

1992

SCT 95595

IN THE COUNTY COURT OF DISTRICT NUMBER FOUR

BETWEEN:

DARYL DEUVILLE AND KELLY DEUVILLE

APPELLANTS

- and -

CENTURY 21 MARKET REALTY LIMITED &

REALTY WORLD CBC REALTY

RESPONDENTS

HEARD: At Truro, N.S., May 28, 1992.

BEFORE: The Honourable Judge Donald M. Hall, J.C.C.

DECISION: October 13, 1992.

COUNSEL: Dennis James, Esq.,  
Counsel for the Appellants.

James Stonehouse, Esq.,  
Counsel for the Respondents.

HALL, D.M., J.C.C.:

This is an appeal of a decision and order of the Small Claims Court wherein the respondent was awarded \$2,464.25 for a realtor's commission on the sale of a residential property.

The issue before the Court is whether the listing agreement constituted a contract for personal services and thus not assignable.

The essential facts are that the appellants listed their property for sale with Realty World/C.B.C. Realty, herein referred to as "Realty World", a realtor licensed under the Real Estate Brokers' Licensing Act, R.S. (1989) c. 384. The listing was described as a multiple listing or a listing under the MLS system, whereby any member of the Realtors' Association who found a buyer for the property could claim part of the commission on the sale. Subsequently Realty World closed out its business and assigned a number of its listing agreements to the respondent through a third company. The appellant sought to cancel the agreement but the respondent refused. Despite this the appellant listed the property with Central Guarantee Trust, another licensed realtor, who found a buyer and completed a sale of the property before the listing agreement with Realty World had expired. The respondent claimed one-half of the real estate commission payable by virtue of its assignor having obtained the original listing.

In the stated case the Adjudicator found that "The primary reasons that the appellants had listed their property with Realty World/C.B.C. Realty, was that their relative, Ellery Deuville, was employed as an agent by that Company, and they knew of his reputation in the real estate field".

The Adjudicator concluded in paragraphs 5(u) and (x) of the Stated Case:

5(u) The Appellant's argued that the contract they had originally entered into with Realty World CBC Realty was a personal service contract for the services of Ellery Deuville. It was my finding that the contract was not a personal service contract because it was not between the Appellants and Ellery Deuville directly, but was with Realty World CBC Realty through its agent Ellery Deuville. There was not even an exclusivity in the listing with Realty World CBC Realty as the listing was an MLS listing.

(x) I found that the listing agreement as was assigned to Century 21 Market Realty was a general form commercial contract which by virtue of principles of common law was capable of assignment

The appellant argued that the listing agreement between them and Realty World was a contract for personal services and thus, in law, not assignable.

The respondent took the position that such an agreement is not a contract for personal services but merely an ordinary commercial contract capable of being assigned.

As counsel indicated it seems that there have been no cases decided directly on point, that is, with respect to the assignment of real estate listings.

The Ontario Court of Appeal in Mervin Greenberg Ltd v. Noel Ltd, [1961] O.R. 664, considered the

assignability of a listing agreement between the realtor, Mr. Greenberg, and a Company which he incorporated to take over his business as a realtor. Mr. Greenberg was the owner of the new company and in complete control of it.

Porter, C.J.O., who delivered the judgment of the Court noted at page 666, "at all times the respondents had the benefit of his skill, judgment, services or any other personal quality precisely as if no assignment to his company had been made - and respondents took advantage of such services."

At page 667 the learned Chief Justice said:

Counsel for the respondents contends that the agreement was of a personal nature or quality and required personal performance and cannot in law be assigned and that no assignee may claim the benefit of it. Assuming without deciding, that the agreement is of such a nature as not to be wholly assignable and that, as a result of the assignment, the skill, judgment and services of another had been substituted in place of that of Greenberg and thus the respondents had been deprived of the services for which the listing agreement stipulated, then the assignment as an absolute one, carrying the burden as well as the benefit of agreement, would have been ineffective. Here, however, the effect of the assignment was otherwise. The respondents were not deprived of the personal services of the agent; those services continued as if no assignment had been made. Knowing that they were dealing with a limited company the respondents without objection or question, continued to take advantage of the very skill, judgment and services for which they had contracted. In these circumstances I think that this case is distinguished from those where as the result of the assignment, the personal skill, judgment and services contracted for, ceased to be available or where the other party to the agreement rejected the services, sought to be rendered in the name of or by the assignee.

He went on to discuss two English cases, Robson

& Sharpe v. Drummond (1831), 2 B. & Ad. 303, 109 E.R. 1156, and British Waggon Co. et al. v. Lea & Co. (1880), 5 Q.B.D. 149. The former case was concerned with the assignment of a contract for the hiring of a carriage "for 5 years from one Sharpe, a coachmaker, at a yearly rent payable in advance each year, the carriage to be kept in repair and painted once a year by the maker."

Chief Justice Porter said at page 668

It was held that the plaintiff could not recover from the defendant - by Lord Tenterden, C.J., on the ground that "the defendant may have been induced to enter into the contract by reason of the personal confidence which he reposed in Sharpe, and therefore have agreed to pay money in advance, [for which reason] the defendant had a right to object to its being performed by any other person", - and by Littledale and Parke, J.J., on the additional ground that the defendant had a right to the personal services of Sharpe, and to the benefit of his judgment and taste, to the end of the contract.

The second case involved the assignment of a lease of a number of railway cars. Porter, C.J.O., reviewed the case and quoted from it at pages 668 - 669 as follows:

In pronouncing judgment Cockburn, C.J., makes the following observations at pp. 152-3:

The case of Robson v. Drummond comes nearer to the present case, but is, we think, distinguishable from it. We entirely concur in the principle on which the decision in Robson v. Drummond rests, namely, that where a person contracts with another to do work or perform service, and it can be inferred that the person employed has been selected with reference to his individual skill, competency or other personal qualifications, the inability or unwillingness of the party so employed to execute the work or perform the service is a sufficient answer to any demand by a stranger

to the original contract of the performance of it by the other party, and entitles the latter to treat the contract as at an end, notwithstanding that the person tendered to take the place of the contracting party may be equally well qualified to do the service. Personal performance is in such a case of the essence of the contract, which, consequently, could not in its absence be enforced against an unwilling party.

At p. 153 he makes the following further comment respecting the Robson case:

While fully acquiescing in the general principle just referred to, we must take care not to push it beyond reasonable limits. And we cannot but think that, in applying the principle, the Court of Queen's Bench in Robson v. Drummond went to the utmost length to which it can be carried.

This issue was considered by the Supreme Court of Canada in Lounsbury Co. Ltd. v. Duthie and Sinclair [1957] S.C.R. 590. At page 597 Cartwright, J., made reference to the English case of Thomas Stevenson & Sons v. Robert Maule & Son [1920] S.C. 235 and said:

That was a case in which the obligation undertaken by the defenders did not require any special skill or experience and consequently was one which might be performed vicariously. After differentiating the contract from one to which the principle delectus personae applies and which is therefore not assignable, the Lord President treats it as a matter of course that the assignment of the contract would not relieve the assignors from liability if their obligation was not performed. He says at p. 343:

It is work, therefore, the performance of which might quite well be delegated to another, the defenders' liability, of course, remaining the same as if the work was being done on their own premises by their own servants. The law applicable to this case is nowhere more succinctly and accurately stated than in Anson on Contracts (15th ed., p. 286). "If A undertakes to do work for X which needs no special skill, (emphasis added) and it does

not appear that A has been selected with reference to any personal qualification, X cannot complain if A gets the work done by an equally competent person. But A does not cease to be liable if the work is ill done." That appears to me to be good law and good sense, and is directly applicable to the present case.

Royal Financial Insurance Ltd v. National Biscuit and Confection Company Limited, reported in [1933] 1 W.W.R. 43, was a case where the defendant had contracted with the assignor of the plaintiff to place all its insurance with the assignor. Mr. Justice Murphy of the British Columbia Supreme Court held that the contract was not assignable as it fell within the principle stated by Lord Macnaghten in Tolhurst v. Associated Portland Cement Mfrs. [1903] A.C. 414, 72 L.J.K.B. 834, as follows:

There are contracts of course which are not to be performed vicariously, to use an expression of Knight-Bruce, L.J. There may be an element of personal skill or an element of personal confidence to which, for the purposes of the contract, a stranger cannot make any pretensions.

Murphy J. continued at page 44:

What I have to consider is Ex. 1 and the evidence bearing on the relation between an insured and the agent placing the insurance. A company may have high business integrity, capacity and skill and those dealing with it may reasonably expect that, as a matter of business prudence, if nothing else, such a company will maintain its standards whatever changes in its personnel may occur.

In The Law Of Contracts, Second Edition, by S.M. Waddams, the learned author stated at page 197:

Some rights of action are not capable of being assigned. Contracts involving personal relations, or personal skills, are not assignable. A

contract may also exclude assignment by its terms. In Tolhurst v. Associated Portland Cement Manufacturers [1903], Ltd. it was said that the rule permitting assignment is "confined to those cases where it can make no difference to the person on whom the obligation lies to which of two persons he is to discharge it".

In Chitty on Contracts, paragraphs 1416, 1417 and 1418 of Chapter 19, the learned authors state the following:

**Personal contracts.** The benefit of a contract is only assignable in "cases where it can make no difference to the person on whom the obligation lies to which of two persons he is to discharge it. It is to be noted that the question whether an assignment makes any difference to the debtor must be decided by the court on objective grounds, having regard to the nature of the contract and of the subject-matter of the rights assigned. It may in some circumstances make a great deal of difference to a debtor whether his creditor is of an indulgent character, or whether he is likely to enforce his legal rights ruthlessly, but considerations of this kind are ignored by the courts in determining whether a right is assignable or not.

. . . Indeed, any contractual right involving personal skill on the part of the creditor, or other personal qualifications (such as his credit), is incapable of assignment. It has even been held that a publisher cannot assign to another the benefit of a contract with an author, though if the author has actually transferred the copyright in the work to the publisher, he can of course assign that as an item of property. The right to employ a person under a contract of employment is clearly not assignable, though wages or salary due to the employee are normally assignable by him. . . .

**Commercial contracts.** Rights arising under ordinary commercial contracts are prima facie readily assignable, at least if there is no question of credit being granted to the assignee. But commercial contracts may sometimes be drafted so as to make the requirements of one of the parties a material consideration in determining the obligations of the other. In such circumstances there is often difficulty in



deciding whether the benefit of the contract is assignable.

**Contracts with companies.** It has been said that the fact that one of the parties to a contract is a limited company is no ground for assuming that the personality of that party is immaterial to the other party. There is an element of unreality about this in the modern world, for the personality of a company may change without any formal change in the legal identity of the company as, for example, where the ownership and management of the company pass into new hands, or where direction passes into the hands of a receiver or liquidator. Thus persons carrying on business in the form of a company may effectively (though not technically) assign all the company's contracts on a transfer of the business, provided that they transfer the company's shares and not simply the company's assets, to the assignee. Had this course been adopted in Tolhurst's case no difficulties would have arisen. (Footnotes not included).

I believe it is indisputable that realtors and real estate salespersons hold themselves out to be professionals and experts in their field. They are not like sales clerks in a retail store. They are required to take a course of training, and write examinations on real estate subjects which they must pass before being qualified to be licensed under the Real Estate Brokers Licensing Act, which is required by law in order to engage in the real estate trade.

Sales of real estate are not merely sales of a simple commodity with a take it or leave it price. Such sales involve legal documents, in particular an agreement of purchase and sale. Specific and peculiar conditions may be attached. Often there are in a single transaction a number of offers and counter offers. For example a vendor

may be seeking a price of \$100,000.00 for his property, but a prospective purchaser offers only \$95,000.00. The vendor normally would seek the opinion and advice of the realtor as to whether he should accept the lower price or hold out for his original price. Undoubtedly the vendor would be greatly influenced by the expertise of the realtor and the amount of confidence reposed in him in reaching the decision. It seems to me, that vendors would always depend greatly on the realtors' opinions and advice in determining whether he was getting a satisfactory deal. Thus, there is great reliance by the vendor on the "skill, judgment and services" of the original realtor. Another example may be where the vendor is asked by the purchaser to finance or provide secondary financing of the sale by accepting a mortgage or second mortgage for part of the sale price. Again it is likely that the advice of the realtor would be sought and whether relied upon would be determined by the confidence reposed in the realtor by the client, the proposed vendor.

It is clear, however, that the professional qualities of the real estate agent are not first called upon at the time of the sale, but rather in the very beginning when the listing agreement is entered into. It is at that time that the owner must decide on an appropriate asking price. Undoubtedly the realtor would have a very significant influence in determining what is an appropriate asking price. Furthermore, the appropriate information must be obtained by the realtor in determining

what the qualities of the property are that might be emphasized to assist in attracting a buyer. The length of the listing period as well as the best time to put the property on the market must be decided. In these and other matters the decisions of the owner would be greatly influenced by the owner's perception of the skill, judgment and personal qualities of the realtor and the confidence that the owner had in the realtor.

The professional quality of such transactions is also borne out by two other factors. One is the fact that the realtor charges a substantial fee for his or her services, usually a commission in the vicinity of five per cent of the purchase price. In the present case the total commission apparently amounted to \$4,868.50. The second is that the client entrusts to the realtor the sale of a very significant asset. With most ordinary people it is often their most important and valuable material asset - their homes, which was the case here.

It is also significant that in listing his or her property with a realtor the owner binds himself or herself to that realtor for the term of the listing and may not engage another to sell the property except under penalty of paying a double commission. It seems repugnant to me that if the realtor assigns the listing contract to another, the vendor should be "stuck" with having to deal with what may be a stranger or someone in whom he has no confidence for the remainder of the listing period,

which may be a fairly lengthy period of time.

It seems to me, therefore, that it is indisputable, that in selecting a realtor to sell his or her property a vendor would give great weight to the various factors referred to in the authorities referred to above, viz., the general skill, judgment, personal services, individual skill, competency, other personal qualifications, special skill or experience of the realtor and the degree of confidence reposed in the realtor by the prospective client.

This being so it leads irresistably to the conclusion that such a listing agreement is not merely a commercial contract but a contract for personal services and thus not assignable. In my opinion, the authorities referred to above support this conclusion. Indeed, it seems to me that the personal qualities of the provider of the services and the confidence reposed in it are of much greater significance in the present case than in Robson (the supplying of and care of a carriage), Royal Financial Services (the providing of insurance coverage) and Tolhurst (the supplying of chalk in the manufacture of cement).

As the authorities indicate it makes no difference whether the provider of the services is an incorporated body or an individual. (See in particular the comment of Murphy, J. in Royal Financial Services Ltd. supra).

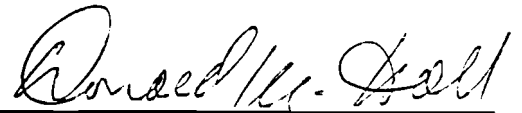
The adjudicator, in the stated case, placed some

emphasis on the fact that the listing was a so called MLS listing. The respondent's counsel argued that since this was a multiple listing that there was no reliance by the appellants on the particular qualities of Realty World and that they in effect had agreed that anyone of the member realtors could sell the property. Although I can see some validity to this argument, in my opinion it is not determinative of the issue before the court. As stated above the services offered by the realtor are not just to obtain an offer for purchase of the property. In the beginning the contractual relationship involves advice and consultation respecting such matters as an appropriate asking price, the best time to offer the property for sale, the appropriate length of the listing period and so forth. The realtor also undertakes to advertise and promote the sale of the property and continues to do so throughout the length of the listing period. In obtaining an offer for purchase the non-listing realtor under the MLS is entitled to part of the commission on the sale but this does not exclude the listing realtor from the contract. In other words the contractual obligations of the listing realtor continues to the conclusion of the sale.

Counsel for the respondent argued that if the assignment was not valid then the commission is owing to Realty World as an original contracting party. With deference, in my opinion, this position is not tenable.

In "closing its doors" or ceasing to do business and attempting to assign the contract it abandoned or repudiated the contract. This constituted a fundamental breach and the appellants were entitled to treat the contract as being at an end.

In conclusion, I find that the learned adjudicator erred in law in concluding that the contract herein was an ordinary commercial contract capable of assignment. The appeal is therefore allowed and the order of the Small Claims Court set aside. The appellants will have their costs in the amount of \$50.00, which is the maximum barrister fee allowable, plus their disbursements.



---

Donald M. Hall  
Judge of the County Court  
of District Number Four