IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No: 26681/2009

In the matter between:

DG PREMIER PROPERTY CAPE (PTY) LTD

t/a DOGON GROUP Applicant

and

CHESTNUT HILL INVESTMENTS 260 (PTY) LTD First Respondent

GREAT FORCE INVESTMENTS 205 (PTY) LTD Second Respondent

Counsel for the Applicant B K Pincus SC (with him D Goldberg)

Instructed by Bowman Gilfillan Attorneys

Counsel for First Respondent: O Rogers SC (with him A Kantor)

Instructed by Bernadt Vukic Potash & Getz

No appearance for the Second Respondent

Court: Western Cape High Court

Judge: Griesel J

Heard: 13 October 2010

Judgment 27 October 2010

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and

CHESTNUT HILL INVESTMENTS 260 (PTY) LTD First Respondent

GREAT FORCE INVESTMENTS 205 (PTY) LTD Second Respondent

Court: GRIESEL J

Heard: 13 October 2010

Delivered: 27 October 2010

JUDGMENT

GRIESEL J:

[1] The applicant is an estate agency, claiming agent's commission arising from a property transaction entered into between the first and second respondents on 6 August 2009 in respect of erf 319, Clifton.

[2] The applicant took the somewhat unusual and bold step of launching its claim by way of motion proceedings. In the notice of motion, the applicant initially sought, against both respondents, an order that they each pay the applicant R1 million as commission upon transfer of erf 319 into the name of the purchaser.

[3] In its founding papers the applicant's main cause of action against the first respondent (the seller) was based on an alleged oral mandate. It relied, in the alternative, on the terms of an addendum to the deed of sale concluded between the first and second respondents on 6 August 2009. (The claim against the second respondent – the purchaser – has been settled after these proceedings had been instituted and its position is not relevant for purposes of this judgment.)

[4] There are various factual disputes between the parties relating to the main cause of action based on the oral mandate. In the view that I take of the matter, however, it is not necessary to consider those disputes in any detail, or to decide whether or not such disputes are *bona fide*, or to decide whether or not the matter should be referred for oral evidence or to trial. In my view, the matter can be decided on the papers with reference to the applicant's alternative cause of action based on clause 4.1 of the addendum to the deed of sale, which reads as follows:

"The seller shall pay to Dogon Group ("the agent") commission in the sum of R1 000 000 (inclusive of VAT) or such lesser amount as may be agreed between them in writing upon the transfer date of the property into the name of the purchaser. In addition, the purchaser shall pay the agent commission in the sum of R1 000 000 (inclusive of VAT) or such lesser amount as may be agreed between them in writing over and above the Property Price paid to the Seller, directly to the agent upon

registration of transfer (and after fulfilment of all the conditions precedent). Commission shall only be deemed to be earned by the agent and payable by the Seller and Purchaser upon registration of transfer.'

[5] The applicant contended that these provisions constituted an agreement for its benefit (*stipulatio alteri*), the benefits of which it had accepted. In its founding affidavit, the applicant referred to the above provisions and stated: 'To the extent necessary, applicant has accepted alternatively hereby accepts the benefits under the written sale agreement.'

In its answering affidavit the first respondent denied that the applicant had accepted 'the benefits flowing to it in terms of this agreement'. It continued: 'However, if it did so (which I deny), then it is only entitled to commission "upon registration of transfer". Transfer has not yet taken place.' Elsewhere, the first respondent denied, without elucidation, 'that it was open for applicant to accept those benefits in its founding affidavit. . .' It contended, further, that if the applicant did accept the benefits under the sale agreement (which it again denied), 'then applicant repudiated same by seeking to claim commission prior to the transfer of erf 319 Clifton to second respondent'.

[6] In reply, the applicant reiterated that it had accepted the benefits flowing to it in terms of the agreement and would have done so far sooner, had the first respondent not refused to provide the applicant with a copy of the agreement when called upon to do so. (Ms Dogon stated on behalf of the applicant that she saw the addendum for the first time when it was annexed to the second respondent's answering papers in these proceedings.)

[7] In argument before me, counsel for the first respondent did not persist with any of the 'defences' raised in the answering affidavit to this part of the applicant's claim. Instead, counsel submitted that the provisions of clause 4.1 do not constitute an agreement for the benefit of the applicant, as contemplated by our law. Counsel relied in this context especially on the following *dictum* from the judgment of Smalberger JA in *Total South Africa (Pty) Ltd v Bekker NO*:[1]

'As was pointed out by Schreiner JA in *Crookes NO and Another v Watson and Others* 1956 (1) SA 277 (A) at 291B-C, "a contract for the benefit of a third person is not simply a contract designed to benefit a third person; it is a contract between two persons that is designed to enable a third person to come in as a party to a contract with one of the other two". The mere conferring of a benefit is therefore not enough; what is required is an intention on the part of the parties to a contract that a third person can, by adopting the benefit, become a party to the contract.' [2]

[8] As always, however, each case must be decided on its own facts; or, as it was put in *George Ruggier & Co v Brook*:[3]

'It is entirely a question whether there is an intention that the third party can, by adoption of the promise, become a party to the contract in which it is embodied.'

[9] In the *Total* case, *supra*, the agreement in question was held not to constitute a *stipulatio alteri*, *inter alia*, because there was no express wording to such effect, nor was there any provision for acceptance by the third party of any benefit thereunder. Furthermore, the terms of the

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[1] 1992 (1) SA 617 (A) at 625B–G.
[2] See also *Joel Melamed & Hurwitz v Cleveland Estates (Pty) Ltd* 1984 (3) SA 155 (A) at 172B–F; *Unitrans Freight (Pty) Ltd v Santam Ltd* 2004 (6) SA 21 (SCA) para 14.
[3] 1966 (1) SA 17 (N) at 23H. See also *Consolidated Frame Cotton Corporation Ltd v Sithole & others* 1985 (2) SA 18 (N) at 24F.

agreement did not support a 'necessary implication' to that effect. In any event, so it was held, there was no evidence that the third party had ever accepted the benefit at a time when it was open for him to do so.[4]

[10] In the *George Ruggier* case, *supra*, the purchaser of fixed property addressed a letter to the agents of the seller, who were acting on the latter's behalf, in which the purchaser offered to buy the property at a stated figure and to pay half the agent's commission. The seller accepted the offer. The agent subsequently sued the purchaser directly, based on the undertaking. The court found –

'that it was intended by all concerned that this undertaking of the defendant could be adopted by the plaintiff so as to give him a right of action against the defendant in the event of the sale going through on the terms proposed [by the purchaser]'.[5]

A direct contract between the agent and the purchaser came into being upon acceptance by the agent of the benefit.

[11] In the present matter, counsel for the respondent argued that the provisions of clause 4, quoted above, 'constituted merely a distribution of the risk of commission between [the first and the second respondents] and had nothing to do with conferring any benefits on the applicant'. I disagree. From the express terms of the agreement it is clear to me that the agreement was intended to be one for the benefit of the applicant where it records in peremptory terms that each of the seller and the purchaser 'shall pay' to the applicant commission in the specified sum of R1 million. (It is common cause that the second respondent had in fact

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[4] At 625G–I.
[5] At 24G–H.

reached agreement with the applicant that its portion of the commission would be reduced to R500 000 and that this amount had been paid by the second respondent.) The sole purpose of the addendum, signed on the same day as the main deed of sale, was to regulate the question of commission payable to the applicant and the respective contributions by the buyer and seller. In this regard, it is noteworthy that, in concluding the addendum, the first and second respondents actually agreed to share the liability for commission on almost identical terms as was originally proposed by the first respondent in the first draft of the deed of sale, forwarded to the applicant during April 2009 for submission to the second respondent.

[12] Counsel for the first respondent also submitted that –

'there is one circumstance which is absolutely destructive of an implication in the applicant's favour: on the applicant's own version, the terms of the sale were deliberately concealed from it. If the intention of the respondents on 6 August 2009 had been that the provisions regarding commission were for the applicant's benefit, and if their intention had been that the applicant could acquire rights thereunder by accepting the benefit, they would not have kept the agreement from Dogon.'

[13] Counsel for the applicant pointed out, on the other hand, that this argument would have carried greater weight had the first respondent at all times been bona fide in its dealings with the applicant which, according to the applicant, was not the case. In my view, this argument is not without merit. However, it is not necessary for me to make a specific finding to this effect. Suffice it for purposes hereof to state that the first respondent has not persuaded me that the inference it seeks to draw from the first

respondent's withholding from the applicant of the signed agreement is in fact the most probable one.

[14] Further support for the applicant's interpretation of clause 4.1 is to be found in the affidavits of both respondents herein. In its answering affidavit the second respondent – on at least five occasions – expressly referred to clause 4.1 as a *'stipulatio alteri'*. In an aborted application for leave to file a further affidavit, the first respondent's attorney of record, likewise, repeatedly referred to clause 4.1 as a *'stipulatio alteri'*. Thus, where both parties to the addendum at one stage recognised the provisions of clause 4 for what they are, it would, in my view, be 'absurd' now to attribute to the clause a different interpretation, as contended for by the first respondent.[6]

[15] Had the applicant elected to reject the benefit stipulated in terms of the addendum, it could of course (if so advised) have proceeded against the first respondent for the full amount of the claim in terms of the oral mandate on which it also relied. However, it elected to accept the benefit stipulated between the buyer and seller and I can think of no reason why such election should not be enforced.

Conclusion

[16] It follows that the applicant is entitled to an order in the following terms:

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[6] Cf *Aussenkehr Farms (Pty) Ltd v Trio Transport CC* 2002 (4) SA 483 (SCA) paras 23, 25.

The first respondent is ordered to pay to the applicant –

(a) **the amount of R1 million (one million Rand);**

(b) **interest on the said amount *a tempore morae* to date of payment; and**

(c) **costs of suit, including the costs of two counsel.**

B M GRIESEL
Judge of the High Court