IN THE SENIOR COURTS OF BELIZE

IN THE HIGH COURT OF BELIZE

CLAIM No. CV 737 of 2022

BETWEEN:

CALVIN REIMER

Claimant

AND

PETER PETKAU

Defendant

Appearances:

Mr. Darrell Bradley for the Claimant
Ms. Payal B. Ghanwani for the Defendant

Closing submissions filed on March 25, 2024

2024: February 27;
April 17

JUDGMENT

Damages; Agreement - part oral, part written; an allegation not pleaded cannot be raised in argument at the trial

[1] **GOONETILLEKE, J.**: The Claimant has by Claim Form dated 28th October 2022 claimed a sum of **Sixty-Two Thousand and Eighty-Five Dollars ($62,085.00)** as damages for breach of contract. Alternatively, the claimant claims damages on a *quantum meruit* basis for work done. The claimant also claims for specific performance of a further agreement to transfer two lots on the defendant's land.

Background

[2] The defendant bought a parcel of land, **20.03 acres** in extent, west of the Hummingbird Highway in the vicinity of the Armenia Village, Cayo District. The defendant thereafter engaged the claimant to subdivide the said parcel of land into **fifty-nine (59**) residential parcels and open spaces, and to market and sell the said fifty-nine (59) parcels. It was agreed between the parties that each parcel would be sold for at least **Ten Thousand dollars ($10,000.00)** and that the claimant would receive **ten per cent (10%)** of the sale price of each parcel sold by him. The agreement between the claimant and the defendant in this regard is an oral agreement. The subdivision was provisionally approved by the Ministry of Natural Resources, Petroleum and Mining on or about 17th September 2021, by letter addressed to the claimant for and on behalf of the defendant.[1]

[3] The claimant asserts that he was the exclusive selling agent of the property and that he was to receive **ten per cent (10%)** of all sales irrespective of who sold the parcels. In addition, according to the claimant, he was the collecting agent who made all collections, did the closings, arranged the sales contracts and kept the records. He states that the sales price would be paid on an instalment basis and that he would deduct his ten per cent (10%) as commission and hand over the balance **ninety per cent (90%)** to the defendant, in cash. According to the claimant, this was done in small amounts on an instalment basis. The claimant also asserts that in April 2022, he entered into a written contract with the defendant to buy **two (2)** of the lots of land from the larger land that was divided into **fifty-nine (59) parcels** and that the payment for these two lots was to be deducted from the commissions the claimant would receive.

[4] The defendant only admits that he engaged the claimant to arrange the subdivision of the larger land and to have it registered with the Lands Department and that he agreed to pay a ten per cent (10%) commission on land sales to the claimant. The defendant denies that there was an agreement that the claimant was the sole or exclusive sales agent of the land and also denies that the purchase price of the two lots agreed to be

[1] Document PP-3, annexed to the Defendant's witness statement.

sold to the claimant were to be paid by deductions from the claimant's commissions. The defendant denies having seen any of the receipts of payment and the receipt books produced by the claimant and also denies having been given or seen a spreadsheet detailing the accounts and sales of the lands maintained by the claimant.

[5] On or about 19th January 2022, the claimant, the defendant and a third party by the name of Edwin Anthony Cruz entered into a brief tri-partite written agreement[2] which allowed the third party, Mr. Cruz, to also sell parcels of land on behalf of the defendant, while the sales agreements, collections and title work of all agreements in regard to all the sales were to be done by the claimant.

[6] The written tri-partite agreement, partly type-written and partly handwritten, is as follows:

> [Type written] "*January 19, 2022*
>
> *Edwin Anthony Cruz is offering to bring buyers for the lots being sold by Peter Petkau at the entrance of Agua Viva. Lots are being sold for $10,000.00 per lot. Whatever price he sells for above $10,000.00 will be profit for Edwin and will be paid out of the first down payment given he can negotiate a big enough down payment to cover the down Payment required by Peter and his commission.*
>
> *All sales agreements, collections and Title work will be done by Calvin Reimer."*
>
> [Hand written] *"Commission will be paid 50% on contract and 50% in 3 months. Down payment will be $ 3000.00."*
>
> [Signed]; *"Calvin Reimer, Peter Petkau, Edwin Anthony Cruz*."

[2] Document PP-5, annexed to the Defendant's witness statement.

[7] The existence of this written agreement dated 19th January 2022, is not disputed. However, the interpretation of this basic and short written agreement is also disputed by the parties. According to the claimant, this written agreement was required because the defendant wanted Mr. Cruz (Edwin) to engage in land sales as well. The claimant stated in evidence that he was not opposed to Edwin also promoting and selling lots on the condition that the claimant was to receive the ten per cent (10%) commission on all lots that were sold, irrespective of who sold it. Thus, the claimant asserts that on the basis previously agreed with the defendant, the claimant would get **ten per cent (10%) of Ten Thousand Dollars ($10,000.00)** for all the lots sold; Ten Thousand Dollars ($10,000.00) being the marked price as referred to in the written agreement. Edwin would therefore have to earn his commission or profit by obtaining a higher price than **Ten Thousand Dollars ($10,000.00)** and could keep the difference. This arrangement, according to the claimant is what is reflected in the written agreement, allowing both Edwin and the claimant to engage in selling lots without affecting the claimant's previous arrangement with the defendant to receive commissions on all lots sold. The claimant also states that he was entitled to a closing fee of **Five Hundred Dollars ($500.00)** and this is why the written agreement confirmed that irrespective of who did the selling, he would do all the collections, the paperwork and the record keeping.

[8] The defendant's version of this written agreement is that he had no exclusive sales agreement with the claimant and that as the claimant was slow in selling, he engaged Edwin who did a better job and sold lots faster. When this happened, Edwin and the claimant started fighting and so it required a written agreement with this arrangement. The defendant also asserted that nowhere in this written agreement is it stated that the claimant would get a commission on all lots sold, irrespective of who sold it. According to the defendant, Edwin was able to market lots at **Thirteen Thousand Dollars ($13,000.00);** this is why the handwritten part of the agreement refers to a **Three Thousand Dollars ($3,000.00)** down payment, whereby the defendant would pay Edwin his profit in **two (2) instalments**; **fifty per cent (50%)** on the down payment and **fifty per cent (50%)** in **three (3) months.** The defendant also stated that he regretted the last part of the agreement enabling the claimant to do all the closings as

the buyers wanted to select their own closing agent. The defendant stated that he wanted to change this arrangement, but could not, as the claimant refused. The defendant alleges that thereafter, the relationship broke down as the claimant was not cooperating; taking time to do closings and thereby losing buyers. The defendant states that for these reasons he set up his office to do the collections and terminated the agreement with the claimant.

[9] Relevant to the background is also the fact that the defendant paid **Six Thousand Dollars ($6,000.00)** to the claimant initially to obtain provisional approval for the subdivision of the land in question. The claimant while acknowledging receipt of this sum, disputes that this **Six Thousand Dollars ($6,000.00)** was his fee for the subdivision. He states that it was a facilitation fee paid to an unnamed third party to speed up the provisional approval of the subdivision of the land. The counsel for the defendant, while cross-examining the claimant asked him if he paid a bribe to get the sub-division approved, and the claimant responded by stating that "You can call it what you like". The court thereafter questioned the claimant as to whether he made any payments to any government official dealing with the subdivision of the land, to which the claimant replied that he paid the money to a third party to facilitate and expedite the transaction.

[10] The claimant asserts that he was not paid for applying for the subdivision and preliminary work because he was to be the exclusive sales agent of this land when it was subdivided. The claimant went ahead with the work on this basis. The claimant has not quantified and sought in his claim any sum for applying for the subdivision of the land or for any preliminary work for the sale of the land. The defendant on the other hand states that he paid **Six Thousand Dollars ($6,000.00)** to the claimant for the subdivision of the land. The sum paid by the defendant is not disputed by the claimant. The claimant was unable to provide a receipt for paying the **Six Thousand Dollars ($6,000.00)** to the third party as a facilitation fee, stating that these payments were made in cash.

Issues

[11] The following issues arise for determination in this matter:

A. Did the claimant have exclusive selling rights for the subdivided lots on the defendant's land?

B. If not, how many lots were sold by the claimant entitling him to a commission of ten per cent (10%) of ten thousand dollars ($10,000.00) per lot?

C. Did the claimant have an exclusive right to be the closing agent of all land sales of the subdivided lots?

D. How much payment is the claimant entitled to?

E. Is the claimant in any event not entitled to succeed in his claim in view of the legal objection of the defendant taken up during cross-examination of the claimant, that the sale of the subdivided lots is not legal until there is an approved subdivision?

F. Is the claimant entitled to specific performance of the agreement to transfer Lots 31 and 40 of the subject land?

Evidence of the parties

[12] Only the claimant gave evidence on his behalf. He tendered in evidence the witness statement he had made, dated 7th August 2023 together with the annexes CR1 to CR 16. In amplification of his witness statement, the claimant also produced at the trial eight (8) receipt books kept in his possession which were tendered in evidence marked CR 17 to CR 24. These receipt books also contained some receipts which were not relevant to this matter. Counsel of both parties were directed to agree on which receipts would be relevant. The agreed list of relevant receipts signed by each counsel was tendered to the court on 11th April 2024 by motion of the claimant.

[13] The claimant's evidence is that he was introduced to the defendant by Mr. John Harder for whom the claimant had acted as a real estate agent. The claimant had also subdivided Mr. Harder's land. According to the claimant, the defendant had bought the 20.3 acres of land from Mr. Harder and therefore wanted the claimant to also engage

in subdividing this land. He states that he had a verbal contract with the defendant to market and sell the land as the exclusive sales agent after the subdivision. The claimant asserts that on this basis, he did not charge for the preliminary work of engaging a surveyor and applying to the Lands Department for the subdivision. The claimant also stated that he drafted the contracts for the purchase agreements in relation to the lots to be sold and that he collected the money and kept the books. He states that the agreement with the defendant lasted from about 6th July 2020, until April 2022 when the defendant incorporated a company to attend to land sales and took over the sales and repudiated the contract with the claimant. The claimant goes on to state that at the time, the defendant repudiated the contract there were thirteen (13) unsold lots from the total of fifty-nine (59) lots that the land had been subdivided into.

[14] The claimant did not call any of the buyers of these lots to give evidence that they had paid the money to the claimant or that the claimant had been responsible for closing the sales. According to the claimant, all payments for the land by the buyers and payments from him to the defendant were in cash. There are no bank records of these transactions.

[15] Only the defendant gave evidence for the defence. He did not call any witnesses to support the position that anybody other than the claimant had been involved in the sale of the lots of land on his property. Even though reference was made to the tri-partite agreement of 19th January 2022, Edwin was not called to give evidence as to how many buyers Edwin had procured, nor to explain his version or interpretation of the written tri-partite agreement of 19th January 2022. Edwin's evidence on this aspect would have been helpful. Regrettably, neither party called him as a witness.

[16] The defendant introduced in evidence documents marked PP - 1 to PP - 11 attached to his witness statement dated 7th August 2023. It is the defendant's position that his intention was to divide the 20.3 acres of land into fifty-nine (59) lots and to sell them to interested people at **Ten Thousand Dollars ($10,000.00)** each. This fact therefore is not in dispute. The Defendant states that he engaged the surveyor, Mr. Ezellio, to prepare the subdivision plan. This plan marked PP 2 is dated 3rd October 2022 and

has been made after the termination of the agreement with the claimant and after the date on which the provisional subdivision was approved, on 17th September 2021 (CR 3).

[17] The defendant confirms that he entered into an oral agreement with the claimant on or about the 6th of July 2020 to market and sell any of the fifty-nine (59) lots for a ten per cent (10%) commission. The defendant states however that this was a non-exclusive marketing and sales arrangement with the claimant. The defendant's version of the written agreement of 19th January 2021 is that he wanted to terminate the oral agreement with the claimant, as Edwin, with whom he had a similar agreement as that with the claimant to sell the land for ten per cent (10%) commission, was securing more buyers. This situation led to a dispute when the claimant was seeking commission even on lots sold by Edwin and the defendant. The defendant also states that the agreement was drafted for Edwin's benefit and that sales agreements and collection were to be done by the claimant.

[18] Interestingly, in this regard, the defendant states the following at paragraphs 17 to 21 of his witness statement:

> "*17. I did not agree with this as that would result in me paying out 20% of the purchase price, which I was not willing to part with and I also saw no reason why Calvin [the claimant] should be paid 10% on sales secured by myself or Edwin who was securing way more sales than Calvin.*
>
> *18. Due to this dispute between Calvin and I, Edwin decided to stop selling lots within the Development on my behalf as Calvin continued to insist that I pay him 10% on Edwin's sales which caused a disagreement between them as well.*
>
> *19. Since Edwin had secured more sales than Calvin, I was prepared to terminate the Oral Agreement between myself and Calvin for him to market and sell lots within the Development as I wished for Edwin to continue doing so since he was doing a better job.*

20. Consequently, when I informed Calvin of my intention to do so, Calvin then insisted that Edwin and I agree that he should be able to draft all sale agreements, do collections where necessary, and do all the title work despite who secured the buyer between him, myself, and Edwin. I had no issue with this request and to my knowledge neither did Edwin.

21. <u>Edwin also agreed to continue to market and sell the lots on the basis that I allowed him to keep any amount in excess of the $ 10,000 secured for the purchase of a lot instead of a 10% commission</u> and that all lots be market for sale by him or Calvin at a minimum of $13,000.00 instead of $ 10,000.00, which I agreed to." [Emphasis added]

[19] In response to the court, as to who drafted the tri-partite agreement dated 19th January 2022, the defendant answered that it was Calvin (the claimant). The defendant also stated that despite a verbal agreement being in place after the 19th January 2022 agreement that lots were to be marketed at **Thirteen Thousand Dollars ($13,000.00),** the claimant continued to market lots at **Ten Thousand Dollars ($10,000.00),** thus preventing Edwin from securing buyers at the higher price.[3] According to the defendant, when he confronted the claimant about this, the claimant wanted another written agreement that he would get ten per cent (10%) of all sales irrespective of who found the buyer.[4] The defendant states that he then consulted an Attorney and terminated all dealings with the claimant both under the oral and written agreement.

[20] According to the defendant, at the time of termination, the claimant had sold nine (9) lots. He therefore deposited outstanding commissions for these nine (9) lots, to the claimant's bank account, after termination of the agreement. These are the only transactions made through a bank and it has been done after termination of the agreement by the defendant, presumably for proof of payment.

[3] Paragraph 26 of the Defendant's witness statement.
[4] Paragraph 27 of the Defendant's witness statement.

[21] The defendant did not present any accounts, nor is there a counterclaim by the defendant demanding any monies from the claimant in respect of sales, although the defendant states at paragraph 26 of his witness statement that the claimant collected monies from buyers and did not hand it over to him. It has therefore to be assumed that all monies collected by the claimant and due to the defendant had been paid over to the defendant by the claimant.

Analysis

[22] **First issue: Did the claimant have exclusive selling rights for the subdivided lots of the defendant's land?** The starting point to answer this question should be the written agreement of 19th January 2022 (sometimes referred to hereinafter as the "January 19th agreement"). According to the defendant, when answering the court, he stated that this agreement was prepared by the claimant.

[23] If as asserted by the defendant in his witness statement, this agreement was entered into for Edwin's benefit, there is no reason for it to have been prepared by the claimant. The fact that Edwin was to receive the difference between the minimum price of **Ten Thousand Dollars ($10,000.00)** and the higher sales price, in lieu of a **ten per cent (10%) commission,** was because; as explained by the defendant in his witness statement, the defendant did not want to pay **two (2) commissions of ten per cent (10%);** one (1) to Edwin and another to the claimant in respect of the same sale. Although the January 19th agreement did not refer to the claimant receiving ten per cent (10%) of all land sales, irrespective of who sold it, the agreement does appear to corroborate the claimant's version about the exclusive selling arrangement. This is because; it is the claimant that had insisted on this agreement being entered into by the three (3) parties. As a result of this tri-partite agreement, Edwin no longer received ten per cent (10%) of sales but instead worked on a profit arrangement of keeping the difference between the sales price and the threshold price. This arrangement left it open for the claimant to receive his ten per cent (10%) commission based on the previous oral agreement with the defendant.

[24] The fact that in practice, the claimant asserted his position as an exclusive sales agent is also brought out in the defendant's witness statement wherein, he states at paragraph 18, that Edwin decided to stop selling lots in the development because the claimant insisted on being paid a ten per cent (10%) commission on Edwin's sales. It was this incident that gave rise to the January 19th agreement. If as suggested by the defendant, both the claimant and Edwin were commission agents, they could both have marketed and sold lots at whatever price each of them could secure and got their ten per cent (10%) commission thereon. There was no reason to change the arrangement for Edwin and to sign a tri-partite agreement, if that was the case.

[25] Another fact about the January 19th agreement that corroborates the previous oral agreement between the claimant and the defendant is the insistence of the claimant that he do all the closings, collections and title work. There was no reason for either the defendant or Edwin to agree to that term unless the claimant had previously exclusively done so and was in control of the documentation.

[26] It would appear that the claimant who insisted on the tri-partite agreement attempted to capture the parties' obligations in the January 19th agreement. However, the claimant is not a lawyer and the agreement is neither precise nor detailed. In these circumstances, when the entire agreement is not contained in writing, it is possible as held by the Privy Council in the case of ***Bolkia v. Brunei Darussalam***,[5] to look at parole evidence and surrounding circumstances to ascertain the terms of the agreement.

[27] This principle of looking at surrounding circumstances to interpret a contract was elaborated in the Australian case of ***Masterton Homes Pty Ltd. v. Palm Assets Pty Ltd.***[6] where the court stated:

> "*The parole evidence rule applies only to contracts that are wholly in writing…where a contract is partly in writing and partly oral, the terms of*

[5] [2007] UKPC 63
[6] [2009] NSWCA 234

the contract are to be ascertained from the whole of the circumstances as a matter of fact. Similarly, finding the terms of a wholly oral contract is a matter of fact. In determining what are the terms of a contract that is partly written and partly oral, surrounding circumstances may be used as an aid to finding what the terms of the contract are…If it is possible to make a finding about what were the words parties said to each other, the meaning of those words, is ascertained in the light of the surrounding circumstances…if it is not possible to make a finding about the particular words that were used (as sometimes happens when a contract is partly written, partly oral and partly inferred from conduct) the surrounding circumstances can be looked at to find what in substance, the parties agreed."

[28] In this instance, it is not possible to rely on the words spoken by the parties as there is a contradiction in the statements of the claimant and the defendant regarding whether there was an exclusive marketing and sales agreement, for the claimant to sell lots of the defendant's land. However, the conduct of the parties, the surrounding circumstances leading to the January 19th agreement and the words in that agreement, incline on a balance of probability, to the presumption that the claimant had exclusive rights to market and sell lots on the defendant's land.

[29] **Second issue: If not, how many lots were sold by the claimant entitling him to a commission of ten per cent (10%) of Ten Thousand Dollars ($10,000) per lot?** As I have held above, answering the first issue, that the claimant had an agreement to exclusively market and sell the lots on the defendant's land, this second issue now becomes academic and redundant.

[30] In any event, I find that there is no reliable evidence on paper to ascertain the exact number of sales executed by the claimant. This is in view of the inconsistencies in the accounts brought out by the counsel for the defendant when cross-examining the claimant. In the teeth of the denial of the defendant, that he had not seen the accounts or the receipts kept by the claimant, it is not possible to make a finding as to how many

lots were sold by the claimant by looking at the accounts and receipts kept by the claimant. It is, however, apparent as will be elaborated at a later point, that the claimant would have sold more than the nine (9) lots suggested by the defendant. Another factor that tends to this conclusion is that the sales agreements produced indicate that the claimant was in control of the sales agreements and he had signed as a witness, in many of them.

[31] As referred to above, however, the defendant does not seek any money from the claimant. This leads to the conclusion that all monies due to the defendant would have been paid by the claimant. For the reasons set out in the paragraph above, I do not find the receipt books produced by the claimant to be helpful. The claimant being a businessman ought to have had an escrow account to which these monies were deposited and from which transfers could have been made. In the absence of such evidence, no finding can be made on the receipt books alone which cannot be corroborated by any other evidence.

[32] **Third Issue: Did the claimant have an exclusive right to be the closing agent of all land sales of the subdivided lots?** This issue is answered in the affirmative, in favour of the claimant. The January 19th agreement corroborates the fact that both the defendant and Edwin, the third party, agreed to this term. The second paragraph of the January 19th agreement is confirmation of the fact that this was how business had been done previously and was to continue even after Edwin came on board, to sell lots on the defendant's land.

[33] The defendant had stated that he was to be paid **Five Hundred Dollars ($500.00)** per closing in addition to fees to be paid to the Government. This was because the claimant prepared the documents and kept the records. The fact that the claimant kept the records of the sales contracts is evident on a balance of probability, as he has produced these records.

[34] **Fourth issue: How much payment is the claimant entitled to?** I have concluded that the claimant had an exclusive agreement to market and sell the claimant's land and is also entitled to the closing fees. Going by this conclusion, if the claimant had

sold all the lots, the claimant would be entitled to **ten per cent 10% of Ten Thousand Dollars ($10,000.00)** for fifty-nine (59) lots, amounting to **Fifty-Nine Thousand Dollars ($59,000.00).** He would also be entitled to the closing fee of **Five Hundred Dollars ($500.00) for each** of the fifty-nine (59) lots amounting to **Twenty-Nine Thousand Five Hundred Dollars ($29,500.00).** Both these amounts; **Fifty-Nine Thousand Dollars** plus **Twenty-Nine Thousand Dollars ($59,000.00 + $29,500.00)** in total add up to **Eight-Eight Thousand Five Hundred Dollars ($88,500.00).**

[35] The claimant however, claims a lesser figure of **Sixty-Nine Thousand and Eighty-Five Dollars ($69,085.00),** based on ten per cent (10%) due on instalment payments of **Two Hundred and Sixty-Five Thousand Eight Hundred and Fifty Dollars ($265,850.00)** and the ten per cent (10%) on thirteen (13) unsold lots amounting to **Thirteen Thousand Dollars ($13,000.00)** plus a closing fee of **Five Hundred Dollars ($500.00) per lot** amounting to **Twenty-Nine Thousand Five Hundred Dollars ($29,500.00),** totalling to **Sixty-Nine Thousand and Eighty-Five Dollars ($69,085.00).**[7] From this amount, the claimant had deducted the **Seven Thousand Dollars ($7,000.00)** paid to him by the defendant. Thereafter, the claim is reduced to a total of **Sixty-Two Thousand and Eight-Five Dollars ($62,085.00**).

[36] The difference between the court's calculation of **Eighty-Five Thousand Five Hundred Dollars ($88,500.00)**[8] and the claimant's claim of **Sixty-Nine Thousand and Eighty-Five Dollars ($69,085.00)** as what is due to him, can only be attributed to the fact that the claimant had already deducted the difference between these two sums as his commission on proceeds received from the sales.

[37] In this background, it would be interesting to analyse the numbers. The processing fee is common to both these calculations and is the same amount of **Twenty-Nine Thousand Five Hundred Dollars ($29,500.00).** This indicates that this sum had not been collected or deducted by the claimant, else he would not claim it. The sum of

[7] Particulars of the claim as stated in the statement of claim.
[8] Based on a calculation of the ten percent (10%) commission for the 59 lots plus the and closing fee for the 59 lots

Thirteen Thousand Dollars ($13,000.00), for the unsold thirteen (13) lots (a figure presented by the claimant) is also common to both the above calculations. For convenience of analysis, these common sums should be excluded. Thereafter, on a raw calculation of what is left, there are fifty-nine minus thirteen lots (59 minus 13 lots), which is forty-six (46) lots. The ten per cent (10%) commission on forty-six (46) lots should be **Forty-Six Thousand Dollars ($46,000.00).** The claimant, however, in particularising his claim, is claiming **Twenty-Six Thousand Five Hundred and Eighty-Five Dollars ($26,585.00),** which according to the claimant is **ten per cent (10%)** of **Two Hundred and Sixty-Five Thousand Eight Hundred and Fifty Dollars ($265,850.00)** that is outstanding as instalment payments on lots sold.[9] The difference between **Forty-Six Thousand Dollars ($46,000.00) and Twenty-Six Thousand Five Hundred and Eighty-Five Dollars ($26,585.00)** which amounts to **Nineteen Thousand Four Hundred and Fifteen Dollars ($19,415.00)** is not claimed by the claimant. Two explanations are possible for this difference. The first is that the claimant had already deducted the commissions and was therefore not claiming it. The second is that the difference of **Nineteen Thousand Four Hundred and Fifteen Dollars ($19,415.00)** represents commissions on lots not sold by the claimant. However, the second explanation is not consistent with the claimant's case and assertion that he is entitled to **ten per cent (10%)** of the price of all lots sold irrespective of who brought the buyer. It is on the basis of his exclusive selling rights that the claimant claims **Thirteen Thousand Dollars ($13,000.00)** for the unsold lots. It is therefore more probable that the claimant had not claimed the **Nineteen Thousand Four Hundred and Fifteen Dollars ($19,415.00)** as this represented a deduction of his commission which had already been made when making cash payments to the defendant. If that is the case, it establishes that the claimant had in fact been doing the collections and had sold more than nine lots, contrary to what is alleged by the defendant.

[38] As the claimant claims the lesser figure of **Sixty-Two Thousand and Eighty-Five Dollars ($62,085.00)** and not **Eighty-Eight Thousand Five Hundred Dollars**

[9] Paragraph 11 of the statement of claim.

($88,500.00 minus the sums paid by the defendant) as calculated by the court, I grant the claimant the sum of **Sixty-Two Thousand and Eighty-Five Dollars ($62,085.00)** claimed as damages for breach of contract. I find that the defendant by terminating the oral contract with the claimant,[10] has breached the contract by not paying the agreed commissions and closing fees to the claimant by not permitting the claimant to act as the exclusive sales agent.

[39] **Fifth issue: Is the claimant in any event not entitled to succeed in his claim in view of the legal objection of the defendant taken up during cross-examination of the claimant, that the sale of the subdivided lots is not legal until there is an approved subdivision**? This objection was not pleaded in the defence nor was an issue on this point raised by the parties prior to the trial. It appeared for the first time in the cross-examination of the claimant and thereafter in the concluding written submissions filed on behalf defendant.

[40] The objection is that ***section 14*** of the ***Land Utilization Act*** prohibits an applicant from selling leasing, giving or otherwise alienating any part of the land intended for the subdivision until final approval is obtained from the Minister. ***Section 7*** of that ***Act*** states that any subdivision in contravention of the Act is void and has no effect in law.

[41] It is therefore argued for the defendant that the sales agreements for which the claimant seeks commission, are void from the very beginning (*ab initio)* and therefore, any transaction akin to or relying on those contracts is also void. The defendant cites the case of ***Silk Grass Farms Limited v. Freshwater Farms Limited***[11] in support of its argument that no one can benefit from their own illegality.

[42] In the concluding submissions of the claimant, it is stated that the defence cannot raise this objection as it has not been pleaded. On behalf of the claimant, the cases of ***Wilfred P. Elrington v. Progresso Heights Limited***[12] and ***Andre Vega v. Attorney***

[10] By letter dated 21st April 2022, written by the defendant's Attorney to the claimant.
[11] Claim No. 75 of 2021
[12] [2024] CCJ 4 (AJ) BZ

General[13] were cited as authority for the position that the defendant cannot raise an objection or raise an issue that had not been pleaded.

[43] The provisions of the ***Supreme Court (Civil Procedure Rules) 2005,*** make it clear that parties are not to be taken by surprise and that any allegation or factual arguments should be raised at the earliest opportunity and not later than the case management conference[14]. Permitting the amendment of pleadings after the case management conference is also at the discretion of the court and only if the party can satisfy the court that there has been a significant change in circumstances that warrant it.[15]

[44] The objection taken by the defendant was not pleaded and no issue was raised on it. Hence, the claimant did not have an opportunity to rebut it. The argument could be taken that the issue raised by the defendant in cross examination of the claimant is a legal objection that goes to the heart of the matter. Even so, it should have been pleaded so that the claimant had an opportunity to respond by admitting that position or disputing it. As held by Lord Norman, in ***Esso Petroleum Co. Ltd. v. Southport Corp***[16], the function of pleadings is to give fair notice of the case which has to be met so that the opposing party may direct their evidence to the issues disclosed in the pleadings. In regard to applying this principle to a legal objection as opposed to a factual position, the Caribbean Court of Justice in the case of ***Todd v. Price***[17] upheld that fraud needed to be pleaded if it was to be relied upon. The Caribbean Court of Justice has also very recently affirmed this position in the case of ***Elrington v Progresso Heights Limited***.[18]

[45] This court is bound by law and precedent, and therefore, cannot permit the defendant to raise the issue of illegality at this late stage in the proceedings. I therefore reject the argument of the defendant on this issue.

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[13] Civil Appeal No. 17 of 2019
[14] Rule 10.5 read with Rule 10.7
[15] Rule 10.7 (3)
[16] [1956] AC 218
[17] [2021] CCJ 2 (AJ) GY
[18] [2024] CCJ 4 (AJ) BZ

[46] **Sixth issue: Is the claimant entitled to specific performance of the agreement to transfer Lots 31 and 40 of the subject land?** That agreement dated 8th April 2022 is in writing and has been produced marked PP - 10 annexed to the witness statement of the defendant. Clauses 22, 23 and 24 of that agreement are to the effect that the written agreement constitutes the entire agreement. It is stated that it proceeds all previous oral and written agreements and that any amendments thereto must be in writing and signed by the parties. Therefore, unlike in the previous instance, it is not possible, because of the entire agreement clause, to look at surrounding circumstances or oral agreements to interpret the written sales agreement.

[47] The law on this position has been clearly established. The case of ***McGrath v. Shah***[19] has described an entire agreement clause as being an "insuperable hurdle".[20] The case of ***Inntrepreneur Pub v. East Crown***[21], held that:

> "[*An entire agreement clause] constitutes a binding agreement between the parties that the full contractual terms are to be found in the document containing the clause and not elsewhere, and that accordingly, any promise or assurances made in the course of negotiations shall have no contractual force, save in so far as they are reflected and given effect to in that document*".[22]

[48] The claimant suggests that payments in respect of this purchase of two (2) lots were to be made by deducting commissions he received for land sales. This however is not reflected in the agreement marked as PP - 10. Therefore, such a representation even if proved cannot be relied upon as it is not written into that contract. A further fact to note is that the date of this Agreement is 8th April 2002, a date at or near a point when the relationship between the claimant and the defendant broke down. It is unlikely that the defendant would have contemplated receiving payment by deducting commissions at this point in time.

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[19] (1987) 57 P. & C.R. 452.
[20] Kim Lewison, Interpretation of Contracts, (Sweet & Maxwell), 7th ed. P. 169.
[21] [2000] 2 Lloyds Rep 611.
[22] [2000] 2 Lloyds Rep 611 at 614

[49] I hold therefore that the claimant by not making any payments in regard to the contract to purchase lots 31 and 41 of the defendant's land has been in default of payment. The contract has been terminated for default of payment. The claimant is therefore not entitled to specific performance of that contract and is not entitled to a refund of any monies that would have been paid in that regard.

Costs

[50] The Claimant is entitled to costs as he has succeeded in his main claim. However, as the claimant has not succeeded on all his claims, he will only be entitled to **seventy-five per cent (75%)** of his costs. The costs are to be agreed upon or assessed.

[51] **IT IS HEREBY ORDERED THAT:**

(1) The Claim is partially allowed.

(2) The defendant shall pay the claimant **Sixty-Two Thousand and Eighty-Five Dollars ($62,085.00)** with interest thereon at a rate of **six per cent (6%) per annum** from the date of this judgment till payment in full.

(3) The defendant shall pay the claimant **seventy-five (75%)** of his costs to be agreed or assessed.

(4) The Registrar is directed to forward this judgment to the police for information, to investigate if a bribe/gratification or incentive payment has been paid to obtain the approval for the subdivision of the defendant's land and for action to be taken according to law if an offence is disclosed.

Rajiv Goonetilleke
High Court Judge