[2018] JMCC Comm 50

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. 2017 CD 00176

BETWEEN	**WINSTON BUTLER**	**CLAIMANT**
AND	**COK SODALITY CO-OPERATIVE CREDIT UNION LIMITED**	**DEFENDANT**
	AND	
BETWEEN	**COK SODALITY CO-OPERATIVE CREDIT UNION LIMITED**	**ANCILLIARY CLAIMANT**
AND	**WINSTON BUTLER**	**ANCILLARY DEFENDANT**

Ms Karlene Larmond and Ms Nastasia Robinson instructed by Rattray, Patterson, Rattray for the Claimant

Mrs Georgia Gibson Henlin QC and Ms Nicola Richards instructed by Henlin Gibson Henlin for the Defendant

HEARD: 29, 30 October and 1 November 2018

CONTRACT FOR SERVICES – CONTRACT PROVIDING FOR PROVISION OF CONSULTANCY SERVICES IN LETTER OF ENGAGEMENT – PAYMENT TERMS INCORPORATED INTO THE LETTER OF ENGAGEMENT – EMPLOYER REFUSING TO PAY FEES UNDER THE CONTRACT – WHETHER BASIS FOR PAYMENT UNDER THE CONTRACT WAS TRIGGERED – WHETHER ANY BASIS OUTSIDE OF CONTRACT FOR PAYMENT ON A QUANTUM MERUIT BASIS

EDWARDS, J

Background

[1] On 17 November 2018, I gave judgment for the defendant on the claim, with costs against the claimant to be agreed or taxed. At the time, I promised to give my reasons in writing and I do so now.

[2] The claimant is a business consultant. His claim is to recover US$178,017.39 for consultancy services, pursuant to an 'unsolicited' Letter of Engagement with the defendant. Alternatively, the claimant claims to be entitled to payment in the sum of US$134,852.46, on a quantum meruit basis. The claim arises from the parties' agreement in a Letter of Engagement dated, 14 March 2016, wherein the defendant agreed "to retain the services of the claimant to act as its non-exclusive intermediary to locate a qualified prospective buyer and lessor that may desire to enter into a sale – leaseback transaction, with the defendant, pertaining to property its owned which was located at 66, 66 ½, 68 and 70 Slipe Road, Cross Roads Square, St. Andrew ("the Property")". The fee structure for this service was also set out in the Letter of Engagement. The basis upon which payment would be made to the claimant was set out under the heading 'Fees'. The agreed fee structure for the services detailed in the Letter of Engagement was consultant's fee – 5% of gross proceeds and Legal Services – 1.5% of gross proceeds.

[3] The relevant portions of the Letter of Engagement under the heading 'Fees', is as follows:

> *"a. The fee is payable immediately upon completion and payment will be made by Real Time Gross Settlement (RTGS) to the Consultant at the same time COK receives its funds (or value).*
>
> *b. A fee equivalent to 6.5% of the total price, prior to any deductions, expenses or offsets of any kind, of the listed property and chattels shall be paid by the COK to the consultant, should the consultant introduce a third party who completes the purchase and lease of the property.*

c. Where the transaction is aborted the consultant shall be paid the fee on the forfeited sum.

d. Where COK accepts an offer in writing from a qualified third party – introduced by the consultant – and subsequently turns down the offer, the fee shall become due and payable on the date COK turns down the offer."

[4] The claimant located a qualified prospective buyer and lessor, Kingston Properties Limited (KPL), which was desirous of entering into such a transaction. After negotiations and discussions, facilitated by the claimant acting as intermediary, on or about 1 April 2016, the defendant and KPL signed a Property Sale – Leaseback Term Sheet, finalized and approved by the defendant's Board of Directors. This Terms Sheet contained negotiated terms for the cash purchase of the property in the sum of US$2,738,729.43 (net) and the lease of the property of US$7.08/sq. ft. per annum. There was also a provision in the Term sheet that it was a non-binding agreement.

[5] On 14 April 2016, KPL signed an Agreement for Sale, arrived at after negotiations with the defendant, through the claimant as intermediary, and the agreement was provided to the defendant through its then president, Coral Anglin. On 15 April 2016, Ms Anglin informed the claimant, first by phone and then by e-mail, that the defendant's Board of Directors took a decision not to execute the agreement for sale with KPL. Two "important factors" were cited in the e-mail, namely, that regulators granted an extension until April 20 for an executed sale agreement to be presented and that attractive competing offers have been forthcoming, which the Board felt compelled to consider, in the best interest of its members.

[6] The claimant sought to have his fees paid by the defendant pursuant to the Letter of Engagement and based on the Term Sheet, but the defendant failed to pay on the basis that the fee structure had not been triggered, as there been no concluded agreement neither had they accepted and then rejected any offer made by KPL. After failed negotiations concerning his fees, the claimant commenced

these proceedings seeking recovery of his fees pursuant to sub-clause (d) under the heading 'Fees' in the Letter of Engagement.

The Claim

[7] By an amended claim form and particulars of claim, filed in these courts on 5 October 2017, the claimant sought to recover certain sums claimed as fees for consultancy services provided to the defendant. The amended claim is, inter alia, for the following:

I. "The amount of sum of One Hundred and Seventy Eight Thousand and Seventeen United States dollars and Thirty-nine cents (US$178,017.39);

II. In the alternative, the amount of One Hundred Thirty-four Thousand, Eight Hundred and Fifty-Two United States dollars and Forty-six cents (US$134,852.46) on a quantum meruit basis for the work and services provided by the Claimant;

III. Interest accruing as at the date of the breach at a commercial rate of interest of 7.07% being the Foreign Currency Weighted Loan Interested Rate as published by the Bank of Jamaica as at the date of the breach, April 2016;

IV. The amount of Two Hundred Thousand Jamaican dollars (JMD$200,000.00) for Court Fees and Attorney's Cost to the date of the filing of this Claim;

V. Costs; …"

[8] The claimant's claim, insofar as it is based on the Letter of Engagement, is set out in the Amended Particulars of Claim. He asserts, inter alia, that he is entitled to the fees because:

"21. Following the meeting, on 1 April 2016 the Defendant's Board of Directors finalised, approved and signed the Term Sheet which was sent to the prospective purchasers for their signature. Though the term sheet was non-binding and subject to contract, it represented an offer and acceptance for the purposes of the Letter of Engagement and provided sufficient comfort to the auditors pending the finalization of the Agreement for Sale.

22. The Term Sheet set out the commercial agreements of the Sale/Leaseback Agreement and the timeline within which the transaction was to be completed, which was envisaged to be 22 April 2016. In furtherance of this the Claimant engaged the services of legal counsel, Kerri-Ann Dryden, on behalf of the Defendant and worked assiduously to meet the deadline that was imposed by the Term Sheet.

23. The Claimant was at all material times central to the negotiations that ensued between the Defendant and KPL. Part of these negotiations centered on the terms which would form the basis of the Sale and Lease Agreements respectively…

24. These negotiations continued as late as 14 April 2016 5:22 pm when the Attorney-at-Law acting on behalf of KPL sent the final version of the Agreement to the Claimant and stated that the same would be executed by KPL the next day (15 April 2016) and the deposit forwarded to the Defendant subject to the Defendant providing KPL with the wiring instructions from them to remit the deposit.

25. The defendant, through its representative, Carol Anglin, by way of telephone conversation, indicated to the Claimant that the Defendant required the signed Sale Agreement to be presented at the Defendant's Board of Directors Specially convened meeting on that said day. As such, and in anticipation of closing the sale, KPL hurriedly signed the Agreement on 14 April 2016 and same was personally collected by Carol Anglin at Jamaica Pegasus of (sic) the same day.

26. On 15 April 2016, by way of e-mail, Carol Anglin informed the Claimant that the Defendant's Board of Directors took a decision not to execute the Agreement for Sale with KPL because "attractive" competing offers have been forthcoming for which the Board felt compelled that should be considered in the best interest of its members…"

30. The acceptance followed by the rejection of the offer made by the qualified prospective buyer triggered the provisions of "Fee" clause, specially clause "d" of the Letter of Engagement between the Claimant and the Defendant, and the Claimant is thereby entitled to be paid according to those terms."

[9] The defendant filed an amended defence and counterclaim on 27 December 2017. The defendant also filed an amended ancillary claim and particulars of claim on 13 February 2018. A reply to defence and counterclaim was also filed.

The amended defence

[10] The amended defence was, inter alia, in the following terms:

"10. Save an except that the Defendant's Board of Directors finalized the Term Sheet, and that it was non-binding Paragraphs 21 and 22 of the Amended Particulars of Claim are denied. In further answer to paragraph 21 the defendant's say that the signing of the term sheet did not indicate an offer and acceptance. Further the Term Sheet sets out the procedure, terms and conditions on which the Defendant would accept an offer to sell the property and/or otherwise enter into a binding commercial agreement to sell the properties set out therein…

11. Save that the Claimant was involved in the negotiations between the Defendant and KPL Paragraph 23 of the Particulars of Claim is denied.

12. Paragraph 26 of the Amended Particulars of Claim is denied. In answer to paragraph 26 of the Amended Particulars of Claim, the Defendant says that the Defendant and KPL were engaged in negotiations in accordance with the "term sheet." The Agreement for Sale that is purportedly signed by KPL is an offer or incomplete offer by KPL to purchase the property in question which was not accepted by the Defendant's Board of Directors. In addition, it is admitted that there were competing offers that precluded the Defendant from accepting the Claimant's prospect. The Claimant well knew that the terms of his engagement was on a non-exclusive basis such that there was no breach by the Defendant when it opted to consider other offers alongside any offer brought about by the Claimant's efforts.

13. In any event the conditions precedent to the Defendant's acceptance of the offer were not met or in place. There was no letter of intent and/or lease agreement that is to be signed contemporaneously with the Agreement for Sale as provided for in term sheet and also in the alleged/proposed Agreement for Sale.

14. The Claimant, a former director of the Defendant, well knows that transactions of the nature in question including the offer by KPL to

purchase the property was subject to the approval of the Board of Directors.

15. Paragraph (sic) 27 and 30 of the Amended Particulars of Claim are denied. The Defendant did not cancel an Agreement for Sale with KPL. No Agreement for Sale was ever made with KPL and the Defendant and no deposit was never tendered to or accepted by the Defendant. Still further no offer by KPL was accepted by the Defendant. The Agreement for Sale was only one of the documents necessary for the meeting of the condition precedent for the payment of the fee to the Defendant.

16. Still further and/or in the alternative in answer to paragraphs 24 to 30 of the Amended Particulars of Claim, the Defendant says that the Claimant knew that the Agreement for Sale was not finalised at all or in such a manner as could constitute an offer or binding offer or an offer capable of acceptance. He knew that it was to be approved by the Defendant's board. He was aware that the Agreement for Sale contained clauses that were not acceptable to the Defendant's representative and in particular, Director Shaw. The Claimant was advised of this by e-mail of 8 April 2016.

17. In addition, on 13 April 2016, the Claimant was specifically sent a clause relating to the letter of undertaking for insertion as that clause was also unsatisfactory. On 14 April 2016, the Claimant sent what he said was the "final" Agreement Sale. The Agreement for Sale was purportedly signed by the servants and/or agents Kingston Properties Limited, it did not have the Company seal and it was not witnessed. It was sent approximately one (1) hour before the board meeting at which it is to be considered as part of providing an update to the Board on the status of the negotiations. The lease referred to in paragraph 17 hereof was sent to the two (2) Board Members only, that is Shaw and Anglin "for review **but not for circulation**". It was therefore not available to the Board for their consideration approval or acceptance…

20. The Defendant denies that it is indebted to the Claimant on the terms or basis alleged by the Claimant in Paragraphs 32, 33, 34, 35 and 36 of the Amended Particulars of Claim. In this respect the Defendant repeats paragraphs 1-19 hereof. In addition no other agreement or alternative for payment was agreed between the parties other than as set out in the agreement of the 14 March 2016. The said agreement by its terms is an entire agreement and contains all the terms, conditions and understandings between the parties as regards the said engagement."

Preliminaries

[11] On the first day of trial, by agreement of the parties, the amended particulars of claim filed 3 October 2017, was amended by deleting certain paragraphs and modifying others. To that extent paragraph 5 was withdrawn and paragraph 6 modified by deleting the first four lines and adding to the last sentence the words- "as it needed to raise funds." Paragraph 7 was modified by removing the words starting at "as an option" to "financial crisis." Paragraph 16, 18 and 19 were withdrawn. Paragraph 20 was modified by deleting the last three lines starting from the words "and satisfy". Consequent on these amendments the ancillary claim was withdrawn as well as the defence to ancillary claim. No orders as to costs were made in relation to the application, the ancillary claim nor the defence to ancillary claim.

The issues

[12] The issues for determination, as I saw it were:

1) Whether the claimant is entitled to fees under sub-clause (d) of the Letter of Engagement dated 14 March 2016; if not

2) Whether, in the alternative, the claimant is entitled to payment for work done, on a quantum meruit basis.

Claimant's submissions

[13] Counsel for the claimant, Ms Larmond, in her written and oral submissions to the court, argued that the determination of this case rests on the interpretation that the court ought to place on sub-clause (d) of the Letter of Engagement. This, she said, begs the question, whether the fee payment was triggered by the signing of the Term Sheet or whether it could only be triggered by the occurrence of a signed sales agreement between the parties.

[14] Counsel submitted that the approach the court ought to take is that which was taken in **Investors Compensation Scheme Limited v West Bromwich Buildings Society** [1998] 1 All ER 98, at pages 114-115. Counsel argued that based on the background to the Letter of Engagement, it shows that an offer accepted by the defendant would convey to a reasonable man the meaning attributed to it by the claimant, that is, that the Term Sheet constituted an offer and acceptance within the meaning of the Letter of Engagement.

[15] Counsel argued further that there was no basis, consistent with the principles of construction, for this court to conclude that the Letter of Engagement contemplated an offer and acceptance which would be manifested in a signed sale agreement and leaseback agreement. Counsel submitted that a reasonable man, armed with the background knowledge of the claimant, would believe that acceptance of an offer in writing, for the purposes of sub-clause (d), was not a signed sales and leaseback agreement but the signed Term Sheet indicating acceptance by the parties of an intended transaction, following the introduction of the buyer by the claimant to the defendant. Counsel argued that if the defendant changed its mind, after the signing of the Term Sheet, the fee would become due and payable.

[16] Counsel contended that it was not the claimant's case that the Term Sheet was a binding agreement, but that it represents an acceptance by the defendant of the third parties desire to purchase and the defendant's desire to pursue that

transaction with that third party. This, she said was sufficient to trigger payment under sub-clause (d). Counsel asked the court to bear in mind that the claimant was asked to locate a prospective buyer who may enter into a signed agreement and the Term Sheet established that the claimant did just that. Counsel maintained that, whilst the claimant was not denying the presence of the non-binding clause in the Term Sheet, he was insistent that he had carried out his mandate and that the Term Sheet reflected that the defendant and the third party had settled on certain terms under which they would embark on their transaction.

[17] Counsel further argued that the fee structure made provision for payment in three instances and payment was provided for in an instance, other than on completion. Counsel claimed, that the claimant had cushioned himself against payment resting only on completion by inserting sub-clause (d). Counsel stated that the case of **Paul Collins v Air Jamaica Limited** Claim No. C.L. 1995/C-203 unreported (judgment delivered 16 March 2007), relied on by the defendant was inapplicable, as it treated with a different set of circumstances than that which pertains in the instant case. Neither, she said, were **Annie Lopez v Dawkins Brown** [2015] JMCA Civ 6 nor **Yeoman's Rowe Management and Anor v Cobbe** [2008] 4 All ER 713, applicable. Counsel asked the court, therefore, to construe the sub-clause (d) as entitling the claimant to the sums claimed.

[18] On the alternative claim for quantum meruit, counsel, Ms Larmond, contended that the claimant was entitled to compensation for the value of the work done, on a quantum meruit basis. Counsel argued that in fulfilling his contractual obligations and providing the evidenced services, from which the defendant benefitted, the claimant was entitled to payment. Counsel pointed out that the defendant had not denied that the services, as enumerated by the claimant, were provided. Counsel argued that, sub-clause (d) was breached and consequent upon the breach, the claimant was entitled to the reasonable value of the work done.

[19] Counsel argued further, that the Letter of Engagement had to be properly construed in the context that, at all material times, the claimant was providing services for which he was to be compensated and which services were not being offered voluntarily. Counsel submitted that the cases of **Jones v Lowe** [1944] All ER (Annotated) and **Luxor v Cooper** [1941] All ER (Annotated), relied on by the defendant, were distinguishable because neither of them had a clause similar to sub-clause (d).

[20] Counsel pointed to the clauses under the heading 'Exceptions on Fee Liability' contained in the Letter of Engagement. Counsel noted that these were the only circumstances upon which the claimant was not to be paid. Therefore, counsel stated, the claimant ought to be compensated for the work done up to the point of termination of the transaction.

[21] Counsel for the claimant contended finally, that the document entitled "Breakdown of Services provided to COK Sodality Co-operative Credit Union" which shows a total due of US$134,852.46 is sufficient evidence on which the court may order payment for compensation on a quantum meruit basis.

Defendant's submissions

[22] Counsel for the defendant, Queens Counsel Mrs Gibson-Henlin, submitted that the defendant was denying that the claimant was entitled to fees and was rejecting any notion that the claimant should be compensated on a quantum meruit basis.

[23] Queen's Counsel submitted further, that this case fell to be decided on the question of what is the proper interpretation to be placed on the Letter of Engagement and the Term Sheet. Queen's Counsel submitted that the credibility of the witnesses, in this case, is not in issue. The sole issue, counsel submitted, was based on a question of interpretation.

[24] Queen's Counsel argued that issue was joined between the parties as to the effect of the Term Sheet. Queen's Counsel asserted further that, contrary to the

claimant's stance, the Term Sheet is a non-binding agreement and no binding offer or acceptance arose from its terms. It was argued further, that the provision in the Term Sheet that "this term sheet does not constitute a binding agreement" and that "the terms set forth herein and other provisions customary for a transaction of this sort shall be incorporated in one or more agreements among the parties", clearly show that there was no offer or acceptance and no intention to create legal relations.

[25] Queen's Counsel also pointed to the fact that the Term Sheet sets out the conditions which the parties required to be met before entering into a binding contract. It was submitted that if the claimant's position was to be accepted by the court, it would lead to the conclusion that there was a binding offer between KPL and the defendant, which obliged the defendant to enter into the agreement with KPL, on the terms set out in the Term Sheet. This, Queen's Counsel noted, could not be so, as the Term Sheet itself specifies that it is non-binding. This, it was pointed out, was conclusive evidence that KPL and the defendant did not intend to create legal relations. On that basis, Queens Counsel submitted, the claimant's right to payment was not triggered by the Term Sheet, pursuant to sub-clause (d) of the Letter of Engagement.

[26] Queen's Counsel asked the court to accept the definition of an offer, as defined in Halsbury's Laws of England, Contract, Volume 22 (2012)/ 3, Formation of Contract – Offer and Acceptance, at paragraph 234. She argued that an essential requirement is that an offer must intimate a willingness to be bound to a contract. Queen's Counsel also cited the case of **Paul Collins v Air Jamaica Limited** at paragraph 26. It was submitted that even where there is an offer, it will not be effective to create a binding agreement unless there is evidence of an intention to be bound by that offer, that is, an intention to create legal relations.

[27] Queen's Counsel also submitted that where an agreement is subject to contract, the courts have found that there is no intention to create legal relations. Counsel cited the cases of **Yeoman's Row Management Ltd and Anor v Cobbe**, at

paragraph 25 and **AG of Hong Kong and Anor v Humphrey's Estate** [1987] 2 All ER 388 at paragraph 355 f, g.

[28] Queen's Counsel submitted further, that, in so far as the Term Sheet expressly stated that it was non-binding and subject to contract, that was a complete answer to the claimant's claim. She also pointed to the fact that it was "contingent" on the parties entering into a lease agreement. Queen's Counsel asked the court to note that there were numerous exchanges in the ongoing negotiations between the parties, in trying to arrive at an agreement. It was pointed out that the terms of the agreement that was proposed to the defendant, differed in a material respect from the Term Sheet, as to the payment of the purchase price. Based on that, it was argued that it could not be said that KPL made an offer, which the defendant accepted and later refused, in the Term Sheet. Furthermore, she said, the sale agreement did not mirror what was set out in the Term sheet.

[29] Queen's Counsel argued that, not only was the Term Sheet not an offer, it was clear that neither the defendant nor KPL could have any expectation or alter any of their positions based purely on the Term Sheet, as neither had bound themselves to its terms. Queen's Counsel further argued that the defendant was at liberty to reject the agreement for sale and that rejection could not trigger the claimant's right to fee under sub-clause (d). Queen's Counsel asked the court to note that in relying on **Paul Collins v Air Jamaica**, and **Annie Lopez v Dawkins Brown**, the defendant was not relying on the facts of that case but on the principles of law applied and adopted therein.

[30] Queen's Counsel pointed to the fact that the claimant was an accomplished consultant and was familiar with such arrangements. She submitted that it was he who structured the fee arrangement and did so in a manner in which he was not only prepared to take the risk but also to benefit from any possible windfall. Queen's Council also noted that **Ag v Hong Kong** case was referred to in **Annie Lopez v Dawkins Brown**. She argued that the claimant voluntarily embarked on work knowing that an agreement may not be reached and was in error in thinking

the term sheet was an offer and an acceptance. Queen's Council also relied on the principles expounded in the case of **Jones v Lowe** and **Luxor v Cooper.**

[31] On the question of whether the claimant was entitled to compensation on a quantum meruit basis, Queen's Counsel submitted that he was not so entitled. She argued that the contract was clear as to the basis upon which the claimant was entitled to be paid. Queen's Counsel pointed out that there was no breach of those terms, as the conditions precedent for such fees to be paid were just not met.

[32] Queen's Counsel submitted that a breach of a contract and the resulting discharge was a condition precedent for a successful claim on quantum meruit. Counsel cited pages 479 and 482 of William R Anson's *Principle of English Contract Law* 21st edition, which, in reference to quantum meruit claims states that:

> *"The case for which it provides is where the party injured by a breach of contract has, at the time when the breach occurs, done most, but not all, of that which he is bound to do under the contract and is seeking to be recompensed for the value of the work that he has done."*

[33] Queen's Counsel also relied on the cases involving agents and their commissions. Queen's Counsel submitted that those cases affirm the principle that commission is only payable where the contract is complete and that no term can be implied into those contracts for a quantum meruit payment.

[34] Queen's Counsel asked the court to note that the Letter of Engagement originated with the claimant. He, she said, knew exactly what he was contracting for. It was he who opted to agree to a fixed fee, on the terms set out in the agreement. No terms, Queen's Counsel argued, can properly be implied into this agreement which was an entire agreement. Queen's Counsel submitted that there was no "fall back" position in such a case and the court would have to find that the defendant had prevented the claimant from concluding the contract, before the

court could find that the claimant was entitled to a quantum meruit payment. This she said was not the case, neither was there such an averment. Queen's Counsel cited **Luxor v Cooper** in support of this contention. Queen's Counsel also cited the case of **Attorney General of Belize & Ors. v Belize Telecom & Anor** [2009] 2 All ER (Comm) paragraphs 16 – 19 and **JPS Company Ltd v The All Island Electricity Appeal Tribunal** [2015] JMCA Civ. 17

[35] Queen's Counsel submitted finally, that where the parties had provided, in their bargain, for the terms and effect of their bargain to be incorporated in the terms of the contract, no other terms should be implied to challenge or derogate from what the parties had agreed, citing the case of **Inntrepreneur Pub Co v East Crown Ltd [2000] 3 EGLR 31** case. In this instant case, Queen's Counsel submitted, the fee structure set out how the claimant was to be paid and nothing the defendant did prevented the fee provisions being invoked.

Discussion and analysis

Issue 1 – Whether the claimant is entitled to fees pursuant to sub-clause (d) of the Letter of Engagement dated 14 March 2016

[36] I have considered all the cases cited by the parties in support of the various contentions. However, I have not found it necessary to refer to them all, as the principles relied on are not in contention and a largely settled. This matter rests solely on the proper construction of the Letter of Engagement and the sub-clause relied on by the claimant as triggering his right to payment. This is to be determined by the answer to the question whether the event occurred which would cause the right to payment to be vested in the claimant.

[37] The claimants claim for a fee is based on sub-clause (d) of the Letter of Engagement, which states as follows:

> *"Where COK accepts an offer in writing from a qualified third party – introduced by the consultant – and subsequently turns down the*

offer, the fee shall become due and payable on the date COK turns down the offer."

[38] The question was whether the claimant, having found a buyer who was willing to buy, the sub-clause should be construed as being satisfied by the signing of a Term Sheet, by the defendant and the third party buyer. The answer lay in the proper interpretation that is to be placed on the Letter of Engagement and specifically on the provisions dealing with fees. Queen's Counsel is correct when she submitted that the issue is not one which is determinable as a matter of credibility but is one based purely on a question of construction.

[39] In **Investors Compensation Scheme Limited v West Bromwich Building Society** [1998] 1 All ER 98, in considering the applicable rules of construction, Lord Hoffman's observations in summary were that:

"(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

(2) The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary

life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars: the meaning of the document is what the parties using those words against the relevant background would reasonable understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax. (see *Mannai Investments Co. Ltd v Eagle Star Life Assurance Co. Ltd.* [1997] 2 WLR 945.

(5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in the *Antaios Compania Neviera S.A. v Salen Rederierna A.B.* [1985] 1 AC 191, 201:

> *'… if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsence, it must be made to yield to business commonsense."*

[40] These principles of construction have been applied with full force in these courts time and time again and I see no reason to do otherwise (see for example the Court of Appeal's decision in **Jamaica Public Service Ltd. v The All Island Electricity Appeal Tribunal** [2015] JMCA Civ 17, which considered and applied

the Privy Council decision in **Attorney General of Belize and ors. v Belize Telecom Ltd. and anor**.)

[41] If the claimant is correct in his contentions, he would be entitled to a fee of US$178,017.39, being 6.5% of the gross proceeds of sale of COK's property. In the alternative, he would be entitled to a payment on quantum meruit basis of US$134,822.46, being the value of the work done up to the point negotiations broke down between TPL and the defendant, in April.

[42] The question of whether he was indeed correct however, could only be answered by the proper interpretation which is to be placed not only on the entire provisions in the Letter of Engagement but specifically on sub-clause (d). It also depends a great deal on the legal effect of the Term Sheet. The answer to the alternative claim depends entirely on when a quantum meruit payment is allowed. I will tackle each question in turn.

[43] The fee structure, as stated earlier but worth repeating here, was as follows:

> *a. The fee is payable immediately upon completion and payment will be made by Real Time Gross Settlement (RTGS) to the Consultant at the same time COK receives its funds (or value).*
>
> *b. A fee equivalent to 6.5% of the total price, prior to any deductions, expenses or offsets of any kind, of the listed property and chattels shall be paid by the COK to the consultant, should the consultant introduce a third party who completes the purchase and lease of the property.*
>
> *c. Where the transaction is aborted the consultant shall be paid the fee on the forfeited sum.*
>
> *d. Where COK accepts an offer in writing from a qualified third party – introduced by the consultant – and subsequently turns down the offer, the fee shall become due and payable on the date COK turns down the offer."*

[44] The sub-clause (d) speaks to the defendant accepting an offer in writing from a qualified third party, introduced by the consultant and the defendant subsequently turning down the offer, in which case the fee becomes due and payable on the date the defendant turns down the offer.

[45] The claimant had argued that sub-clause (d) does not require an offer and acceptance leading to a binding contract. Instead, the claimant maintained that as long as he introduced a qualified third party to the defendant and the defendant accepted, in writing, that third parties offer to enter into negotiation, as it did in the Term Sheet, that was sufficient to trigger the fee payment, if that offer to negotiate was subsequently rejected- as was done by the defendant when it refused to sign the sale agreement and terminated negotiations April.

[46] The question is whether sub-clause (d) can effectively bear that interpretation. The claimant contends that in keeping with the terms of his engagement, he located a qualified prospective buyer and lessor in KPL, he introduced them to the defendant, with the result that they entered into agreed terms, reflected in the Term Sheet. This, the claimant says, was sufficient offer and acceptance for the purpose of sub-clause (d).

[47] Sub-clause (d), I believe, has to be examined in the context of the entire fee payment structure. In sub-clause (a) the fee become payable upon completion. It was generally agreed that completion meant that the defendant and the prospective purchaser have entered into a binding contract. Sub-clause (b) then states what is to be paid - 6.5% of the total price is to be paid to the claimant on completion of the purchase and lease of property, if the purchaser is a third party he introduced. So, therefore, the fee is payable on completion, which all the parties agreed, is the entry into a binding contract between the defendant and a third party purchaser. 6.5% of the purchase price is to be paid to the claimant, if the third party completing the transaction, is one that he introduced.

[48] Sub-clause (c) states that where the transaction is aborted, the claimant is to be paid 6.5% of the forfeited sum. It was generally agreed by the parties at trial, that this was in contemplation of a circumstance where the defendant has the right to forfeit a deposit, if the transaction is aborted (most likely in those circumstances by the third party because it is difficult to envisage any circumstance where the defendant aborts a valid transaction and then validly claim to be entitled to forfeit the third parties deposit).

[49] Sub-clause (d) envisaged an offer to purchase and lease back being made by the third party introduced by the claimant, the defendant accepting that offer, then subsequently turning down that offer - in which case the claimant is still entitled to his fee.

[50] The clear meaning of the fee structure in the sub-clauses a-d is that; (a) the claimant is entitled to a fee at completion of the transaction; (b) that all goes well for the buyer and seller and claimant gets his fee; (c) that after the transaction is completed things to go awry and its aborted, the claimant is still entitled to his fee this time on the deposit forfeited; and (d) that the transaction is completed but the defendant decides not to go through with it (effectively breaching the contract with third party) in which case the claimant is still entitled to his fee.

[51] Pursuant to sub-clause (a) where the fee became payable on completion, (b) (c) and (d) provides for payment after completion, in the different circumstances listed. There is no room, therefore, for any other interpretation than that the fee is only triggered in any of the circumstances listed in sub-clauses a - d, upon completion of the transaction between the defendant and the third party, introduced by the claimant.

[52] Was the Term Sheet an offer and acceptance between the defendant and KPL? The claimant had located a qualified prospective buyer and lessor in KPL. After discussions and negotiations facilitated by the claimant, KPL and the defendant signed a property sale – leaseback Term Sheet which was finalized and approved

by the Board of Directors of the defendant. The relevant portions of the Term Sheet stated:

"Terms:

Procedure:	**Sale of the property is contingent on** the buyer entering into a lease agreement with COK upon execution of the final payment; is based upon the signing of a Letter of Intent (LOI) together with all such documents to give effect to a binding sale/lease agreement between the parties. The contract will be delivered to the buyer within five (5) days of the signing of the LOI, and the parties will execute same within five (5) calendar days thereafter.
Lease:	The parties shall enter into a Lease Agreement covering the entire premises…
Operating Agreement:	As part of the transaction, particularly given that the premises will be fully occupied and leased by COK, the parties shall negotiate and agree to an operating agreement for the operation of the property…
Payments:	
Initial Deposit:	On 6 April 2016 KPL will deposit US$650,000.00 into an escrow account held by COK's attorney.
First Down Payment:	The buyer will, on 13 April 2016 place an additional US$1,000,000.00 into the aforementioned escrow account.
Final Payment and	

Closing:	Closing will occur by 22 April 2016 and shall require payment of the remainder of the sale price to COK's attorney.

This Term Sheet does not constitute a binding agreement. The terms set forth Herein and other provisions customary for a transaction of this sort shall be incorporated in one or more agreements among parties."

[53] On the 14 April 2016, KPL signed an agreement for sale after continuing negotiations with the defendant, facilitated by the claimant. This signed sale agreement was sent to the then president of the defendant, Carol Anglin, who took it to the Board. The Board declined to enter into agreement with KPL. The reason for not doing so, I deem to be irrelevant to this case. On 15 April 2016, Ms Anglin informed the claimant that the agreement with KPL would not be executed.

[54] The claimant claims to be entitled to fees from 15 April 2016, when the defendant refused to execute the sale agreement. But he relies not on the sale agreement for the fees, but on the Term Sheet. Queen's Counsel for the defendant says he cannot rely on the Term Sheet to trigger his fees because there was no offer and acceptance in the Term Sheet which resulted in a concluded agreement. I was inclined to agree with her.

[55] The claimant accepted that there was no binding concluded agreement in the Term Sheet and that alone should have bought an end to any reliance on it, for a claim to fees. The very nature of the fee structure, tells us that the claimant is only entitled to fees on a prima facie completed agreement and in sub-clause (d) on a completed agreement breached by the defendant.

[56] There is no binding completed agreement in the Term Sheet, so nothing was breached by the defendant. The fee payment under sub-clause (d) was therefore not triggered. However, since the claimant has persisted with his line of reasoning that he is entitled to be paid, merely on the basis of KPL and the defendant

entering into negotiation (because that's all it was and the disclaimer at the end of the Term Sheet confirms that's all it was), regardless of the fact that there is no completed agreement in the Term Sheet, I nevertheless considered whether, his claim could be sustained on any legal basis.

[57] Counsel for the claimant contended that the background and context to the letter of agreement shows that an offer accepted by COK would covey to a reasonable man the meaning attributed by the claimant, that is, that the Term Sheet was an offer and acceptance within the meaning of sub-clause (d). I could not say that any reasonable man would attribute such a meaning. The background or matrix of facts is that the defendant was in need of capital and needed it fast. The regulators were on its back. They were approached by the claimant who offered his services, unsolicited, ultimately on terms agreed in the Letter of Engagement. His services were to be non-exclusive, meaning that if others came in with offers which the defendant accepted before his, he would get nothing. That is the context in which the agreement is to be viewed. It clearly states non-exclusive. Therefore, he knew, quite likely, that whilst he was seeking a qualified prospective buyer, someone else was likely also doing so, or the defendant, itself, could also have been seeking a qualified buyer, and it was a first past the post situation. There was no provision in the Letter of Engagement for him to be paid for services rendered whilst seeking a qualified buyer, no matter how much effort he placed on doing so.

[58] Counsel also asked this court to interpret the Letter of Engagement as conveying to a reasonable man, armed with the background knowledge, that the acceptance of an offer in writing as stated in sub-clause (d) was not, for the purpose of the Letter of Engagement, a signed Sale Agreement between the defendant and KPL but was, rather, the Term Sheet signed pursuant to the introduction by the claimant of KPL to the defendant.

[59] Again, I could not accept such an interpretation. It would in fact defy the clear words in the fee payment structure. Payment was due on completion that is sub-

clause (a). No provision was made for payment simply for introducing a prospective buyer or for them entering into negotiations with the seller. The terms of engagement originated with the claimant. If he had wished to have the defendant agree to pay him simply for introducing a purchaser with whom they could enter into negotiations, that could easily have been included in the fee structure. It was not. No doubt for good reason, since his arrangement was non-exclusive.

[60] The claimant does not dispute that the Term Sheet is non-binding, therefore, it was not necessary for me to examine the cases, cited by the defendant, on what constitutes offer and acceptance or on agreements which are subject to contract. The claimant simply asked the court to interpret the Letter of Engagement as one which required only that he finds a third party qualified prospective buyer, desirous of purchasing and leasing the property and that for the purpose of his engagement, the fact that he did so find a buyer who expressed the desire to purchase by entering into the Term Sheet, it was sufficient to trigger the payment under sub-clause (d).

[61] For this court to accept that notion however, I would have to ignore the entire content, letter and spirit of the fee structure under the terms of the Letter of Engagement.

[62] In **Jones v Lowe**, which was a case involving the payment of a commissioned agent, it was held that commissions payable on the introduction of a purchaser was payable only on the conclusion of a legal and binding contract of purchase and sale. Counsel for the claimant says this case is distinguishable on the basis that there was no clause similar to sub-clause(d). in that respect she is correct. The judgment in **Jones v Lowe** is based on the decision in **Luxor v Cooper** which defined what a “purchaser” was. However, the sub-clause (d) in the instant case, takes the matter out of the doubt which lingered in the mind of the judge in **Jones v Lowe** because the precise wording in that sub-clause makes it clear what event

would trigger payment. If that event did not occur, then no right to payment vests in the claimant.

[63] The court in both cases referred to above, interpreted the word "purchaser" to mean someone who entered into a binding contract of sale. Counsel for the claimant argued that in the instant case the claimant was only engaged to introduce a "prospective purchaser and lessor". She argued that for payment to take effect under sub-clause (d) there was no need for an executed sale agreement between the KPL and the defendant. Counsel submitted further that the Term Sheet was evidence that a prospective purchaser desired to enter into a sale lease back transaction had been identified by the claimant, and that terms were agreed by the prospective buyer with the defendant, the prospective seller, to guide the transaction process.

[64] Again, I must reject this contention by counsel for the claimant. It may well be that that the Letter of Engagement engaged the claimant to find a qualified prospective buyer, but the same Letter of Engagement does not provide for him to be paid for doing so. The basis of his payment is set out under the heading Fees and it clearly states payment in circumstances which involve an offer and an acceptance followed by a withdrawal of that acceptance.

[65] On a true interpretation of the terms of engagement and in particular sub-clause (d) the claimant is not entitled to any fees as the condition precedent for payment was not triggered by the Term Sheet, as contended by the claimant. In other words, the event did not happen, the occurrence of which would vest in the claimant, the right to be paid the contractually agreed sum.

Issue 2 – Whether, in the alternative, the claimant is entitled to payment for work done, on a quantum meruit basis

[66] That being the case, the remaining question is whether the claimant is entitled to any compensation on a quantum meruit basis. The claimant made this an

alternative claim. He says he worked, he should be paid. The defendant says he is not so entitled. The defendant says, the contract is an entire contract conveying the terms of work and fees to be paid. Queen's Counsel says there is no room to imply a term that he is to be paid, other than as expressly stated in the contract and there is no breach.

[67] I was inclined to agree with Queen's Counsel. There is no dispute as to the work the claimant did. The only dispute is whether it is work for which he is entitled to be paid. In *Principles of English Law of Contract and of Agency in the Relation to Contract* (21st edition), the learned author sets out the criteria which must be met before a quantum meruit payment can be made. First, it is only available if the original contract is discharged. The contract must have been broken by the defendant in such a way, as to cause the innocent party to feel himself discharged from any further obligation to perform. Only the innocent party may claim a quantum meruit payment. The failure to complete the contract must result from the breach of the other party.

[68] Counsel for the claimant argued that the defendant had breached its contract to pay the claimant and therefore the court should order that defendant pay on a quantum meruit basis. I find unfortunately, that this is a misguided claim. There is no breach of contract by the defendant. The defendant had, in no way, prevented the claimant from completing the contract, thus breaching the contract and causing the claimant to only part perform. This is the only circumstance in which the claimant would be entitled to a quantum meruit claim.

[69] Instead, what we have is a case were the claimant entered into a precise expressed contract to provide services for which he would be paid on the happening of certain events. None of those events occurred, therefore his right to payment was not triggered. This did not result from his breach or the defendant's beach. The contract not only expressly provided for a fee structure but was expressed to be an entire agreement, therefore on the authorities (see **Inntrepreneur Pub Co v East Crown Ltd** and **Jones v Lowe,** in those

circumstances, the claimant is not entitled to any payment on a quantum meruit basis. There is no room, in such a contract, to imply a term giving the claimant a right to such a payment.

[70] It was for these reasons that I made the decision I did as indicated in paragraph 1 of this judgment.