

the claimant who, from December 2004 to August 2005, made several attempts to collect the commission.

(4) The claimant further alleged that the defendant orally and in writing represented that the purchasers had an agreement with the defendant for the Purchasers to pay all fees associated with the sale including the claimant's commission and promised to be a witness in any proceedings brought by the claimant against the purchasers to enforce this Agreement. The defendant admits an agreement between himself and the purchasers for the purchasers to pay all cost associated with the realtor's agreement. The defendant admitted that a promise was made to the claimant to be a witness in any case brought by her to enforce his agreement with the purchasers.

(5) On the 25th August 2005, the parties executed a Discharge, Release and Indemnity document in which the claimant accepted \$6,589.38 in full and final settlement of all claims arising out of the sale of Timerlea against the defendants and their attorneys. The claimant contends that she has since discovered that the representations made by the defendant were false as the purchasers have denied knowledge of any agreement with the defendant to pay the claimant commission.

(6) On the 19th June 2006 the claimant filed a claim form with particulars, claiming rescission of the contract, entered into with the defendant on the 25th August 2005 to release, discharge and indemnify the claimant and his attorneys-at-law from his obligation under the contract to pay the claimant 5% commission. The claimant further contend that the defendant used misrepresentations and economic duress to induce the claimant to enter the contract.

(7) The economic duress was particularized as follows:

“The defendant having learnt that the claimant was in financial difficulty used that knowledge to induce the claimant to sign a contract releasing the defendant from his liability to pay the claimant’s commission before making any payment to the claimant.”

The defendant contended that this does not amount to economic duress.

Particulars of Fraud were that:

The defendant knew that he had no contract with the purchasers. Further, the defendant never intended to be a witness in a trial against the purchasers in any proceedings for recovery of the claimant’s commission.

(8) The defendant denies that he was responsible for any economic duress the plaintiff may be under and denied any misrepresentations at all. The defendant further stated that any claim that the claimant had in relation to the commission has been extinguished by her execution of the Release.

(9) Among the issues identified by the claimant and defendant for resolution are the following;

- (a) Is the defendant liable to pay the claimant her 5% commission, having accepted from the purchaser presented by the claimant a price that is lower than the price the defendant asked the claimant to fetch?
- (b) Did the defendant employ economic duress to induce the claimant to sign the Discharge, Release and Indemnity on August 25, 2005?
- (c) What is the effect of the Release and indemnity being signed by the claimant?
- (d) What in law constitutes economic duress and misrepresentation?

(10) The claimant represents her position as it concerned the issue of the selling price as follows: based on all the circumstances and in particular the selling price of other properties sold on or around the date of the defendant’s sale in the prime area of Upton; the defendant understated the true selling price of the property in the Agreement for Sale.

The claimant states that she found suitable purchasers as agreed, who were willing to pay the price that the defendant instructed the claimant to secure.

(11) Did the claimant fill the terms of the agreement dated 13th January 2003, in which the defendant undertook to “pay a commission of five per cent (5%) should **she or her representative find a suitable purchaser?**” She did allege in her claim, which was not denied, that she had introduced the purchasers to the property. It was some time later that on visiting the property with prospective purchasers. She learnt that the Browns, whom she had introduced to the defendant, had bought the property.

(12) The claimant was unaware of the terms of the sale. Her ignorance of these terms were expressly demonstrated in her affidavit filed in opposition to set aside a default judgment she had entered against the defendant. At paragraph 9 c of her affidavit, the claimant states;

“Neither the Defendant nor the Purchasers provided me with a copy of the Agreement for Sale; therefore I had no way of knowing if the purchasers were in fact under a contractual obligation to pay my commission.”

(13) The agreement between herself and the defendant had specified a selling price of between \$800,000.00 and \$850,000.00. The defendant has put in evidence the Sales Agreement between himself and the purchasers, that the sale price was not achieved by the claimant. The defendant alleged at paragraph 5 of his defence that the premises was in fact sold for US\$417,150.00. The chattels were sold for \$110,000.00. The Sales Agreement supports this contention. You may think that was a price far from the agreed purchase price at which a prospective purchaser should be found. However, in her evidence, the claimant refuted the defendant’s suggestions that she had failed to find a suitable buyer. She testified that she had found a buyer who was willing to pay the defendant’s asking price of US\$850,000.00 or at least US\$800,000. However, she said

she had not agreed that her commission should be paid only if a buyer was prepared to pay US\$800,000.00 to US\$850,000.00 stated in the contract.

(14) The defendant said that “although he was of the strong view” that the claimant was not entitled to be paid a commission, he agreed to settle her claim in the sum of US\$6,589.38. That in giving the claimant the sum she signed a Release and Discharge.

(15) Can the purchaser in the circumstances alleged by the claimant, be described as ‘suitable?’ There are no special rules which are applicable to commission contracts. They are susceptible to the general law of contract. The courts have to apply the same rules of construction of contracts. The question therefore is whether the purchasers provided were suitable. It seems to me that the parties must have understood that the proposed selling price was of utmost importance and would be the substantial factor in determining ‘suitability.’ The obligation that the claimant had was to find a purchaser capable of purchasing the property at a particular price. There is nothing in the contract to indicate any other factor which may determine suitability. It is not finding a purchaser, but one who is able to purchase at the stated price. In Jack Windle Ltd. v Brierley [1952] ALL ER 398, Lynskey, J. said:

“An agent is only entitled to commission if he introduces a ready, willing, and able purchaser. It is true that the plaintiffs introduced Mr. Greatorex, but at the time of the introduction and right up to May 17, although Mr. Greatorex was a willing purchaser, he was not an able purchaser. He had not the money. I am satisfied that on May 12 negotiations for the sale had ceased and the effect of the introduction, although to some degree it remained, was really no longer an operating factor in the sale of the property thereafter. Mr. Greatorex never became an able purchaser until the defendant provided the necessary finance on unsecured terms, relying for £3,200 of the purchase price on a promissory note and leaving £1,500 on mortgage. The effective cause of the subsequent sale to Mr. Greatorex was, not the introduction, but the provision of finance by the defendant which enabled the sale to take place.”

The effective cause of the sale in this case was the negotiations into which the defendant engaged the purchaser and the much reduced purchase price he offered.

(16) The learned authors of Cheshire, Fifoot & Furmstrom, Law of Contract “Twelfth Edition, after referring to the oft-quoted passage of Lord Russel of Killowen in Luxor (Eastbourne) Ltd. v Cooper (1941) AC 108 at p124 said at page 500;

“The most important observation of Lord Russel is in effect that the principal’s liability for the payment of commission depends on whether, on the proper interpretation between him and the agent, the event has happened upon which the commission is to be paid. The agent is not entitled to claim payment for work as such but only for an event, i.e. the event required by his contract with the principal.”

In this case, that event is the sale to a purchaser for a sum of \$800,000.00 to \$850,000.00; that event has not happened.

(17) In Howard Houlder and Partners Ltd. v Manx Isles Steamship Company, Limited (1923)1 KB 110, the court held that the option to purchase in the charter under which the claim was made was expressed to be at the price of \$125,000. The court found that that option was never exercised, as the sale, as effected, was done at a distinct new price of \$65,000. The court held that the claimants there must fail as being unable to say that she participated in the new sales arrangement at the new price of \$65,000. McCardie, J. said at p 113:

“It is a settled rule for the construction of commission notes and the like documents which refer to the remuneration of an agent that a plaintiff cannot recover unless he shows that the conditions of the written bargain have been fulfilled. If he proves fulfillment he recovers. If not, he fails. There appears to be no halfway house, and it matters not that the plaintiff proves expenditure of time, money and skill. This rule is well illustrated by *Aler v Boyle* (1) (where commission was not payable until an abstract of conveyance was drawn out); *Bull v. Price* (2) (**where the commission was only payable on money actually “obtained”**); *Battams v. Tompkins* (3) (**commission payable on “completion” of purchase**); *Clack v Wood* (4) (commission payable “subject to the title being approved by my solicitor”), and by such illustrative decisions as *Mason v Clifton* (5) (commission to be paid on “the amount if money is raised on specified terms), *Martin v Tucker* (6) (commission to be paid on the amount of the capital brought into the business”). It therefore seems clear that the plaintiffs cannot recover upon the actual terms of the commission note.”

(18) I am unable to find that the instant claimant participated in the new sales arrangements that culminated in the sale at a price of \$417,150.00. The correspondence between the vendor and purchaser demonstrates that there were prolonged and intense negotiations before the new price was agreed. The claimant is a stranger to those arrangements. I accept the evidence of the defendant that the Release and Discharge was entered into not as a result of any commission that was due the claimant, but to settle the claim. The Release discharges the defendant from all claims and demands whatsoever arising directly or indirectly from the sale of the abovementioned premises. The claimant does not deny that this would prevent the action she has launched; however, she said that the Release was executed by her as a result of a misrepresentation. She had no claim in the first instance, the event which she undertook pursuant to the Agency agreement of 13th January 2003 did not happen.

(19) There is no privity between the claimant and the purchasers. The promise made by the defendant to be a witness in any case brought against the purchasers by the claimant is therefore worthless. In any event, no such suit has yet been launched, so who can say he will not be such a witness if a case is brought. I find there was no misrepresentation that caused the claimant to accept/execute the Release.

The claimant's action fails. Costs to the defendant to be agreed or taxed.