

IN THE QUEEN'S BENCH

BETWEEN:

QUEST REAL ESTATE LTD.,

Plaintiff,

- and -

DAQUAY ENTERPRISES LTD.,

Defendant.

A transcript of evidence and proceedings had and taken before The Honourable Mr. Justice Hanssen at trial held in the Law Courts Building, in the City of Winnipeg, in the Province of Manitoba, on the 24th and 25th days of April, 1984.

APPEARANCES:

M. D. Werier appeared on behalf of the Plaintiff

A. J. Hogue appeared on behalf of the Defendant

COURT RE-OPENED AT 4:20 P.M.

THE COURT: The plaintiff, a realtor, sues the defendant for a real estate commission of \$14,100.00, relating to the sale of the Notre Dame Hotel in Notre Dame de Lourdes, Manitoba, to P.L.N. Enterprises Ltd.

There are really two main issues for the Court to determine in this case. Firstly, was there an agreement between the plaintiff and the defendant, whereby the defendant agreed to pay a commission of six percent of the sale price to the plaintiff if the plaintiff introduced someone to the hotel who ultimately purchased the hotel.

Secondly, if there was such an agreement, was the plaintiff the effective cause of the sale of the hotel to the purchaser.

15 In light of the conflicting testimony before me,
16 it is of course clear that the outcome of this case will be
17 determined by my findings of fact and credibility.

18 In the summer of 1981 Mr. Smoluk, the president of
19 the plaintiff, learned that the Notre Dame Hotel might be
20 for sale.

Smoluk says he contacted Mr. Daquay the president of the defendant by telephone on August 11th, 1981. According to Mr. Smoluk he was unsuccessful in reaching Mr. Daquay on his first attempt and left a message for him to call him back. Mr. Smoluk says Mr. Daquay did call him

back, collect, later that day.

It was during this telephone call Mr. Smoluk says that Mr. Daquay provided him with the bulk of the particulars regarding the hotel, including the approximate asking price.

At this time Smoluk says Daquay refused to give him an exclusive listing of the hotel, but did agree to pay the plaintiff a commission of six percent of the selling the price if the plaintiff introduced a purchaser to the property.

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Mr. Smoluk says he again contacted Mr. Daquay by telephone, twice, on September 10th, 1981, for the purpose of getting some additional information regarding the hotel, and particularly the legal description, financial statements, and the amount the defendant would require as a down payment.

On the other hand, Mr. Daquay denies having agreed to pay the plaintiff a commission if the plaintiff brought about a sale of the hotel. As well, he denies that he provided Mr. Smoluk with the particulars of the hotel as claimed by Mr. Smoluk. But Mr. Daquay goes further, and comes just short of denying having spoken to Mr. Smoluk by telephone on either August 11th or September 10th of 1981.

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After listening to the evidence, observing the witnesses, and hearing counsel, I have come to the

conclusion that I believe Mr. Smoluk's version of what took place on those dates. I believe Mr. Smoluk when he says Mr. Daquay promised to the plaintiff a commission of six percent of the selling price if it brought about the sale of the hotel.

The converse of course is that I do not believe Mr. Daquay. His evidence does not stand up to scrutiny. For example, I cannot accept that he has little or no recollection of having spoken to Mr. Smoluk, once on August 10 11th, and twice on September 10th. I am satisfied that those conversations took place, and Mr. Smoluk's evidence in that regard is corroborated by the telephone statements, Exhibits 5 and 6. As well, I cannot accept Mr. Daquay's contention that he was interested in selling his hotel in May 1981 and again in October 1981, and did in fact sell it in January 1982 but was not interested in selling it in August and September of 1981, and in fact was upset that anyone should even approach him in this regard at that time.

20 Having concluded, as I have, that there was in existence an agreement binding the defendant to pay a commission to the plaintiff if the plaintiff was effective in bringing about a sale, I must go on to determine if the plaintiff introduced the purchaser to the property and thereby became the cause of the sale and entitled to the commission claimed.

There is no question that on September 11th, 1981, the date Mr. and Mrs. Mocan the principles of P.L. Enterprises Ltd. the eventual purchasers of the hotel were first brought to the hotel, they were brought there by Mr. Smoluk. Mr. Mocan, who gave evidence on behalf of the defendant, disavowed an interest in the Notre Dame Hotel on that date. I can accept that at this point in time he may still have been more interested in the Glenboro Hotel, but if he and his wife were disinterested in the Notre Dame Hotel, as he claims, why were they there? Why did they travel out of their way some sixteen miles to stop at the hotel? Why were they interested in the Belmont Hotel, the Glenboro Hotel, the Whitemouth Hotel, but by his evidence totally, and I stress totally, disinterested in the Notre Dame Hotel, although it seemed to meet the general criteria of the type of hotel he and his wife were looking for? Why did they later cause their corporation to purchase the Notre Dame Hotel? The answers I think are obvious. The answer to all of the questions is that there was a very significant degree of interest on the part of the Mocans in the purchase of the Notre Dame Hotel.

While I don't feel the evidence given by Mrs. Daquay added much to the defendant's case, I should put on the record that where there was a conflict between her evidence and that of Mr. Smoluk, I have chosen to believe

the evidence given by Mr. Smoluk. That of course applies to the other two witnesses who were called on behalf of the defendant.

I should add as well, that I agree with Mr. Hogue when he says that I should not have had assigned any weight to the documents filed by the plaintiff as Exhibits 2, 3 and 4 because of their self-serving nature. I have in fact assigned no weight to those documents in coming to my conclusion. I think their only value in the final analysis was for the purpose of refreshing Mr. Smoluk's memory when he was giving his evidence.

Insofar as the question of interest is concerned, this is a case where I am prepared to exercise my discretion and award interest on the amount claimed. I have chosen to award interest from May 1st, 1982, which in my view would be the approximate date on which the monies would have been paid to the plaintiff in the normal course had the transaction proceeded in the normal way.

However, I feel it is incumbent upon a plaintiff, who seeks to recover interest at what he alleges to be a reasonable rate, to offer some evidence of what is a reasonable rate. This was not done in this case. Accordingly I have decided that the interest rate should be five percent, being the interest rate specified in the Interest Act.

Therefore, there will be a judgment in favour of the plaintiff for \$14,100.00 plus interest thereon at the rate of five percent per annum from May 1st, 1982, to this date.

I would say, as well, as was noted during argument, that the Statement of Claim was not amended to ask for the additional \$300.00 which I compute would have been the appropriate amount payable based on the sale price of \$140,000.00. Since the Statement of Claim was not amended
10 and there was ample opportunity for the plaintiff's counsel to do so, I have made the award \$14,100.00 as claimed in the pleadings.

That is the judgment of the Court. Do you wish to speak as to costs?

MR. WERIER: My lord, the costs to be the usual tariff.

THE COURT: No comment on costs, Mr. Hogue?

MR. HOGUE: Under the circumstances, I would ask
20 that there be no costs, because there was certainly an issue of some dispute and difference of facts was not clear. Your lordship certainly has, under the circumstances, the discretion to award no costs, and I would hope your lordship would exercise your discretion to award costs which would be the normal costs of the cause, the taxable costs.

THE COURT: In my view, costs should be awarded.

award costs in favour of the plaintiff to be taxed in accordance with the provisions of the Queen's Bench Rules. Anything further, gentlemen?

MR. WERIER: No, my lord.

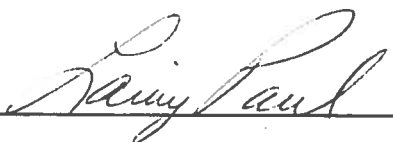
MR. HOGUE: No, my lord.

(COURT ADJOURNED AT 4:35 P.M.)

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REPORTER'S CERTIFICATE

I HEREBY CERTIFY that the foregoing pages of typewritten matter, numbered 1 to 8, are a true and accurate account of the proceedings in this matter as taken by me by stenomask to the best of my skill and ability.



Official Court Reporter