and outlined in the partially executed agreement for sale to have been completed for the Claimant to receive his commission, the Defendants claims are denied. Ex nihilo nihilo fit.

Conclusion

[68] In conclusion the following orders are made:

1. The Claimant's claim is dismissed.
2. The second order of Justice Brian Cottle made 28th May 2008, is amended. The Bank of Saint Lucia is ordered to release to the Second Defendant as executor of the Estate of John Bertrand Goddard, the sum of EC\$1,423,726.50 (which sum represented US\$485,000.00) and release the sum of EC\$106,030.00 being a sum designated for prescribed costs, together with all interest earned on the account.

3. The Defendants' are awarded prescribed costs in the sum of EC\$106,030.00 on the Claimant's dismissed claim.
4. The Defendants' counterclaim is dismissed.
5. The Claimant is awarded prescribed costs in the sum of EC\$14,000.00 on the Defendants' dismissed counterclaim.


Rosalyn E. Wilkinson
High Court Judge