

**EASTERN CARIBBEAN SUPREME COURT
FEDERATION OF SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SKBHCV2014/0254

BETWEEN:

COBURN T. NORFLEET

Claimant

and

PRATHER MCNEAL-HUTCHISON

Defendant

Appearances:

Mrs. Stacey Ann Aberdeen-Sargeant for the Claimant

Mr Garth Wilkin for the Defendant

.....
2017: July 20

2018: March 27
.....

JUDGMENT

Introductory

- [1] **LANNS, J. [AG]:** This case concerns the vexed question of the entitlement of a real estate agent to commission, in circumstances where (a) a sale of property falls through after the realtor had found a buyer; (b) where the seller, accepted (by e-mail) a purported 'written offer' of sale presented to her (also by e-mail) by the realtor, purportedly on behalf of the buyer, (c) where the seller, having been presented with a 'purchase agreement' purportedly reflecting terms contained in the 'written offer' which she 'accepted' by email, refuses, (on grounds of 'illegality' and 'fraud'),¹ to execute the purchase agreement and withdrawing from the sale. Central to the dispute is the operation of the Citizenship by Investment Program of St Kitts and Nevis, the interpretation of section 3 (5), of the Saint Christopher and Nevis Citizenship Act, Cap 1.05, and Regulation 5 (2) of the Saint Christopher and Nevis Citizenship by Investment Regulations No. 52 of 2011, and the Schedule to the Regulations.

The Claimant's Case

- [2] The claimant's case is grounded in contract. He seeks to recover his commission by way of damages for breach of contract. He pleads that at all times material he was a real estate agent and owner of AAA Real Estate situate at Frigate Bay. He says he is licensed to sell real estate. Mr Norfleet asserts that by virtue of an agreement dated 16th March 2014, he and the defendant Mrs Prather McNeal-Hutchison (Mrs McNeal-Hutchinson) agreed that Mr Norfleet would act as a real estate agent in relation to the sale of units numbered 27 and 28 of Sealofts Condominium situated at Frigate Bay in St Kitts.
- [3] By clause 7 of the agreement, it was agreed in essence between the parties that should Mr Norfleet succeed in securing a 'written offer' and 'written acceptance' on an agreed sum and /or a reduced price mutually agreed by the parties, Mr Norfleet would still be entitled to be paid the full commission, even if Mrs. McNeal-Hutchison withdraws the property from the market subsequent to the acceptance.
- [4] According to Mr Norfleet, on or about the 15th August 2014, Mrs. McNeal-Hutchison accepted an 'offer' on the sale of units 27 and 28. This 'offer' was arranged and negotiated by Mr Norfleet with one, Mr Samer Suliman Salibi of Dubai. After acceptance of the offer, Mrs McNeal-Hutchison withdrew the units from the market and has neglected and or refused to pay Mr Norfleet the full commission due to him as agreed, notwithstanding several demands for payment.
- [5] Mr Norfleet complains that Mrs. McNeal-Hutchison has evinced an intention no longer to be bound by the agreement wherefore; he has suffered loss and damages.
- [6] Mr Norfleet has particularised his loss as follows:

"PARTICULARS OF SPECIAL DAMAGES

Legal fees to obtain advice on breach of agreement	EC\$ 500.00
Monies owed under the agreement	EC\$130,411.20
Loss of referral fees payable	EC\$ 29,885.90
Loss of finders' fee payable	<u>EC\$ 8,150.00</u>
Total	<u>EC\$168,947.10</u>

[7] In his prayer for relief, Mr Norfleet seeks damages, special damages, interest, costs and any further relief as the court deems just.

The Defendant's Case

[8] Mrs McNeal-Hutchison's pleaded case consists mostly of admissions and denials:

- (1) Denies that Mr Norfleet is entitled to the relief sought;
- (2) Neither admits nor deny that Mr Norfleet is a licensed real estate agent and or owner of AAA Real Estate;
- (3) Admits that Mrs McNeal-Hutchison owns units 27 and 28 of Sealofts Condominiums;
- (4) Admits the vendor's agreement between the parties dated 16th March 2014; whereby Mr Norfleet would act as real estate agent in relation to the sale of units 27 and 28
- (5) Denies paragraphs 4 of the statement of claim which speaks to clause 7 of the vendor's agreement. States that although Mrs McNeal-Hutchison did execute the vendor's agreement, inherent in clause 7 of that agreement was that the written offer contemplated therein would be a non-fraudulent and lawful 'written offer';
- (6) Denies that Mrs McNeal-Hutchison accepted the offer referred to in paragraph 5 of the statement of claim; states that the proposed draft 'purchase agreement' submitted to Mrs McNeal-Hutchison by Mr Norfleet was fraudulent and against public policy. States further that Mrs McNeal-Hutchison never executed the proposed draft 'purchase agreement'.

The particulars of fraud, illegality and breach of public policy were stated to be:

- (a) The Citizenship by Investment Program of St Kitts and Nevis was established in 1984 to attract investors of good character to make a substantial contribution to the development of St Kitts and Nevis;
- (b) Such a person is entitled upon making application and upon payment of a specified fee, to be registered as a citizen of St Kitts and Nevis if the Cabinet of the Federal government is satisfied that such person has invested substantially in St Kitts and Nevis.

- (c) For applicants to qualify for citizenship of St Kitts and Nevis under the real estate option of the Citizenship by Investment Program, they are required by the Cabinet of the Federal government to invest in a designated real estate with a value of at least US\$400,000.00 plus payment of various registration and other fees;
- (d) The Federal government of St Kitts and Nevis determines by Cabinet Decisions, which projects and which amounts of investment lead to eligibility under the Citizenship by Investment Program.
- (e) Only the purchase of villa units in an approved real estate development will qualify for citizenship.
- (f) Sea Lofts is an approved real estate development.
- (g) Mr Norfleet personally proposed and submitted a draft purchase agreement to Mrs McNeal-Hutchison and actively attempted to have her enter into the said draft purchase agreement with Mr Samer Suliman Salibi.
- (h) The said draft purchase agreement contained terms which purported to make the Mrs McNeal Hutchison responsible to pay the costs of, among other things Mr Salibi, his wife and his son, two dependents for their application to become citizens of St Kitts and Nevis via the Real Estate Option of the Citizenship by Investment Program of St Kitts and Nevis;
- (i) The said draft purchase agreement contained terms which purported to make Ms. McNeal-Hutchison responsible to pay Mr Norfleet “USD\$3,000 on behalf Mr Silibi [for] a finder’s fee for finding him this property”
- (j) The said draft purchase agreement contained terms which purported to make Mrs McNeal-Hutchison responsible to pay Mr Salibi’s legal fees in the sum of US\$10,000.00, and ‘new furniture to replace the items of the very old existing furniture in the sum of US\$15,500.00’
- (k) Mr Norfleet also told Mrs. McNeal-Hutchison that “this is how it is now done in St Kitts” in respect of properties sold for citizenship, that is to say, there would be a deduction from the purchase price of Mrs McNeal-Hutchison’s property to cover the costs of Mr Salibi, his wife, his son and his two dependents for their applications to become citizens of St Kitts and Nevis and other fees and expenses not normally payable by a seller.

- (l) The proposed draft purchase agreement between Mrs. McNeal-Hutchison and Mr Salibi is fraudulent as it sought to defraud the Federal Government of St Kitts and Nevis of a substantial contribution investment of US\$400,000.00, when in effect the investment proposed in the said draft purchase agreement would have only been US\$250,000.00.
 - (m) The said proposed agreement is also illegal being an attempted breach of the Saint Christopher and Nevis Citizenship Act, being an attempt by Mr Salibi through his agent Mr Norfleet to obtain citizenship by false pretence.
 - (n) The said proposed draft purchase agreement is also in breach of public policy, which is, that the substantial contribution by way of real estate purchase in the Federation of St Kitts and Nevis should be no less than US\$400,000.00.
- (7) Denies paragraph 6 of the statement of claim; states that the defendant refused to execute the draft purchase agreement because it was a fraudulent document and the defendant did not wish to be a part of any illegality.
- (8) Admits paragraph 7 of the statement of claim wherein the claimant avers that the defendant has evinced an intention no longer to be bound by the said agreement; states that the defendant, since knowing that the draft purchase agreement was illegal, refused to do any business with the claimant.
- (9) Denies Mr Norfleet has suffered loss and damages as particularised in paragraph 8 of the statement of claim. States that Mr Norfleet cannot be entitled to damages purportedly flowing from the vendor's agreement because inherent in clause 7 of that agreement was that the 'written offer' contemplated therein would be a non-fraudulent and lawfully written offer. On the contrary, the purported 'written offer' was a fraudulent and illegal offer. States further that Mr Norfleet cannot be entitled to damages purportedly flowing from the proposed draft 'purchase agreement' because it was never executed, and even if it was, it is an illegal and unenforceable contract. States further still that it is inappropriate and unlawful for Mr Norfleet to claim "legal fees paid to obtain advice on breach of agreement" as special damages.

The Claimant's Reply

- [9] By his reply, Mr Norfleet maintained that as a result of Mrs McNeal-Hutchison's breach of contract, he has suffered loss. He says that he complied with all the laws of the Federation and denies that the written offer contemplated was fraudulent; rather it was lawfully written. He puts Mrs McNeal-

Hutchison to strict proof that the written offer was fraudulent. He pointed out that at no time during electronic correspondence with Mrs McNeal-Hutchison did she raise any issue of fraud, illegality or unethical deceit. He reiterated that Mrs McNeal-Hutchison in an email dated 16th August 2014, accepted the 'written offer' submitted by Mr Norfleet on behalf of Mr Salibi. Mr Norfleet denied that the draft purchase agreement which Mr Norfleet sought to have Mrs. McNeal-Hutchison enter into was drafted by Mr Salibi's attorney-at-law and it was not fraudulent, illegal, or against public policy. As to the particulars of fraud and illegality, Mr Norfleet admitted items a to f but denied paragraphs g, m, and n, which among other things stated that the purchase agreement was drafted by an attorney at law who would not draft a document that is illegal or fraudulent. He opined that as a result of Ms McNeal Hutchison's breach, the government lost about US\$40,000.00 for stamp duty and other government fees of US\$150,000 totalling US\$190,000.00 which Mr Norfleet considers to be is a huge loss for the Sugar Industry Diversification Fund.¹ As regards the allegation of breach of public policy, the claimant denied that the draft purchase agreement was in breach of public policy as it clearly states that the property is being sold for US\$400,000.00. The claimant avers that the defendant has produced nothing in his defence to prove allegations of fraud, illegality and breach of public policy. The claimant maintains that he has suffered loss and damages as particularised in his statement of claim.

The Issues

- [10] The issues to be decided by this court, amongst others are:
- (a) Whether the claimant, at the material time was a real estate agent and owner of AAA Real Estate, and licensed to sell real estate in St Kitts;
 - (b) Whether Mr Norfleet is entitled to be paid commission of 12 per cent of the sale price of units 27 and 28 of Sea Lofts Condominium

Was the Claimant at the Material Time a Real Estate Agent and Owner of AAA Real Estate and Licensed to Sell Real Estate?

- [11] At paragraph 1 of His statement of claim, Mr Norfleet pleads that he is a real estate agent and owner of AAA Real Estate and licensed to sell real estate in St Kitts. The record shows that Mr

¹ I am at a loss as to the reference to the Sugar Industry Diversification Fund. This matter falls under the Real Estate Option.

Norfleet verified the contents of his statement of claim by a certificate of truth. So prima facie, he is taken to be a Real Estate Agent and owner of AAA Real Estate, and licensed to sell real estate in St Kitts. Additionally, at paragraph 2 of his reply to the defence, Mr Norfleet states “at the time of the agreement, the claimant, was, and still is a registered agent and can produce evidence of same if required.” He repeats this averment in his witness statement which he also verified to be true.

[12] Notably, the list of documents disclosed documentary proof to substantiate the averment by Mr Norfleet that he was in fact the owner of AAA Real Estate and licensed to carry on the business of real estate agent.² Based on the evidence, the court finds that Mr Norfleet, at all times material, had the capacity to act as a real estate agent; that Mr Norfleet was the owner of AAA Real Estate, and licensed to sell real estate in St Kitts; and that there was an agency relationship between Mrs McNeal-Hutchinson and Mr Norfleet.

Whether Mr Norfleet is entitled to be Paid Commission of 12 per cent of the Sale Price of Units 27 and 28 of Sea Lofts Condominium

[13] The vendor’s agreement, (particularly clauses 2 and 7) dated 16th March 2014 is relevant to the determination of this issue

[14] The agreement was headed “Vendor’s Agreement” It provided that Mrs McNeal-Hutchison desired to sell her property for the price of USD \$477,000.00. It also provided that Mrs McNeal-Hutchison desired to retain Mr Norfleet as her real estate agent to sell her property at Sea Lofts Condominiums at Frigate Bay, and Mr Norfleet agreed to act as real estate agent for that purpose.

[15] In the operative part, the agreement provided for a commission to be paid by Mrs McNeal-Hutchison. Clauses 2 and 7 of the agreement are reproduced for convenience, and are in the following terms

“2. Commission. Owner shall pay Real Estate agent a sales commission which shall be an amount equal to TWELVE percent (12%) of the Sales Price. Real Estate Agent’s right to receive the Commission is expressly conditioned on the sale of the property to a buyer

² The documents reflect that his licence was issued on 27th December 2013 and 22nd January 2015. However, during cross examination, Mr Norfleet, when asked how long he had been a real estate agent in St Kitts, replied: ‘In 2011’

procured by the Real Estate Agent. The Commission is payable within 48 hours of closing. If a sale is not closed but a deposit is paid, the Real Estate Agent ... is to be paid 35% of the deposit if it is forfeited, said sum to be paid within 48 hours of forfeiture.”

- [16] It is clear to me from clause 2 of the vendor’s agreement that the commission was dependent on the eventual sale of the property to a buyer procured by Mr Norfleet. This is in keeping with the legal principles which are set out in many cases on estate agency agreements. Thus, in **John D. Wood & Co (Residential and Agricultural Ltd) v Edward Craze [2007] EWHC 2658 QB**, Justice Swift DBE citing Jenkins LJ in **Midgely Estates Ltd v Hands [1952] 2 QB 432** stated:

“The purpose of engaging the services of an estate agency to market a property is to achieve an advantageous sale of the property. Thus it has been said that, in the absence of some other clear expression of intent, the intention of the estate agent and vendor when entering into an agreement concerning the sale of a property is likely to be that the commission stipulated for should be payable only in the event of an actual sale resulting³

- [17] To the same effect is the opinion of Harman L.J in **Sheggia v Gardwell [1963] 3 All E.R. 114** at 118, letters G-I:

“Estate agents live on commissions of which they are frequently baulked at a late stage, although they have done all their work, because the parties change their minds or the bargain goes off for some unforeseen reason, and naturally estate agents have been anxious to protect themselves as far as they can by ensuring that their commission is payable once the prospective vendor and purchaser have been brought together whatever the upshot. They have, therefore, adopted various devices, chiefly in the form of printed conditions written on the back of the applicant’s particulars so as to bring this about. The courts have frowned on these efforts because it is clear, in general, a would-be seller does not expect to have to pay a commission except out of purchase money when he receives it. It has come to be the law that references to “sale” or “purchase” as a condition of earning commission are taken to mean that these are payable when there is a complete purchase or sale and not before.”

- [18] Harman L.J continues:

“The authorities are ... best summed up by Jenkins L.J. in **Midgly Estates, Ltd v Hand**. The Lord Justice said: “As has been pointed out over and over again in the reported cases, an agency contract of this sort just like any other contract must be construed according to its terms. One has to look at the contract, and see whether, according to its terms, construed in accordance with the ordinary principles of construction, the event has happened in which the commission is expressed to be payable. So far as the general principle is deducible from the authorities, their effect may I think be thus summarised. The question depends on the construction of each particular contract, but prima facie, the

³ See Mrs. Justice Swift DBE in **John D. Wood &Co (Residential and Agricultural Ltd) v Edward Craze [2007] EWHC 2658 QB**, citing Jenkins LJ in **Midgely Estates Ltd v Hands [1952] 2 QB 432**

intention of the parties to a transaction of this type, is likely to be that the commission stipulated for should only be payable in the event of an actual sale resulting. The vendor puts his property into the hands of an agent for sale, and generally speaking, he contemplates that, if a completed sale results and not otherwise, he will be liable for the commission, which he will then pay out of the purchase money. That is, broadly speaking, the intention which, as a matter of probability, the court should be disposed to impute to the parties. It follows that general or ambiguous expressions, purporting to make the commission payable in the event of the agent 'finding a purchaser' or 'selling the property' have been construed as meaning that the commission is only to be payable in the event of an actual and completed sale resulting, or, at least, in the event of the agent succeeding in introducing a purchaser who is able and willing. That is the broad general principle in the light of which the question of construction should be approached, but this does not mean that the contract, if its terms are clear, should not have the effect in accordance with those terms even if they do involve the result that the agent's commission is earned and becomes payable although the sale in respect of which it is claimed for some reason or the other turns out to be abortive..”

- [19] One of the earliest cases on the issue is **Jacques v Lloyd D George & Partners, Ltd** [1968] 2 All E.R. wherein Denning, MR stated at letter C:

“We have had many cases on commission claimed by estate agents. The common understanding of mankind is that commission is only payable by the vendor when the property is sold. It is payable out of the purchase money; but some agents have sought by their printed forms, to get commission even though the property has not been sold or the purchase money received.”

- [20] Lord Denning continued at letter G:

“The principles which, in my opinion, are applicable are these: When an estate agent is employed to find a purchaser for a business or a house, the ordinary understanding of mankind is that the commission is payable out of the purchase price when the matter is concluded. If the agent seeks to depart from that ordinary and well understood term, then he must make it perfectly clear to his client. He must bring it home to him so that he makes sure he agrees to it. When his representative produces a printed form and puts it before the client to sign, he should explain the effect to him, making it clear that it goes beyond the usual understanding in these matters. In the absence of such explanation, a client is entitled to assume that the form contains nothing unreasonable or oppressive. If he does not read it and the form is found afterwards to contain a term which is wholly unreasonable or totally uncertain ... then the estate agent cannot enforce it against the innocent vendor. Applying this principle, I think that the clause in this case was wholly unreasonable and totally uncertain. It can and should be rejected, leaving the agent to his commission on the usual basis, namely that, if the sale goes through, he gets his commission. “

Applying the Principles

[21] In the present case, clause 2 is clear; commission is only payable in the event of an actual sale resulting. In this case, no sale has resulted. No commission is payable. This is not a case like the Antigua case of **Leona Francis v. Daven Joseph**⁴ where, in the year 2013, this court found that the claimant was entitled to her 5% commission on the sale price, in circumstances where there was an oral agreement between Ms. Francis and Mr Joseph for finding a purchaser for Mr Joseph's property; where there was also a verbal agreement for the payment of a 5% commission once the prospective purchaser identified by Ms Francis eventually bought the property; where Ms Francis found purchasers (husband and wife) to whom the property was eventually sold. In my judgment, **Leona Francis'** case does not assist the claimant to the extent that there, the claimant not only brought the seller and purchaser together, but the property was eventually sold to the person identified by Ms Francis for a price which included the 5% commission which was added to the price which Mr Joseph was originally asking for the property. Here, even if it can be said that Mr Norfleet brought Mrs. McNeal-Hutchison and Mr Salibi together, there was no eventual sale to Mr Salibi or to anyone else. The evidence is that the property is still up for sale.

[22] It bears repeating the critical sentence in clause 2 which is as follows:

“[The] Real Estate Agent's right to receive the Commission is expressly conditioned on the sale of the property to a buyer procured by the Real Estate Agent.”

Conclusion on clause 2

[23] Giving clause 2 its ordinary and plain meaning, and being guided by the relevant authorities quoted above, the event on which the payment of a commission was dependent (namely, the completion of the sale of units 27 and 28 by Mr Norfleet), had not occurred, with the result that the commission does not become payable.

[24] Arguably, this finding may or may not be dispositive of the matter. However, in the event that I am found to be wrong and for completeness, I go on to examine and construe clause 7 of the agreement

⁴ ANUHCV2011/0573, cited by counsel for the claimant

Clause 7

[25] Clause 7 of the agreement was captioned “**Getting a Written Offer**” and it provided that:

“In the event the Real Estate Agent succeeds in getting a written offer and a written acceptance for the asking price for the property/land, or a reduced price mutually agreed on by both the Buyer and the Seller, and the Seller withdraws the property from the market after the acceptance, the full commission to the Real Estate Agent in this contract remains payable.”

[26] Clause 7 raises several questions including: (a) what is the legal interpretation of this clause, Does clause 7 stand by itself or whether it supersedes clause 2 in respect of the conditions under which commission is payable? Whether it contains ambiguities concerning the payment of commission and should be construed contra proferentem. All of these sub-issues can conveniently be dealt with together.

[27] Mr Wilkin pointed out that clause 7 was drafted by Mr Norfleet. Counsel submitted that clause 7 must be read in the context of clause 2 which states “Real Estate Agent’s right to receive the Commission is expressly conditioned on the sale of the Property to a buyer procured by the Real Estate Agent”. Counsel further submitted that clause 7, when read in the context of clause 2, and in consideration of the principle of contra proferentem⁵ results in a legal interpretation of clause 7 which allows for the right of a real estate agent to claim his or her commission being hinged on the formal execution of a purchase and sale agreement between a purchaser and a vendor.

[28] Ms Aberdeen on the other hand, contended that clause 2 is not to be considered in isolation of clause 7; that in accordance with clause 2 of the vendor’s agreement, a buyer was procured, even though there was no actual sale; that in accordance with clause 7, an offer and acceptance were procured by Mr Norfleet; that the sale would have been concluded had not Mrs McNeal-Hutchison withdrew the property from the market; that the sale would have been concluded is evident by Mr Salibi’s drafting and signing⁶ the sale and purchase agreement. By Ms Aberdeen’s further submission, since the terms of clause 7 had been fulfilled by Mr Norfleet, and the terms of clause 2

⁵ That is to say, when a contractual term is ambiguous, the preferred meaning should be the one that works against the interests of the party who provided the wording

⁶ The copy of the purchase agreement before the court is unsigned

would have been fulfilled had it not been for the default of Mrs McNeal-Hutchison, clause 2 cannot come into effect when the reason the sale was not concluded was the failure of Mrs McNeal Hutchison to proceed with the agreed sale of the property. Mrs McNeal-Hutchison, submitted Ms Aberdeen, cannot be expected to benefit from her own wrong, and be thereby excused from paying the commission. According to Ms Aberdeen, Mr Salibi was ready and willing to pay, and was merely waiting on Mrs McNeal Hutchison to effect the transfer.

Finding

[29] I do not find that the terms of clause 7 sit/fit well with the terms of clause 2; nor do the terms of clause 7 fit well with the legal principles enunciated in the case law in relation to clause 2. To my mind, clause 7 in the context of clause 2 is contradictory and obscure. Accordingly, I am inclined to go along with Mr Wilkin and find that clause 7, when read with clause 2, is ambiguous and must be construed contra proferentem against the interest of Mr Norfleet who drafted the vendor's agreement. The result is that clause 7 allows for the right of Mr Norfleet to claim his commission depends on a written offer (containing a price mutually agreed between Mrs McNeal Hutchison and Mr Salibi) being made by Mr Salibi to Mrs McNeal-Hutchison, and a proper acceptance of that offer; and a formal execution by both parties, of a legally enforceable purchase and sale agreement between Mrs McNeal-Hutchison and Mr Salibi, and the subsequent withdrawal of Mrs McNeal-Hutchison from the sale, as well as taking the property off the market. In regard to the withdrawal of the property from the market, it is noteworthy that Mrs Mc Neal-Hutchison gave evidence that she still owns the property; that she did not withdraw it from the market; and it is still up for sale. I believe her.

[30] In the result, I am unable to agree with the analysis and contentions of Ms Aberdeen that clause 2 cannot come into effect on the basis that even though there was no actual sale, had it not been for the default of Mrs McNeal-Hutchison, the sale would have taken place, as Mr Norfleet had fulfilled his obligation under clause 7. As can be seen, Ms Aberdeen has introduced the issue of 'fault'. In this regard, counsel, during cross examination directed Mrs McNeal-Hutchison to paragraph 7 of Mr Norfleet's witness statement and the email from Mrs McNeal Hutchison to Mr Norfleet dated 28th August 2014 informing of her withdrawal from the sale. Counsel went on to suggest to Mrs McNeal-Hutchison that she was not able to give any reasons why she did not proceed with the sale. Mrs

McNeal-Hutchison's response was to the effect that she pulled out of the sale on the advice of her lawyer Mr Grant who informed her that the document was an illegal document.

[31] Notably, the email dated 28th August 2014 informed Mr Norfleet that Mrs. McNeal-Hutchison was unable to accept the purchase agreement for personal reasons which had nothing to do with the services of Mr Norfleet. That email seems to contradict what she stated, under cross examination, was the reason for not proceeding with the sale. Her explanation for saying it had nothing to do with the services of Mr Norfleet was to keep matters civil, she stated. Normally, where a sale is aborted because of the fault of the seller, the realtor is still entitled to his commission. But was the sale aborted because of the fault of Mc Neal-Hutchison? Seemingly not and thus, my finding above in relation to clause 7 stands.

[32] Notwithstanding my finding and conclusion in relation to clause 7, in case I am wrong in such conclusion, I go on to consider the offer and acceptance issues contained in clause 7 of the vendor's agreement.

The 'Written Offer' and 'Written Acceptance' Issues in Clause 7

[33] Mr Norfleet, in his witness statement and under cross examination, as well as Ms. Aberdeen in her written submissions stated that the e-mail dated 16th August 2014 sent to Mrs. Mc Neal-Hutchison was a 'written offer' contemplated by clause 7 of the vendor's agreement, and that Mrs McNeal-Hutchison's e-mail response of even date was her 'written acceptance'. Counsel pointed to the e-mail correspondence between the parties dated 16th August 2014, as well as other e-mail correspondences dated 25th, 26th, 28th and 29th August 2014; and 13th September 2014. Counsel then construed, analysed and commented on each of the emails in an effort to show that Mr Norfleet is entitled to his commission in accordance with clause 7 of the vendor's agreement.

[34] Learned counsel Mr Wilkin does not agree with Ms Aberdeen's submissions and arguments on the offer and acceptance issues. As far as counsel was concerned, the only 'written offer' made by the Mr Salibi was the draft 'Purchase Agreement' signed by Mr Salibi, the prospective buyer, which was sent by email on 26th August 2014 to Mrs McNeal-Hutchison by Mr Norfleet on behalf of Mr Salibi for Mrs McNeal-Hutchison's signature. Counsel pointed out that Mrs McNeal-Hutchison did

not execute the 'draft Purchase Agreement', nor did she indicate in writing or otherwise that she intended to enter into that particular agreement as drafted. Therefore, submitted Mr Wilkin, there was no 'written acceptance' as contemplated by clause 7.

- [35] It was Mr Wilkin's further submission that clause 7 does not and cannot contemplate a mere email from the real estate agent himself or herself addressed to the property owner, would satisfy the provisions for 'the Real Estate agent [succeeding] in getting a written offer..'

Discussion and Finding on the Offer and Acceptance Issue Contained in Clause 7

- [36] The e-mail which Ms. Aberdeen submits as being the 'offer' contemplated by clause 7 is dated 16th August 2014, from Mr Norfleet to Mrs McNeal-Hutchison. It reads as follows:

"Hi Pratha

Please email me that you have accepted the verbal offer that I gave you on your number 27/28 in St Kitts in the amount of 400,000 USD from Mr Salibi, the buyer and at closing you will pay the Buyer or who he directs in the contract the total amount of 150,000 USD that will be going towards future homeowners fees, all government fees to get citizenship in St Kitts, service provider fees and renovation of the condo unit.

The Vendor Agreement that I have with you dated March 16th 2014 says the commission that you would pay out would be 12% of the sales price but I would be willing to reduce that commission to 8% of the sales price to Mr Salibi only. If this sale falls through for some reason the commission would hold on other prospects as the 12% rate.

Thanks
Tom Norfleet"

- [37] By e-mail dated Saturday 16th August 2014, Mrs McNeal-Hutchison responded (at 7:29 pm) as follows:

"Accepted offer on 27/28 sealofts as written in this email dated August 16, 2014 at 6:14 pm from Tom norfleet

Pratha mcneal-Hutchison”

- [38] As previously stated, Mr Norfleet relies on the contents of those two e-mails to say that he performed his end of the bargain (because he succeeded in getting a written offer (purportedly from Mr Salibi) and a written acceptance from Mrs. McNeal-Hutchison herself); whereas Mrs McNeal-Hutchison failed to perform her end of the bargain, in that she has refused to pay over to him (Mr Norfleet) the commission contemplated by and payable under clause 7, despite him making demands, and that, by her refusal, Mrs McNeal-Hutchison has breached the vendor’s agreement.
- [39] I must honestly say the ‘offer’ and ‘acceptance’ referenced in clause 7, and said to be reflected in the emails of 16th August 2014, is apt to confuse rather than illuminate. If the email from Mr Norfleet dated 16th August 2014 is the ‘written offer’ contemplated by clause 7, is it in the same terms as the ‘verbal offer’; how is the ‘purchase agreement’ signed by Mr Salibi and unsigned by Mrs McNeal-Hutchison to be classified?: If the replying email of Mrs McNeal-Hutchison dated 16th August 2014 is the ‘written acceptance’ contemplated by clause 7, then what is the effect of the non-execution of the ‘purchase agreement by Mrs McNeal-Hutchison ? I would have thought that the ‘written offer’ and ‘written acceptance’ referenced in clause 7 of the vendor’s agreement meant a ‘written offer’ from a prospective buyer to a would-be seller. But Mr Norfleet and Ms Aberdeen hold a differing view.
- [40] All that having been said, and questioned, the evidence disclose that Mrs McNeal-Hutchison by email accepted what is said to be, and what she understood to be the ‘written offer’ contemplated by clause 7. The ‘written offer’ and ‘written acceptance’ reflected a reduced sale price for the units (from US\$477,000.00 to US\$400,000.00. I divert here to note the language employed in clause 7 which refers to ‘a reduced price mutually agreed on by both the Buyer and the Seller’. No such agreement had been reached between Mr Salibi and Mrs McNeal-Hutchinson. Agreement would only have been reached if Mrs Mc Neal-Hutchison and Mr Salibi had executed the ‘purchase agreement’ emailed to Mrs McNeal-Hutchison by Mr Norfleet. Mrs McNeal-Hutchison did not sign with an explanation for not so doing.

[41] The purchase agreement emailed to Mrs McNeal-Hutchison for her signature reflected that out of the US\$400,000, Ms. McNeal-Hutchison was to pay US\$150,000.00 towards future homeowners' fees, all government fees to get citizenship in St Kitts, service provider fees and renovation of the condo unit. Mrs McNeal-Hutchison told the court that she accepted the terms concerning the payment of US\$150,000.00 after Mr Norfleet told her that that is how it is done in St Kitts. In answer to the court as to whether she tried to find out if that was how it was actually done in St Kitts, Mrs McNeal-Hutchison responded thus: "Not at the time. I took Mr Norfleet at his word. I reposed trust⁷ in him. I found out otherwise when the documents were given to my lawyer Mr Grant at the time and he advised me not to sign it [the purchase agreement] as it was not a legal document." In further answer to the court, Mrs McNeal-Hutchison stated that she believed the purchase agreement was prepared by Dr Merchant; that she does not know Dr Merchant; she had never received any correspondence from him; that the purchase agreement was given to her by Mr Norfleet,

[42] Mr Norfleet, during, cross examination stressed that there were two agreements, being the vendor's agreement and the purchase agreement. As mentioned before, Mr Norfleet said that the purchase agreement had nothing to do with the vendor's agreement which in clause 7 contemplates that notwithstanding Mrs McNeal-Hutchison withdrawing from the sale, and pulls the property from the market; he is still entitled to his full commission. It bears repeating that Ms Aberdeen submitted that Mrs McNeal-Hutchison cannot be expected to benefit from her own wrong, and be thereby excused from paying the commission. According to Ms Aberdeen, Mr Salibi was ready and willing to pay, and was merely waiting on Mrs McNeal-Hutchison to effect the transfer.

[43] As has been shown, an explanation was given by Mrs McNeal-Hutchison for not proceeding with the sale. This explanation was not disputed. And the unchallenged evidence is that the property was not withdrawn from the market; it was still, at the date of trial, up for sale. I accept this bit of

⁷ It is aid that in addition to those duties which are implied by the law into agreements creating agency relationship, there are others which stem from the fact that the agency relationship is one of trust, even though not strictly one of trustee and beneficiary Irrespective of any contract, or even agreement between the parties, once the relationship of principal and agent exists, however it may arise, a complex of duties attaches to the agent. These duties are equitable in character, and may be lumped together under one general principle, namely, that he agent must not let his own personal interest conflict with the obligation he owes to his principal. (Fridman's Law of Agency, Fifth Edition, page 152-153.

evidence. It cannot be said, and I do not believe that Mr Salibi was ready, willing and able to pay when, based on the evidence, he was obviously relying on Mrs McNeal-Hutchison to pay fees and costs which he is obligated to pay from his own pocket when applying for citizenship after he has purchased property for US\$400,000.00 in a designated area.

- [44] Mr Norfleet cannot seriously be saying that the vendor's agreement had nothing to do with the purchase and sale agreement in circumstances where certain unusual terms contained in the 'written offer' which was said to be 'accepted' by Mrs McNeal-Hutchison were reflected in the 'purchase agreement. If the 'written offer' contained terms that were unusual or unreasonable, or illegal or fraudulent, and these terms were transported to the 'purchase agreement', then as the saying goes 'what went bad in the morning cannot come good in the evening'. These two agreements are inextricably linked to the extent that they contain terms which were not in the interest of Mrs McNeal-Hutchison and contrary to the letter and spirit of the Citizenship by Investment Regulations and Program. They appear to be structured in a way to, and have the potential to dishonestly deny Mrs McNeal-Hutchison of the true market value of her property, and allow Mr Salibi to gain citizenship without paying the requisite US\$400,000.00, under the pretext that this is how it is done in St Kitts.

Findings

- [45] Applying the principle expounded in the case law as set out above, I find and hold that when Mr Norfleet presented the 'written offer' to Mrs McNeal-Hutchison, (which he said he did on behalf of Mr Salibi) he ought to have explained the true effect to her, making it clear that it goes beyond the usual understanding in these matters. He did no such thing. Instead, he told Mrs McNeal that this is how it is done in St Kitts, when he knew fully well that this not how it should be done in St Kitts. Given that explanation, Mrs McNeal-Hutchison was entitled to assume that the offer contains nothing unreasonable or oppressive or illegal or dishonest. And since it was found afterwards to contain a term or terms which was/were wholly unreasonable or totally uncertain, and dishonest, then Mr Norfleet cannot enforce clause 7 against her as she was an 'innocent vendor'. I think that Mrs McNeal-Hutchison was well within her rights to decline paying the commission, as well as executing the 'purchase agreement' (which contained unreasonable and oppressive, and illegal or

dishonest terms), and leave Mr Norfleet to his commission on the usual terms as contained in clause 2, that if the sale goes through, he gets his commission and nothing else.

[46] I find that Mr Norfleet in his 'written offer' to which Mrs McNeal-Hutchinson is said to have provided a 'written acceptance' departed from the usual, ordinary and well understood terms as set out in clause 2. I find that clause 7, hinges on an offer which contains unreasonable terms, which were disadvantageous to the interest of Mrs. McNeal-Hutchison and advantageous to the interest of Mr Norfleet and or Mr Salibi. The evidence is that Mrs McNeal-Hutchison accepted the offer because she understood it to be 'how it is done in St Kitts'. I find that the offer referred to which resulted in the acceptance goes beyond the usual understanding in these matters, the effect was not properly or correctly explained to Mrs McNeal-Hutchison in that, it was erroneously represented to her that that is how it was done in St Kitts.

[47] In the foregoing premises, it cannot be said there was any breach of clause 7 of the vendor's agreement; and it can hardly be said that Mrs McNeal-Hutchison is seeking to benefit from her own wrong as counsel for the claimant has submitted. Rather, it seems to be the other way around. Indeed, Mr Norfleet cannot benefit from his own wrong-doing.

Illegality, Fraud, Public Policy Issues

[48] At the risk of being repetitive, the main issue to be considered here is whether the written offer reflected in the purchase and sale agreement was fraudulent, illegal and against public policy

Position of the Parties

(a) Mr Wilkin's Position

[49] Mr. Wilkin's position on this issue is grounded in contract in the context of the Citizenship by Investment Program. Mr Wilkin's submission was that the 'written offer' contemplated in clause 7 was against public policy, illegal and amounts to a public mischief, and is of no effect.

[50] The gist of Mr. Wilkin's argument on this issue was that the only offer submitted to the defendant by Mr Salibi was the draft 'purchase and sale agreement'. Counsel went on to outline the terms of the agreement pertaining to the fees which the defendant was required to pay upon closing. Counsel described these fees (amounting to USD\$150,000.00) as a kick back to the purchaser.

Counsel then went on to examine sections 3 (5) of the Citizenship Act and section 5 (2) of the Regulations to that Act and the Schedule to the Regulations. In the end, counsel argued that

“A Citizenship-By-Investment applicant’s application fee is not a “real estate investment” **nor** is the cost of new furniture; **nor** is legal fees; **nor** is real estate finder’s fees. Any such deductions from the minimum real estate investment applicant therefore are illegal kickbacks to the purchaser/Citizenship-By-Investment applicant, by fact and by law. It is simply fraudulent, illegal and improper method of attempting to avoid the minimum requirement for real estate investment establishment by Parliament and regulated by the Minister responsible for Citizenship.”

[51] In summary, counsel’s final submissions were:

- A. The draft purchase agreement is fraudulent as it sought to defraud the Federal Government of a substantial contributive investment of US\$400,000.00, when in effect the investment proposed in the said draft purchase and sale agreement would have only been US\$250,000.
- B. The draft purchase and sale agreement is also illegal being an attempt to breach the Citizenship Act, as it contemplates that Mr Samer Suliman Salibi would seek to obtain citizenship by false pretence.
- C. The draft purchase agreement is also in breach of public policy, which is, that the substantial contribution by way of real estate purchase in the Federation of St Kitts and Nevis should be no less than US\$400,000.00 in order for a purchaser to qualify to apply for citizenship by investment.

[52] To bolster his submissions, counsel placed reliance on the Antigua case of **Kenneth Providence v Elnathan Little**⁸ where Blenman J. was called upon to interpret sections 3 and 14 of the Non-Citizens Land Act to decide the legality of an agreement entered into between Mr Providence and Mr Little in relation to property. In that case, Blenman J considered what the intention of Parliament was and whether the agreement was in keeping with the intention of Parliament. The learned judge went on to find that the intention of the legislature was to expressly prohibit the holding of land by non-citizens in Antigua without first obtaining the requisite licence, whether it was held beneficially or otherwise. The learned judge opined that the legislature is of the view that the requirement for non-citizens to have licences is for the protection of the public of Antigua and Barbuda. Accordingly, the judge went on to hold that the agreement that was entered into was illegal and in

⁸ ANUHCV2005/0142

clear breach of the law and its purpose was to evade the provisions of the Act. “The Court must give effect to the intention of the legislature and protect public policy,” the learned judge stated.⁹

[53] Based on the principles identified by Blenman J in the Providence case, Mr Wilkin submitted that the intention of St Kitts Nevis Legislature was that persons could apply for citizenship of St Kitts and Nevis if they invest a minimum sum of US\$400,000.00 in real estate, which would be considered a sum substantial sufficient for that person (and his immediate family members) to qualify to apply for citizenship. Therefore, any attempt to invest less than US\$400,000.00 by way of kickbacks or otherwise would be an attempt to defraud the people and bypass the laws of St Kitts and Nevis by subverting the minimum real estate investment requirements which are legislated.

(b) Ms. Aberdeen’s Position

[54] In summary, the position of Ms. Aberdeen is grounded on the following points:

- (1) The defendant’s argument about defrauding the government of US\$400,000.00 shows confusion on the part of the defendant as to the end result of the proceeds of sale of a property under the real estate option of the citizenship by investment regime
- (2) The government has no dealings with amounts received for purchases; what the government is concerned with is the payment of government fees for registration of citizenship;
- (3) The defendant is misled as a transaction such as that contained in the purchase and sale agreement cannot be said to be inappropriate or wrong if the seller takes a loss but is happy with the deal;
- (4) There would have been no harm.as there was full disclosure of the transaction from the offer stage and no one was put at risk;
- (5) The citizenship regulations state that the minimum real estate requirement is US\$400,000.00 which was in fact the sum to be paid by the buyer to the seller and after closing the seller would have given the buyer US\$150,000 as agreed for the satisfaction of fees associated with the citizenship application;

⁹ See paragraph [63]

- (6) It is permissible and not illegal for a seller to assist a buyer with closing costs and in such instances the cash back is regarded as earnest money as is the case at hand;
- (7) There was no fulfillment of the requirements to establish fraud;
- (8) The parties were fully aware of the details of the purchase and the defendant by her own admission accepted the offer;
- (9) As the parties were in two different countries, and communicated by way of e-mail, this eliminated any attempt at coercion to contract; the defendant signed the written acceptance of her own free will and volition.

(c) The Purchase Agreement

[55] I believe I have already alluded to the issues pertaining to the purchase agreement, but for what it is worth, and since counsel canvassed it in their submissions, I go on to consider it at the risk of repetition in some respects, and bearing in mind that this agreement primarily concerns Mrs McNeal-Hutchison and Mr Salibi, and there is no claim made by Mr Salibi that requires me to consider the agreement in depth.

[56] The purchase agreement was signed by Mr Salibi and his solicitor Dennis merchant. It was then e-mailed to Mrs. McNeal-Hutchison by Mr Norfleet, with instructions as to its execution and its notarization. The agreement is headed "PURCHASE AGREEMENT" and in it 'DR. PRATHER MC NEAL HUTCHISON'¹⁰ is described as "SELLER" and "SAMER SULIMAN SALIBI"¹¹ as "PURCHASER" In its operative part, the agreement provides that the purchase price shall be 'USD\$400,000.00'.

[57] "3.1 Upon the PURCHASER'S receipt of the SELLER'S signed agreement the sum of USD\$40,000.00 shall be paid as an initial deposit to be held with the SELLER'S solicitor, in an escrow account as escrow agent ... pending closing."

[58] "3.2 The SELLER has agreed to pay the PURCHASER USD\$150,000.00 paid within ten (10) business days of the closing date to cover cost of the following:

¹⁰ Residing at 200 Lake Ridge Road, Eclectic, Alabama

¹¹ Residing at MI ZALA BUILDIG, SHIEKH RASHID ROAD, AL CHARHOUD, PO. BOX 99446, DUBAI UNITED ARAB EMIRATES

1. USD\$100,000 TO COVER HIS COST OF THE APPLICATION FOR: CITIZENSHIP and his two dependents.
2. Main applicant due diligence US\$7, 500.00.
3. Wife of main applicant due diligence USD\$4,000.00
4. CIU fees of USD\$10,000.00
5. Legal fees USD\$10,000.00 inclusive of all legal fees payable by the Purchaser (Payment terms 50% on signing and 50% on closing)
6. TO PAY COBURN T. NORFLEET A (sic) USD\$3,000 IN BEHALF OF THE PURCHASER A FINDERS'S FEE FOR FINDING HIM THIS PROPERTY UPON CLOSING BY THE SELLER'S SOLICITOR.
7. New furniture to replace the items of very old existing furniture USD\$15,500.00."

[59] Curiously, even though the purchase agreement is expressed to be between Mrs McNeal-Hutchison and Mr Salibi, and even though Mr Norfleet stated in cross examination that the vendor's agreement had nothing to do with the purchase agreement, clause 10 of the purchase agreement shows otherwise. Clause 10 of the purchase agreement is headed "COMMISSION AND FEES PAID OUT AT CLOSING. It provides as follows:

"10. AAA REAL ESTATE'S (sic) SHALL BE PAID EIGHT PERCENT COMMISSION TO BE DEDUCTED FROM THE BALANCE DUE TO THE SELLER.

[60] By clauses 10.5 it is provided that "THE SELLER HAS AGREED TO PAY THE PURCHASER USD\$150,000.00 PAID AT CLOSING TO COVER THE COSTS OF HIS APPLICATION FOR CITIZENSHIP AND NEEDED FURNISHING OF THE PROPERTY, TO BE PAID OUT OF THE REMAINING BALANCE OF THE USD\$360.000."

[61] And by clause 10.6 it is provided that "THE SELLER IS AWARE THAT USD\$20 000 OF THE BALANCE (MENTIONED IN CLAUSE 10.5) WILL BE RECEIVED AND RETAINED BY PURCHASER'S SOLICITOR FOR PAYMENT OF TAXES, THUS THE NET TO BE PAID TO THE SELLER INCLUSIVE OF THE DEPOSIT UPON CLOSING SHALL BE USD\$190,000.00."

[62] This so called purchase agreement¹² brings into sharp focus the sharp practices employed by real estate agents and others in the context and operation of the Citizenship by Investment Program. It appears that the program is being abused in several ways by certain actors under the program.

[63] The government of Saint Kitts and Nevis offers citizenship in exchange for investment of US\$400,000.00 in real estate in designated areas. I do not find that this purchase agreement reflects an intended investment of US\$400,000.00 by Mr Salibi. When one looks at the amount of deductions to be made from the purchase price on behalf of Mr Salibi, it appears that Mr Salibi is indeed attempting to get citizenship of St Kitts and Nevis by false pretence because he would be investing less than the minimum US\$400,000.00 that would qualify him for citizenship for himself and his dependents, while Mrs. McNeal Hutchison would be mulct with fees and expenses which Mr Salibi would ordinarily be required to meet under the Citizenship-by-Investment Regulations. Significantly, Mr Norfleet, when, asked during cross examination if he read the purchase agreement responded: "Yes. Nothing seemed strange in it. After reading it I sent it to Mrs McNeal-Hutchison. I did not see anything wrong with it at all". When pressed further, Mr Norfleet said that if he were to find out that the purchase agreement was an illegal document, he would not want to have anything to do with it.

[64] In all the circumstances of this case, I think it would be an affront to public conscience to grant Mr Norfleet the relief he seeks, because it would thereby appear to assist or encourage Mr Norfleet in his conduct in encouraging would be investors in illegal and oppressive and dishonest transactions.

[65] It follows that I prefer and accept the submissions of Mr Wilkin in preference to those of Ms Aberdeen, and for the reasons stated above I propose to dismiss the claim.

Conclusion

[66] For all the reasons stated above, I dismiss the claimant's claim and I give judgment for the defendant with costs as prescribed under CPR 65.5.

[67] Last, but by no means least, I must express my gratitude to counsel for their helpful submissions and authorities. It is well recognised from the authorities on the law of agency that this area of the law is very difficult and many of the decisions are inconsistent. I must honestly say, I found this

¹² The copy exhibited to the witness statement of Ms McNeal Hutchison is undated and unsigned.

case to be a testing one - one which might be of sufficient importance for consideration by the Full Court of Appeal

Pearletta E. Lanns
High Court Judge [Ag]

By the Court

Registrar