

In the County Court at Great Grimsby

Before DDJ Nix

D62YM901

RTA (Business Consultants) Ltd

V

Mrs Ann Cizek

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Order

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Upon hearing from solicitors for the claimant and defendant on 16 March 2018 and hearing oral evidence from the defendant, considering a written statement filed on behalf of the defendant from Cemal Hamit (who did not attend court and in relation to whom a CEA notice was not served) and considering a written statement from Paul O' Reilly for the claimant in relation to which a CPR27.9 notice was filed and served, and upon reserving judgment to allow for review of the parties' submissions and authorities and in view of other cases listed that day, and upon providing a note to the parties to be disseminated to the parties with this order with brief reasons for the decision,

It is ordered:

1. The claimant's claim is dismissed.
2. The claimant is to pay the defendant's witness expenses, to be assessed by the court if not agreed. The defendant may make submissions to the court regarding witness expenses, if any are sought and a determination is required from the court but such submissions are to be filed by 4pm on 4 April 2018.

16 March 2018

In the County Court at Great Grimsby

Before DDJ Nix

D62YM901

RTA (Business Consultants) Ltd

V

Mrs Ann Cizek

Brief reasons for the determination made on evidence and submissions heard at the small claims hearing of this matter on 16 March 2018

1. At the small claims hearing of this matter on 16 March 2018 I heard from solicitors for the claimant and defendant. I heard oral evidence from the defendant, considered a written statement filed on behalf of the defendant from Cemal Hamit (who did not attend court and in relation to whom a CEA notice was not served) and considered a written statement from Paul O' Reilly for the claimant in relation to which a CPR27.9 notice was filed and served.
2. I reserved judgment to allow for review of the parties' submissions and authorities and in view of other cases listed that day. I have now made my decision, and ask the court to arrange for this note to be disseminated to the parties with my order. It gives brief reasons for the decision.
3. The claimant seeks recovery of commission, to which it says it is entitled by reason of a contract signed by the defendant and a representative of the claimant on 5 September 2014. The defendant denies the claim. In

paragraph 3 of the contract the sum of £21,500 + VAT is said to be payable by the defendant when a sale or one of the events in paragraph 3 takes place. The claimant has issued proceedings for £10,000, saying that it is prepared to limit its claim to that sum. The claim has been allocated to the small claims track, as opposed to the fast track to which it may well have been allocated if the total commission had been claimed. Of course this means that CPR 27.9 is available to, and has been used by, the claimant and that the costs position is provided for in CPR27.14.

4. The defendant contended that she had terminated the contract. I have already given a short oral judgment in which I stated that I was unable to find on the balance of probabilities that the contract had been terminated by her in accordance with paragraph 2 of the contract.
5. The defendant queried whether the claimant was making a claim of breach of contract but the claimant's solicitor confirmed that this is not the case. The defendant's solicitor then asked the court to consider and make a determination on the remaining defence pleas: A. Misrepresentation – the defendant argues that she was induced into the contract by a representation by the salesperson of the claimant that the claimant had buyers waiting and could bring about a speedy sale. This representation was false and accordingly was misrepresentation. In submissions the defendant's solicitor also made reference to the fact that the agreed selling price was unrealistic. B. The contract was not a sole selling rights agreement. That being the case the court was invited to imply a term into the contract that the claimant needed to be the effective cause of the sale if it was to recover the commission sought.
6. Misrepresentation - Taking the agreed selling price first (paragraph 4 of the contract), I note the final sentence of paragraph 16 of the contract which says that the defendant confirms that the agreed selling price is not a valuation levied or recommended by the claimant. Furthermore I consider that the value of the property, at its highest, is an

expression of opinion as opposed to a representation and accordingly would not form the basis of a misrepresentation. Turning then to the representation by the salesperson of the claimant that the claimant had buyers waiting and could bring about a speedy sale, again I consider this to be a statement of opinion - especially the "speedy sale" comments. Representations said to have been made to the defendant were general, "mere puff", and the type of representations that would be made by many estate agents. I do not consider them to be representations which are actionable by the defendant. I contrast them with a statement such as - the claimant salesperson saying that part of the service is that for all instructions he always arranges and attends at monthly meetings with the defendant to review sales progress and consider alternative marketing, or a statement that he had already reserved space for weekly adverts on pages 1-4 of X publication, such adverts to be of X size. Such would be representations which, if not true, could be actionable misrepresentations.

7. Even if I had been minded that the statements that the defendant refers to were representations that induced her to enter the contract (as opposed to opinion or "mere puff" etc), I would not have found that the representations were untrue - For a misrepresentation claim to succeed, the representation relied on must have been false. The evidence filed by the claimants with the witness statement of Mr O'Reilly shows that the claimant had a significant number of parties to whom they sent sales particulars of the defendant's property. As such I am not persuaded on the balance of probabilities that a representation that the claimant had buyers waiting was false.
8. The claimant's solicitor referred me to a clause in the agreement at paragraph 8 in relation to the misrepresentation defence, which stated that the defendant acknowledged that no representations had been made to her. A contract term which excludes or restricts liability for pre-contractual misrepresentation or any remedy available

for such misrepresentation has no effect except insofar as it satisfies the requirement of reasonableness set out in UCTA (section 3 of the Misrepresentation Act 1967) - if UCTA is applicable - but I have not had to consider this further given my comments above.

9. Sole selling agreement - The claimant's witness, Mr O'Reilly, says at paragraph 15 of his witness statements : "the defendant bizarrely suggests that the contract is not one that provides sole selling rights. Clause 2 specifically states that the defendant is providing to us sole selling rights and under a sole selling rights contract the agent does not have to be the effective cause of the sale." He refers to the authority of **Fleurets v Dashwood**.
10. In oral evidence the defendant herself indicated that in terms of the contract being a sole selling agreement, she "understood it to be such", but of course the issue for me is not what she thought but how I interpret the contract.
11. There is certainly a heading between paragraphs 2 and paragraph 3 of "sole selling rights" and paragraph 2 states that the vendor "give you sole selling rights for an irrevocable (6 month) period. I agree that these sole selling rights shall remain in force after that date until terminated by me". Paragraph 6 states: " I further acknowledge that if I instruct... another agent to sell my business and property on a sole agency, joint sole agency or a sole selling rights basis I may have a liability to pay fees to more than one agent".
12. Notwithstanding the references to "sole selling rights" and inclusion of wording at paragraph 3a and b which was mandated in the Estate Agents (Provision etc) Regulations 1991, my determination is that this is not a sole selling rights agreement. The agreement read as a whole does not support it being a sole selling rights agreement, irrespective of the uses of that phrase - see below. As the contract is ambiguous, contra proferentem will apply and the court will not find there to be a sole selling rights agreement. (1)
There is no express clause stating that no other agent can

be instructed. (2) There is recognition in paragraph 6 of the possibility of a vendor instructing another agent and the possibility that the vendor may have a liability to pay fees to more than one agent, (which does not sit well with a sole selling rights agreement). The defendant's solicitor made a similar point about 3a. (2) Paragraph 7 refers to termination having the effect of the claimant having no entitlement to commission even if it had introduced a purchaser but the purchase occurs through another agent more than 6 months from termination, which conflicts with the wording of 3b - which (3b) is presumably included because of the author of the contract terms' awareness of the need to include this wording if sole selling rights is to be referred to due to the 1991 Regulations. (3) In the event of cancellation (per paragraph 11) paragraph 6 says if 3b is engaged there is a liability to still pay commission 2 years after "cancellation".

13. As I have found that this is not a sole selling rights contract, I do find that there should be implied into the contract a term that for the commission to be payable, the claimant must show that it was the or an effective cause of the sale e.g. by introducing the purchaser. **Foxtons v Bicknell** considered and also **Fleurets v Dashwood**. I consider such an implication to be needed to give business efficacy to the contract. There is no evidence here that the claimant was the or an effective cause of the sale – in July 2017 the defendant (with no assistance from and no introduction by the claimant) sold the property, to the Plums, purchasers who had showed interest in around April 2017. They had not been referred to the defendant by the claimant. The claimant had had no role in bringing about the sale. Accordingly the claimant's claim for commission in circumstances where this was not a sole selling rights agreement and the claimant was not the or an effective cause of the eventual sale must fail.
14. As I have made this determination I have not had to make any further decisions, for example on unconscionability of the contract for reasons of non consideration or other

reasons, (the sentence in paragraph 2 of the contract providing that the sole selling rights for the irrevocable (6 month) period shall remain in force after that date, was advanced by the defendant as unconscionable), or indeed whether to give effect to any term on the basis of uncertainty of any of the contract terms.

15. Although the point is raised in the Defence that the withdrawal fee that the claimant has claimed from the defendant, relying on paragraph 14 of the contract, is a penalty, I have found that the contract was not terminated and so no withdrawal fee would be payable in accordance with the contract.