

IN THE SUPREME COURT OF BELIZE, A.D. 2014

CLAIM NO: 133 of 2014

BETWEEN

EMERALD FUTURES REAL ESTATE LTD CLAIMANT

AND

K.L.M. DEVELOPMENTS LTD DEFENDANT

Keywords: Sale of Real Estate; Non Exclusive Listing and Sales Agreement;
 Compensation or Commission on sale of Real Estate; Implied
 Terms of Contract; Custom and Usage of Trade;

 Agency; Commission, Compensation and Remuneration of Agent;
 Standard Scale of Fees; Reasonable Remuneration or Commission.

Before the Honourable Mr. Justice Courtney A. Abel

Hearing Dates: 30th October 2014
 5th December 2014

Appearances:

Ms. Pricilla Banner for the Claimant

Ms. Naima Barrow for the Defendant

JUDGMENT
Delivered on the 5th day of December 2014

Introduction

[1] This is a claim brought by the Claimant, Emerald Futures Real Estate Ltd (“the Claimant”), a Belizean real estate company doing business in Belize, against the Defendant, K.L.M. Development Ltd (“the Defendant”) a Belizean company

which owned a 7.35 acre private island approximately 10 Miles Southeast of Dangriga Town, Stann Creek District of Belize known as “Ragged Caye” (“Ragged Caye”).¹

- [2] There is a written agreement signed by the parties under which the actual basis on which Ragged Caye was eventually sold was not expressly contemplated by, or provided for, by the agreement.
- [3] The Claimant undoubtedly introduced to the Defendant the eventual purchaser of Ragged Caye, a company known as Hephaestus Capital LLC of Texas, USA, (“the Buyer”).
- [4] The parties agree that some compensation is due to the Claimant but they cannot agree on the terms or the amount of such compensation.
- [5] This claim concerns the entitlement of the Claimant to a commission or other compensation and if so how much on such sale.
- [6] The central question for determination is what is due to the Claimant by the Defendant by way of compensation or commission payment.

Background

- [7] By written agreement dated the 12th June 2013 (“the Agreement”) the Defendant entered into an irrevocable non-exclusive listing and sales agreement for a period of six (6) Months (“the period”) by which the Defendant authorized the Claimant to sell Ragged Caye.
- [8] This was the second agreement into which the parties had entered, the first, an Exclusive Listing - being an Authorisation to Sell Agreement - having been entered into on the 28th December 2012 for a period of 6 months.
- [9] The Agreement was drafted by the Claimant and resulted from discussions between the Claimant’s agent, John Estephan (“Mr. Estephan), and the representative for the Defendant Mr. Guanpiero ‘Peter’ Luppi (“Mr., Luppi”).

¹ Comprising 4.49 acres pursuant to Grant No. 518 of 2005 and 2.86 acres pursuant to Grant No. 483 of 2012.

[10] The Agreement contained the following provisions each of which is described as a “written condition”:

- (a) By Condition (A) the Defendant had set the price of Ragged Caye “at US\$4,450,000.00 or any other price and any other terms, including exchange, as [the Defendant] may subsequently authorize in writing” during the period.
- (b) By Condition (E) it was provided that “in consideration of the services and efforts of [the Claimant in selling Ragged Caye]” the Claimant “shall be entitled to a commission of 7% of the total selling price [of Ragged Caye if it is sold] for US\$4,000,000.00 or more and 6% if [Ragged Caye] sells between US\$3,500,000.00 and US\$4,000,00.00” (“the Commission”).
- (c) By Condition (F) it was provided that the Defendant would pay the Claimant “all monies due upon execution of Sales Agreement at the time of the receipt of 25% deposit towards sale price in case of financed situation, or in the case of cash sale, at the time of closing”.
- (d) By Condition (H) it was provided that should Ragged Caye “be sold or exchanged (SIX) 6 months of the expiration of this agreement to clients introduced to [the Defendant] by the [Defendant or any of the Defendant’s Representatives that the Claimant] would be entitled to his commission as agreed under condition (E) of this Agreement”.
- (e) By Condition (I) it was provided that the Defendant agreed to represent Ragged Caye “in a professional manner and agrees to pay for all costs involved in their efforts to sell [Ragged Caye] such as overseas telephone calls, faxes, website, advertisements, signs, transportation, etc”.
- (f) By Condition (I) it was provided that the Defendant “hereby grants to the [Claimant] the irrevocable right to sell [Ragged Caye] and for the duration of this Non Exclusive Listing Agreement”.

[11] After signing the Agreement in June 2013 the Claimant commenced the marketing and the provision of ancillary services for the sale of Ragged Caye.

- [12] Mr. Estephan testified, which I accept, that the Claimant had an agreement with 'Private Islands' that if Private Islands provided a lead to purchase Ragged Caye the Claimant were obliged to pay 25% of any commission and as a result that they did a full feature of Ragged Caye.
- [13] On the 18th July 2013 through Private Islands' website (www.privateislands online.com) the Claimant made contact with one Bill Poston ("Mr. Poston"), the Director of the Buyer.
- [14] In August 2013 and pursuant to the instructions of Mr. Luppi the Defendant agreed to reduce the asking price for Ragged Caye to US\$3,500,000.00 to effect a quick sale.
- [15] On the 14th August 2013, Mr. Poston at his request and the agreement of Mr. Luppi was put in direct contact with the Defendant.
- [16] Mr. Poston and an associate travelled to Belize on 29th August 2013 and stayed until 31st August 2013 for the purpose of visiting Ragged Caye and thereafter made arrangements for securing funding to purchase Ragged Caye.
- [17] An offer was then made by Mr. Poston to purchase Ragged Caye at considerably less [US\$2.65 million] than the US\$3.1 million.
- [18] On the 21st November 2013 Mr. Luppi informed Mr. Estephan, for the Claimant, by email as follows:

"Hi John, I hope all's well on your end. I apologise for the delay in getting back to you on Bill's revised offer, but I've finally had a chance to think about it and discuss it internally.

I think it would be foolish to agree to a sale that would result in less than \$3.1m net to the seller. You surely have a better idea than I do where Bill's limit is, but it seems clear to me that in order to close this deal, there might have to be some flexibility, and pain, on all sides.

You'll recall that you originally expressed an opinion about the property's value being around \$4.1m, and suggested an initial

asking price close to \$5m and that's reflected by the graduated commission structure starting at that amount.

You're clearly entitled to compensation for your work and there is absolutely zero desire to squeeze you on the commission, but the reality of the situation is that when a seller has a bottom line, and a buyer has a top line, there's only so much in between. Since it was not specified what your commission would be in case of a sale below \$3.5m, I think it's vital that you get Bill up to a level which will result in at least \$3.1m net to the seller and a commission for you.

Please consider the above and get back to me so that we may discuss how to proceed.

All the best

Peter.

- [19] The Claimant on the 21st November 2013 then counter offered for the sale of Ragged Caye with US\$3.3 million.
- [20] The Claimant continued to provide services to the Defendant of which the Defendant took full advantage. Mr. Estephan testifying that he made an earnest effort to get the Buyer to US\$3.3 million.
- [21] The Defendant, however, claims that at all times it was made clear in telephone conversations that the commission would be paid from funds in excess of US\$3.1 million while the Claimant maintained that at all times in telephone conversations he made clear that he had to get a least US\$150,000.00 out of the sale. This is an issue to be determined.
- [22] There were attempts by the Claimant to ascertain if the counter offer was accepted but there was no response (“deftly silence²”) and then John Estephan then sent an email to Mr. Luppi on the 26th November 2013 in the following terms:

² According to an email from Mr. Estephan to Mr. Luppi dated 26th November 2013.

“Hi Peter,

Here is the follow up email I sent yesterday after my second phone call went unanswered. Perhaps the cost is more than they can bear or more than they are willing to offer?

I will call again if I do not hear from Bill by near end of day.

Regards

John”

[23] There was no response from the Buyer.

[24] Mr. Luppi then on the 28th November 2013 sent an email to Mr. Poston in the following terms:

“Hello Bill, I hope to find you well and enjoying Thanksgiving with family and friends.

I called John last night to get an update since I hadn't heard anything for about a week, and I was informed that you are pondering financial matters and may be working on some alternative payment scenarios.

I think it would be mutually beneficial to have a direct dialogue, and I'm confident that it will result in us being able to wrap things up on the spot once and for all. Please let me know when in the next few days it would be convenient for you to have a chat on the phone.

Kindly acknowledge receipt of this email, and accept my best regards.

Sincerely

Peter G. Luppi”

[25] Mr. Poston and Mr. Luppi then made arrangements to speak on Friday the 29th November, 2013 and together they agreed on a sale price of US\$3,150,000.00 for Ragged Caye.

[26] On the 2nd December 2013 Mr. Luppi wrote to Mr. Estephan an email in the following terms informing him that the Defendant and the intended purchaser had come to an agreement:

“Good Morning John, I hope you had a pleasant weekend.

I’m happy to inform you that Bill and I have spoken over the weekend, and have come to an agreement on \$3.15m for the island, broken down in three years.

We’re still working on the agreement but I don’t believe there to be any hurdles, simply formalities. It’ll take a few days to deal with those matters, at which point the paperwork will be put back in Aldo’s hands for the actual transaction. When we finalise the contract I’ll provide you with a copy.

I thank you for getting us to this point, and for your continued support going forward. I’ll be out this morning but back on the island all afternoon. For your information I plan to head to Florida on the 8th and return on the 13th, but that may change if this transaction requires it.

Best regards,

Peter”

[27] On the 21st December 2013 Mr. Luppi sent to Mr. Estephan the fully executed signature pages (purchase and escrow) for his records and informed him that the deposit had already been wired.

[28] On the 24th January 2014 Mr. Luppi sent an email to Mr. Estephan in the following terms:

“Hi John just keeping you apprised of the festivities... I am doubtful that the closing will be on the 29th. I still have absolute confidence in the transaction but clearly the tone is changing. Oh well. I’ve amply demonstrated my good faith and I’ve gone far beyond the requirements of the agreement. If Bill doesn’t that I can’t keep

spending money and handing over the business before the closing while they play good cop/bad cop, that too bad and we'll just stick to the letter of the agreement then.

Kindly keep this confidential and please don't interfere, the matter is well in hand. Again the transaction is not in peril in any way.

All the best

Peter “

- [29] On the 4th February 2014 Mr. Luppi to Mr. Estephan (at his request on the 3rd February 2014) confirmed that closing had indeed taken place the previous week. The parties were very much on amicable terms at this stage.
- [30] On the 6th February 2014 the Defendant offered to the Claimant the sum of US\$50,000.00 (approximately 1.6%) as commission which was the difference between the sale price of US\$3,100,000.00 and the sale price of Ragged Caye at US\$3,100,000.00.
- [31] By email dated 6th February 2014 the Claimant rejected the Defendant's offer and claimed entitlement to a reasonable compensation of 5% commission on the sale price of Ragged Caye in view of the fact that the Claimant's commission in accordance with the scale of the initial commissions would be 5%. Mr. Estephan alleged that he was managing the sale all along until Mr. Luppi decided he wanted to take over and negotiate on his own and that Mr. Luppi did not give him the opportunity to finish the deal.
- [32] The parties have remained at variance on this point of the compensation/commission (including in an exchange of emails which followed) which is due to the Claimant for the sale of Ragged Caye and that is the subject of the present claim.
- [33] It is, however, undisputed that the Claimant is entitled to compensation for the sale of Ragged Caye at least in the sum of US\$50,000.00. It is in dispute how much the compensation should be and whether a commission of 5% of the sale price, as contended, by the Claimant and if so what lesser sum than US\$50,000.

The Court Proceedings

- [34] On the 26th March 2014 the Claimant filed the Claim Form & a Statement of Claim in which it sought the following relief:
- i. A Declaration that the Defendant is bound by an implied term to pay the Claimant a reasonable commission of 5% of the purchase price of property sold pursuant to the Agreement dated 12th June, 2013 (as amended);
 - ii. Payment of the sum of US\$157,000.00 being a reasonable commission of 5%, or such other sum as may to this Honourable Court appear just;
 - iii. Damages;
 - iv. Interest;
 - v. Costs;
- [35] On the 25th April 2014 the Defendant filed a detailed Defence in which it maintained the Claimant was entitled to no more than the US\$50,000 it offered as the Defendant had made clear that it had to get US\$3.1 million net and that the commission to the Claimant would be from funds in excess of this sum.
- [36] On the 30th June 2014 the Claimant filed a Reply largely joining issue with the Defence.
- [37] On the 23rd June 2014 a Case management Conference was held at which directions were given for trial and the claim was also referred to mediation.
- [38] Disclosures were made by the parties on 7th July 2014
- [39] The parties failed to settle the claim at mediation held on the 25th August 2014.
- [40] Witness Statements were eventually filed by the parties by the 23rd September 2014.
- [41] In the event of a trial the parties were directed at case management conference to agree costs on or before 30th September 2014 which they have done in the sum of \$20,000.00 to the successful party.
- [42] On the 6th October 2014 the Claimant filed an application to appoint Mr. Hugo Moguel as an expert witness on its behalf and that the Claimant be given time to file an expert opinion and that the taking of the expert testimony be held either

before or after the trial date (as it turned out after the trial date). The application came up for hearing on the date fixed for trial and was opposed by the Defendant on the basis of the timing of application. In the event the court decided to grant the application due to the lateness of the application (after the claim had already gone to mediation and was ready for trial with the resultant complications which would arise and bearing in mind the overriding objectives).

[43] At the trial the parties nevertheless agreed that the evidence of the proposed expert witness, Mr. Hugo Moguel, President of the Association of Real Estate Brokers of Belize, as contained in a letter dated August 12th 2014 would be admitted in the following terms:

“The generally recognized commission rates for real estate brokerage services provided in Belize range from a minimum of 5% to a maximum of 10% of the selling price. Commissions are payable by the seller of the property and are due upon successful close of sale”.

[44] Mr. John Estephan was the only witness for the Claimant at the trial and Mr. Luppi was the only witness for the Defendant.

The Law

[45] The Agreement expressly, by Clause (E), contemplated that in the event that the Claimant or its representative introduced to the Defendant a buyer (someone to whom Ragged Caye was sold) the Claimant would be entitled to a commission but by way of the amount of the commission which only stipulated, as a minimum price on which a commission would be paid by the Defendant to the Claimant, the sum of US\$3,500,000.00).

[46] Although no provision was expressly made by the Claimant and the Defendant in the Agreement for a sale below the sum of US\$3,500,000.00 the Agreement no doubt, by implication, gives rise to a presumption that the Claimant would be paid for the services which the Claimant provided to the Defendant by way of remuneration in relation to a sale below the sum of US\$3,500,000.00³.

³ See Paragraph 31-132, Chitty on Contracts Twenty-Ninth Edition 2004, Volume II Specific Contracts (Agency).

- [47] In any event on the facts of the present case it is common ground between the parties and it is agreed by the Defendant (who assured the Claimant) that the Claimant was clearly entitled to be compensated for its work, even though a commission rate was not specified, in the case of a sale of Ragged Caye below US\$3,500,000.00.
- [48] In any event generally under the laws of agency the Claimant under the Agreement was an agent in law for its principal the Defendant. As such it is the duty of the principal to pay his agent any commission or other remuneration agreed upon and if such remuneration is not expressed then such commission or remuneration may be implied from the nature of the relationship once an agent is employed to act as such in circumstances which raise the presumption, such as in the present case, the agent would, to the knowledge of the principal have been expected to be paid⁴.
- [49] The Defendant has sought to rely on General Principles of the law of contract as they relate to implied terms to be implied by the court as a matter of law “which depend upon the intention of the parties as collected from the words of the agreement and the surrounding circumstances”⁵. The Defendant has also sought to rely on similar principles that a term may also be implied if it was so obviously a stipulation in the agreement that the parties must have intended it to form part of their contract if the courts are satisfied that both parties would, as so-called “reasonable men”, have agreed to it had it been suggested to them⁶. I do not, however, consider that these principles of law has application to the facts of the present case where there is a specific principle applicable to agency situations (as above) which more appropriately does have such application.
- [50] The amount of [the remuneration] or payment and the conditions on which it is payable will depend on the circumstances. In law, again generally, if there is a custom or usage of the particular trade regulating the payment of remuneration there is a presumption, in the absence of any express agreement to the contrary,

⁴ Ibid.

⁵ See Paragraph 13-003, Chitty on Contracts Twenty-Seventh Edition 1994, Volume I General Principles.

⁶ Ibid Paragraph 13-006.

that the parties contracted for the payment of the remuneration in accordance with this custom or usage⁷.

[51] In relation to such custom or usage, however, the standard scale of charges will not apply unless it is expressly or impliedly incorporated and the mere fact that it is commonly used will not suffice.

[52] The Scottish case of **Wilkie v Scottish Aviation**⁸, concerning a chartered surveyor, in circumstances not materially dissimilar to the facts of the present case, is instructive, as no specific arrangements had been made for his remuneration and after the surveyor had performed his services he expected to be paid in accordance with a scale of fees of his professional body but was paid something considerably less which was unacceptable to the person who employed him and sought to rely on the scale of fees on the basis that it was customary and was to be implied into the agreement between the parties. The Lord President (Clyde) opined that:

“To establish a custom, however, of this kind the evidence must show that it is reasonable certain and notorious.... To establish the custom it is not essential to prove that the defenders actually knew of it. It is enough if it was so well recognized that it ought to have been known to both parties.....There is, after all, nothing inequitable in such a requirement. If a person employs a professional man to perform some service and makes no inquiry as to the basis upon which the professional man is to be remunerated for his service, it is not unreasonable that he should pay for the service on the usual and customary basis. It is not open to him to complain that he is unaware of it, if he has never even taken the trouble to ascertain it before engaging another to do work for him without specifying a precise fee.....”

⁷ See Paragraph 31-132, Chitty on Contracts Twenty-Ninth Edition 2004, Volume II Specific Contracts (Agency).

⁸ 1956 S.C. 198

Merely because surveyors have agreed among themselves what they would like to be paid does not give them a legal right so to be paid. Accordingly, even if the practice of operating the Schedule were proved to be notorious within the meaning of the decisions, that does not require the Court necessarily to adopt it. As was pointed out in more than one of the cases, the Court must always consider whether the application of the Schedule to the award in question produces a reasonable result.”

- [53] If there is no proof of such custom and no express agreement, then a reasonable remuneration is payable⁹. 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 parties¹⁰.
- [54] The remuneration of the agent is typically a commission being a percentage of the value of the transaction which the agent is to bring about for the principal¹¹. In such circumstances the agent does not become entitled to its commission until the event has occurred upon which his entitlement arises as determined by the terms of the agreement¹².
- [55] In the case of an agreement for listing and sale of real estate (estate agency) the interpretation of such event turns on the words used in the particular agreement such as in the present case: “upon execution of Sales Agreement at the time of the receipt of 25% deposit towards sale price in case of finance situation, or in the case of cash sale, at time of closing”.
- [56] No issue arises in the present case as to the interpretation of this provision as the event upon which it is stipulated that a commission has arisen being clear and has

⁹ See Paragraph 31-132, Chitty on Contracts Twenty-Ninth Edition 2004, Volume II Specific Contracts (Agency).

¹⁰ Ibid.

¹¹ See Paragraph 31-134, Chitty on Contracts Twenty-Ninth Edition 2004, Volume II Specific Contracts (Agency).

¹² See Paragraph 31-134, Chitty on Contracts Twenty-Ninth Edition 2004, Volume II Specific Contracts (Agency).

taken place namely that Ragged Caye was sold within 6 months of the Agreement “to clients introduced” by the Defendant by the Claimant.

[57] There is therefore no doubt that in the circumstances of the present case the event has happened upon which a commission is to be paid.

[58] The only question for determination is what, in the circumstances of the present case, is a reasonable remuneration or commission.

The Issues

[59] As already noted the central question for determination is what is due to the Claimant by the Defendant by way of commission or compensation?

[60] The factual question has arisen between the parties in relation to the conflicting evidence of their witnesses Mr. Estephan and Mr. Luppi and alleged telephone conversations between them concerning what compensation was to be paid and the net figure both were expecting out of the sale of Ragged Caye?

[61] Was there an agreement/understanding between the parties that any commission would be on funds in excess of US\$3,100,000.00 as claimed by the Defendant?

[62] Does the bargaining between the parties show the value put on the Claimant's (as agent) services by them?

[63] The legal issue has to be determined as to whether there was an applicable custom or usage for payment of compensation arising from the admission from the President of the Association of Real Estate Brokers of Belize that there is a range of fees chargeable in Belize with a minimum of 5%.

[64] What is a reasonable remuneration for the sale of Ragged Caye in all the circumstances of the case?

[65] Is the Claimant entitled to more than US\$50,000.00 (US\$157,000.00) and to interest and costs?

[66] Is the Claimant entitled to be paid on a quantum meruit basis in relation to any sale below the minimum price if so what would be the basis?

The Evidence Relating to Disputed Factual Matters

Evidence of Mr. Estephan

- [67] Mr. Estephan testified that it was plain from the dealings and communication between the parties that the Claimant was entitled to reasonable compensation for the work which it had done to bring about a sale of Ragged Caye and that the sum of US\$50,000.00 which KLM unilaterally paid to the Claimant does not represent a reasonable sum for the work done to obtain a buyer for Ragged Caye.
- [68] Mr. Estephan testified under cross-examination that he took the time to find the buyer and that they should have been left alone to complete the deal.
- [69] He testified that he made an earnest effort to enforce the Buyer that they needed to get up to US\$3.3 million.
- [70] Mr. Estephan also testified that Mr. Luppi and he agreed in many conversations, that he (Mr. Estephan) would have to make US\$150,000.00 minimum, but he accepted that in the end Mr. Luppi evidently did not agree but maintained that Mr. Luppi agreed with him (when he stated that the Defendant had to get 3.1 million) or implied that the Claimant would be paid US\$150,000.00.
- [71] Mr. Estephan accepted that he did not invest any money in Ragged Caye and that the Defendant has the decision as to what he would be willing to sell it for, but testified that he would not have consented to a sale for less than US\$3.3 million but the Defendant did not allow him to negotiate for the US\$3.3 million (which sum was offered provided evidence that there was an agreement for US\$150,000) to which he believed he could have got the buyer if the Defendant had allowed the Claimant to finish its job.
- [72] Mr. Estephan testified that it was agreed that he would get 5% commission but that it was rounded down to US\$150,000.00 and testified that the evidence was in telephone conversations. He further testified that if Ragged Caye was not sold he (the Claimant) would have sold the buyer another Island.

Evidence of Mr. Luppi

- [73] Mr. Luppi testified that the parties specifically discussed that the properties would not be sold for less than US\$3,500,000.00, based on Mr. Estephan's valuation of

the property and representations about its abilities and the Defendant's investment in the property and expectations about return on investment.

- [74] Mr. Luppi also testified that Mr. Estephan represented that it was the Claimant's job to sell the property in the agreed upon price range. That the explicit terms of the agreement was that the commission was based on the performance of the Claimant and did not contemplate the Claimant not securing a sale in the stipulated price range.
- [75] Mr. Luppi also testified that by the email dated the 21st November, 2013 he informed Mr. Estephan that because the agreement specified that commission would only be paid for sales above US\$3,500,000.00, it would be vital to get the purchaser to a level which will result in at least US\$3,100,000.00 to it and a commission to the Claimant. But he received no written response to the email of 21st November, 2013 and that they should raise the sale price.
- [76] Mr. Luppi testified that because he had conveyed to the Claimant that the sale price would have to result in at least US\$3,100,000.00 to the Defendant and a commission to the Claimant, and that the Claimant continued to provide its services, he took it as agreed that the Claimant would secure a sale price which would have the result in at least US\$3,100,000.00 to the Defendant and a commission for the Claimant. But that there was never any "understanding" about "reasonable" or unreasonable commissions as it was clearly specified that the commission would be funds in excess of US\$3,100,000.00.
- [77] Mr. Luppi testified that he specifically discussed the Defendant's position with Mr. Estephan and they also discussed strategic alternatives to try to secure a higher sale price and larger commission for the Claimant and that on the 21st November, 2013 the Claimant as sales agent declined an offer made by the Buyer and counter offered in the sum of US\$3,300,000.00.
- [78] Mr. Luppi accepted that on the 28th November, 2013 when he had not heard anything further Mr. Estephan he contacted the intended purchaser and suggested that they speak directly.

- [79] Mr. Luppi testified that the decision to accept the offer of US\$3,150,000.00 was consistent with the email of 21st November, 2013 and subsequent discussions with the Claimant.
- [80] Mr. Luppi testified that the offer to pay the Claimant US\$50,000.00 was premised on the position stated in his email of 21st November, 2013 that the Defendant needed to net US\$3,100,000.00 from the sale.
- [81] Mr. Luppi testified that by email dated 7th February, 2014 Mr. Estephan rejected the Defendant's offer of US\$50,000.00 and claimed entitlement to a reasonable compensation on the sale price of Ragged Caye.
- [82] Mr. Luppi testified that the incremental reduction of commission suggested by the Claimant would have resulted in the Defendant suffering an exponential decrease in return on its investment or even a loss and accepted that notwithstanding the response of Mr. Estephan, on the 20th February, 2014 Mr. Luppi instructed the Defendant's attorneys to deposit US\$50,000.00 to the American bank account of John Estephan.
- [83] Under cross-examination Mr. Luppi accepted that he did say that he wanted the Claimant to get a commission but that his position is that the Claimant is not entitled to a commission but is entitled to compensation for work done.
- [84] Mr. Luppi also accepted in cross-examination that he was eager to close the sale and testified that 7 days were sufficient time to close the sale and because of that he decided to take over the sale. Also that the Defendant's position was that US\$3.1 million was what it wanted and that one of the reasons he took over the negotiations was that the sale was too complex for the Claimant.
- [85] Mr. Luppi under cross-examination also admitted that he said to Mr. Estephan that the Claimant's mandate was to find a buyer which technically he did; but that the price of \$3.15 million was obtained solely because of his (Luppi's) negotiating skills and that it was not his business to routinely negotiate million dollar sales of properties. Also that he was not alone responsible for the sale price

as he had to negotiate with the buyer but that apart from the buyer he was solely responsible.

[86] Mr. Luppi under cross-examination accepted in emails that he was pleased with the relationship with Mr. Estephan and was enjoying the exchanges between them regarding the sale of Ragged Caye.

[87] Mr. Luppi also accepted in cross-examination that he wanted to ensure the Claimant would be properly compensated and that the Defendant would get his money but denied that Mr. Estephan said that he had to get US\$150,000.00 but accepted that Mr. Luppi decided, unilaterally, that US\$50,000 was sufficient compensation. Mr. Luppi also testified that Mr. Estephan was not a licenced realtor but accepted that he acted as a realtor and thought he did not know if he was a property valuer he considered his valuation and did not consider it negligent to do so.

[88] Mr. Luppi accepted that he took over the sale of Ragged Caye but felt that a commission of US\$50,000.00 is reasonable.

[89] In re-examination Mr. Luppi testified that he had taken over the negotiations as Mr. Estephan had given up. That he had said that the lowest price which the Defendant would accept was 3.15 million which was the sale price so that Mr. Estephan would receive some kind of compensation.

The factual and legal contentions of the parties to the proceedings

Claimant's Contentions

[90] Counsel for the Claimant contends that the Claimant has proven that it is entitled to payment of reasonable fees from the Defendant as on the Defendant's own admission, the Claimant had fulfilled its mandate and found a buyer.

[91] It is also contended by Counsel for the Claimant that it is not for the Defendant to unilaterally decide what is a reasonable commission, fee or compensation as that is the core dispute between the parties, and that it is a matter for the Court to determine after consideration of all the facts and the law.

- [92] It is contended by Counsel for the Claimant that it is entitled to a reasonable commission or compensation of 5% of the sale price for the Property in the sum of US\$157,000 as the applicable principle of law is that in the absence of express agreement, there is an implied agreement not only to pay the Claimant remuneration (as an agent employed to act as such under circumstances which raise the presumption that it would to the knowledge of the principal have expected to be paid) but a reasonable compensation looking at the surrounding circumstances and the entire nature of the transaction between the parties which on the facts of the present case is 5% of the purchase price in the sum of US\$157,000., based on the agreed fact that the industry standard for commission for real estate agents in Belize is at minimum 5%.
- [93] Counsel for the Claimant contends that even without the agreement as to the industry custom and looking at the “evidence of the bargaining between the parties” to determine the value put upon the agent’s services by the parties, the Agreement, which predated the finding of any buyer, provides a schema for the commission payments; the natural progression for the sale of Ragged Caye between USD\$3 million and USD\$3.5 million is 5%, and that the implication of a term that the Claimant would be paid a reasonable compensation of 5% of the purchase price is also necessary to give the Agreement business efficacy.

The Defendant’s Contentions

- [94] Counsel for the Defendant contends that in all the circumstances of the case the Claimant was not the effective cause of the sale but it was the Defendant.
- [95] Counsel for the Defendant also contended that the expectations of both parties were not met by the sale and in the circumstances of the present case (the fact that the Claimant made no objection to the Defendants suggestion that he had to net US\$3.1 million) the sum of \$50,000 is reasonable.
- [96] Counsel for the Defendant contends that the mere fact that a range is used in the industry with a minimum of 5% of the purchase price is not sufficient for the court to conclude that the Defendant contracted for the payment of remuneration in accordance with this custom as such minimum does not meet the requirements

for application in the instant case because the Agreement did not use such a percentage.

[97] Counsel for the Defendant contends that the commissions provided for in the Agreement are consistent with the position of the Defendant desiring to net at least US\$3.5 million and the progression suggested by Counsel for the Claimant is not applicable as:

(a) There is no scale evident from the Agreement which the court can progress, and

(b) There were no communications between the Claimant and Defendant more recent than the Agreement and more relevant to the Defendant agreeing to sell Ragged Caye for less than US\$3.5 million

[98] Counsel for the Defendant submitted that the situation may have been different, and that a scale could have been said to exist if the Agreement had provided for 7% of the purchase price to be paid if Ragged Caye sold between US\$4 million and US\$4.5 million; 8% of the purchase price if it sold between US\$4.5 million and US\$5 million, and so on (which is not the case).

[99] Counsel for the Defendant sought to show by various permutations of the sale price and commission charged that given the most recent bargaining between the parties (in November 2013 when the Defendant made it known to the Claimant who raised no alarms about its position in advance of the conclusion of the purchase with the Buyer) that it is unreasonable for the Claimant to get a commission of 5% and the Defendant would thereby be unfairly and adversely affected.

[100] Counsel for the Defendant submits that on the facts of the case the Defendant would never have agreed to sell Ragged Caye for US\$3.15 if it did not believe that the Claimant would have been satisfied with earning \$US50,000.00 from its sale.

Findings of fact relating to Disputed Matters

- [101] In relation to the two witnesses in the case Mr. Estephan and Mr. Luppi, I generally preferred the evidence of Mr. Luppi.
- [102] I generally found Mr. Estephan was a poor and unconvincing witness and in places even felt that he may even have been lying.
- [103] However on the central point of the case I was satisfied that he genuinely believed that he was entitled to the compensation of US\$150,000.00 and that he merely trying to fit the evidence before the court and his interpretation of the facts to fit into this conclusion. I felt that his evidence was more emotional than dispassionate or objective and that this, rather than any desire to deceive, may have resulted in his poor performance.
- [104] On the other hand I considered Mr. Luppi a much better and more convincing witness. I was impressed by the fact that he did not attempt to escape any and all liability to pay some compensation (which argument might have been arguable based on a strict or literal interpretation of the Agreement). Again I concluded that he genuinely believed that the offered compensation of US\$50,000.00 was a reasonable compensation for the work done by the Claimant.
- [105] Overall, and on balance, I was satisfied that the reasonableness of the situation lies somewhere in between the position of the respective positions of the Claimant and the Defendant – hence why they were so severely at odds and were not able to resolve this commercial dispute between them – which I consider may have been more suitably and possibly fairly resolved in this way.
- [106] However I generally I considered that both witnesses were equally convinced about the correctness of their positions and neither were prepared to compromise their position – even to arrive at a reasonable commercial compromise of their difference. It is therefore incumbent on this court to arrive at a legally just and reasonable resolution of the dispute on a finely balanced, balance of probabilities, by determining on the law and evidence what is a reasonable remuneration for the Claimant. In this regard I considered that my hands were tied by the facts as I was constrained to find it and on the law, as I have determined it, which had to be applied.

[107] For the purposes of determining the case in relation to the disputed matters I find the following facts on the balance of probabilities:

- (a) I was unable, on balance, to resolve the conflicting evidence between Mr. Estephan and Mr. Luppi in relation to any agreement on the compensation for the Claimant with the former saying he had to get US\$150,000 and the latter saying that the Defendant had to get US\$3.1 million. I was not able therefore to decide the case on any alleged agreement or understanding between the parties reached on any such bargaining between them.
- (b) In the circumstances of the case I do not consider that there is an applicable custom or usage for compensation for the Claimant, and of Real Estate Brokers or agents, such as the Claimant, in Belize which was incorporated into the Agreement. The evidence does not exist in the case to establish such a finding. But the evidence of 5% does provide some evidence in the case of which the court can make some use and to which it can refer.
- (c) I have already found that there was an implied term and/or that it was agreed by the parties that the Claimant was entitled to be compensated for its work even though a commission rate was not specified in the Agreement for the sale of Ragged Caye at the price that it was eventually sold to the Buyer (being less than the least price of US\$3,500.00 for which the Agreement expressly made provision and for payment of a commission of 6% at this minimum price).
- (d) In my view the strongest argument that the agreement implied that a commission should be paid for a price less than US\$3,500.00 is provided by the descending scale provided by the Agreement of 7% (for a sale of the Ragged Caye between US\$4,000,000.00 or more) and 6% (for a sale of the Ragged Caye between US\$3,500,000.00 and US\$4,000,000.00).
- (e) The difficulty is that just two such commission scales in my view do not clearly establish a progression but it does suggest some evidence of a

general commission range in the area between 5% and 6% or thereabouts for a sale between US\$3,000,000.00 and US\$3,500,000.00.

- (f) But this lack of provision in the actual scale in the Agreement, and of such conclusive evidence in my view, however, may be bridged, and I so find, by the provision of an agreed bottom commission of 5% being the agreed industry standard within Belize as agreed by the parties.
- (g) Also there was clear documentary evidence in the email dated 21st November 2013 from Mr. Luppi to Mr. Estephan by which the former informed the latter that he did not wish to squeeze him on his commission but in the circumstances outlined Mr. Luppi encouraged Mr. Estephan to “*get Bill up to a level which will result in at least \$3.1m net to the seller and a commission for you.*” This evidence was not entirely clear as to its import and it is regrettable that Mr. Estephan did not respond in writing immediately to clarify the position. The court is left simply to either believe Mr. Estephan or Mr. Luppi that this was discussed and agreed without any written confirmation – a wholly unsatisfactory situation especially given this court views of the witnesses, and on which I was unable to make a finding one way or the other.
- (h) In any event this court has concluded that the Defendant, in the circumstances of the present case, did not give the Claimant a sufficient time (about 5 days) to attempt to negotiate with the buyer up to US\$3.3 million before stepping in and taking over the negotiations.
- (i) In the circumstances of the case I have found that there was not therefore an agreement/understanding that any commission would exist on funds in excess of US\$3,100,000.00 as Mr. Estephan did not respond to the offer relating to the vague offer to collect monies in excess of US\$3.1 million especially as not sufficient time was given to negotiate the price to US\$3.3 million.
- (j) I have also concluded that a commission of 5% of the sale of Ragged Caye was indeed reasonable given the commission scale in the Agreement

together with the agreed evidence of an agreed bottom commission of 5% being the agreed industry standard within Belize. I have concluded that the cumulative effect of all such matters tilts the balance in the Claimant's favour.

- (k) I have concluded that the Claimant is entitled to more than US\$50,000.00 and was initially hesitant to conclude that he was in fact entitled to the commission of 5% but if left with one or either of the alternatives that appears to be presented to the court, on the circumstances of the case, I consider that the Claimant is indeed entitled to a commission of 5% and the sum of US\$157,000.00 and to interest and costs as it is more in keeping with the Agreement and the overall bargaining of the parties.
- (l) I have alternatively concluded that if I had to decide the case on the basis of quantum meruit I would have come to quite a different conclusion. If I had not come to the conclusion, as I have, that the Claimant is entitled to a reasonable commission of 5% of the sale price of Ragged Caye I would have concluded that given there is an agreement that at least a compensation of US\$50,000.00 is due to the Claimant and that the Defendant had agreed to pay for all costs involved in their efforts to sell Ragged Caye, which in my view would have included the 25% of any commission which the Claimant obtained then the Defendant would have to pay 25% of at least the agreed sum of US\$50,000.00 (US\$12,500.00) which is US\$62,250.00. This figure is not in my view a reasonable remuneration but there is no other basis or sufficient evidence in the case on which the court could arrive at a quantum meruit determination of the case on the evidence.

Costs

[108] In the circumstances of my decision on liability in the case and pursuant to the agreement of the parties I order that the Defendant shall pay the Claimant's costs in the sum of \$20,000.00.

Disposition

[109] For the reasons given above, I shall therefore grant the Claimant the following reliefs:

- i. A Declaration that the Defendant is bound by an implied term to pay the Claimant a reasonable commission of 5% of the purchase price of property sold pursuant to the Agreement dated 12th June, 2013.
- ii. Order payment of the Claimant by the Defendant sum of US\$157,000.00 being a reasonable commission of 5%.
- iii. Order that the Defendant shall pay the Claimants Costs agreed of \$20,000.00

The Hon Mr. Justice Courtney A. Abel