[2020] JMCC Comm 21

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. SU2019CD00430

BETWEEN	ANDREW ISSA REALTY LIMITED (T/A COLDWELL BANKER JAMAICA REALTY)	1ST CLAIMANT
	ANDREW RICHARD ISSA (T/A COLDWELL BANKER JAMAICA REALTY)	2ND CLAIMANT
AND	EVEROY H. CHIN & CO.LTD.	DEFENDANT

Application for summary judgment –Claim by broker for commission on sale of land- Whether defence has real prospect of success- Multi Listing Agreement (MLA)- Whether sale to person "associated or affiliated" to someone with whom broker negotiated - Whether Defendant entered into another "valid, bona fide" MLA- Whether 1st Claimant a party to MLA –Whether Claimants were licensed brokers-Whether triable issues of fact – Attorney swearing affidavit- Whether costs to be allowed –Observations on the use of exhibit schedules.

Nigel Jones and Olesya Ammar instructed by Nigel Jones & Co. for the Claimant

John Graham QC and Peta Gaye Manderson instructed by John G. Graham & Co. for Defendant.

Heard: 18th & 24th June, 3rd July & 31st July, 2020.

IN CHAMBERS: By ZOOM

Cor: Batts J.

[1] The Claimants have applied for Summary Judgment. They say, consistently with Rule 15.2 (b) of the Civil Procedure Rules, that the Defendant has no real prospect of successfully defending the claim. They say further that, notwithstanding certain factual denials by the Defence, the documentary evidence can be used to determine the matter summarily. This is in accordance with the approach of the Court of Appeal in ***ASE Metals NV v Exclusive Holiday of Elegance Limited [2013]JMCACiv 37*** (per Brooks JA at para 19) and, the decision of the Judicial Committee of the Privy Council in, ***Sagicor Bank Jamaica Ltd (Appellant) v Taylor-Wright (Respondent) [2018] UK PC 12 (Privy Council Appeal no. 0011 of 2017)***.

[2] There is a plethora of affidavit evidence before me. However, save for a few areas of contention, the facts are generally not in dispute. It is however a matter of regret that the Claimants adopted a rather unhelpful mode of affixing exhibits. Instead of tagging each document, attached to an affidavit, with its own exhibit slip an exhibit schedule was used. The effect of this is twofold. Firstly, it makes identification of the exhibit referenced in the affidavit uncertain and, secondly, it means the affiant has not himself certified that the particular document is the one he intends to reference. This practice, of attaching multiple documents by schedule, may be convenient to the practitioner but it is unhelpful to the court.

[3] The material facts, on which there is consensus, are as follows:

a. The Defendant was a party to a Multiple Listing Agreement (MLA) for the period 19th September 2018 to 19th March 2019.The written terms of the MLA are not in dispute. They are to be found at exhibit LS 1 to the affidavit of Lystra Sharp filed 14th November 2019, see also paragraph 3 of the affidavit of Karl Salmon filed 2nd June 2020.The Defendant says the second Claimant, and not the first Claimant, was a party to that MLA.

b. In the MLA the Defendant listed property it owned, being 21 Balmoral Avenue, for the purpose of sale. The MLA had a fixed term of 6 months.

c. In the course of that 6 months, and even after it expired, the Claimants took steps to market the property.

d. Prior to the expiration of the MLA a proposed purchaser was identified, and a sale agreement prepared, for a price of $285 million. The intended purchaser was Dr. Michael Banbury. He withdrew his offer and did not sign the agreement or pay a deposit (see paragraph 6 in the affidavit of Lystra Sharp filed 14th November 2019 and paragraphs 5,6,7& 8 of the affidavit of Karl Salmon filed 2nd June 2019).

e. Dr. Banbury's lawyer, for the purpose of that negotiation, was Mr. Linton Walters (exhibit LS2 to affidavit of Lystra Sharp filed 14th November 2019))

f. The MLA expired and was not renewed (Paragraph 7 of affidavit of Lystra Sharp filed 14th November 2019 and paragraph 10 of affidavit of Karl Salmon filed 2nd June 2020).

g. On the 9th July 2019, that is within 6 months of the expiration of the MLA, the Defendant entered into an agreement to sell the same premises to First Rock Capital Holdings Limited. The agreed price was $345million. (paragraph 11 of affidavit of Lystra Sharp filed 14th November 2019 and paragraph 16 of affidavit of Karl Salmon filed 2nd June 2020).

h. The attorney for the purchaser was also Mr. Linton Walters (paragraph 15 of affidavit of Karl Salmon filed 2nd June 2020 and exhibit LS 4 to affidavit of Lystra Sharp filed 14th November 2019).

[4] The Claimants contend that they are entitled to a commission on the sale agreement ultimately entered into. This is because the sale occurred within 6 months of the expiry of the MLA and, was to a party associated or affiliated with a person with whom the Claimants had earlier negotiated and, in respect of which the Defendant had written notification. The Claimants rely, in this regard, on clause 4 of the MLA which states:

> *"The seller also agrees to pay the full commission due under this Agreement if, within six (6) months after the Expiration Date of this Agreement, the Seller sells or agrees to sell the property directly or indirectly to anyone who has made an oral or written offer to purchase the property and whose names the Listing Broker shall have submitted in writing to the Seller within ten (10) days after the expiration of this Agreement or with whom the Listing Broker has negotiated prior to the Expiration Date provided the Listing Broker has given the seller written notification of such negotiations prior to the Seller's sale of the property to such person or to a person or entity with whom such person is associated or affiliated. The negotiation with such person need not be over the price of the property or any specific term or condition of sale. The seller will not be obligated to pay the Listing Broker the commission if, at the time of such sale or agreement to sell, the Seller has entered into a valid, bona fide Multiple Listing Agreement relating to the property with any other RAJ member."*

[5] On the evidence, and on a balance of probabilities, it does seem that the Defendant has no real prospect of succeeding in this matter. I will demonstrate by reference

to each of the points raised by the Defendant and then contrasting it with the evidence and, where necessary, the law on the matter.

[6] Defence counsel submitted that the Claimant could not rely on Clause 4 of the MLA because, it had expired and, no list had been submitted within 10 days of its expiry. On a true construction of clause 4 the submission of a list is unnecessary where the seller had written notification of the broker's negotiations with the purchaser or with persons to whom he was associated or affiliated. There is no doubt that the Defendant had written notification of the earlier proposed purchase by Dr Michael Banbury, (see paragraphs 5 and 6 of the Karl Salmon affidavit filed on the 2nd June 2020). The Claimants have also put forward unchallenged documentary evidence of negotiations with Dr Michael Banbury even after the MLA had expired. There is evidence that this correspondence was copied to the Defendant and there is reference to the First Rock entity in these exchanges, (see paragraphs 7 and 8 and exhibits JD2 and JD3 to affidavit of Julian Dixon filed 11th June2020). The negotiation with Dr Banbury, and the Defendant's knowledge of it, is corroborated by "WhatsApp" messages passing between the Claimant's and the Defendant's agents, see exhibit LS1 to the affidavit of Lystra Sharp filed 11th June 2020, (messages dated 5/15/19,5:13pm to 5/26/19 9:08AM). In the face of this evidence the Claimant need have served no list in order to rely on clause 4.

[7] The Defendant also argues that the eventual purchaser was not "associated or affiliated" with the earlier proposed purchaser and that no evidence of that has been provided. This again is an untenable submission. The earlier proposed purchaser is Dr. Michael Banbury. He is a promoter and major shareholder of First Rock Capital Holdings Limited (see paragraph 12 and exhibit 8 to the affidavit of Lystra Sharp filed 14th November 2019 and exhibit OYA 1 to the affidavit of Olesya Ammar filed 3rd June 2020). Dr Michael Banbury is a class A shareholder holding some 400 shares and is asterisked as a connected party in the company's prospectus. His association and affiliation with First Rock Capital Holdings Limited, the eventual purchaser, is undeniable.

[8] It is further urged that Clause 4 cannot be relied on because, at the time of the purchase, the Defendant had entered into another MLA agreement with another broker. It is said that, at the very least, this is a triable question of fact. It certainly is a question of fact. However, it is one which, on the evidence, can be answered summarily. There is little doubt that the alleged second broker was unaware of the existence of the alleged second MLA. When asked about the MLA he responded to the effect that any such alleged agreement had been put on hold. The letter, attached to his email of the 16th June 2020, is worthy of full quotation: (See exhibit OYA 2 to the affidavit of Olesya Ammar filed on the 17th June 2020)

> *"Dear Sirs,*
>
> *I was requested to do an update of a previous valuation done by my company in August 2018 on property located at 21 Balmoral avenue with a view to determine the present market value. I was then asked to find a buyer and it was agreed that an MLS form would be signed.*
>
> *I wrote up and signed an MLS form and submitted same to Everoy Chin & Co. Ltd. to be signed by the vendor. Shortly after I was advised that a prospect had approached the company with a desire to lease the said property for an extended period and that I should hold until negotiations were completed, hence the listing was not posted on the MLS site. "*

[9] The Defendant's response to that letter was an Affidavit of Karl Salmon filed on the 2nd July 2020 which exhibited, as KS 1, an exchange of correspondence between the Defendant's attorneys and the alleged second broker. The Defendant's attorneys wrote sending him an executed MLA. They informed him that their client instructed that they had entered into an MLA with him, effective April 1, 2019 to April, I 2020, and that the property had been sold. They then asked three questions: (1) whether the agreement enclosed was the one signed with the

Defendant, (2) whether he had made a claim for commission and, (3) if he had not made a claim whether he intended to do so. His response I also quote in full:

> *Dear Mr Graham,*
>
> *In response to your letter of June 22,2020 please note that I am bound by the code of ethics of the Real Estate Board and the Realtors Association.*
>
> *With regard to the sale of 21 Balmoral Avenue;*
>
> *The MLS form that you sent me is the said form I signed and sent to Everoy Chin and Company but I never made a claim for commission because I am only now getting back a signed copy of the MLS agreement.*
>
> *I would like to be paid the commission as stipulated in the MLS agreement.*
>
> *Regards,"*

[10] The evidence Is clear that the alleged second agent, whose name I have chosen to withhold as he is not a party to these proceedings, did absolutely no work in terms of promoting or selling the property. It was not listed as per Clause 8 of the MLA. This is not surprising. He had signed it and sent it to the Defendant who told him it would be put on hold as they were entering into a lease. There was no further communication with him. He was never told it was signed by the Defendant or that it was no longer on hold. It is therefore not a "valid, bona fide Multiple Listing Agreement" within the meaning of clause 4 of the MLA. I test this finding by asking whether the Defendant could successfully sue the agent for breach of that alleged MLA (because for example he had not listed it in accordance with clause 8).I do not think such a suit would have any chance of success. The agent can say "I never knew you signed so there was no meeting of minds, and therefore, no contract", see ***Entores LD v Miles Far East Corporation [1955] WLR 48*** per Lord Parker LJ at 54. He may also say "you are estopped from claiming as you represented to me, and I accepted, that the matter was on hold". Conversely the agent is unlikely to succeed in an action against the Defendant for commission.

They would be entitled to say in their defence "You are in breach of the agreement, and have not complied with your end of the bargain, as you failed to list the property in accordance with clause 8 and did absolutely nothing in relation to the sale of the property". There was therefore no other "valid bona fide" MLA in relation to the property.

[11] The Defendant's counsel argued that the Claimants are not entitled to bring this claim because they were not licensed to practice, and/or there is no evidence of a valid licence, when the transaction was entered into, as is required by section 47(1) of the Real Estate (Dealers and Developers) Act. It is said Lystra Sharp, who engaged in discussions on behalf of the Claimants, was not a licensed broker. The relevant evidence is to be found at exhibit 2 to the affidavit of Olesya Ammar filed 11th June 2020 and exhibit 1 to the supplemental affidavit of Olesya Ammar filed on 11th June 2020.The latter exhibit also shows that Lystra Sharp contrary to the Defendant's assertion, was at all material times, a licensed real estate dealer.

[12] Finally, the Defence asserts that there was no contract with the 1st Claimant as only the 2nd Claimant signed the MLA. The contract is expressed to be with "Coldwell Banker Jamaica Realty". The unchallenged evidence is that the 1st and 2nd Claimants are partners trading under the name, "Coldwell Banker Jamaica Realty", see paragraph 5 and exhibit OYA 2 to the affidavit of Oleysa Y Ammar filed 4th June 2020. The documents speak for themselves. The contract is expressed to be with the partnership. Partners enjoy liability which is joint and several. Therefore, either or both partners, entitled to use that trade name, can commence this claim. The Defendant says further that the partnership relationship was not pleaded. I disagree. The Particulars of Claim describe both first and second Claimants as "(t/a Coldwell Banker Jamaica Realty)". That suffices to alert the Defendant that the relationship is one of partnership. There is no other explanation for both of them using the same trade name.

[13] There is therefore, for all the reasons stated above, no real prospect of the Defendant succeeding in its defence to this Claim. In the result there will be

judgment for the Claimants against the Defendant. No issue was joined, in argument, on affidavit, or in the defence filed, on the amount of commission to which the Claimants would be entitled if successful.

[14] In the course of submissions, I indicated to counsel for the Claimant that, as the associate appearing with him had also sworn to several affidavits of fact, in the event he was successful I was not minded to allow her costs of appearing. The practice, of attorneys swearing affidavits in matters in which they appear, has become far too common in these courts. Therefore, for reasons more fully articulated in **Cable & Wireless Jamaica Limited v Eric Jason Abrahams Claim No. 2018CD000526 [2019] JMCC Comm 7** (unreported **judgment 15th March 2019 at paragraph 3),** costs for the attendance of Ms Olesya Ammar are disallowed.

[15] Judgment is therefore entered for the amount claimed of $12,057,750.00. Interest will run, as claimed at 6 percent per annum, from the 9th day of September 2019 (being 5 days after the invoice was tendered and the date of breach, as per the letter of demand, see exhibit LS 9 to the affidavit of Lystra Sharp filed on 14th November 2019). Costs will go to the Claimants to be taxed if not agreed.

David Batts
Puisne Judge