

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

CENTURY 21 GOLD TEAM REALTY LTD.
and GLEN J. PIRIE

PLAINTIFFS

REASONS FOR JUDGMENT

AND:

443979 B.C. LTD.

OF THE HONOURABLE

DEFENDANT

MR. JUSTICE H.A. CALLAGHAN

Counsel for the Plaintiffs: F.G. Potts

Counsel for the Defendant: G.C.N. Langdon

Dates and Place of Trial: November 6, 7, 8, 9, 1995
Vancouver, British Columbia

1 This is an action for real estate commission.

2 On March 18, 1993 Cressey Developments Ltd. through its realtor, the plaintiff Pirie, entered into an interim agreement to acquire real property comprising six lots from a Marie Atherley for a price of \$1,225,000, \$300,000 down and the balance of \$925,000 secured by way of first mortgage payable in blended monthly payments.

3 Cressey had some difficulty in obtaining the necessary financing in order to complete the purchase, and consequently approached the realtor, Pirie, for assistance in locating another party willing to assume its obligations under the contract.

4 Pirie contacted Paul Flett, a former realtor and now an investor, and enquired whether he was interested in buying the lots for sub-division development. The discussion piqued Flett's interest and he thereafter contacted a friend Lorne Embree, resulting in their agreement to assume Cressey's obligations under the interim agreement.

5 In order to accomplish this they incorporated a numbered company, the defendant in this action. Embree and Flett are the principals of that company. On May 21, 1993 Cressey assigned its interest in the contract to the defendant company for \$50,000.

6 Following the purchase the defendant then engaged Pirie and Century 21 as listing agents.

7 The listing agreement dated May 31, 1993 provided for a commission of 5% to be payable to the plaintiff on the occurrence of one of the following events:

- (a) If a binding contract for sale of the property was entered into by August 31, 1993; or
- (b) If a binding contract for sale of the property was entered into at any time as long as the plaintiff was the effective cause of that contract; or
- (c) If a person was introduced to the property who was ready, willing and able to purchase the property whether or not such a person was introduced by the defendant or their agent or by another person before August 31, 1993.

8 The contract did not provide for a commission for the sale of any type of interest in the land, commission was only payable upon a sale of "the property".

9 The agreement, although dated May 31, 1993 was faxed by the plaintiff to the defendant on June 1st, for signature by an officer of the defendant company. Lorne Embree for the defendant signed the agreement and faxed it back on June 2nd. Pirie, on behalf of the plaintiff company, signed the faxed agreement and filed it. The copy of the agreement which remained with the defendant was never executed by Century 21.

10 The covering letter which accompanied the exclusive listing agreement on June 1st proposed certain bonuses payable to the real estate sales person who sold the lot or lots. He or she would receive \$10,000 for the sale of the first two lots and Century 21 would receive a \$50,000 bonus if the six lots were sold prior to August 31, 1993. Embree was requested to sign the letter as an acknowledgment that this was the vendor's understanding and return it with the listing agreement. This was done.

11 As there was little immediate interest in the property Embree wrote to the plaintiff on June 26, 1993 and suggested that he approach a number of companies including Molnar, with regard to an outright sale, trade or joint venture. Subsequently, Pirie delivered a brochure describing the property to Robert Flitton, vice-president of Molnar. Following a series of meetings Embree and Flett ultimately convinced Maple Leaf Molnar Homes to enter into a joint venture. The intention was that the joint venture would develop and sell the individual lots.

12 The joint venture agreement dated August 31, 1993 provided that the defendant as trustee would hold the lands in trust for the joint venturers, namely, Molnar and 443988 B.C. Ltd., a company incorporated by Embree and Flett for the purposes of carrying out the joint venture. The joint venture agreement also provided that on the completion of the purchase of the lands from Marie Atherley by the trustee, the joint venture would pay to Century 21 Gold Team Realty Ltd. the sum of \$25,000 for bringing the property to the joint venture.

13 The plaintiffs submit they are entitled to a commission of 5% of the stipulated value of the joint venture, namely \$2.5 million, plus the bonuses to Pirie and Century 21 as the joint venture was entered into before August 31st, 1993, or, alternatively, they seek 5% of 1.25 million, the amount paid by Molnar. If both claims fail the plaintiffs seek reasonable remuneration on a quantum meruit basis for services provided to the defendant.

14 The defendant responds by alleging firstly, that the exclusive listing agreement is invalid as the plaintiffs failed to comply with Section 46 of the Real Estate Act, R.S.B.C. 1979, c. 356, by not delivering a true executed copy of the agreement to the defendant; secondly, the agreement is unenforceable as a prospectus or disclosure statement was not filed with the Superintendent of Real Estate contrary to Part 2 of the Act, relying specifically on Sections 1, 49, 50, 50.1 and 62; thirdly, that if the exclusive listing agreement was valid commission was only payable upon completion of a binding agreement for the transfer of the title to the lots, not upon entry into a binding contract where it held the property in trust pursuant to a joint venture agreement; and finally that the plaintiffs are not entitled to a commission as they were not the effective cause of the sale.

15 In my view I need not deal with the defenses raised by Section 46 and Part 2 of the Real Estate Act, since I have concluded that, on the facts of this case, there was no sale of the property.

16 Under the terms of the joint venture agreement legal title to the property remained with the defendant company, however, it held ownership in trust for the two other numbered companies, the joint venturers, as tenants in common.

17 The plaintiffs and the defendant contemplated the development of the lots into a subdivision with the eventual sale of individual lots to individual purchasers. The parties did not contemplate that the entering into a joint venture would entitle the plaintiff to a commission. The plaintiffs would get their

commission when the land was sold. This was at its heart an investment and development contract. It was not a sale of the property.

18 The defendant during the life of the listing agreement acknowledged that some commission was due the plaintiffs for their part in facilitating the joint venture and bringing the property to the joint venture. That is set out in paragraph 52 of the joint venture agreement which reads,

On the completion of the purchase of the lands the contributions referred to in paragraphs 4.1 and 4.2 (a) shall be paid by the joint venture as follows: (c) \$25,000 to Century 21 Gold Team Realty as commission for arranging purchase of the land.

19 The sole remaining question is whether the plaintiffs are entitled to recover remuneration on the basis of quantum meruit. If their services fell within the scope of the contract then, of course, the answer must be no. See Heitzman Management Consultants Ltd. v. Carling O'Keefe Breweries of Canada Ltd. (6 August 1993), Vancouver Registry No. C903277 (B.C.S.C.).

20 The defendant instructed Pirie to try to locate either a buyer or joint venturer. If he located a buyer his commission was to be determined by the contract. If he obtained a joint venturer however, his services would fall outside the scope of the contract as there would be no sale of "the property". Pirie is entitled to reasonable remuneration for the services he performed, which lead to a completion of the joint venture.

21 The test is whether the services provided by Pirie either caused or materially contributed to Molnar taking a position as a joint venturer. It is not necessary that the agent, Pirie, be the sole effective cause of the agreement in order to demonstrate a benefit to the defendant. See Bancorp Mortgage Limited v. Sicon Group Inc. (1990), 2 B.L.R. (2d) 161.

22 While the defendant had reason to believe that the ultimate investor, Molnar, might be interested, it was the plaintiff, Pirie, who solidified that interest in the property and brought Molnar to the negotiating table with the defendant. The plaintiffs did the very thing they were hired to do -- canvass the market and bring an interested party to the table.

23 Since a contract was concluded the plaintiffs are entitled to be paid.

24 But how should the plaintiffs' remuneration be calculated? Section 35 of the Real Estate Act is of some assistance. It reads,

All commission or other remuneration payable to an agent in respect of the sale of any real estate shall be on an agreed amount or percentage of the sale price; and where no agreement as to the amount of the commission has been entered into the rate of commission or other basis or amount of remuneration shall be that generally prevailing in the community where the real estate is situated.

25 The average commission for sale, lease or joint venture in the Coquitlam area is 3 to 5%. Considering the services performed I am of the view the plaintiffs will be adequately compensated if they receive 3% of the \$1.25 million that Molnar was contractually bound to invest, or, in other words, \$37,500. There will be judgment accordingly.

"H.A. Callaghan, J."

H.A. Callaghan, J.

Vancouver, British Columbia
January 9, 1996