**COMMONWEALTH OF THE BAHAMAS**
**IN THE COURT OF APPEAL**
**SCCivApp No. 118 of 2025**

**B E T W E E N**

**DIANE HOLOWESKO**

**Appellant**

**AND**

**FABIO MANTEGAZZA**

**First Respondent**

**AND**

**THE BOHEMIAN PTC LTD**

**Second Respondent**

**BEFORE:** **The Honourable Mr. Justice Evans, P**
**The Honourable Sir Ian Winder, CJ**
**The Honourable Mr. Justice Smith, JA**

**APPEARANCES:** **Mr. Peter Village, KC, with Ms. Gail Lockhart Charles, KC, and Ms. Tatyanna Maynard, Counsel for Appellant**

**Mr. Marco Turnquest, with Ms. Chizelle Cargill and Ms. Sashae Duncan, Counsel for Respondents**

**DATES:** **18 June 2026; 15 July 2026; 28 October 2026**
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*Civil Appeal – Contract – Agency – Estate agent's commission - Unilateral contracts - Implied terms – Unjust enrichment – Quantum meruit – Fiduciary duty – Conflict of interest –Failure to meet contractual deadline – Whether agent entitled to commission following subsequent sale - Whether breach of fiduciary duty disentitled agent to commission*

Harbour House, an extensive waterfront property located in Lyford Cay, New Providence, The Bahamas, was placed on the market for sale. A friend of the First Respondent knew that he was interested in purchasing a property in The Bahamas and recommended that he contact the Appellant, a real estate agent, to arrange a viewing of Harbour House. The Appellant met with the First Respondent and accompanied him to view the property. Acting as agent for the purchaser, the Appellant's position was that she initially agreed to a commission of 6% plus VAT, which she later reduced to 4% plus VAT.

The Appellant claimed commission, which she alleged was due to her as agent for the purchaser in respect of the sale of Harbour House, which the Respondents purchased for $58 million.

The Appellant alleged that there was an agreement under which she would be paid a commission of 4% plus VAT upon completion of the sale, amounting to $2,320,000.00 plus VAT. She relied upon an exchange of emails and telephone calls as evidence of the agreement. Alternatively, the Appellant sought to rely on an implied term entitling her to payment since the Respondents had benefited from her services. In the further alternative, she sought remuneration on the basis of unjust enrichment and/or quantum meruit.

The Respondents maintained that the agreement was conditional upon the Appellant securing a deal by 8 April 2022 at a price of $57 million. As this was not achieved, they denied that any commission was payable. They further contended that the eventual sale was negotiated directly through the vendor's agent, without the Appellant's involvement. Alternatively, they alleged that she breached her fiduciary duties by offering the property to a competing bidder and therefore was not entitled to claim any commission on the sale.

The trial judge dismissed the Appellant's claim. The Appellant appealed, while the Respondents cross-appealed against aspects of the trial judge's reasoning.

*Held:* Appeal dismissed. The trial judge's orders are affirmed. The Appellant is ordered to pay the Respondents' costs of the appeal, certified fit for two (2) junior counsel, to be taxed by the Registrar in default of agreement.

The evidence revealed that the Appellant was entitled to commission only if a deal was struck by 8 April 2022 at the price of $57 million. Having failed to achieve this, she was not entitled to commission on the subsequent sale of Harbour House through the vendor's agent at the price of $58 million. The agreement was not to pay commission merely if the Appellant used her best endeavours.

The Appellant had not pleaded any implied terms before the trial judge and had raised the argument for the first time in submissions, making it unfair to advance it on appeal. The trial judge found the Respondent's witness credible, and there was no evidence of any dirty trick, underhandedness or collusion to deprive the Appellant of commission.

The Appellant could not claim reasonable remuneration on a quantum meruit basis, having failed to secure a deal on the agreed terms. In the alternative, a claim based on unjust enrichment was not maintainable on the present facts.

*Alpha Trading v Durham Pattern* [1981] 2 KB 290, mentioned
*Bahamasair Holdings v Messier Dowty Ltd* [2018] UKSC 25, applied
*Balwah (by Shelly-Ann Balwah, his Mother and next friend) and another v Abdulla (Trinidad & Tobago) and other cases* [2026] UKPC 31, applied
*Barton and Others v. Morris and Another* [2023] UKSC 3, applied
*C Christo & Co Ltd v. Marathon Advisory Service* [2015] EWHC 1971 (QB), mentioned
Dennis Reed Ltd v Goody [1950] 2 KB 277, applied
Luxor (Eastbourne) Ltd v. Cooper [1941] AC 108, applied
*Volpi v Volpi* [2022] EWCA Civ 464; [2022] 4 WLR 48, applied

# J U D G M E N T

**Judgment delivered by the Honourable Mr. Justice Smith, JA:**

## Introduction

**1.** The underlying action on this appeal concerns a claim by the Appellant for commission allegedly due to her as agent for the purchaser, upon the sale of a valuable property at Lyford Cay, New Providence.

**2.** The Second Respondent, the Bohemian PTC Ltd ("the Trust"), was the intended purchaser of the property on behalf of its principal, Fabio Mantegazza, who is the First Respondent.

**3.** The property at Lyford Cay consisted of an extensive waterfront property known as Harbour House and also an extensive beachfront property known as the Bee's Nest (both collectively referred to as 'Harbour House'). Harbour House was eventually purchased through the vendor's agent, George Damianos, at the price of $58 million BSD.

**4.** The trial judge (Senior Justice Deborah Fraser) (as she then was) dismissed the Appellant's claim and ordered her to pay the Respondents' costs.

**5.** The Appellant now appeals the decision of the trial judge.

**6.** While they do not contest the decision of the trial judge to dismiss the Appellant's claim, the Respondents have cross-appealed against parts of the reasoning of the trial judge in coming to her decision.

**7.** For reasons that will appear in this judgment, I would dismiss this appeal and order the Appellant to pay the costs of the Respondents, certified fit for two (2) experienced junior counsel to be taxed by the Registrar in default of agreement.

## Factual Summary

**8.** The following factual summary is not meant to be an extensive statement of the facts. I only set out such matters as would give a basic understanding of the dispute between the parties. Indeed, the Record of Appeal comprises more than 1,000 pages, of which more than 500 pages represent the evidence and transcripts of the proceedings before the trial judge.

**9.** The Appellant alleged that the Respondents agreed to pay her a commission of 4% plus VAT upon the sale of Harbour House. The agreed value of the sale was $58 million, so that the commission she was entitled to was the sum of $2,320,000.00 plus VAT. This agreement was

evidenced by the exchange of numerous emails and the oral evidence of phone calls between the parties.

**10.** In the alternative, the Appellant alleges that there was an implied term to the effect that the Respondents would not act in such a way as to prevent her from earning her commission, having benefitted from her services. Further, since the eventual sale was concluded as a result of the benefit of her services, the Respondents' action of concluding a sale directly with the vendor's agents was a breach of this implied term.

**11.** In the further alternative, the Appellant claims to be entitled to a payment for her services according to the doctrines of unjust enrichment and/or quantum meruit.

**12.** The Respondents' case is that the Appellant was engaged upon the expressed conditions that she would secure the sale of Harbour House to them by 8 April 2022 and at the price of $57 million. The Appellant failed to achieve this and therefore she is not entitled to any commission, especially since the subsequent sale of Harbour House was effected directly with the vendor's agent, George Damianos, and she had no input into that sale. There is therefore no room for any implied term nor for the application of any doctrine of unjust enrichment and/or quantum meruit to justify any claim on the Appellant's behalf.

**13.** The Respondents also contend that the Appellant was in breach of her fiduciary duties as an agent in offering Harbour House to a competing bidder. Therefore, she is not entitled to any commission as a result of her breach of fiduciary duty to the Respondents.

**Summarised Chronology**

**14.** The parties each submitted detailed chronologies of the email and phone exchanges between them and their representatives. These chronologies spanned about 18 pages, and no useful purpose would be served in repeating them. I would only summarize those aspects of the chronology which create a general picture of the factual background to this dispute.

**15.** In March 2022, one Luc Van Hoff, who owned a property at Lyford Cay, contacted his friend, Mr. Fabio Mantegazza, the First Respondent, about the fact that a waterfront property at Lyford Cay, known as Harbour House was now on the market. Mr. Van Hoff, was aware that the First Respondent was looking to purchase property in the Bahamas. Mr. Van Hoff also recommended that the First Respondent contact the Appellant to arrange a viewing of the property.

**16.** On 4 April 2022, the Appellant made contact with the First Respondent. The Appellant also informed the First Respondent about the availability of the Bee's Nest beachfront property and arranged a viewing of the two (2) properties for the following day, 5 April 2022, when the First Respondent would be visiting The Bahamas.

**17.** On 5 April 2022, the Appellant met the First Respondent and his entourage at Jet Nassau and escorted them in limousines to Lyford Cay to view the Harbour House properties.

**18.** On 6 April 2022, the Appellant sent documents about the sale of the Harbour House properties to the First Respondent and his representatives, namely, Katie Booth, Ian Black and Moira Butcher. In those documents, the Appellant stated, inter alia, that the selling price of the Harbour House properties was $58.5 million and her commission at 6% was in the sum of $3,510,000.00 plus VAT at 10% in the sum of $351,000.00. There were also other emails and telephone conversations between the parties on that day. The Respondents' agents (inter alia) expressed surprise at the purchaser having to pay commission since, in their joint experience, it was the vendor who paid the real estate commission. The Respondent and his agents also expressed the view that the commission at 6% was too high.

**19.** On 7 April 2022, there were further exchanges of emails and telephone conversations between the parties. Among the matters discussed was the Appellant's agreement to drop her commission to 4% plus VAT, amounting to 2,340,000.00 and $234,000.00, respectively. In her written submissions of 24 June 2026, the Appellant, at several paragraphs, described this as the effective date of her commission agreement with the Respondents. However, in oral submissions before us, Counsel for the Appellant abandoned this allegation of an agreement made on 7 April 2022 and accepted the date of the agreement as 8 April 2022. The Respondent and their agents stuck to their position that this 'offer' of 7 April 2022 had to be discussed among them and agreed to. There was no agreement to pay commission.

**20.** On 8 April 2022, there was a flurry of emails and telephone exchanges between the Appellant and the Respondents. Chief among them were the following:

I. At 12.49 Katie Booth, the representative of a corporate director of the trust notified the Respondent as follows:

> **"Dear Diane**
>
> **Thanks for speaking with me earlier**
>
> **<u>Your commission in the sum of 4% is agreed subject to satisfactory conclusion of a deal today at $57m.</u> We have instructed David Johnstone to amend the Offer Letter accordingly and we will forward it to you for delivery to George Damianos.**
>
> **Best regards**
>
> **Katie." (Emphasis added)**

II. At 12.58, the Appellant responded:

> **"Dear Katie**
>
> **Thank you for your email**

**As reiterated in our telephone conversation this morning. I had previously been asked by a client to arrange a viewing of Harbour House this weekend. As you know, while you and I were speaking I received a follow up email from that client. A showing of Harbour House has been arranged for him tomorrow.**

**<u>I will certainly do my best to conclude a sale today</u> but, as you might suspect, it would be unusual for the owners to agree to a deal at below full price knowing they have a highly qualified potential buyer scheduled to tour the property tomorrow.**

**The sooner I receive the offer, the sooner I can begin the negotiation process.**

**Diane" (Emphasis added)**

III. The First Respondent signed a letter of intent along the lines of the 12.49 email from Katie Booth.

IV. At 15.57 the Appellant sent an email to Moira Butcher, one of the First Respondent's legal advisers, on the following terms:

**"Dear Moira**

**I confirm receipt of the Offer Letter**

**Please confirm that the terms of the Letter and my agreed commission are not subject to satisfactory conclusion of a deal today.**

**Diane"**

V. At 16.09 Moira Butcher responded to this email in the following terms:

**"Dear Diane**

**I believe Katie has made it clear that we expect every effort to be made today to get this deal agreed subject to formal contract.**

**Kind regards**

**Moira"**

**21.** The Respondent and his agents contend that they did not want to get into a bidding war with another prospective purchaser of Harbour House who was due to visit the properties on 9 April 2022. That is why they stipulated for an agreement with the purchaser "today" (8 April 2022), at the reduced price of $57 million as opposed to the original price of $58.5 million.

**22.** Eventually, one Ian Black, the representative of another corporate director of the Trust, contacted the seller's agent, George Damianos, copying all the parties, to the effect that if the vendor did not accept the offer of $57 million by 10 p.m., the offer would be withdrawn. Another series of emails followed this communication, and a lot of testimony covered the events following the email.

**23.** The vendors did not agree to the sale of Harbour House on 8 April 2026. In fact, the vendor's agent, George Damianos, indicated that he did not see Ian Black's email on 8 April 2022 as he had been out to dinner without his mobile phone. He only saw this email on the morning of 9 April 2022.

**24.** On 9 April 2026, Ian Black negotiated directly with George Damianos for the purchase of Harbour House at the price of $58 million.

**25.** On 11 April 2022, the First Respondent and the vendor signed a letter of intent for the purchase of Harbour House at $58 million.

**26.** On 12 July 2022, the trust completed the purchase of Harbour House through the company HH Ltd.

**The Trial Judge's decision**

**27.** In her written judgment, the trial judge set out the relevant facts for her consideration and defined the issues that were before her. The relevant issue to this appeal was stated at paragraph 5 (b), namely: **"whether the Claimant (Appellant) is entitled to a commission on the purchase of the Harbour House and beachfront property?"**

**28.** The trial judge then went on to summarise the evidence of the parties and made her findings on the facts. In summary, the trial judge preferred the evidence presented by the Respondents over the evidence of the Appellant.

**29.** Specifically, the trial judge found that the Appellant's evidence was:

> **"inconsistent and evasive regarding communication with Katie Booth and Ian Black and her understanding of the agreement terms or the conflict in representing two buyers for the property."**

**30.** The trial judge found that the evidence of the First Respondent was **"consistent and credible, and his evidence was not challenged in cross-examination."**

**31.** Ian Black's evidence was **"mostly unchallenged"** and the trial judge **"found him to be a credible witness."**

**32.** Katie Booth's evidence was found to be credible.

**33.** The trial judge then set out the submissions of the parties and the general law to be applied.

**34.** Thereafter, the trial judge set out her analysis of the law and the facts.

**35.** The relevant analysis and conclusions considered the application of the law with respect to estate commission contracts as set out in the cases of **Luxor (Eastbourne) Ltd v. Cooper** [1941] AC 108, **Barton and Other v Morris and another** [2023] UKSC 3 and **Dennis Reed Ltd v Goody** [1950] 2 KB 277.

**36.** The trial judge found as a fact that the Appellant was not the effective cause of the sale. Further, that the agreement between the parties was subject to **"the strict express condition"** of the acceptance of the offer by the vendor by 10 p.m. Since this was not fulfilled, the Appellant had no entitlement to receive any commission.

**37.** Further, at paragraph 50 of the judgment, the trial judge found that the Appellant was:

> **"under a fiduciary duty not to place herself in a position where her responsibilities to the Defendants' (Respondents) conflicted with the (Respondents') Defendants interest."**

She concluded that **"the Claimant's (Appellant's) representation of two principals with competing interests amounts to a conflict of interest."**

**38.** At paragraph 51, the trial judge rejected the Appellant's claim based on unjust enrichment/ quantum meruit as being contrary to their express bargain, and further there was no evidence of the market value of the Appellant's services to establish her claims.

**39.** At paragraphs 52 and 53 of the judgment, the trial judge summarised her reasons as stated above for rejecting and dismissing the Appellant's claim and ordered her to pay the costs of the Respondents.

**Analysis**

**40.** The Appellant has proposed five (5) grounds of appeal, and I will deal with these in sequence.

**Ground 1 - "The judge erred in law in construing the terms of the contract between the parties and by holding that the obligation to pay commission was subject to the**

**Appellant procuring an agreement for the purchase of the Property (i) by 10 pm on 8 April 2022 (ii) at a price of $57m"**

**41.** This is the central ground of the Appellant's appeal, and the outcome of the appeal is largely dependent on the determination of the ground.

**42.** The Appellant contends that the trial judge should have found that the terms of the agreement between the parties was that the Appellant was required only to use her best endeavours to obtain a sale of Harbour House to the purchaser on 8 April 2022 at the price of $57 million. Further, the evidence shows that the Appellant did use her best endeavours to secure such a sale and was therefore entitled to her commission of 4% on the proposed sale at $57 million.

**43.** The Respondents' cross-appeal mostly deals with the findings of the trial judge on this ground. The Respondents propose that the proper conclusion that the trial judge should have arrived at was that the Appellant was not entitled to commission due to her failure to secure an agreement for the sale of the Harbour House properties on or before 8 April 2022. The 10 p.m. deadline on 8 April 2022 was inconsequential. Further, rather than finding that the sale was subject to the conditions precedent of a deal by 8 April 2022 for $57 million, the trial judge should have found that the agreement between the parties was a unilateral contract that was not fulfilled.

**44.** In considering the issue, the trial judge cited three (3) cases which I also find to be very relevant to the determination of this ground of appeal. The first of these is the long-standing authority from the House of Lords in respect of agency commission cases. This is the case of **Luxor (Eastborne) Ltd v Cooper** (above). This case demonstrates that while the general principles of agency law are applicable to such commission contracts, they are generally one way or, as the more modern terminology asserts, unilateral contracts. At page 124 of the decision, Lord Russell stated:

> **"A few preliminary observations occur to me. (1.) Commission contracts are subject to no peculiar rules or principles of their own; the law which governs them is the law which governs all contracts and all questions of agency. (2.) No general rule can be laid down by which the rights of the agent or the liability of the principal under commission contracts are to be determined. In each case these must depend upon the exact terms of the contract in question, and upon the true construction of those terms. And (3.) contracts by which owners of property, desiring to dispose of it, put it in the hands of agents on commission terms, are not (in default of specific provisions) contracts of employment in the ordinary meaning of those words. <u>No obligation is imposed on the agent to do anything. The contracts are merely promises binding on the principal to pay a sum of money upon the happening of a specified event, which involves the rendering of some service by the agent.</u> There is no real analogy between such contracts,**

**and contracts of employment by which one party binds himself to do certain work, and the other binds himself to pay remuneration for the doing of it." (Emphasis added)**

**45.** Viscount Simon L.C. referred to three (3) categories of cases in respect of such contracts, namely (i) those where commission is promised for merely introducing a person who makes an offer of not less than a stated sum to his principal, (2) cases where property is put in the hands of the agent to dispose of the same (usually vendor's agents), and (3) cases where the agent is promised commission only upon the completion of the transaction between the offeror and the principal. Viscount Simon stated at page 120:

**"It may be useful to point out that contracts under which an agent may be occupied in endeavouring to dispose of the property of a principal fall into several obvious classes. There is the class in which the agent is promised a commission by his principal if he succeeds in introducing to his principal a person who makes an adequate offer, usually an offer of not less than the stipulated amount. If that is all that is needed in order to earn his reward, it is obvious that he is entitled to be paid when this has been done, whether his principal accepts the offer and carries through the bargain or not. No implied term is needed to secure this result. There is another class of case in which the property is put into the hands of the agent to dispose of for the owner, and the agent accepts the employment and, it may be, expends money and time in endeavouring to carry it out. Such a form of contract may well imply the term that the principal will not withdraw the authority he has given after the agent has incurred substantial outlay, or, at any rate, after he has succeeded in finding a possible purchaser. Each case turns on its own facts and the phrase "finding a purchaser" is itself not without ambiguity. Inchbald's case (1) might, I think, be regarded as falling within this second class. <u>But there is a third class of case (to which the present instance belongs) where, by the express language of the contract, the agent is promised his commission only upon completion of the transaction which he is endeavouring to bring about between the offeror and his principal. As I have already said, there seems to me to be no room for the suggested implied term in such a case. The agent is promised a reward in return for an event, and the event has not happened. He runs the risk of disappointment, but if he is not willing to run the risk he should introduce into the express terms of the contract the clause which protects him</u>." (Emphasis added)**

**46.** The present matter does not come under the first two (2) categories of cases cited above, but the 3rd category. In this category of case, as the quote above indicates, Viscount Simon L.C.

noted the high risk/reward factor of these unilateral contracts. This view was also echoed by Lord Russell at page 125, where he stated:

> **"The agent takes the risk in the hope of a substantial remuneration for comparatively small exertion. In the case of the plaintiff his contract was made on September 23, 1935; his client's offer was made on October 2, 1935. A sum of 10,000*l.* (the equivalent of the remuneration of a year's work by a Lord Chancellor) for work done within a period of eight or nine days is no mean reward, and is one well worth a risk. There is no lack of business efficacy in such contract, even though the principal is free to refuse to sell to the agent's client."**

**47.** Indeed, in the present matter, if her efforts to conclude a sale of the Harbour House properties were successful, the Appellant would have obtained a substantial reward of $2.32 million for about 1 week of work (a sum that is greater than 10 years' of the current salary of an appellate judge in the Bahamas).

**48.** Because of its relevance to the appeal, I also cite parts of this decision in respect of such one way/unilateral contracts which negate (a) the implication of terms which bind a principal not to refuse to complete a sale to a client who the agent introduces to the principal or (b) to pay a commission for work done in and about such an aborted sale. Lord Russell stated at page 125:

> **"I do not assent to the view, which I think was the view of the majority in the first Trollope case (1), that a mere promise by a property owner to an agent to pay him a commission if he introduces a purchaser for the property at a specified price, or at a minimum price, ties the owner's hands, and compels him (as between himself and the agent) to bind himself contractually to sell to the agent's client who offers that price, with the result that if he refuses the offer he is liable to pay the agent a sum equal to or less than the amount of the commission either (a) on a quantum meruit or (b) as damages for breach of a term to be implied in the commission contract. <u>As to the claim on a quantum meruit, I do not see how this can be justified in the face of the express provision for remuneration which the contract contains.</u> This must necessarily exclude such a claim, unless it can (upon the facts of a particular case) be based upon a contract subsequent to the original contract, and arising from some conduct on the part of the principal.**
>
> **<u>As to the claim for damages, this rests upon the implication of some provision in the commission contract, the exact terms of which were variously stated in the course of the argument, the</u>**

> **object always being to bind the principal not to refuse to complete the sale to the client whom the agent has introduced.**
>
> **I can find no safe ground on which to base the introduction of any such implied term." (Emphasis added)**

**49.** The second case cited by the trial judge is the majority decision in the more recent authority from the U.K. Supreme Court in the case of **Barton and Another v. Morris and Another** (above). The facts of that case, which bear close resemblance to the current appeal, are that an oral agreement was reached to the effect that if a property should be sold by its owner for £6.5 million to a buyer whom an individual introduced to the owner, the individual would be paid a fee of £1.2 million. A buyer introduced by the individual did offer £6.5 million, but after issues with respect to planning permission arose, the price paid for the property was £6 million. The Supreme Court upheld the decision of the trial judge that the individual had no claim to the 'fee' for his services in contract or unjust enrichment. While the individual was acting as a vendor's agent in that case, the fact remains that the eventual sale was for the lower price of £6 million. In the present matter, the purchaser's agent was able to secure a sale at a reduced price of $57 million; however, the eventual sale price was not the reduced cost/price to the vendor of $57 million but the increased price of $58 million.

**50.** At paragraph 17 of the decision in **Barton**, Lady Rose used the terminology of unilateral contracts when she stated:

> **"17. It is therefore clear to me that the judge did not find that it was an express term of the agreement that Mr. Barton would be paid a fee if the property was sold to Western for less than £6.5 million. The contract found by the judge was, thus, a straightforward, unilateral contract. Mr. Barton was not under any obligation to make an introduction of a potential buyer to Foxpace in the sense that if, after he had concluded the agreement with Foxpace, he had decided for whatever reason not to disclose Western's name to Foxpace, he would not have been in breach of any contractual obligation. But if he did make the introduction and if Foxpace did sell Nash House to Western for £6.5m, then Foxpace would be in breach of the express terms of the agreement if they failed to pay him £1.2 million. That was the extent of the express agreement reached by the parties." (Emphasis added)**

Further, at paragraphs 35 and 37, Lady Rose expanded upon this by stating:

> **"35. Further, even without that factor, an agreement whereby someone contracts for a higher than normal payment on the fulfilment of a condition and is prepared to take the commensurate risk of getting nothing if the condition is not fulfilled is not a bizarre or uncommercial contract.**

…

**37. That is what Mr. Barton bargained for here. What would be strange, in my judgment, would be for Foxpace to agree to what would become a one-way bet for Mr. Barton; that he should receive a fee of almost three times the reasonable fee if the sale price were £6.5 million or more and still receive the full reasonable fee of £435,000 if the sale price were something less than that. I do not see what benefit there would be for them in concluding such an agreement."**

**51.** This view of the estate agents' contracts as being generally considered unilateral contracts has also been espoused by academics and in standard practitioners' texts. (See e.g. Chitty on Contracts 35th edition Volume 1 at paragraph 4 -109 and Bowstead & Reynolds on Agency 23rd Edition at paragraph 7-036)

**52.** The third case relied on by the trial judge was **Dennis Reed Ltd v. Goody** [1950] 2 KB 277. This was a decision of the Court of Appeal of the U.K., where the headnote sums up the unanimous decision of the court:

**"The defendants, the owners of a dwelling-house, signed a contract with the plaintiff house agents which was in the following terms: "I hereby instruct you to find a person ready, able and willing to purchase the above property for .... 2,825l. or such other price to which I shall assent. Upon your introducing such a person I will pay you commission" [in accordance with a scale set out]. The plaintiffs introduced H., who signed an agreement prepared by the plaintiffs to buy the house for a sum acceptable to the defendants, but subject to the vendors' agreeing to indemnify him against future road charges. The defendants took time to consult their solicitor before themselves signing the agreement. During the delay which resulted H. withdrew his offer to purchase. The plaintiffs claimed to be entitled to their commission as having introduced "a person ready, able and willing to purchase."**

**Held, per totam curiam, that, as the person introduced had withdrawn from the negotiations before any binding contract had been made, and the defendants had never been in default, the plaintiffs had not introduced a person "ready, able and willing to purchase" within the meaning of the contract of agency, and were therefore not entitled to commission.**

**Per Denning L.J. and Hodson J. The words "upon your introducing" were equivalent to "in consideration of your**

> **introducing," and did not indicate that commission was payable at the time of introduction.**
>
> **Per Denning L. J. The common understanding of men being that commission is payable out of the purchase price, if the agent desires to bind the principal to pay commission not only on sales but also on offers, he must use clear and unequivocal language to that effect, otherwise either the purchaser or the vendor may withdraw at any time before a binding contract is made, and no commission will be payable; and, even when a binding contract is made, if the purchaser fails to perform the contract, no commission will be payable unless the vendor recovers in an action for specific performance or in an action for damages; but he is not bound to bring any action against the purchaser. Commission, however, will be payable if the vendor fails to complete and the purchaser remains ready, able and willing to complete."**

**53.** In the present matter, the dispute between the parties in relation to the agency contract was whether, as the Respondents contend, it was the standard unilateral contract whereby the Appellant was only to receive a commission upon a deal being reached between the Respondents and the vendor "today", (i.e. 8 April 2022) at the reduced price of $57 million? Alternatively, as the Appellant contends, was it an agreement for the Appellant to use her best endeavours to secure a deal with the vendor with respect to the Harbour House properties by 8 April 2022 at the price of $57 million?

**54.** This was essentially a question of fact for the trial judge, based upon the documentary and oral testimony before her.

**55.** The trial judge preferred the evidence of the Respondents over that of the Appellants. That evidence, especially that of Katie Booth, who the trial judge found credible, was that Ms. Booth clearly made it known to the Appellant orally and confirmed by email that the commission of 4% was only payable if a deal had been struck by "today" (8 April 2022) at a price of $57 million, for the Appellant to earn a commission. Since this did not occur, and based on the case law she considered, the trial judge was entitled to reject the Appellant's claim.

**56.** This Court has consistently held that it would not overturn findings of fact of a trial judge unless they were "plainly wrong", even if this Court may have come to a different conclusion (See generally: **Bahamasair Holdings v Messier Dowty Ltd** [2018] UKSC 25 at paragraphs 33-36)

**57.** Having examined the judgment of the trial judge, she gave adequate reasons for preferring the Respondents' evidence (I will expand upon this later in this judgment in considering Ground 5 below).

**58.** I see no reason to overturn the finding of fact by the trial judge that this was not a case where, as the Appellant contends, the parties agreed that the Appellant was entitled to a commission upon using only her best endeavours to strike a deal by 8 April 2022 at the price of $57 million. The agreement arrived at between the Appellant and the Respondents was for a payment of a commission upon striking of a deal "today" (8 April 2022) at the price of $57 million.

**59.** I also agree with the cross-appeal of the Respondents that Ian Black's attempt to impose a 10 p.m. deadline on the deal was inconsequential for the following two (2) reasons.

**60.** First, on the facts of this case, this deadline for completion was a deadline purportedly communicated to the vendor, for the vendor to complete an agreement by 10 p.m. on 8 April 2022. However, the uncontradicted evidence is that the vendor, through its agent, never received this "ultimatum" on 8 April 2022, through no fault or collusion with the Respondents. The vendor's agent had been out to dinner without his mobile phone and did not see Ian Black's email until the following morning, 9 April 2022. By that time, it was not possible to strike a deal by 8 April 2022.

**61.** Secondly, this email was sent at 10:37 p.m. on 8 April 2022, which was well after the terms for the payment of commission of 4% on obtaining an agreement for a sale today (8 April 2022) at $57 million had been arrived at. This unilateral attempt to impose a new term to a completed agreement was in any event ineffective to vary the agreement arrived at earlier that day.

**62.** In the circumstances, I am of the view that the trial judge did not err in the construction of the terms of the agreement between the parties as the Appellant alleged in Ground 1 of this appeal.

**Ground 2 - "The Judge erred in law and/or failed to make relevant factual findings and/or failed to give adequate reasons for her conclusion that A was not entitled to commission on the purchase of the Property in accordance with the terms of the Agreement."**

**63.** In her written submissions, the Appellant raises three (3) findings that she alleges the trial judge should have made, which would entitle the Appellant to judgment. I summarise these below:

I. That the obligation to pay commission upon completion of the sale flowed from the introduction to the property.

II. That the Appellant was the effective cause of the sale.

III. That there was no conflict of interest/breach of fiduciary duty in representing two (2) principals with competing interests.

*(i) The obligation to pay commission upon the introduction to the property.*

**64.** As stated in my analysis of Ground 1 above, the issue of when the obligation to pay commission arose depended upon the agreement between the parties. As I have already found, the trial judge properly decided that the Respondents' evidence was preferred. This evidence established that the agreement to pay commission on any sale arose only if a deal was struck between the vendor and the Respondents by 8 April 2022 at the price of $57 million. This was not done; therefore, the Appellant was not entitled to any commission. More specifically, on the facts as found by the trial judge there was no obligation on the Respondents to pay any commission upon the eventual completion of the sale between the vendor and the Respondents, which occurred after 8 April 2022 and at the price of $58 million.

*(ii) The effective cause of the sale*

**65.** This is an attack upon paragraph 49 of the judgment of the trial judge where the trial judge found, for the reasons stated therein, that the Appellant's efforts were not the effective cause of the sale.

**66.** In coming to this finding, the trial judge was dealing with the arguments raised by the Appellant before her. However, those arguments, in my humble view, took the Appellant's case no further. Bearing in mind the case law that I cited in my analysis of Ground 1, this was a unilateral contract which had to be observed according to its terms. If these terms were not met, the Appellant would not be entitled to any commission. The Appellant was undertaking a high risk venture for a potentially very high reward. This agreement was to secure a deal between the vendor and the Respondents by 8 April 2022 at the price of $57 million. It was not an agreement to pay commission if the Appellant used her best endeavours to secure a deal. The Appellant undertook a high risk venture for a very high potential reward, and having failed to achieve the agreed result, she cannot rely on her efforts in and about the risky venture to conclude a deal by 8 April for $57 million to secure the payment of any commission. The issue of whether she was the effective cause of the eventual sale between the vendor and the Respondents was irrelevant to her entitlement to be paid a commission.

**67.** Further, as the authorities indicate, if the Appellant had desired to get commission on any other basis, like upon eventual completion of a sale between the vendor and the Respondents because of her alleged inputs, the onus was on the Appellant to make this part of the agreement with her principals (the Respondents) in unequivocal terms. The Appellant failed to make any such express or unequivocal agreement with the Respondents and she cannot now seek to claim commission upon a basis that was not agreed.

*(iii) Conflict of Interest/Breach of fiduciary duty*

**68.** In the conclusion of the judgment at paragraph 52, the trial judge reiterated that her decision was based upon her finding that the Appellants' commission was only payable if a deal was struck on 8 April 2022. The issue about conflict of interest/breach of fiduciary duty by the Appellant representing two (2) potential purchasers with conflicting interests was an alternative finding. It was not necessary for the rejection of the Appellant's claim.

**69.** While it is accepted that there is generally no conflict of interest or breach of fiduciary duty for an estate agent to represent more than one principal, this issue was incidental to the main issue in this case as discussed in my analysis of Ground 1 above, and its resolution would have made no difference to the outcome of this appeal. I therefore, do not propose to make any finding on this issue.

**70.** In all the circumstances, I am of the view that Ground 2 is without merit.

**Ground 3 - "The Judge erred in law holding that the Rs were entitled to negotiate directly with the vendors (or their agent) and to exclude A from these negotiations following the expiry of the unilaterally imposed 10pm deadline."**

**71.** The written submissions on this ground of appeal seeks to rely upon an implied term as stated in Ground 3 set out above when the Appellant never pleaded that there were any terms to be implied into the agreement between the parties.

**72.** As the Respondents observed, the first mention of any implied terms was done in submissions before the trial judge. As such, the Respondents were denied the opportunity to formally deal with the issue of this or any implied terms in the presentation of their evidence, cross-examination and submissions. Further, this implied term was not addressed by the trial judge. It would be unfair to allow the Appellant to advance this specific case on this appeal, and it is accordingly not a valid ground.

**73.** In any event, this case of an implied term not to negotiate directly with the vendors following the expiry of the unilaterally imposed 10 p.m. deadline, is without merit.

**74.** While it is not usual to imply terms into unilateral contracts (see **Luxor Eastbourne Ltd v. Cooper** cited above especially at paragraph 48), the courts have done so where it is proved that there was some actual dirty trick (**Barton and others v Morris and Another** at paragraph 31), underhandedness or collusion with a vendor or purchaser, with the express aim of depriving the agent of commission that was properly earned. (See also **Alpha Trading v Durham Pattern** [1981] 2 KB 290 and **C Christo & Co Ltd v. Marathon Advisory Service** [2015] EWHC 1971 (QB).)

**75.** There are two (2) reasons why this is not a proper case to imply such a term.

**76.** Firstly, as I have indicated above, the imposition of the 10 p.m. deadline by Mr. Black was inconsequential. It was a deadline purportedly imposed on the vendor to complete the agreement by 10 p.m. on 8 April 2022. However, this ultimatum was never received by the vendor's agent until 9 April 2022. It was an ineffective attempt to impose a deadline and it had no impact on the agreement between the Appellant and the Respondent to secure a deal with the vendor by 8 April 2022. The Respondents' ineffective attempt to impose a 10 p.m. deadline was not an act which deprived the Appellant from earning a commission, and as such there was no reason on the facts to imply such a term into the agreement between the Appellant and the Respondent.

**77.** Secondly, in cross-examination, Mr. Ian Black, who had purported to introduce this 10 p.m. deadline, stated that, in his experience, this type of allegedly short deadline was not unusual. Further, the trial judge found him to be a credible witness. There was therefore no proven dirty trick nor underhandedness nor collusion with the vendor to deprive the Appellant of her commission.

**78.** In all the circumstances, this ground of appeal is not properly made out.

**Ground 4 - "The Judge erred in concluding that A was not entitled to reasonable compensation by virtue of R's unjust enrichment"**

**79.** This ground asserts that the trial judge should have decided that the Appellant was entitled to reasonable compensation for her services so that the Respondents would not unjustly benefit from their wrongdoing.

**80.** In submissions, this case seems to have been a rolled-up argument of what is known as a quantam meruit claim (i.e. a claim for reasonable compensation for work done) and a claim to prevent the unjust enrichment of the Respondents.

**81.** Like the case with respect to implied terms at Ground 3 above, this claim was not pleaded below and apparently only raised in addresses. Like in the case of Ground 3 above, the Respondents were denied the opportunity to address this rolled up plea frontally in the presentation of their case before the court below.

**82.** It would be unfair to advance this case on appeal, and it is accordingly not a ground of appeal that should be entertained on this appeal.

**83.** In any event, this ground of appeal is without merit because of two (2) of my conclusions on the grounds above.

**84.** Firstly, as I decided in my analysis of Ground 1 above, the Appellant was only entitled to commission if she secured a deal by 8 April 2022 at the price of $57 million. This was a high-risk, high-reward venture. Having failed to secure such a deal, she cannot claim any reward. Specifically, there is no room for a claim for reasonable remuneration upon a quantum meruit. This has been the law since the **Luxor** case (see paragraph 44 above), where I repeat the citation:

> **"I do not assent to the view, which I think was the view of the majority in the first Trollope case (1), that a mere promise by a property owner to an agent to pay him a commission if he introduces a purchaser for the property at a specified price, or at a minimum price, ties the owner's hands, and compels him (as between himself and the agent) to bind himself contractually to sell to the agent's client who offers that price,**

> **with the result that if he refuses the offer he is liable to pay the agent a sum equal to or less than the amount of the commission either (a) on a quantum meruit or (b) as damages for breach of a term to be implied in the commission contract. <u>As to the claim on a quantum meruit, I do not see how this can be justified in the face of the express provision for remuneration which the contract contains.</u> This must necessarily exclude such a claim, unless it can (upon the facts of a particular case) be based upon a contract subsequent to the original contract, and arising from some conduct on the part of the principal.**
>
> **As to the claim for damages, this rests upon the implication of some provision in the commission contract, the exact terms of which were variously stated in the course of the argument, the object always being to bind the principal not to refuse to complete the sale to the client whom the agent has introduced.**
>
> **I can find no safe ground on which to base the introduction of any such implied term." (Emphasis added)**

**85.** Second, as I decided in my analysis of Ground 3 above, the Appellant has not proved any dirty trick, underhandedness, collusion or other unreasonable conduct in respect of the subsequent negotiation and purchase of the Harbour House properties by the Respondents at the price of $58 million <u>after</u> the agreement with the Appellant terminated on 8 April 2022. The alternative plea in respect of unjust enrichment is not maintainable on the present facts.

**Ground 5 - "The Judge failed to have regard to highly relevant factual matters and/or reached findings concerning the credibility of the parties which were inconsistent with the evidence and were irrational and/or inadequately reasoned."**

**86.** This ground of appeal is a general attack on the trial judge's findings of fact. It contains wide ranging allegations, but I summarise the major contentions under four (4) heads, namely:

I. Failure to recite or analyze many exchanges of communications.

II. Failure to particularize evidence to justify the finding that the Appellant's evidence was inconsistent and evasive in certain aspects.

III. Failure to properly analyze the evidence of the First Respondent, which evidence was not credible.

IV. The trial judge's analysis of the facts is marred by flawed reasoning as manifested in her wrongful findings in respect of the Appellant's conflict of interest.

**87.** Before analyzing these wide-ranging attacks on the trial judge's findings, I find it useful to firstly repeat the statement that an appeal court would only interfere with the findings of fact of a trial judge if they are "plainly wrong" (see paragraph 56 above and the **Bahamasair** case.)

**88.** Second, I find it very helpful to state certain accepted principles in respect of any critique of a trial judge's findings of fact as expressed by Lewison LJ in **Volpi v Volpi** [2022] EWCA Civ 464; [2022] 4 WLR 48 and more recently restated in the case of **Balwah (by Shelly-Ann Balwah, his Mother and next friend) and another v Abdulla (Trinidad & Tobago) and other cases** [2026] UKPC 31, where Lady Wise stated at paragraph 40:

> **"40. The correct approach for an appellate court asked to substitute its own finding of fact for that of a trial judge is to exercise judicial restraint and give due deference to the conclusion on primary facts by the first instance judge, who will have had the advantage of seeing and hearing all of the relevant evidence. In reiterating this principle in Christo Gift v Dr Keith Rowley [2025] UKPC 37, the Board approved the following factors expounded by Lewison LJ in Volpi v Volpi [2022] EWCA Civ 464; [2022] 4 WLR 48, at para 2, as those which an appellate court must consider:**
>
> > **"(i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.**
> >
> > **"(ii) The adverb 'plainly' does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.**
> >
> > **"(iii) <u>An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.</u>**
> >
> > **"(iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The**

> **weight which he gives to it is however pre-eminently a matter for him.**
>
> **"(v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.**
>
> **"(vi) <u>Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract</u>." (Emphasis added)**

*(i) Failure to recite/analyze all the relevant emails*

**89.** In this regard, I repeat observations (iii) and (vi) from the **Volpi v Volpi** (above) case as highlighted above, namely:

> **"(iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.**
>
> **…**
>
> **"(vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract."**

**90.** I am prepared to assume that the trial judge considered all the evidence before her and did not overlook any of it.

**91.** Further, in her judgment at paragraphs 3-12, the trial judge summarized the background facts, the evidence of the parties and the submissions of the parties (which restated the facts relevant to each party's case.)

**92.** This, in my view, revealed a more than adequate comprehension and detailing of the relevant facts. The trial judge was not required nor expected to set out those facts in the same manner or detail that the Appellant seems to mandate.

**93.** Further, the Appellant, in my view, cannot properly complain that the trial judge failed to give proper consideration to any of or the whole of the evidence before her. The trial judge

was under no duty to particularize all of the exchanges between the parties. Her recitation and consideration of the respective cases and evidence of the parties was, in my view, more than adequate. There is no merit in this complaint.

*(ii) Particulars of the finding that the Appellant's evidence was inconsistent and evasive*

**94.** This is an unwarranted critique of the judgment of the trial judge since she actually did particularize the reason why she found the Appellant's evidence to be inconsistent and evasive, namely:

> **"I found the evidence of Diane Holowesko to be inconsistent and evasive <u>regarding communication with Katie Booth and Ian Black and her understanding of the agreement terms or conflict in representing two buyers for the property</u>." (Emphasis added)**

**95.** Further, the Respondents' submission indicates parts of the evidence which support the trial judge's findings.

**96.** No useful purpose would be served in setting out the lengthy details of such evidence, and I summarise it as follows:

> While the Appellant mentioned many details about conversations with Ian Black and Katie Booth on 7 and 8 April, when confronted with the specific testimony of these witnesses which contradicted her story, the Appellant somehow could not remember the details of these conversations, neither could she frontally deny them. This evidence was in stark contrast to the unshaken and credible testimony of Ian Black and Katie Booth and the trial judge's conclusions that the Appellant's evidence was evasive and inconsistent were not plainly wrong and should stand.

*(iii) The evidence of the First Respondent*

**97.** The trial judge found the First Respondent's evidence **"consistent and credible, and his evidence was not challenged during cross-examination."**

**98.** The Appellant contends firstly that the First Respondent was extensively cross-examined, and the trial judge's conclusion that his evidence was unchallenged during cross-examination is unsustainable.

**99.** I am of the view that the statement that the First Respondent's evidence was unchallenged during cross-examination is infelicitous language. It was linked to the prior statement that his testimony was consistent and credible and was, in that limited context, unchallenged evidence even if cross-examination was extensive. In any event, even if the Respondent's evidence was challenged, as I will indicate below, it did not materially detract from his overall credibility or the strength of the Respondent's evidence.

**100.** The second contention of the Appellant is that the First Respondent's evidence was not consistent or credible. Specifically, the Appellant points to an alleged inconsistency in his evidence as being fatal to his testimony.

**101.** While the First Respondent stated several times in his evidence that he was not aware, prior to the Appellant's showing of the Harbour House properties to him on 5 April 2022, that the Appellant was acting as a buyer's agent and that she was not the Vendor's agent. George Damianos was the vendor's agent. The First Respondent's attorney stated in a letter to the Appellant that:

> **"Prior to the showing of Harbour House on the 5th April, my client was aware that George Damianos of Sotheby's was the exclusive MLS agent for Harbour House and that you, on behalf of Holowesko's Realty would be an introducing agent for Fabio Mantegazza as a prospective purchaser."**

**102.** Even though this is an apparent inconsistency in the Respondent's testimony, it does not, in my view, destroy his credibility nor does it materially undermine the Respondents' case. I say so for the following three (3) reasons which I summarize below:

(i) Even though his attorneys contradict the First Respondent on this point, the First Respondent asserted that his attorneys were mistaken and that his testimony was correct.

(ii) Even if this was an inconsistency in his testimony, it does not necessarily follow that the rest of his evidence was not credible or unshaken by cross-examination. The trial judge was not "plainly wrong" to accept his evidence as credible as a whole.

(iii) In any event, the Appellant has not demonstrated any material inconsistencies in the evidence of Ian Black and, more so, the evidence of Katie Booth. Therefore, any alleged weakness in the evidence of the First Respondent would not, on the present facts, have materially shaken the case of the Respondents and/or the evidential findings of fact of the trial judge. The trial judge's preference for the Respondents' case with respect to the terms of the agreement was, in my view, unassailable. The First Respondent's alleged inconsistency would not have affected the findings of the trial judge.

*(iv) The Appellant's conflict of interest*

**103.** The Appellant makes a bold assertion that the trial judge's misunderstanding of the law with respect to the Appellant's alleged conflict of interest in representing two (2) competing purchasers **"infected"** the Appellant's **"evidence in the eyes of the Judge".**

**104.** Even if the trial judge committed such an error of law, it does not thereby translate into an error of fact or fact finding. An error of law does not necessarily render the fact-finding exercise "plainly wrong". Further, even if this was an error of law it was only in relation to the distinct and discrete secondary or alternative issue and does not rise to the level of

**"infecting"** the findings on the main issue in the case, namely, the agreement arrived at between the parties.

**105.** This contention is without merit.

**Conclusion**

**106.** Having regard to my conclusions on the Appellant's grounds of appeal, I would dismiss this appeal and affirm the orders of the trial judge.

**107.** Since the Appellant was the unsuccessful party on this appeal, I see no reason why costs should not follow the event. Further, the appeal raised several complex issues that merited the assistance of King's Counsel. In fact, the Appellant was represented by two (2) King's Counsel on this appeal. The Respondents were not represented by King's counsel, but by two (2) experienced junior counsel whose assistance was also merited.

**108.** In the circumstances, I would order the Appellant to pay the Respondents' costs of the appeal certified fit for two (2) junior counsel, to be taxed by the Registrar in default of agreement.

**The Honourable Mr. Justice Smith, JA**

**The Honourable Mr. Justice Evans, P**

**The Honourable Sir Ian Winder, CJ**