

2. The first claimant, Mr. Ernest J. Ball, controls the second corporate claimant, Sunset Ventures Ltd. Their claims are exactly the same against the first and second defendants, Mr. Howard Oldham and Mrs. Wilana Oldham. The two defendants likewise advanced exactly the same defence. There has been no issue as to who were the proper parties. The proceedings were conducted by both sides on the footing that all the parties were proper parties.

3. The facts on which this claim is based are common to, the claimants on the one side, and the defendants on the other. The claimants were the owners of 951.9 acres of land, known as Parcel 1639, Block 24, in the Society Hall Registration Section, Cayo District. By a listing contract dated 17.9.1999, they placed their land in the hands of the defendants for sale until 17.9.2000. When the twelve months elapsed and the listing contract expired, the claimants still permitted the defendants to sell the land. On 30.5.2001, the defendants obtained a purchaser, Rainbow Trust, of Danriellon Florida, USA, who signed a contract for the sale and purchase of the land. The price agreed to was US\$375,000.00. On the same day, the claimants and the defendants signed an agreement they described as a, "Commission Agreement".

In the agreement they provided for, “8% commission on US\$375,000.00”, which was the purchase price.

4. Pursuant to the sale and purchase agreement, the purchaser paid US\$80,000.00 as, “down payment”. The balance of the purchase price was to be paid in sixty instalments; and interests were chargeable. The defendants retained US\$30,000.00 out of the US\$80,000.00. They said, that was the commission of 8% on US\$375,000.00, payable to them. The purchaser proceeded to pay the instalments until it defaulted after it had made total payment of US\$142,839.00.

5. On 14.9.2007, the claimants filed these proceedings, claiming US\$18,572.88, which they said was in excess of the commission that the defendants were entitled to. Their claim was made on the grounds that: the proper interpretation of the “commission agreement”, was that the commission of 8% was chargeable on the sum actually paid as, or towards the purchase price, in this case, on US\$142,839.00; and that it was the norm (meaning the custom and practice) in real estate business to charge commission on money actually paid as purchase

price, not on the sum merely agreed to as purchase price. In his submission, learned counsel Mr. L. Welch for the claimants, argued that the practice has been proved by Mr. Oldham in his testimony that he was acquainted with the practice and that he had himself been doing estate agency business.

6. Learned counsel Mr. M. Young SC, for the defendant, argued two points in his submission. The first was that in interpreting the commission agreement, the court should take the ordinary meaning of the words used to ascertain what the parties intended. Secondly, Mr. Young argued that by not demanding for a longtime since 2001, the return of commission over and above commission on US\$142,839.00, the claimant by conduct, accepted that commission was chargeable on the purchase price of US\$375,000.00, not on the actual money paid, and therefore they were estopped from denying it as late as in 2007, when they filed their claim.

7. ***Determination***

The commission agreement was very short. It is as follows:

“COMMISSION AGREEMENT.

This agreement is made this 30th day of May 2001 by and

between Sunset Ventures Ltd and Howard Oldham.

E. J. Ball, pres. agrees to pay Howard Oldham \$30,000.00 USD, which is 8% commission on \$375,000 for the sale of 951.9 acres. Payment to be made upon receiving a down payment of \$80,000. USD.

Signed.

E.J. Ball
Seller

Date: 30th May 2001

Signed

Howard Oldham
Tropic Real Estate

Date: 30th May 2001

Witness _____ Date: _____”

8. The meaning of the Commission agreement could not be any clearer.

Payment of commission was, “to be made upon receiving a down

payment of \$80,000 USD”. Payment of the down payment of US\$80,000.00 was made, and received; and commission became payable on that event and occasion. The defendants proceeded to deduct and retain US\$30,000.00 as commission. That is exactly what the ordinary meaning of the words: “Payment to be made upon receiving a down payment of \$80,000 USD”, is.

9. In his submission, Mr. Welch agreed with the submission by Mr. Young on the rule of law that in interpreting a written document of all kinds, the rule to be followed was that clarified in the Privy Council judgment in, *Melanesian Mission Trust Board v Australian Mutual Provident Society (New Zealand) [1996] UK PC 53*. The question in the case was whether on each occasion when the commercial lease would be renewed, and the rent reviewed, the initial rent would remain the same if the result of the view was a lower rent. The Privy Council upheld the dissenting judgment of Henry J, that when the ordinary meaning of the relevant words in the lease was taken, the rent was to vary up and down only when it was more than the rent for the initial period of the lease. The important summary of the rule was stated at paragraph 8 of the judgment as follows:

“The approach which must be taken to the construction of a clause in a formal document of this kind is well settled. The intention of the parties is to be discovered from the words used in the document. Where ordinary words have been used, they must be taken to have been used according to the ordinary meaning of these words. If their meaning is clear and unambiguous, effect must be given to them because that is what the parties are taken to have agreed to by their contract. Various rules may be invoked to assist interpretation in the event that there is ambiguity... So, the starting point is to examine the words used in order to see whether they are clear and unambiguous. It is of course legitimate to look at the document as a whole and to examine the context in which these words have been used, as the context may affect the meaning of the words”.

10. I am obliged to follow that as the rule for interpreting any document, be it a lease, a will or an ordinary contract. In the present claim, the text of the commission agreement is just five lines long; and the entire

agreement is comprised of three short sentences. The meaning of the words used in context is the same as their ordinary meaning. The important matter to determine is the intention of the parties as to what event was to result in the payment of commission and as to whether the commission was to be a percentage of money paid or of the sum agreed as the purchase price.

11. The claimants contended that they intended that payment would be made only on the sum actually paid. The defendants on the other hand, contended that commission was payable on the purchase price of US \$375,000.00, and on the occasion of the payment of the US\$80,000.00 down payment. It is my respectful decision that the ordinary and natural meaning of the words of the commission agreement accord with the submission by Mr. Young.

12. Mr. Welch also urged the court to view the commission as becoming payable, “upon closing”, and to imply the “norm”, the practice in the market place into the commission agreement. With due respect, I have to say that it will be wrong and contrary to the rule of construction of a document, for the court to overlook the ordinary and

natural meaning of the words in the sentence: “E.J. Ball, pres. to pay Howard Oldham \$30,000.00 USD, which is 8% commission on \$375,000.00 USD for the sale of 951.9 acres”. Moreover, to say that commission is payable, “upon closing” is to introduce the words, “upon closing”, into the agreement and create ambiguity which otherwise is not apparent in the text of the agreement. Counsel actually adopted the expression, “upon closing”, from the listing agreement which all parties agreed had expired on 17.9.2000.

13. Further, the word closing in real estate transaction, is not always used with precision. Some estate agents use it to mean the stage when the contract of sale has been reached between the vendor and the purchaser. That is what Mr. Oldham understood the words to mean. He is wrong in law. The word closing, also known as completion, means the final meeting between the vendor and purchaser at which the final transactions are carried out; that is, the conveyance documents are concluded, the money is paid whether in full or according to the agreed manner of payment, and the property is transferred. That of course does not include recording and registration at the Land Registry, where it is required. To introduce the words,

“upon closing”, into the commission agreement would inject the ambiguity associated with the word closing, into the commission agreement unnecessarily.

14. In any case, it is my respectful view that the claimant has not established by evidence upon a balance of probabilities, that there is an established practice in Belize to charge commission always on the sum paid towards the purchase price, and not on the agreed purchase price. The first hurdle to overcome was for Mr. Ball and Sunset Ventures, the claimants, to prove that Mr. Ball was also an expert witness. The claimants did not do that. The second hurdle was that it was Mr. Ball’s word against that of Mr. Oldham; and the burden of proof was on Mr. Ball to tilt the balance of probabilities in his and Sunset Ventures’ favour. That was not accomplished.

15. Judgment is entered for the defendants. The claim of Earnest J. Ball and Sunset Ventures Ltd, against Howard Oldham and Wilana Oldham is dismissed. Judgment in the counterclaim was entered earlier at case management stage, and has already been satisfied.

16. Costs, to be agreed or taxed, are awarded to the defendants.

17. Pronounced this Wednesday the 24th Day of September 2008
At the Supreme Court
Belize City

Sam Lungole Awich
Judge