REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2007-03202

BETWEEN

EXCLUSIVE REAL ESTATE SERVICES LIMITED

Claimant

AND

D'REEF LIMITED
DARYAN WARNER

Defendants

Before The Hon. Madam Justice C. Gobin
Appearances:
Ms. E. Green for the Claimant
Mr. A. Singh for the Defendants

JUDGMENT

1. The claimant is a real estate agency engaged in the business of selling 'executive' or high-end properties in Trinidad and Tobago. The first defendant D'Reef was the registered owner of such a property situate at 31 Sunset Drive, Bayshore. The second defendant is the majority shareholder in D'Reef. He owns 49,999 shares while his brother Darryl Warner owns one. At all material times in the course of the transaction between the parties, the claimant's agent Angela Attong dealt with D'Reef through Mr. Warner. From her evidence it is clear that she understood that she was dealing with D'Reef, a registered company and that Mr. Warner was the human face of the company. Her correspondence confirmed that she understood they were separate entities.

2. Sometime prior to September 8th 2005 Ms. Attong approached Mr. Warner to enquire whether he was interested in selling the property. She suggested it could fetch a

price of $23Mn. Mr. Warner candidly expressed that he was ecstatic at the price. By an agreement dated September 8th 2005 the claimant agreed to find a buyer for the property and D'Reef agreed to pay an estate agent's commission. No price was stipulated. The agreement was contained in a form which showed the claimant's standard commission structure. It was executed by Mr. Warner who made and initialled some changes to that standard document. The effect of the changes was to reduce the claimant's sliding commission structure to a flat 3% of "the value" of the property. The "value" of the property or the price which was contemplated was $23Mn. The agreement stipulated as follows –

> "commission is due and payable on receipt of a deposit and payable on receipt of a deposit and the signing of a legally binding sale/rental agreement".

This could not have been more clearly expressed.

3. On September 19th 2005 as a result of the claimant's efforts the second defendant and Darryl Warner as shareholders in the first defendant entered into an agreement with one Reginald Charran for the sale of the property at a price of $24,300,000. Upon the signing of the agreement for sale the first defendant received a deposit of $2,430,000.

4. At that date, on the application of the most basis contract principles, and barring any other relevant occurence, the claimant became entitled to its full commission of $729,000. On October 15th 2005 Mr. Warner caused a company Nautie Krew Limited to pay the claimant a part of the commission that was due in the sum of $160,000.00. The balance of $569,000 remains outstanding to date.

5. The defendants do say however, and this is relevant, that express term for payment was subsequently varied when it arose that the transaction would be completed partly by the payment of $11,300,000 and partly by an exchange of a property owned by Mr. Charran located at Pine Avenue, Bayshore to the defendants, the value of which was agreed would cover the balance of the purchase price. I therefore had to consider the evidence of this alleged variation to determine whether it did occur.

6. The exchange of correspondence which followed the execution of the commission agreement does not support the defence in this regard. At all times the second defendant appeared to be attempting unilaterally to impose a variation and this was clearly rejected by the claimant. On the evidence, it does appear to me that Mr. Warner was attempting to reduce the claimant's commission by seeking to make it payable on the cash part of the transaction only. In the face of his own deliberate insertion and amendment to the commission agreement on September 8th 2005, and in the absence of the agreement of the claimant to this proposed variation, this argument was simply not open to him. At the end of his cross-examination and by his responses to the Court I think it was clear even to Mr. Warner, that that aspect of defence could not stand. The "value" of the property remained $23Mn and the commission was payable on that sum. The claimant was therefore entitled to commission as at September 19, 2005. As to who is liable to pay it, the claimant seems to have abandoned its case that both defendants or either of them were parties to the commission agreement. In the light of Mrs. Attong's evidence that course was to be expected.

7. The remaining question is whether there is any basis for a finding of liability in the second defendant on the remainder of the pleadings and the answer to my mind must be that there is none. In the course of the trial Counsel for the claimant was asked to indicate what paragraphs of the pleadings gave rise to the second defendant's liability. Counsel referred to paragraph (3) of the statement of case and paragraphs 1 and 10 of the reply. I have considered the statement of case. The first point to note is that the claimant accepts that the first defendant is the owner of the property. Other than the abandoned plea that Mr. Warner too was a party to the contract, the only other matter which relates to the second defendant is the fact that he controls the business of D'Reef, that he owns 49999 shares in it while his brother holds one. These bare facts are insufficient to raise an issue as to Mr. Warner's liability for the actions of D'Reef.

8. In their defence and specifically in relation to the abandoned plea the second defendant responded that he had signed the agreement on behalf of D'Reef and in those circumstances no personal liability attached to him. In its reply in answer to this, the claimant restated not once but twice, the shareholding of the second defendant. In so doing the claimant ignored the purpose of a reply (See Blackstone's Civil Practice 2005 para. 27.2). It went on further to say for the first time that D'Reef was "a creature" of Mr. Warner's. This added nothing to the original pleading in that, without more, it did not amount to a cause of action.

9. It was insufficient because there was no claim of fraud or impropriety in the incorporation of the first defendant, no suggestion of a relationship of agent and principal

between the first and second defendant's nor indeed that the legal title in the property was held on trust by the first defendant for the second defendant.

10. In her closing submissions counsel for the claimant indicated the ground on which the second defendant's liability rests and I quote as follows:

> *5.2.2 Notwithstanding the general rule, certain exceptions or variations to the Salomon principle have emerged. In Pennington's Company Law, 8th ed., Butterworth's (London) judicial disregard of the principle has been identified as one such exception "… where the protection of public interests is of paramount importance or where the company has been formed to evade obligations imposed by law or contract, and by the courts implying in certain cases that a company is an agent or trustee for its members." It is on this last ground that the claimant submits the second defendant is liable on the commission agreement between the claimant and the first defendant.*

11. If the court was being asked to imply that the first defendant was simply an agent or trustee for the second defendant then that was not clearly pleaded. Indeed I am even now unable to ascertain whether the claimant's case was that D'Reef was either an agent or a trustee or whether both are one and the same in this case. The obligation on the claimant was to clearly state what case the defendants were to meet. In this regard the statement of case was clearly wanting. The court cannot be expected to imply a relationship when that relationship has not been set out, and the circumstances which give rise to the alleged relation were not set out with particularity. I can only conclude the relevant instructions were not available when the pleadings were settled.

12. Counsel for the claimant did elicit in cross-examination certain evidence that might have been relevant had the issue been properly pleaded. In the circumstances that evidence is rendered irrelevant and I shall disregard it.

13. There shall be judgment for the claimant against the first defendant The claimant's case against the second defendant is dismissed. There shall be no orders to cost.

Dated this 27th day of May 2010

CAROL GOBIN

JUDGE