[2018 Gib LR 269]

BUCKINGHAM PROPERTIES (GIBRALTAR) LIMITED v. F. CASSAR and J. CASSAR

SUPREME COURT (Butler, J.): October 2nd, 2018

Agency—estate agents—commission—estate agent which introduced buyer to property entitled to commission (under terms of agreement) even though purchase ultimately negotiated through another agent—chain of causation between introduction and exchange of contracts not broken

The claimant, an estate agent, sought judgment for the commission on the sale price of the defendants' property.

The defendants placed a property for sale with an asking price of £1,950,000. They instructed a number of agents, including the claimant. The defendants' relationship with the claimant was governed by a "multi-agency" agreement and it was clearly envisaged that the defendants could also instruct other agents. Under the heading "Multiple Agency," the defendants would pay to the claimant commission, *i.e.* the multi-agency percentage of the total sale price (agreed at 2%),

> "if contracts for the sale of the property were exchanged (whether during the period of the multiple agency agreement or at any time thereafter) with a Buyer first introduced to the Property by Us or where we were instrumental in the negotiations with the buyer and/or the decision to purchase Your Property by the Buyer."

The first defendant was an experienced and knowledgeable businessman in the field of property.

The defendants subsequently decided to reduce the asking price to £1,850,000. They informed various agents but the court found that it was likely that they omitted to inform the claimant.

The purchaser contacted the claimant expressing an interest in the property and the claimant arranged for him to view the property twice, and also assisted with a meeting with a community manager and a visit to a local school. Another potential purchaser made an offer for the property of £1,750,000, which was accepted by the first defendant.

The claimant discovered that the property was being marketed for £1,800,000 by another agent, reduced the price for which it was marketing the property accordingly and informed the purchaser. The purchaser decided to use another estate agent, "BMI," to represent him in a potential purchase negotiation. He offered £1,850,000 for the property through BMI, which was accepted by the defendants. The claimant informed the first defendant that there was a possible risk in relation to commissions

and wished to resolve the matter but with no success. The defendants subsequently paid commission to BMI.

The claimant sought judgment for £36,500, being 2% commission on the sale price of the property. The defendants denied liability and counter-claimed for a declaration that the claimant was in breach of the terms of the agreement.

Held, allowing the claim:

(1) The claimant was entitled to the commission. The court derived the following legal principles from the authorities. Contracts providing for estate agents' commissions were subject to the general law of contract. While the authorities were of assistance in illustrating the general approach of the courts, it was clear that each case depended on its particular facts. The first task of a judge hearing such a claim was to decide the facts. Legally competent parties were free to agree any terms they wished (subject to the Unfair Contract Terms Act) and would generally be bound by those terms. It was common ground that the Unfair Terms in Consumer Contracts Act did not apply to the circumstances of this claim. There might be cases in which commissions to more than one agent would be payable. The terms of the agreement between the agent and the principal must be given their ordinary and natural meaning in all the circumstances of the particular case known to the parties at the time of the agreement. The fact that the vendor had agreed terms which were objectively weighted against him or which he might later regret was not in itself a ground for failing to give those terms effect if the court was satisfied that the parties intended a particular meaning to be attributed to the words at the time of the agreement. Interpretation of terms was not limited to consideration of the dictionary or usual definitions of the words, though their usual meaning was likely to be a consideration. It was for the claimant to prove that it was entitled to the commission as claimed. It was for the defendants to prove on balance the facts which they relied on as resulting in the claimant not being entitled to the commission. In so far as terms were unclear or there was an issue as to whether terms should be implied, the contract was to be interpreted against the party relying on its own standard terms and conditions or who had had the benefit of drafting the conditions. The test was nevertheless objective in that the issue was what a reasonable person in all the circumstances would have assumed at the time the agreement was entered into. The courts had been concerned to avoid the unfair requirement of purchasers paying dual commissions and had implied terms that ensured, where appropriate, that only one commission would be payable. This had generally been achieved by implying a term (so long as it was not inconsistent with the express terms of the agreement) that commission was payable only to the agent who was "the" or "an" effective cause of the sale of the property. There was no room for the court to apportion the roles of two or more agents and divide a commission between them (in the absence of express provision). Nor was there any assumption against the possibility of there being liability for

more than one commission. Ultimately, all depended on the circumstances of a particular case (para. 27).

(2) In the present case, the court agreed with the approach of counsel that the issue was resolved by asking whether the chain of causation between the date of the introduction of the purchaser by the claimant and the date of the exchange of contracts (or perhaps completion) had been broken, whether by a breach of contract by the claimant, the decision of the purchaser to transfer to another agent or as a result of the actions of the second agent, BMI. There was no doubt that the relevant chain of causation had not been broken. It would be wholly unfair to the claimant that, having worked for over a year in promoting the property, the chain of causation should be regarded as broken simply because the purchaser took offence as a result of seeing the property advertised at a lower price, without making any further enquiries of the claimant or the defendants. It had been suggested that in appropriate circumstances the court should ask what would have happened if the second agent had not been approached by the purchaser. The court's firm finding was that the purchaser, as a result of the viewings and other services provided by the claimant, had decided, probably before he contacted BMI, that he wished to buy the property. He would not have reached that stage without the claimant's involvement. In the circumstances, any right-thinking person would regard it as unfair for the chain of causation to be regarded as broken and the claimant deprived of its commission. There would be little point in a clause of the nature of the claimant's multi-agency commission clause if they would always be deprived of commission if a purchaser decided to approach different agents through no fault of the claimant. It was likely that if BMI had suggested to the purchaser and the defendants that the claimant should be advised of the situation, a sensible discussion and compromise between agents could have been agreed. The defendants should not necessarily be liable for double commission. BMI was not a party to the action but as there was no written contract between BMI and the defendants and BMI had only a brief involvement in the matter, there would likely be an implied term that if the claimant were entitled to commission, BMI would not be so entitled. The claimant had made the defendants aware of its position in relation to its entitlement to commission. The claimant's commission term expressly provided that commission should be payable if contracts for the sale of property were exchanged with a buyer first introduced to the property by the claimant. This term was clear. The court assumed that a term should be implied that the introduction to the property should remain a cause of the sale and that the chain of causation should not be broken. This had not occurred in the present case (para. 27).

(3) The defendants' counterclaim for a declaration that the claimant was in breach of contract lacked merit and would be dismissed (para. 34).

Main authorities to which the judge was referred:

(1) *AA Dickson & Co.* v. *O'Leary*, [1980] 1 E.G.L.R. 25.
(2) *A.R. Brett & Co. Ltd.* v. *Bow's Emporium Ltd.*, 1928 S.C. (H.L.) 19.
(3) *Brian Cooper & Co.* v. *Fairview Estates (Invs.)*, [1987] 1 E.G.L.R. 18.
(4) *Burney* v. *The London Mews Co. Ltd.*, [2003] EWCA Civ 766.
(5) *Christie Owen & Davies Ltd.* v. *Rapacioli*, [1974] Q.B. 781; [1974] 2 All E.R. 311.
(6) *County Homesearch Co. (Thames & Chilterns) Ltd.* v. *Cowham*, [2008] EWCA Civ 26; [2008] 1 W.L.R. 909; [2008] 1 E.G.L.R. 24.
(7) *E.P. Nelson & Co.* v. *Rolfe*, [1950] 1 K.B. 139; [1949] 2 All E.R. 584.
(8) *Foxtons Ltd.* v. *Bicknell*, [2008] EWCA Civ 419; [2008] 2 E.G.L.R. 23.
(9) *Glentree Estates Ltd.* v. *Holbeton Ltd.*, [2011] EWCA Civ 755; [2011] 2 P. & C.R. DG19.
(10) *Greatorex* v. *Shackle*, [1895] 2 Q.B. 249; (1895), 72 L.T. 897.
(11) *John D. Wood & Co.* v. *Dantata*, [1987] 2 E.G.L.R. 23.
(12) *John McCann & Co.* v. *Pow*, [1974] 1 W.L.R. 1643; [1975] 1 All E.R. 129.
(13) *Lordsgate Properties* v. *Balcombe*, [1985] 1 E.G.L.R. 20.
(14) *Luxor (Eastborne) Ltd.* v. *Cooper*, [1941] A.C. 108; [1941] 1 All E.R. 33.
(15) *Millar, Son & Co.* v. *Radford* (1903), 19 TLR 575.
(16) *Savills (UK) Ltd.* v. *Blacker*, [2017] EWCA Civ 68.
(17) *Standard Life* v. *Egan Lawson Ltd.*, [2001] 1 E.G.L.R. 27.
(18) *Webranchek* v. *L.K. Jacobs & Co. Ltd.*, 1948 (4) SA 671 (A).

C. Salter and *J. Phillips* for the claimant;
D. Dumas, *Q.C.* and *C. Bonfante* for the defendants.

1 **BUTLER, J.:** The claimant, an estate agent, seeks judgment for £36,500, being 2% commission on the sale price of the defendants' residential property at 20 Admiral's Place, Gibraltar, plus contractual interest. The defendants deny liability and have counterclaimed for a declaration that the claimant was in breach of the terms of the agreement governing the claimant's engagement in relation to the property.

2 I have read in detail the documents placed before me before and during the final hearing, including witness statements and exhibits and counsel's submissions, and have listened carefully to the oral evidence and counsel's oral submissions. I have heard oral evidence from:

(i) Mr. Nicholls (the claimant's managing director);

(ii) Mr. Benson (the claimant's sales director);

(iii) Miss Bannister (the claimant's senior sales director);

(iv) both defendants;

(v) Mr. Bodner (the purchaser of the property);

(vi) Mr. Montegriffo (managing director of BMI Property Matters Ltd. estate agents known in Gibraltar as "BMI," who handled the ultimate sale of the property to Mr. Bodner and to whom the defendants, I am told, have already paid 2% commission on the agreed £1,825,000 sale price).

Preliminary observations

3 It is right to observe that the defendants' honesty and ethical standing have not been challenged by anyone. The first defendant is well-known and respected in the commercial sector in Gibraltar (particularly in the field of property). The defendants' recollection and reliability in relation to the facts of this case have been challenged in some respects. They have at all times acted in accordance with what they genuinely felt was the correct manner (though the first defendant was concerned at one stage about the ethics of what was happening). It is their misfortune that they have found themselves caught in a legal battle which has, I find, highlighted the serious risks for clients of estate agents if they do not examine and consider fully the contractual terms of engagement which they are asked to sign. It is the meaning and effect of those terms which has formed a major part of this claim. It is difficult to envisage that lay clients can be expected to appreciate the effect of terms (often standard terms for estate agents) when the agents themselves and their legal advisers (and indeed extremely senior judges in the United Kingdom) cannot agree them. Whilst it has not affected my decision, I have been uncomfortable about the vulnerability of estate agents' clients who may unwittingly find themselves liable to pay commission to more than one agent ("double commission"). I do not criticize the claimant for its terms and conditions. I do, however, observe that it would be far more satisfactory if the provision governing the circumstances in which the agent would become liable for a double commission were in bold type and included a warning to the client to consider it carefully and that if the property is sold through another agent to a client previously introduced by the claimant the client may become liable to pay commission to both agents.

4 In this case I am satisfied that the first defendant, who signed the claimant's terms and conditions, was an experienced and knowledgeable businessman in the field of property and that he was aware of the relevant clause, though it is likely that he did not give it much thought at the time.

5 The particular circumstances of this case are unusual. My experience is that the many agents who co-exist in Gibraltar almost invariably manage to agree a fair arrangement concerning fees when a client may otherwise become liable to double commission. Indeed, this was the clear evidence of Mr. Nicholls, which I accept. Before me is a Code of Conduct

produced by the Office of Fair Trading in Gibraltar, governing relevant estate agents. At the relevant dates in this case, it was advisory only but both agents in this case had posted it on their websites, where it could be seen by clients. I am told that this is the first time that such an issue has been litigated in Gibraltar. I am not surprised; anything which I say in this judgment should not be taken as a reflection on the ethical standards of estate agents in Gibraltar. Now that the Code is being mentioned in this court, I shall mention why, in my view, the relevant clause merits some reconsideration. I am sure that most agents interpret it as requiring them to act fairly and ethically with each other and with clients.

6 Be that as it may, I must decide this case in accordance with its facts and the law as I find them.

The facts

7 Mr. Nicholls and the first defendant have both been respected figures in the commercial world (particularly property related) in Gibraltar. They have enjoyed (at least until this dispute arose) a cordial and mutually friendly relationship.

8 The defendants' relationship with the claimant with regard to the sale of the property is governed by an agreement dated May 4th, 2015. It is what is known as a "multi-agency" agreement. It was clearly envisaged that the defendants would be free to instruct other agents in addition to the claimant. The property was to be marketed with an asking price of £1,950,000. The following (not numbered) terms particularly relate to this case:

- The agency would last for 26 weeks, after which either party could give 21 days' notice (none was given in this case).
- Under the heading "Agency Services": The claimant would provide a service to introduce interested parties who may wish to buy the defendants' property. It would take photographs and advertise the availability of the property on its website and other media as the claimant saw fit. It would undertake accompanied viewings, would assist in the negotiation process between the defendants and any interested party and would manage the sale until such time as a sales contract was exchanged and/or completed. (The latter part of the clause has some relevance in considering one of the defendants' complaints.)
- Under the heading "Multiple Agency": The defendants would pay to the claimant commission, being the multi-agency percentage of the total sale price of the property (in this case agreed at 2%) "if contracts for the sale of the

> Property are exchanged (whether during the period of the multiple agency agreement *or at any time thereafter*) with a Buyer first introduced *to the Property* by Us *or* where we were instrumental in the negotiations with the buyer and/or the decision to purchase Your Property by the Buyer." [Emphasis supplied.]
>
> - The claimant's fee would be due upon completion of the purchase contracts with the buyer.
> - In default of payment within 7 days of the commission becoming due, the defendants would become liable to pay interest at 5% above National Westminster Bank plc base rate and all reasonable costs of recovery would be borne by the defendants upon an indemnity basis in the event that these are not paid in the due date.

9 The defendants had previously placed the property on the market for sale in 2010. Towards the beginning of 2015 the defendants decided to return it to the market. They instructed many agents to handle it. During 2015 there were many viewings but no realistic offers. By August they were very anxious to sell and so informed the various agents. By January 2016 they were "desperate" to secure a sale. I am satisfied that the claimant was aware of that fact, as were BMI, who were in the pool of agents instructed.

10 Having listened carefully to and read all the evidence I am satisfied that during 2015 the claimant had handled the defendants' instruction well. They had treated the first defendant as a special customer, for instance by arranging for the defendants' property to be promoted on a full page in the claimant's London associate company (the Gibraltar company operates under a franchise) in its international magazine. The defendants had made no complaint and no other agent had secured a sale.

11 In December 2015, the defendant sought advice from the claimant, including as to whether a reduction in asking price would help. The claimant replied promptly and said that a reduction would help, though it would have to be a substantial reduction.

12 At about the beginning of February 2016, the defendants decided to reduce the asking price to £1,850,000. They set about informing the various agents, including BMI, of their decision. They did not inform them all at the same time or in the same way. They shared the task, though it was the first defendant who mainly undertook it. They were very busy with much on their minds. Some were informed by telephone; some were informed by email. There is an issue as to whether, by the time Mr. Bodner first viewed the property, the defendants had instructed them to reduce the price. In his written statement, the first defendant suggested

that the claimant had been instructed to do so but in oral evidence I found him to be less certain. He believes that they were but, on the balance of probability, I find that they were not. There is no record of such instructions having been given; there is no apparent reason why the claimant would not have acted promptly on such instructions, especially since they had already advised a reduction; I found the claimant's witnesses on this point convincing. I have every sympathy for the defendants and their predicament at the time but it is, in my judgment, far more likely that they had unwittingly omitted to inform the claimant of their decision than that the claimant had ignored or failed to act in accordance with their instructions. I have taken into account other aspects of the defendants' evidence upon which I found them to be rather less than reliable. It is, of course, notoriously difficult to recall with certainty events which occurred long ago at a somewhat hectic time for the defendants.

13 On Tuesday, February 16th, Mr. Bodner contacted the claimant showing an interest in the property, which he had noticed as a result of the claimant's marketing of it. Mr. Benson responded by email on the same day and arranged a viewing on Friday, February 19th. Mr. Bodner had also requested information about similar properties which the claimant may have on its books and for other advice and information. He also mentioned possible rental properties and made it clear that he wished to move his family to Gibraltar very soon. Viewings of other properties were arranged. On February 19th, a positive viewing of the property took place, as confirmed by Mr. Bodner, who requested a second viewing, which took place on February 25th. He indicated that he would then consider an immediate offer to purchase. Mr. Benson responded promptly on the same day. Mr. Bodner emailed him again on Saturday 20th asking for more information, for floorplans and whether the claimant could arrange a meeting for him with the community manager of Admiral's Place. Again Mr. Benson replied quickly and, since he was to be away until the following Wednesday, Mr. Nicholls was briefed on Sunday, contacted Mr. Bodner on Monday and set things in motion to deal with Mr. Bodner's requirements. He obtained floorplans from the first defendant and forwarded them to Mr. Bodner. He also gave instructions for a visit to the local school to be arranged—and all reasonable attempts were made to do so within Mr. Bodner's timescale. He had emphasized that he would be away until mid-March. A second viewing was arranged for Thursday 25th, when Mr. Benson had returned and attended again. Mr. Bodner was perfectly content with the service the claimant was providing at that time and, I find, rightly so. He had indicated to Mr. Benson that he intended to make an offer following the second viewing and before he left Gibraltar. The claimant made it clear that they would assist him further with anything he needed. Following the viewing, Mr. Bodner indicated that he intended to make a low offer but the claimant heard no more.

14 In the meantime, other potential buyers (the Tirleas) had arranged to view the property on February 26th (the day following Mr. Bodner's second viewing). It was a surprise to have two interested buyers concurrently, given the lack of positive results until then. At their viewing (attended by them, Ms. Dyer and the first defendant), Mr. Tirleas made an oral offer of £1,700,000, which the first defendant rejected; he increased his offer to £1,750,000 and the first defendant accepted on condition that the sale would proceed quickly. They shook hands. I need not record the remainder of what happened at that viewing. I accept Mr. Benson's evidence that he asked the first defendant whether he wished him to contact Mr. Bodner to see whether he would make a better offer and the first defendant instructed him not to, on the basis that he had reached an agreement, shaken hands and would not go back on his word. The first defendant does not remember that but it seems likely to me that that conversation, or something like it, would have taken place. It was a natural question for Mr. Benson to ask and the response was exactly what the first defendant said later, when Mr. Bodner made higher offers through BMI. The first defendant's recollection of what he was told prior to the Tirleas' viewing is also erroneous. It was his belief that they were only viewing the property as prospective tenants and not as prospective purchasers. He was firm in this belief in his statement, there suggesting that the claimant had not introduced the Tirleas as purchasers and therefore should not have been entitled to commission on that sale. It is clear, however, that an email was sent to the defendants prior to the viewing informing them that the Tirleas were interested both as potential tenants or as potential purchasers. The first defendant replied with thanks. I also accept that the first defendant thanked Mr. Benson and made a comment such as the claimant had done much more in marketing the property than had the other agents instructed. By this time, the claimant had been actively marketing the property for over a year without any expression of dissatisfaction from the defendants.

15 On February 25th, Mr. Benson had spoken to the claimant's Jacky Carreras-Dyer, because he had noticed that the property was advertised by another agent at the lower price of £1,800,000. Had he been instructed to reduce the price before then, I am satisfied that he would have remembered it, he being the person with conduct of the property. The first defendant was contacted immediately and confirmed that he wished the price to be reduced. The claimant's property history was altered immediately and I accept Mr. Benson's evidence that he informed Mr. Bodner of the reduction at the second viewing.

16 A further issue arises from the events in the few days following the agreement with the Tirleas. I find that the defendants were clearly concerned to secure the sale as soon as possible and that they did telephone Mr. Benson daily to ask what was happening. The claimants did

prepare the memorandum of sale and send it to the parties' solicitors. There was a brief error in getting the parties' solicitors the wrong way round but that was corrected immediately and all was done within the day. The defendants complain that Mr. Benson did not act with the urgency they expected. There is no evidence, however, that they complained to him about this. The matter was in the hands of solicitors. Mr. Benson initially did not know how they were progressing the matter but I am puzzled if the defendants did not contact their solicitors to find out. Mr. Benson had performed his part and it was for the solicitors to perform theirs. He was not unhappy to assist but the criticism of him I find unjustified. As he said, it usually takes weeks, if not months, for final exchange of contracts to take place following agreement. This was a matter of days and he was busy. The issue is of marginal importance, since I am concerned with the sale to Mr. Bodner but it does indicate to me (and I find) that by the time of this case reaching legal proceedings the defendants had become influenced by the criticisms of the claimant by Mr. Bodner and Mr. Montegriffo. They then looked back and became, with hindsight, dissatisfied with the service they had been given by the claimant. It adds to my concern as to the accuracy of the defendants' evidence overall.

17 Mr. Bodner told Mr. Montegriffo that he preferred to be represented by BMI in a potential purchase negotiation. Given the close relationship between them, that statement was concerning. It indicated a real blurring of boundaries but on balance I do not think that that was intended. I have no doubt that Mr. Montegriffo wished to keep his longstanding client happy and to satisfy him but, on balance, I do not find that he intended to prejudice the interests of his real clients in this situation, namely the defendants. I return to the claimant's terms and conditions. They include that: "We . . . will assist on the negotiation process . . . and we will manage the sale until such time that a sales contract is exchanged and/or completed." That cannot mean that the claimant would undertake the work of the defendants' solicitors and was certainly not understood to mean that. But it does indicate that the claimant's role did not cease at the time of the oral agreement. Under the heading "Involvement between Offer and Exchange of Contracts," cl. 13 of the Code of Conduct provided that:

> "(a) After acceptance of the offer . . . and until exchange of contracts you should not influence the legal process or the mortgage lending process. Your obligations to the vendor are: (i) to monitor progress; (ii) to assist where possible, if asked; and (iii) to report information deemed helpful to bringing the transaction to fruition."

Had I thought that the claimant had acted unreasonably or insufficiently promptly following the defendants' calls to Mr. Benson, I would have found that there was a minor breach of its duties. I do not so find and, even if I had found otherwise, it would not have affected my conclusions. I

observe too that the Code of Conduct was not incorporated into the contract, though it did appear on the websites of both agents.

18 As the matter progressed, Mr. Nicholls, for the claimant, sought meetings with the first defendant and the identity of the buyer. He made it clear that there was a possible risk in relation to commissions and repeatedly suggested that the claimant should ask BMI to contact him. He was indicating a wish to sort the issue out.

19 In the meantime, Mr. Montegriffo encouraged the first defendant not to answer Mr. Nicholls' enquiries. In the end, he suggested that the first defendant simply should not respond. Somewhat surprisingly, it seems that BMI had no written contract with the defendants at all (though the first defendant told me that he expected to pay commission to BMI at the rate of 2%). I am satisfied that the first defendant was not attempting to avoid Mr. Nicholls during the period until contracts for sale to Mr. Bodner were exchanged. Equally I accept that it must have seemed to Mr. Nicholls that the first defendant was avoiding him. It must have seemed strange and suspicious that, though he was convinced that the buyer was Mr. Bodner, the defendants were unwilling to disclose that fact. The following are examples of the conflicting advice being given to the defendants:

(i) On March 2nd, Mr. Nicholls mentioned cl. 7C to the first defendant, who replied: "thanks . . . I hate the lack of ethics . . . mate I think you and I are, regrettably, in a definite minority." At that stage the defendants were obviously very uncomfortable about the advice being given to them to hide the buyer's identity.

(ii) On March 3rd, Mr. Montegriffo, referring to Mr. Bodner as his client, advised the first defendant: "As mentioned to Jackie yesterday it's best that we keep this confidential until you take a view based on my communication later this morning." Later he emailed: ". . . He is talking to his wife about the increased offer of £1.85M and will revert in 10 minutes . . ." and later: "We have a deal at £1,850,000."

(iii) On March 4th, Mr. Nicholls emailed: "Ok, just tell me one thing—is it Manfred [Mr. Bodner] . . ."

(iv) On March 7th, Mr. Montegriffo emailed:

> ". . . I am surprised to hear that the others [meaning the claimant] know it is him as he has no contact with them and only the lawyers are aware of the deal and have been told to keep it confidential. I suggest that at this stage you do not communicate with them. All is going well with lawyers and I do not want to spook anyone here."

In oral evidence he struggled to explain what he had meant by "spook," After all, he, the defendants and Mr. Bodner were all aware of the situation and if he and/or the first defendant had communicated with

Mr. Nicholls in an open way, I am convinced that a mutually satisfactory solution should have been possible. He continued: "Once completion takes place you can by all means refer the other agents to me and I will sort this out. It is not for you to get involved. The email attached from Manfred makes it very clear and places you in a solid position." That was, I find, unfortunate, unwise and naïve advice, calculated to give the defendants confidence that they had nothing to worry about in relation to dual commission. It was based solely on what Mr. Bodner had said without knowing the whole picture. The obvious course to take was to sort the situation out with the claimant at an early stage (subject to contrary instructions, which he did not have—on the contrary, the defendants were feeling uncomfortable about the secrecy). Mr. Montegriffo said that it was usual practice that matters were kept confidential pending exchange of contracts. I accept that in usual circumstances but this situation required a different approach. It was extremely likely to sour relations between the defendants and the claimant and between BMI and the claimant. The advice led the defendants to believe that it was safe for them to proceed without risk of double commission. Later Mr. Montegriffo emailed: "Exactly Franco—Agreed! Rest assured that I will protect your position at all times." The first defendant was expressing concern that: "I'm getting heat from the others. They know its him . . . I can come round tomorrow afternoon to discuss this . . ." and "I mentioned last week that I had another offer via yourselves. They straightaway said it must be M!! I haven't said anything else since you confirmed who it is. As you say let's get the deal done . . ."

(v) On March 8th, the first defendant met Mr. Nicholls at the Chamber of Commerce, when the latter made it clear that if the buyer were Mr. Bodner, "there is a fee dispute." There followed a chain of emails between the first defendant and Mr. Montegriffo, in which there was clear reference to the viewings of the property through the claimant. I find that those viewings were still very much operational in the mind of Mr. Bodner: it is because of them that he did not require any further viewing. It is because of the actions of the claimant that he was keen to purchase the property. Mr. Montegriffo had not done anything material to alter the mind of Mr. Bodner, who is a particularly forceful personality. On March 24th, Mr. Montegriffo confirmed that contracts had been exchanged.

(vi) On April 24th, Mr. Nicholls emailed: ". . . We need to address the commission issue . . . better for you if pre-completion, so let know what you propose and/or if you wish to meet at any time . . ." The first defendant replied: ". . . [Y]ou need to speak to Louis . . . he is ready and waiting. Happy to talk but there is not much worth for me to add." Mr. Nicholls took the view that the issue of the claimant's commission was a matter between it and the defendants. It is, sadly, unfortunate that he did not contact Mr. Montegriffo, who had given the advice upon which the

defendants had acted and was willing to discuss the situation. Mr. Nicholls continued to press for a satisfactory response and on April 26th the first defendant emailed Mr. Montegriffo:

> ". . . MN is still at it and wants to meet tomorrow. I had well over an hour with him last week going round in circles . . . mainly referring to the clause which . . . says that if I have a contract with them . . . they are entitled to a share of the commission if it subsequently sells to someone else. He says he has something to show me. Let's see . . . I'll keep you posted . . ."

Mr. Montegriffo reassured the first defendant that:

> "There really is no further need for you to go out of your way in explaining your position to MN further. The fact that the buyer has insisted in NOT dealing with Chestertons and we have email to that effect with reasons, the fact that they pursued a failed purchase, which was subsequently superseded by our offer as instructed agents and a deal closed by us, quite clearly maintains your position and that you have nothing to answer for. I really would put an end to it."

Again, I find such advice, with such certainty, from a non-lawyer (Mr. Montegriffo emphasized to me in oral evidence that he was not a lawyer and was naïve when it came to legal matters) concerning. As it was, the advice, I find, was misleading. At the very least there was potential for uncertain litigation. He continued:

> "I would avoid any further meet in the matter . . . if he continues to pursue, I will get lawyers to look at it for you. You should get Dickie to advise . . . I know exactly what he'd say."

Mr. Nicholls continued to press. He advised the first defendant that he should not be paying commission to BMI on completion (that too was misleading, given that he was unaware of the terms upon which BMI acted for the defendants). But he did emphasize that he was "trying to resolve this but it takes two to tango."

(vii) On April 29th, the first defendant emailed to him:

> ". . . I regret you feel we are heading to a dispute. I had thought at one stage that this was clear cut but its turned out to be much different and a lot less clear than you suggest . . . I am happy to meet."

(viii) On May 1st, Mr. Nicholls emphasized the potential for payment of two commissions:

> "I thought at our last meeting would be a fee split. In the end you confirmed that you did not recognise that telling me that you had no interest to pay Chesterton any fee and that you have the intention of

> paying BMI the full fee. You also said you would speak with BMI so I do not know . . ."

He also explained that cl. 7C of the Code of Conduct is drafted to help prevent a dual fee situation. It would appear that BMI chose not to follow it:

> "I cannot allow my business to go unpaid . . . There's no point being in business if we attract buyers (bearing in mind that Manfred first went through our London Office), undertake viewings, assist his decision making process, encourage him to make an offer, only for another agent to take an offer without having done an ounce of work. We may as well pack up our bags if this is how the system works . . ."

And: "I have always been and am happy to negotiate." And: "In my opinion Chesterton is the effective cause of your sale." The defendants were taking a strong stance against the claimant, unwilling to enter into negotiations, and convinced by the clear and certain advice given to them by Mr. Montegriffo.

(ix) On March 29th, 2016, the first defendant emailed: "we are anxious to nail this one way or another."

(x) On February 2nd, 2017, Mr. Montegriffo sent an email to Mr. Bodner:

> ". . . I had thought that Chestertons had given up . . . I find it extraordinary . . . I am meeting . . . David Dumas . . . I think he would just like your comments in what appears to be blatant lies from Chestertons in their case . . ."

I find that comment disturbing. I do not know to what alleged lies Mr. Montegriffo was referring but it was clearly a serious allegation by one professional about another. I do not find it supported by the evidence before me.

20 I found both Mr. Nicholls and Mr. Benson to be straightforward and convincing witnesses. I do not believe that they have wished this matter to proceed to court. The defendants were in a difficult position and relied upon the advice given to them by Mr. Montegriffo. They continued to instruct the claimant in relation to another property at King's Wharf and appeared happy with the service which they had received. Not until hearing of Mr. Bodner's allegations did they become dissatisfied. Miss Bannister too was an honest and impressive witness, whose evidence convinces me that it is on balance likely that the defendants had not given instructions to the claimant to reduce the price by the time of the first viewing. She was an assiduous record keeper and there was no record of any such instruction being given to her. If it were given to Mr. Benson,

that would have registered in his mind and he would have acted accordingly. This is no reflection on the defendants, who between them (mostly the first defendant) were having numerous conversations with agents and have no real record or recollection of what was said, by whom and to whom. The first defendant's recollection was that the various agents were instructed to reduce the price at least by the beginning of February. His memory was not correct about this. BMI were not so instructed until February 19th. The likelihood was that it took significant time to contact the various agents.

21 Mr. Benson was very impressive and, in my judgment, clearly honest. It was his judgment that within days of the sale being placed in the hands of the defendants' solicitors it was too soon to start pushing them. I find that to have been a reasonable decision at that very early stage.

22 Mr. Bodner was unimpressive. He was clearly wishing to vindicate his decision. He appeared arrogant, aggressive and abrasive but I have kept in mind that impressions of witnesses in the witness box can often be misleading. In his first statement he failed even to mention his second viewing and (wrongly) alleged that the only price quoted to him by the claimant was £1,950,000. When Mr. Benson told him that the price was reduced and gave him the revised particulars, he did not mention that he was already aware of that fact. He was using the claimant for the second viewing but probably had already decided to use BMI for his purchase if the second viewing confirmed his wish to purchase. He did not mention any dissatisfaction. He went to BMI simply because he was angry that the claimant had advertised the property at a higher price and because of his relationship with BMI. He was even angrier when informed that the property had been sold to another buyer without his being informed. My impression was that he was used to obtaining his own way. Only in his oral evidence did he allege for the first time that the floorplans sent to him by the claimant were unsatisfactory. I reject that suggestion. There was no complaint in his statement about the claimant not sending him other properties.

23 Mr. Montegriffo too was less than satisfactory as a witness. It transpired during his cross-examination that shortly before the pre-trial reviews of this case he had telephoned the judge who was due to hear the case, discussed it with her and sought her advice. Whilst notices of the date of the hearing were no doubt sent out, I am not prepared to find that he was aware that she was due to hear it. The result was that when it came before her for a pre-trial review she had to reveal what had happened and recuse herself from further involvement. She was placed in an embarrassing position by Mr. Montegriffo's conduct. Whilst I cannot find that he was in any way attempting to pervert the course of justice (and that has not been suggested) it does show that at least in relation to this matter his judgment has been particularly poor. My decision would have been the

same without this evidence but it confirms my impression of him. He was extremely apologetic and attributed his actions to lack of legal knowledge and naïvety about the law. He had telephoned his friend at the Office of Fair Trading and told me that he was informed that there was no problem in BMI taking on the matter. If he were given such bold advice, it would have been based on the information given by Mr. Montegriffo. When he first made contact with the first defendant after receiving Mr. Bodner's instructions, he did not give the buyer's name because he thought that the defendants were not entitled to it. He only revealed the name once the deal was confirmed. He then told the first defendant of Mr. Bodner's disappointment on finding the property advertised by the claimant at the higher price and of his annoyance at being told it was sold. He denied the suggestion that he told the first defendant that "Dickie Azopardi would laugh . . ." but that does ring true to me in light of his other comments and advice to the defendants. He also denied the defendants' evidence that he had told them on March 2nd, 2016 to ignore the claimant. I prefer on balance the defendants' recollection. The same applies to the suggestion that he told them that they did not have to pay anything to the claimant and that he said anything like "don't worry about that."

24 The first defendant confirmed in evidence that the only criticism of the claimant in relation to the Tirleas agreement was the failure to push the matter with the solicitors. He agreed that on the day of the agreement the claimant acted promptly and ensured that the solicitors had the correct memorandum of sale by late the same day. The first defendant had spoken to his lawyer on the following Monday, Tuesday and Wednesday. He regarded it as their duty to make contact with their opposite number. Mr. Benson did return his calls. He felt that Mr. Benson should have chased the Tirleas' lawyer. He raised no issue about this until he received the claimant's bill, months later. The first defendant said that he did not want it known that he was considering other offers (but he had already informed the claimant of those offers). I cannot accept the suggestion that there was any reason to suppose that Mr. Bodner would be "spooked" if it became known that he had made an offer. He was not even asked. Again, the potential for confusion as to Mr. Montegriffo's role was raised, it being the first defendant's recollection that Mr. Montegriffo said that he was acting for the purchaser. The first defendant imagined he was acting for both. It was clear to me that, despite his knowledge of the property world in Gibraltar, the first defendant was not fully acquainted with the law. In his eyes, Mr. Benson had not sold the property and was therefore not entitled to commission. The commission clause is, however, deliberately designed to cover the situation in which a property is purchased through a second agent after the first has done the work which results in the purchase. I find that the first defendant's initial discomfort about the situation was correct and that his attitude to the claimant hardened with the encouragement of Mr. Montegriffo. He told me that he had thought

that Mr. Montegriffo was unethical because of the suggestion that he had been poaching. It was clearly not, I find, a case of an agent deliberately contacting a prospective client with a view to poaching. The first defendant told me "We haven't paid because Mr Bodner was very unhappy with the Claimant's services. Therefore it was not as clear cut. There should have been a discussion taking place." I agree that it would have been preferable for the agents to have made contact and had a discussion to sort the situation out. In the absence of Mr. Montegriffo doing so, it is a pity that Mr. Nicholls did not make contact with him, especially since the first defendant told him that Mr. Montegriffo was prepared to talk. It is not clear, however, that this would have resulted in agreement. There was no contractual or legal requirement to make such contact. During the hearing I was told that the defendants have paid to BMI 2% commission on the sale. In his evidence, Mr. Montegriffo told me that if I find that the claimant is entitled to its commission, he would still say that BMI were entitled to theirs, resulting in double commission for the defendants. I accept the first defendant's explanation that "I just don't know how it works."

25 The second defendant told me that she did not play a part in informing agents of the price reduction. It was clear from her evidence that the defendants did believe that the claimant was entitled to some commission but that negotiations should take place between the two agents.

26 I have not rehearsed the whole of the evidence or made findings as to all of the facts (only sufficient to explain my decision) but have considered them all.

The law and application of it to the facts of this case

27 I have been referred to numerous judicial authorities and texts concerning the law relating to estate agents' commissions. It is an issue with which the courts of the United Kingdom have grappled for well over a century. I have listened carefully to the submissions of Mr. Salter for the claimant and Mr. Dumas, Q.C. for the defendants, which have been well presented and argued. In the light of my findings of fact, it is perhaps unnecessary for me to embark upon a detailed analysis of that law but I do propose to mention a number of the legal principles which derive from those authorities:

(i) Contracts providing for estate agents' commissions are subject to the general law of contract. Whilst the authorities to which I have been referred are of assistance in illustrating the general approach of the courts, it is clear that each case is fact sensitive and dependent. The first task of any judge hearing such a claim is to decide the facts.

(ii) Legally competent parties are free to agree any terms they wish (subject to the Unfair Contract Terms Act) and will generally be bound by those terms. It is common ground that the Unfair Terms in Consumer Contracts Act does not apply to the circumstances of this claim. The result is that there may be (and clearly have been) cases in which commissions to more than one agent will be payable.

(iii) The terms of the agreement between the agent and the principal (in this case the vendor) must be given their ordinary and natural meaning in all the circumstances of the particular case known to the parties at the time of the agreement. The fact that the vendor has agreed terms which are objectively weighed against him, or which he later may regret, is not in itself a ground for failing to give those terms effect if the court is satisfied that the parties intended a particular meaning to be attributed to the words at the time of the agreement. Interpretation of the terms (including consideration of what, if any, terms should be implied) is not limited to consideration of the dictionary or usual definitions of the words, though their usual meaning is likely to be one of the considerations. The circumstances of a particular case may justify giving the words a meaning wholly different from their usually accepted meaning but there must be good reason for such a finding. It has been said that the consequence may be that the worse the parties' drafting of their agreement is, the more likely it may be that it will not bear the meaning which the words alone would suggest.

(iv) It is for the claimant to prove that in the circumstances it is entitled to the commission as claimed. It is for the defendants, however, to prove on balance the facts which they rely upon as resulting in the claimant not being entitled to the commission which on the face of it they should receive. In this case, however, my conclusions have not depended on the burden or standard of proof.

(v) In so far as the terms are unclear or there is a legitimate issue as to whether any terms should be implied, the contract should be interpreted against the party relying upon its own standard terms and conditions or who has had the benefit of drafting the conditions, having no doubt had legal advice and the added advantage of professional knowledge and expertise in the field. The test is, nevertheless, objective in the sense that the issue is what a reasonable person in all the circumstances would have assumed at the time when the agreement was entered into (not later on the basis of hindsight or second thoughts in the light of subsequent events). If the parties were *ad idem* as to the meaning of the terms, this principle will not assist.

(vi) In all the circumstances of this case I do not consider that the reasonable, objective person would have thought that the intention was that the claimant would be entitled to commission if the sale were lost

wholly through fault or breach of contract on the part of the claimant, even if it were revived as a result of the involvement of another agent. Such interpretation would offend common sense and moral justification. The more difficult issue is whether the claimant should be entitled to commission if the prospective purchaser is lost to the first agent as a result of any fault or breach of contract. There are certainly cases in which it has been held that the claimant was entitled to commission despite being in breach of contract. Again, each case will depend upon its own facts. It may be that the main cause of losing the purchaser would not be a minor breach by the claimant, although the breach may have been a contributory element. In this case, for the reasons which I mention below, I need not consider this principle further. The defendants did not consider the claimant to be in significant, let alone fundamental, breach of contract until, following the completion of the sale, they were told by Mr. Montegriffo of the reasons given by Mr. Bodner for wishing not to deal with the claimant. That fact would not harm their case in itself.

(vii) Since the beginning of the last century, the courts have been concerned to avoid the unfair requirement of purchasers to pay dual commissions and have given effect to that approach mainly by implying terms which ensure, where appropriate, that only one commission will be payable.

(viii) This has generally been achieved by implying a term (so long as it is not inconsistent with the express terms of the agreement) that commission is payable only to an agent who is "the" or "an" effective cause of the sale of the property. Terms such as "introducing a purchaser" have been interpreted (where circumstances allow) as meaning "introducing a purchaser to the sale of the property," rather than to the property itself. That approach has survived and served well. It has been developed and refined, not always in decisions which are consistent with each other. It has been said that there should be only one agent who is the effective cause and that it is that agent who should receive commission. There is no room for the court to apportion the roles of two or more agents and divide a commission between them (in the absence of express provision allowing that). Nor is there any assumption against the possibility of there being liability for more than one commission. There has been disagreement about whether an implied term should require that the agent be "the" or simply "an" effective cause of the sale. Ultimately, in my view, all depends on the circumstances of a particular case.

(ix) I agree with the approach of counsel in this case, namely that the issue is resolved by asking whether the chain of causation between the date of the introduction of the purchaser by the claimant and the date of exchange of contracts (or perhaps completion) has been broken, whether by some breach of contract by the claimant, the decision of the purchaser to transfer to another agent to achieve and deal with the purchase (through

losing confidence in the first agent, whether reasonably or not) or as a result of the actions of the second agent. The asking of that question in itself does not produce the answer. As part of the exercise, a judge seeking the answer will, in my view, need to consider again what is reasonable in the particular circumstances. I have no doubt in this case that, whatever approach is adopted, the relevant chain of causation has not been broken. It would be wholly unfair to the claimant that, having worked for over a year in promoting the property and having provided the services which I do not intend to repeat, the chain of causation should be regarded as broken simply because Mr. Bodner took offence, without making any further enquires of the claimant or the defendants, and without the claimant having any contemporaneous opportunity to make any representations (as a result of the secrecy promoted by Mr. Montegriffo), as a result of seeing the property advertised by BMI at a lower price.

(x) It has also been suggested that in appropriate circumstances the court should ask what would have happened if the second agent had not been approached by the purchaser. My firm finding is that Mr. Bodner, as a result of the viewings and other services provided by the claimant, had decided, most probably before he contacted Mr. Montegriffo at all, that he wished to buy the property. He acted precipitously and capriciously upon seeing the advertisement. Far from tackling the difference in advertised prices with Mr. Benson or Mr. Nicholls, he took advantage of a further viewing and the claimant's services without mention of that issue. I find it likely that he had decided by the time of the second viewing that he would ask Mr. Montegriffo to represent his interests in the purchase which he had decided to make. Subsequent events support that conclusion. He was extremely disappointed (in fact angry) that the property had been sold before he managed to make his offer. He made increased offers. He wanted and needed to buy a property urgently. He was determined to buy it. He would not have reached that stage without the claimant's involvement. In my opinion, any right-thinking person would regard it, in these circumstances, unfair for the chain of causation to be regarded as broken and the claimant therefore to be deprived of the commission which it deserves and has earned. There would be little point in a clause of the nature of the claimant's multi-agency commission clause if they would always be deprived anyway of their commission if a purchaser decided to approach different agents through no fault of the claimant. That it might be unfair to the claimant that it should not receive commission will not be determinative if that is the effect of the agreed terms. It may, however, assist in interpreting and applying those terms.

(xi) Furthermore, the likelihood is that if Mr. Montegriffo had, as many would have thought rightly, suggested both to Mr. Bodner and to the defendants that the claimant should be advised of the situation, a sensible discussion and compromise between agents could have been agreed, to the

benefit of them and of the defendants. The relationship between Mr. Montegriffo and Mr. Bodner was longstanding and solid and I do not believe that there would have been any risk in Mr. Montegriffo advising Mr. Bodner that the proper course to take was to be open and straightforward with the claimant. I am sure that the defendants would have accepted that advice. It would make sense of cl. 7C in the Code of Conduct. The probability is that Mr. Montegriffo allowed his relationship with Mr. Bodner, no doubt uncharacteristically, to cloud his judgment. If he was misled by advice from someone else, that is not the fault of the claimant and does not alter the material factual matrix.

(xii) This conclusion should not necessarily, in my judgment, expose the defendants to liability for double commission. The case has not involved concentration on the entitlement of BMI to commission and it is not a party to the action. It is possible that other circumstances could entitle them also to commission but on the information before me, including that there was no written contract between BMI and the defendants, there was only brief involvement of BMI in the matter and Mr. Montegriffo's reassurances to the defendants, there would be likely to be an implied term that if the claimant were entitled to commission then BMI would not be so entitled. It is, in my judgment, a useful check, after considering the evidence, submissions, legal authorities and circumstances and reaching conclusions, to stand back and consider whether my conclusion appears just and reasonable. In my firm opinion it is. To his credit, Mr. Dumas has not argued the case on the basis that the chain of causation should be regarded as broken in the circumstances which I have found established on the balance of probability.

(xiii) In some situations a vendor may accept that an agent is entitled to commission but nevertheless agree to use another agent who will also be entitled to payment. A vendor may well be bound by his agreements if he has entered into them with his eyes open and is aware of the risks which he runs. It may be that the financial or other advantages to him outweigh the disadvantages. I can only decide the matter in this case on the basis of the evidence before me, conscious though I am that there may be circumstances of which I am unaware which could make the defendants liable to pay BMI.

(xiv) The claimant throughout made the defendants aware of its position in relation to its entitlement to commission. They took the view that the claimant should not be entitled to commission if it did not actually handle the sale. But even as laymen they had initially been uncomfortable about the secrecy and ethics of the situation.

(xv) The claimant's commission term expressly provides that commission should be payable if contracts for the sale of the property were exchanged (whether during the period of the multi-agency agreement or at

any time thereafter) "with a buyer first introduced *to the Property* by Us," "*or* if contracts for the sale of the Property are exchanged (whether during the period of the multiple agency agreement or at any time thereafter) with a Buyer first introduced *to the Property* by us" [emphasis supplied]. Though I have made my decision primarily on the basis set out previously in this judgment, it seems perfectly arguable to me that this provision, different from the provisions in contracts with which the UK authorities were concerned, is clear and inconsistent with an implied term that commission would only be payable if the agents introduced the property to the sale, rather than only to the property. The trigger for liability to pay commission to the claimant is completion of the purchase but the entitlement arises from the introduction to the property by the claimant. There may be implied terms as to the time lapse between the introduction and the sale but they would not affect this case. I have assumed for present purposes that a term should be implied that the introduction to the property should remain a cause of the sale and that the chain of causation should not be broken. More likely, as I have indicated previously, there is an implied term that commission should not be payable if the purchaser is lost to the claimant and the defendant as a result of significant fault of the claimant and the purchaser's interest and eventual sale is renewed as a result of the actions of another agent. Those are not the facts of this case.

Miscellaneous points

28 It has been suggested by Mr. Salter that the agreement in this case was a "unilateral contract." I do not agree. The claimant had clear duties under its terms and conditions. Those duties clearly continued unless and until the agreement was terminated either by termination of the contract by the giving of notice by either party or by a sale being completed. The reference to a unilateral contract is, in my opinion, unhelpful in this case. Whatever label is used in describing the contract, it does not alter the result.

29 Whilst it is for the legislature and the estate agents' professional body to decide what statutory provisions or guidance should be given in relation to estate agents' commissions, it does seem to me that lay clients of professional agents are often vulnerable and do not understand properly the effect of commission terms. Mr. Nicholls regards the claimant's terms as particularly apposite in Gibraltar, where there is a large number of estate agents operating and competing within a small geographical area. Whilst I recognize the problems mentioned by him, I have doubts as to whether they justify provisions which are significantly more adverse to clients than those which are generally used in the United Kingdom. I have in mind particularly that interpretation of such terms has occupied lawyers, agents and the courts now for generations. The chances of a lay client understanding fully the consequences and effects of this type of

term are slim. It is common that they will sign without having the time, advice, inclination, knowledge or experience to protect themselves against the risks to which these terms may give rise or to be able to assess adequately whether they are reasonable and whether they should agree them. That does not mean that they are not bound by them.

30 I do not suggest that agents should not be free (subject to the Unfair Terms in Consumer Contracts Act) to seek and agree any terms and conditions they wish. As professionals engaged in a competitive market and dealing with people often selling their homes in upsetting circumstances and under great pressure, it does seem to me that more detailed guidance for agents would be welcome. Consideration might be given to at least the main potential consequences for lay clients, if they agree the terms and conditions, being specifically drawn to their attention. Perhaps it should be clear in the Code of Conduct what steps an agent should take if he or she discovers that another agent has previously introduced a prospective purchaser and may well be entitled to charge a commission. More consistent standard terms and conditions might be an advantage. It would be possible to require agents who wished to agree terms exposing clients to more risk to draw those clients' attention to the fact that the terms do not accord with the recognized standard terms and conditions for estate agents. It may be recommended that the intended effect of the commission terms should be spelled out in more detail and/or in bold type.

31 It does seem to me that it would be desirable for consideration to be given as to what steps, if any, should be taken to protect the consumer in this area. In so saying, I must observe that this is the first such case to reach this court. I believe that that is because in Gibraltar agents do act reasonably and co-operate in order to reach a fair and reasonable solution when situations which affect clients adversely are encountered. I believe this to be so whatever the strict legal position.

32 Whatever else, it seems to me that openness in commercial dealings is generally to be encouraged and that clearer guidance would help to ensure that repetition of a situation such as has arisen in this case can be avoided. A recommendation that second agents warn their clients of the risk of double commission and that they advise disclosure of the situation to the first agent (in the absence of other circumstances which may, for instance, prejudice a sale) may assist. If, having received that advice, the client nevertheless with open eyes instructs the second agent to proceed, for whatever reasons, he would, of course, have to accept the consequences. At least the risk of resentment, ill-feeling and upset would be minimized and unseemly legal conflicts between agents would be avoided.

33 The above are not specific recommendations, save to say that I do think that relevant authorities might productively reconsider the position.

34 The defendant has counterclaimed in this case for a declaration that the claimant is in breach of contract. There is no counterclaim for damages or for a set-off. Despite Mr. Dumas's robust defence of that claim, I find it to lack merit. Such a declaration without more detail would be of little use to anyone. To spell out any breaches which I may have found would not add to the findings which would have been made in my judgment. If they were such as to disentitle the claimant to commission, the defendants would have achieved their purpose and would gain no more from the formal declaration. I accept that it is no longer necessary for damages to be claimed and that a declaration in appropriate circumstances may be sought in a free-standing application. Declaratory relief is, however, discretionary, though the discretion must clearly be exercised judicially. Mr. Dumas was unable to explain how this case might differ from any case in which a party is found to have been in breach of contract. Nor was he able to persuade me that it would provide any advantage to the defendants which they would not have as a result of the public findings which I might have made. I confess that I have never encountered such a counterclaim before and would discourage the unnecessary complication which raising claims for declarations with no apparent advantage to the party claiming them.

Conclusions

35 There will be judgment for the claimant in the sum claimed. It seems to me that the claimant is entitled to the contractual interest provided for in the agreement but I shall hear further argument. Mr. Dumas has not argued otherwise. I ask that counsel agree the amount if possible. The agreement also contains provisions concerning costs (which would normally follow the event). If the appropriate order for costs cannot be agreed, I shall hear counsel on that issue.

Order accordingly.