1995 **S. H. No. 123423**

IN THE SUPREME COURT OF NOVA SCOTIA

Cite as: Country Business Inc. v. Cameron, 1999 NSSC 88

BETWEEN:

COUNTRY BUSINESS INC.

PLAINTIFF

- and -

HEATHER CAMERON (nee MacISAAC)

DEFENDANT

D E C I S I O N

HEARD BEFORE:	**The Honourable Justice Walter R. E. Goodfellow in the Supreme Court of Nova Scotia on June 10, 1999**
DECISION:	**June 28, 1999**
COUNSEL:	**R. Barry Ward, Solicitor for the Plaintiff** **Dufferin R. Harper and Ruth Bailey/law student, Solicitor for the Defendant**

GOODFELLOW, J.:

1. BACKGROUND

Heather Cameron is the owner/operator of Kenmac Enterprises (Molly Maid), a business she has operated for almost seventeen years. In the early 1990's she contacted Country Business Inc, a company that maintains a list of several hundred buyers interested in business ventures. CBI when contacted by a business owner who wishes to sell discreetly, mainly through networking, communicates with perspective buyers and initially there is some information provided but the name of the seller is not disclosed unless CBI is satisfied the buyer has the financial capacity to purchase the business. CBI takes generally three to four hundred hours to bring a deal together.

Ms. Cameron did not proceed on the initial occasion.

In the summer of 1994, Ms. Cameron again contacted CBI, resulting in the entry of two contracts the 23rd of August, 1994, one a Consulting Agreement whereby Molly Maid paid a retainer of $1700.00 for the analysis of her business and the second an Exclusive Right to Sell Marketing Agreement. The Exclusive Right to Sell Marketing Agreement provided that if it was not renewed, terminated or extended, the Agreement expires at one minute before midnight on the 31st of July, 1995.

CBI was operated as a partnership between Mark R. Crossman and James P. Sawler. Mr. Crossman purchased Mr. Sawler's interest three years ago and Mr. Sawler passed away two months ago.

CBI introduced Molly Maid to Ralph F. Maxwell and his brother, Lee, and there followed considerable negotiations, meetings, etcetera, leading up to a letter of intent July 11th, 1995 accepted by Molly Maid the 13th of July, 1995. This letter of intent was followed by additional correspondence, a draft Agreement of Purchase and Sale the

12th of September, 1995 and a further draft Purchase Agreement and Sale the 18th of October, 1995. Molly Maid contends that as of receipt of a copy of a letter from Ralph F. Maxwell to CBI October 2nd, 1995 that the transaction was at an end, even though it was followed by correspondence from Mr. Maxwell's solicitor October 18th, 1995 enclosing the Agreement and a letter October 19th from Lee P. Maxwell indicating that they have met all outstanding issues as presented by Molly Maid.

Ms. Cameron was preoccupied in early October as a witness in a major criminal matter and also went on her honeymoon from October 7th to October 21st, 1995.

Ms. Cameron alleges that her determination not to sell crystalized during her honeymoon when she and her husband addressed the projected layoff of her husband in his employment, maintaining such intention did not occur until after Ms. Cameron's interpretation of Ralph Maxwell's letter of October 2nd, 1995.

Ms. Cameron takes the position that she was not required to pay any commission until such time as the sale was consummated and she received her cheque.

CBI commenced this suit for payment of a commission it maintains it is entitled to under the Exclusive Right to Sell Marketing Agreement.

2. THE CLAIM

The Right to Sell Marketing Agreement contained a formula. The applicable portions of it are:

Ten per cent of the first $500,000.00 of Sales Price. "Sales Price" means the gross value of the assets of the business being sold, including current assets, fixed assets and good will.

The Exclusive Right to Sell Marketing Agreement provides:

> "If, during the term of this Agreement, CBI secures a prospective purchaser ready, willing and able to purchase the Business at the price and on the terms and conditions stated herein, or the Seller accepts an offer to purchase all or any portion of the Business at any other price or terms or conditions, the Seller agrees to pay CBI a fee calculated as specified on the reverse side hereof."

CLAUSE 5 - "If, subsequent to accepting an offer to purchase, the Seller decides not to sell the Business at such price and on such terms and conditions as agreed upon, the fee as calculated in this agreement, will be due and payable."

The Consulting Agreement provided that if CBI succeeded in selling the Business as contemplated by the Exclusive Right to Sell Agreement, the consulting fee of $1,700.00 will be deducted from the agreed upon fee at the closing of such sale.

CBI claims it is owed a fee of ten per cent of the gross selling price as agreed upon as follows:

10% of agreed gross selling price	-	$17,300.00
PLUS: 7% G.S.T. ($17,300 & .07)	-	1,211.00
Sub-total	-	$18,511.00
Less: Retainer paid on account	-	1,700.00
Balance claimed as owing (principal)	-	**$16,811.00**

The obligation of Molly Maid to pay CBI arises therefore in any one of the three situations:

1) for securing a prospective purchaser ready, willing and able to purchase the Business at the price and on the terms and conditions stated; **or**

2) where the Seller accepts an offer to purchase all or any portion of the Business at any other price or terms or conditions; **or**

3) if, subsequent to accepting an offer to purchase, the Seller decides not to sell the Business.

3. ISSUE

Did CBI secure a prospective purchaser ready, willing and able to purchase the Business at the price and on the terms and conditions of the Exclusive Right to Sell Marketing Agreement?

The Ontario Court of Appeal in **Township of Nelson v. Stoneham** 7 D.L.R. (2d) 39, Hogg, J.A. at p. 43 stated:

> "In the present case, the sale was not completed but, in commenting upon this contention advanced by the appellant, the learned trial Judge made reference to the appeal of **Luxor (Eastbourne) Ltd. v. Cooper**, [1941] A.C. 108, in the House of Lords, where Viscount Simon L.C. said at p. 120, in a passage quoted by the trial Judge: "There is the class [of contract] 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.:
>
> In other words, whether an agent is entitled to a commission or not is dependent in each case upon the express terms of the particular contract with such agent. If the commission is to be paid upon the completion of the contract, then the mere procuring of an offer to purchase is not sufficient to entitle the agent to the commission. In **Gladstone v. Catena**, [1948], 2 D.L.R. 483, O.R. 182, the agreement provided for the payment of a commission to the agent upon a sale being effected. As the sale was not effected the agent was not entitled to be paid the commission. But in the case now under consideration, there is nothing said about the commission being dependent upon the sale being effected or completed. The agreement made with the respondent to pay him a commission was such as is contemplated in the passage quoted by the judgment of Viscount Simon L.C. in the **Luxor** case. The respondent was promised his commission if he procured for the appellant corporation an offer for the land, which was agreeable to the appellant. This the respondent did. It was not for effecting a sale, but for procuring the offer

> made by Hickey which was the consideration for the payment of the commission."

In this case, the evidence clearly establishes CBI secured a prospective purchaser, Ralph F. Maxwell and his brother, Lee P. Maxwell, who were ready and anxious to purchase Molly Maid. Molly Maid takes the position that they were not financially able to purchase, therefore, the ability of the Maxwells to purchase is a factual issue.

Ms. Cameron in her evidence takes the position that no commission is payable unless until a sale actually took place. Her evidence essentially was that "when I get my cheque, they get paid their commission". With respect, that is not the Agreement she entered into. While she has come to convince herself that it is the situation, Ms. Cameron is an astute, successful business person, who had available and made use of legal advice throughout. To suggest that the Agreement between Molly Maid and CBI only gave rise to a commission on her receiving a cheque for sale proceeds is totally erroneous. I conclude Ms. Cameron's point of view crystalized by a rationalizing exercise to justify in her mind the failure to close the deal and failure to pay the commission.

Ms. Cameron's counsel in his brief takes the position "the purchasers never had the ability to complete the transaction within the time frame during which the payment clause of the Marketing Agreement was enforceable". This representation is based upon Ms. Cameron's stated belief as to when a commission is payable. He also relies heavily on the letter from Ralph F. Maxwell, October the 2nd, 1995, which raises a suggestion made by the bank. The letter indicates that several weeks ago he arranged bank financing to complete the purchase but that an issue arose with the bank as to the ownership of the customer list. It follows two alternatives which would satisfy the bank and Mr. Maxwell asks CBI to inquire of Ms. Cameron. The letter concludes, "I would

appreciate your immediate efforts so we can work towards meeting our closing date of October 31st, 1995".

It must be remembered that the correspondence followed the Letter of Intent entered into by the parties July the 11th, 1995, which created an obligation for the parties to use their best efforts to negotiate, draft and execute a Formal Agreement of Purchase and Sale, with the closing date to be as quickly as the franchisor training permits and estimated to be late August. The subsequent correspondence and the conduct of the parties was within the intent of the Letter of Intent and Ms. Cameron now takes the position that on receipt of the October the 2nd letter raising some suggestions, that it was at this time she decided not to complete the sale of Molly Maid and that she had a right to do so.

She went off on her honeymoon and the suggestions raised in the October 2nd, 1995 letter were not accepted by her. Lee P. Maxwell wrote October the 19th saying, fine, we'll simply proceed as agreed, and the draft Agreement of the 18th of October was advanced by the intended purchasers' solicitor by letter the 18th of October.

The first written response by Molly Maid declining to proceed is dated October 25th, 1995 as follows:

October 25, 1995

BY FAX

24584

J. E. Dickey
6th Floor, TD Centre
1791 Barrington Street
Halifax, N. S.
B3J 3K9

Dear Mr. Dickey:

RE: Proposed Sale by Heather MacIsaac to 2468526 Nova Scotia Limited

Please be advised that my client has instructed me not to proceed further with this transaction.

Yours truly,

FLINN MERRICK

Michael Kennedy

I want to deal first with the factual question of when did Molly Maid decide not to complete the transaction.

I had an opportunity to observe Ms. Cameron and Mr. Crossman. There is not much conflict in their evidence, however, wherever there is a conflict in their evidence, I prefer the evidence of Mr. Crossman. Ms. Cameron has herself convinced **now** that she was entitled to cease using good faith in receipt of Mr. Maxwell's letter of October the 2nd, 1995 and **now** that was the time she determined not to proceed with the sale of the Business. In fact, it was more probably and quite probable that she did not wish to proceed with the Agreement for Sale in early October, prior to going on her honeymoon. I do not accept her evidence that this only arose while she was on her honeymoon. The real reason Ms. Cameron did not complete the deal had nothing to do I find with the October the 2nd, 1995 letter, but solely was a personal decision based on concern for her soon-to-be and shortly thereafter husband who was faced with the prospects of losing his employment and Ms. Cameron wanted to retain Molly Maid for income producing purposes so that at least one member of the family would have an income. I have no difficulty whatsoever reaching this conclusion based on my observation of Ms. Cameron, as she gave her evidence, and it is clear from all of the evidence that both parties, prior to the October the 2nd, 1995 letter, were working towards and fine tuning what was necessary to consummate the intended transaction. Ms. Cameron, I am satisfied, because of her concern for her husband's employment situation, was on

receipt of the October the 2nd, 1995 letter looking for a way to renege on the Letter of Intent.

Returning now as to the factual issue of whether or not Ralph F. Maxwell and Lee P. Maxwell had the ability to purchase the Business in accordance with the price and terms and conditions of the Exclusive Right to Sell Marketing Agreement, the evidence is as follows.

Ms. Cameron takes the position that no commission was due until she received her cheque. Additionally, it is argued on her behalf that the letter of October the 2nd, 1995 making suggestions and pointing out the bank's requirement as constituting evidence or that it should be inferred Maxwells had not the financing in place to complete the transaction.

I accept the evidence of Mr. Crossman that CBI built up a list of prospective investors and that if there is a prospective investor who they consider does not have the financial capacity to carry through with the a specific transaction, they will not make any disclosure. He outlined and I will not recite the various steps and correspondence that led up to the Letter of Intent of the 11th of July, 1995. When Ms. Cameron signed the Letter of Intent the 13th of July, he said, "we were effectively done". In his view they had found a buyer who was ready, willing and able. Mr. Crossman placed some weight and significance that the Letter of Intent referred to a deposit of $4,000.00 and neither the Letter of Intent or subsequent draft agreements contained any provision that it was to be subject to Maxwells arranging financing. Subject to financing is a common term in Agreements of Purchase.

With respect, Ms. Cameron's counsel in his argument and to some extent in cross-examination wrongly equates the financial ability to complete the transaction with the arranging of specific financing. I am satisfied that throughout the Maxwells had the

financial ability and I agree with Mr. Crossman that the October the 2nd, 1995 letter was a matter of posturing as it relates to financing aspects. If any corroboration was needed, it is found in the letter from Maxwells of October the 19th. Additionally, I note that at no time did Ms. Cameron raise any concern about the financial ability of the Maxwells to complete the transaction, nor did she at any time call into question CBI's conclusion that the Maxwells had the prerequisite financial ability. Not even the letter from her solicitor of October the 25th, 1995 raises any suggestion or questioning of the financial ability of the Maxwells to complete the transaction.

In conclusion, I am satisfied that CBI is entitled to its commission because it had no later than the 11th of July, 1995 (13th of July, 1995) met fully one of the three situations where contractually Molly Maid undertook to pay a commission. Namely, CBI had secured a prospective purchaser anxious, ready, willing and financially able to purchase the Business, not only at the price and on the terms and conditions stated but at an enhanced price.

Ms. Cameron raised a number of other arguments, including that the offer of $173,00.00 by exceeding the price set out in the Exclusive Right to Sell Marketing Agreement relieved Ms. Cameron from her obligation to pay a commission. To accept such an argument would lead to the ludicrous result that if CBI had gone back to the Maxwells and said, no, you can only offer $160,000.00 plus working capital, then Ms. Cameron would be bound.

Ms. Cameron takes the view that under the terms of the Agreement it had to be finalized on or before the 31st of July, 1995 as there is no formal renewal or extension. Let me say that I have no difficulty whatsoever in concluding that the parties continued to act after the Letter of Intent of July the 11th, 1995 in a manner calculated to close the transaction and in so doing waived any technical time periods. Ms. Cameron reneged

on payment of the commission for one reason and one reason only and that is because she had a change of heart, as related to her husband's prospective loss of income.

Ms. Cameron's counsel takes the position that the Letter of Intent is not a binding contract. I agree **Keating, et al v. Bragg, et al** (1996) 158 N.S.R. (2d) 241, confirmed on appeal (1997), 160 N.S.R. (2d) 81. A Letter of Intent is an agreement between the parties to use good faith and if they fail to do so, it can give rise to damages. The Letter of Intent is between the intended parties to the intended contract, and CBI is not a party to the Letter of Intent. The significance of the Letter of Intent is that it is yet additional evidence of confirming CBI had obtained a purchaser ready, anxious, willing and financially able to complete the transaction. The Letter of Intent is consistent with all of the other evidence before me of the Maxwells being ready, anxious, willing and financially able to purchase the Business and at that time the intent of Heather Cameron to sell the Business to them. The cases referred to by Ms. Cameron's counsel deal with the attempt to enforce a Letter of Intent or memorandum of intent and such does not give rise for example to specific performance, but only to damages in the event there is a failure of good faith.

Recovery by CBI is clearly established in accordance with the Exclusive Right to Sell Marketing Agreement.

3. RESULT

CBI is entitled to recovery of the balance claimed as owing, $16,811.00.

4. PRE-JUDGMENT INTEREST

CBI is entitled to pre-judgment simple interest **Cashen v. Donovan** (1999) 173 N.S.R. (2D) 87. Pre-judgment interest should run from the 13th of July, 1995 to date.

5. COSTS

Counsel are entitled to be heard on costs and should file and exchange their positions on costs as soon as possible and on or before the 6th of July.

J.