

1998

Date:20010309
COURT FILE NO: S BW 4294

IN THE SUPREME COURT OF NOVA SCOTIA
CLAUSSEN WALTERS & ASSOCIATES LIMITED

Plaintiff

- and -

DAVID A. MURPHY and SONIA MURPHY

Defendants

DECISION

[Cite as: Claussen Walters & Associates Ltd. v. Murphy, 2001 NSSC 105]**HEARD BEFORE: THE HONOURABLE JUSTICE HIRAM J. CARVER****DATES HEARD: JANUARY 29, 30, 31, FEBRUARY 1 & 2, 2001****PLACE HEARD: BRIDGEWATER, N.S.****DATE WRITTEN****DECISION FILED: MARCH 9, 2001****COUNSEL: RUBIN DEXTER, for the Plaintiff**
ALAN J. STERN, Q.C., for the Defendants**FACTS: Oral contract for development and sale of land****ISSUES:**

- 1. Was there an oral agreement for payment of a fixed commission between the parties?**
- 2. If there was an oral agreement, what were the terms?**
- 3. If there was an oral agreement, is such an agreement enforceable by the Plaintiff?**
- 4. In the absence of an enforceable agreement between the parties, is the Plaintiff entitled to recover from the Defendants based upon quantum meruit or unjust enrichment?**
- 5. If the answer to No. 4 above is yes, what is the appropriate amount?**

FINDING: There was an oral agreement for the payment of a fixed commission, there were definite terms, that the oral agreement was enforceable but in the alternative an award of unjust enrichment was made to compensate for work done.

[1] This is an action by the Plaintiff, **Claussen Walters and Associates Limited** against **David A. Murphy and Sonia Murphy** for damages for breach of contract or in the alternative a claim for unjust enrichment and/or *quantum meruit*.

[2] At the end of the trial, the Plaintiff asked to withdraw his claim against the Defendant Sonia Murphy. Same was granted. As to costs which were sought by defence counsel, I reserved upon that issue until a later date.

ISSUES:

1. Was there an oral agreement for payment of a fixed commission between the parties?
2. If there was an oral agreement, what were the terms?
3. If there was an oral agreement, is such an agreement enforceable by the Plaintiff?
4. In the absence of an enforceable agreement between the parties, is the Plaintiff entitled to recover from the Defendants based upon *quantum meruit* or unjust enrichment?
5. If the answer to No. 4 above is yes, what is the appropriate amount?

FACTS:

[3] The Plaintiff carries on business as a licensed real estate brokerage firm with an office in Lunenburg. Tony Walters is the President of the Company. He is a licensed real estate broker. His company began to build a marketing reputation of innovative ideas.

[4] The Defendant is a retired heart surgeon and resides with his wife, Sonia, at Halifax.

[5] The Defendant began to reside at Kingsburg, Lunenburg County as a seasonal resident in 1973. Over the years he acquired many parcels of land until he eventually owned approximately 100 acres in an area known as “Hell Point” or the “Hell”. This land was close to the village of Kingsburg. The transactions were negotiated privately between Mr. Murphy and the various owners of the lots. Title to all parcels of land vested in Mr. Murphy.

[6] The intention of David Murphy with respect to the lands he acquired was to develop a retirement farm. For a period of time the Defendants had a substantial number of sheep on the land; however, by 1990 there was a serious problem with coyotes. Up until that time David Murphy had fertilized, ploughed, mowed and grazed portions of the land and had fencing erected.

[7] By 1995 the Defendants entered into discussions with Nature Conservancy of Canada and the Province of Nova Scotia and explored the possibilities of donating the land.

[8] During the course of dealings with the Province of Nova Scotia, appraisals were carried out by two appraisers, one of which was Hardy Appraisals who did a subsequent appraisal for the Plaintiff after this action was started.

[9] Mr. Murphy did not donate the land as desired because of possible tax implications.

[10] On the recommendation of Peter McCurdy, who is a neighbour and friend of Mr. Murphy, Mr. Murphy telephoned Mr. Walters on November 26, 1996 and indicated he was interested in selling the land in question. Mr. Walters was familiar with this land.

[11] The first meeting between Tony Walters and Mr. Murphy took place on December 2, 1996. Mr. Walters says this meeting took place at the Murphy home at Kingsburg whereas Mr. Murphy said this meeting took place at Mr. Walters' office at Lunenburg. Mr. Walters said when he met with them at Kingsburg, Mr. Murphy's daughter Deirdre was present for part of the meeting. Deirdre and Mr. Murphy say this was not possible as December 2 is Deirdre's birthday which was celebrated at her parents home at Halifax. Also in her evidence, Deirdre said she first met Mr. Walters at her parents home in April 1997. She also told the Court on that day she was in the Court of Appeal.

[12] There is another problem as Mr. Walters says he made an arrangement for Mr. Murphy to see David MacDonald. All seem to agree that meeting was at 4 PM well after the 11 AM meeting between he and Mr. Murphy. The office of Mr. MacDonald was nearby.

[13] Having heard the evidence, I am satisfied someone is honestly in error. I find the meeting of December 2, 1996 took place in Lunenburg at the office of Mr. Walters.

[14] At that meeting Mr. Murphy brought with him aerial photographs, deeds and old documents. Mr. Murphy discussed selling it as a single lot whereas the suggestion of Mr. Walters was to develop it. Development of the land caused Mr. Murphy real problems as he wanted to keep the land in tact and certainly did not want any development as he had seen in other areas. It was at this meeting Mr. Murphy said he was busy, that he was not a developer, nor did he have the expertise, to which Mr. Walters replied he could do the development for him. Mr. Walters told him they would need a surveyor to see what could be done as any proposed sub-division had to pass the Planning Board. Two surveyors were discussed with Mr. Murphy deciding that Mr. Becker would do the survey work.

[15] At this meeting commission fees were discussed. Mr. Walters told Mr. Murphy if there was a direct or bulk sale his commission was 6% but if he got involved in the sub-division his fee would be 10% of the total sales when the sales took place. Mr. Murphy disputes that this conversation took place.

[16] At the December 2, 1996 meeting there was discussion about needing a lawyer to help with the legal issues of the project. Mr. Walters suggested Mr. Murphy should go and see David MacDonald as he had done a lot of work for him and he did good work. Mr. Murphy did go to see Mr. MacDonald later that afternoon.

[17] Discussion also included the need for Mr. Murphy to talk to his accountant re the

HST and any income tax implications.

[18] On December 9, 1996 Mr. Murphy, Mr. Walters and Mr. Becker met at the office of the Plaintiff at Lunenburg. The purpose of this meeting was to acquaint the surveyor with the proposed sub-division and see if it would meet planning approval. Mr. Becker was of the opinion it could be done but they would have to go through some hoops to get there.

[19] Very little was done through the winter of 1996 with the exception of Mr. Walters walking the land.

[20] Mr. Murphy and Mr. Walters met on the property in April 1997. At this meeting, Mr. Murphy queried Mr. Walters about the cost to which Mr. Walters replied his cost was 10%. Mr. Murphy said Mr. Walters told him for the 10% he could help get bids, help to get the road in, lay out the lines and work with the surveyor. Mr. Murphy said he told Mr. Walters it sounds good but wanted to talk to his family. Mr. Murphy testified he thought the commission was a bit pricy. He also testified at that time he hadn't a clue about value but he did have a ball park figure in mind. During these or prior discussions, Mr. Walters told Mr. Murphy to shop around with other real estate brokers to see if they would do it for less.

[21] After this meeting on the property, Mr. Walters and Mr. Murphy met at Mr. Murphy's house where much of what was said on the hill was repeated by Mr. Walters. Both Deirdre and her husband, Robert, were at the Murphy home. Deirdre was present for a part of the meeting. She was not present when the commission was discussed. There was discussion as to how Mr. Walters would market the land and that it would be sold in large lots with proper set backs. There was also discussion about the value of Mr. Walters company in selling this property. Mr. Murphy testified it was an amicable meeting. He noted his wife had queried Mr. Walters about the 10% to which Mr. Walters replied rather abruptly 10% is my commission. Mr. Murphy told the Court he did not object to the 10% at that meeting nor did he query it. At this time Mr. Murphy told the Court it was up to him after the meeting to get in touch with Mr. Walters. Mr. Murphy did call Mr. Walters within the week at which time he told him they were going ahead. Once Mr. Murphy told Mr. Walters they were going ahead, Mr. Walters said "I'll call Mr. Becker and we will go out and lay out the lots."

[22] A new road had to be constructed. Getting bids for the road was left to Mr. Walters. After obtaining bids, Mr. Mailman's quote was recommended by Mr. Walters to Mr. Murphy. Exhibit 1 Tab 5 sets out the tender and its acceptance by Mr. Murphy. It reads as follows:

“
 BERNARD L. MAILMAN PROJECTS LTD.
 R.R.2, BRIDGEWATER, N.S.
 B4V 2W1
 (902) 543-3936

A & A Walters

P.O. Box 428
Lunenburg
BOJ 2CO

ATT: Tony Walters

RE: Dr. Murphy Job

Quote for road as discussed	\$14,946.44
HST	\$ <u>2,241.97</u>
	\$17,188.41

We have priced job for 6-12" culverts.

Additional 12" culvert would cost \$159.24 plus h.s.t. EACH.

If job does not require 6 culverts we would give credit of \$159.24 plus h.s.t. per culvert.

Aug 4/97

I accept his bid, providing -

1. As per our review with David Silver - will try to maintain limbing and cleaning to 12 foot.
2. Let Tony Walters know when dozer and backhoe are ready to start - can contact at 634-4040 office; 527-8440 - cellular with a message.
3. Avoid driving on grass of protected beach road
4. Add gravel as necessary to make repairs to present road -

D.A. Murphy"

[23] Overseeing of the road construction was left under the direction of Mr. Walters. When it was completed, everyone was happy with its construction, including Deirdre and her husband.

[24] Mr. Walters went upon the land and with flagging tape laid out the lots and tied them into the new road. With the assistance of Mr. Murphy, set backs were also developed for each lot. With the assistance of Mr. Becker, Exhibit Number 1 Tab 32 was developed as a preliminary plan. This plan resulted from the work of Mr. Walters and to some extent that of Mr. Murphy. This plan was prepared showing the position of the new road tying in the lots. It is to be noted Mr. Becker testified "where the lots were laid out I took my instructions from Mr. Walters". It is to be noted how closely Exhibit Number 1 Tab 32 comes to the final approval of the plan as contained in Exhibit Number 1 Tab 36 or appears in Exhibit Number 4.

[25] As to the strategy regarding boundaries, Paragraph 2 of Exhibit Number 1 Tab 7, which is contained in a letter from Mr. Murphy to Mr. Walters, the following appears:

“A few questions as to lot strategy regarding -
boundaries - I leave this up to your wisdom.
Bob has the questions.”

[26] In August 1997 Mr. Murphy went to his neighbours to alert them he was selling his property and there would be some noise and dirt. He went to the home of Dwoone Massie, wife of Mr. Dexter, counsel for the Plaintiff and told her about selling his property. She testified as follows:

“He said Tony would be supervising construction of the road and he said Tony will be selling the properties. He said he hired Tony. I told him I didn't know Tony would do that. He told me if there was a problem with anything, I should phone Tony not the Murphys.”

[27] In his evidence, Mr. Murphy told the Court this conversation in part resulted from a telephone call from Mr. Dexter complaining about the noise.

[28] Up to the 5th of November, 1997, the parties worked amicably together. Everything seemed to be going well. On November 5, 1997 Mr. Walters took David MacDonald, his wife, Barbara Claussen to the home of Mr. Murphy. Together they all went to the lot at “Hell Point”. There was conversation with Mr. MacDonald by Mr. Walters and Mr. Murphy about covenants that would appear in any deeds for property sold. It was left with Mr. MacDonald to review a set of covenants supplied or to be sent by Mr. Murphy and to draft suggestions. Mr. Murphy said at this meeting he was becoming uneasy with the presence of Barbara Claussen, another real estate agent and Mr. MacDonald. He told the Court he was also concerned he had not received any agreement in writing from Mr. Walters and about the settlement of the commission.

[29] Mr. Walters testified from his point of view his work was completed on constructing the road and laying out the lots for Mr. Becker to survey and present to the Planning Board unless Mr. Becker came back and said they couldn't do as configured. I accept this evidence of Mr. Walters that his work in this area was completed save problems Mr. Becker may need resolved.

[30] Shortly after this meeting of November 5, 1997, Mr. Murphy phoned Mr. Walters to advise him there was to be a meeting in Halifax at the office of his daughter, Deirdre on November 13, 1997. He told Mr. Walters the purpose of the meeting was to generate some comment about a contract for the sale of the land. Present at that meeting were Mr. Walters, Deirdre and her husband, Robert. Mr. Murphy was not present. Mr. Murphy's absence at such a critical time gives the Court some real cause of concern particularly where he was so closely connected to the transaction and

had dealt with Mr. Walters almost exclusively on all issues. I really didn't accept his excuse of being busy. I got the reading the meeting was planned to be that way as where he set up the meeting with Mr. Walters he could have picked a non-scheduled day to permit his presence.

[31] All agree the meeting was professional, appropriate and cordial until near the end when the 10% was discussed and what costs was to be included in this amount. Mr. Walters told them he had certain responsibilities and that at that time they were all done. He told them they were only that far from going to the market and depended upon Mr. Becker getting approval. At this time no one told Mr. Walters the approval could not be obtained or that there was a problem.

[32] On November 13th, Deirdre Murphy told Mr. Walters she had no intention of re-negotiating the 10% but it was a concern upon which Mr. Walters replied he had a deal with her dad for 10% and that was his commission. Deirdre told him he should not take a position of 10% or there may be no need of going further. She conveyed to Mr. Walters if he didn't back off the 10% it might be no need to go further. The question was raised as to whether he would get the listing. Dierdre Murphy said there was no discussion of any break-down of the 10%. There does appear at Exhibit Number 1 Tab 15 Page 35 which are Robert's notes which reads as follows:

“Rational basis for 10%. 6% for nothing but
MLS and no other input.”

[33] At the time of the November 13, 1997 meeting Deirdre knew the road had been completed but was not familiar with any of the other work Mr. Walters had completed.

[34] As an outcome of this meeting, Mr. Walters was to prepare and forward to them an overview of the marketing services provided by the Plaintiff Company. This Mr. Walters did by letter to Mr. David Murphy dated November 17, 1997 found at Exhibit Number 1 Tab 16. Three paragraphs of that letter are important. They are found at page 41 and 45 respectively and appears as follows:

“The issue of AA Walters' commission came up in the discussions with Deirdre and Robert. Our agreement was 10% commission, inclusive of the project management, with the provision that if at any time you were not satisfied with our firm you could notify me and if we could not remedy the situation to your satisfaction then we would withdraw from the project. Our time and fees are purely on a contingency basis. If you are satisfied with our work, I wonder why we are asked to negotiate the commission again after so much of the project has been completed and the properties are essentially ready to market.

The commission not only compensates us for our knowledge and expertise but, importantly, allows us to provide a high level of marketing services. As you and your family discuss the value of our recommendations and services please consider the following discussion and the importance, in your opinion, of the role of AA Walters Limited in creation of value and the future marketing of the Hell Point properties.

Listing Agreement

AA Walters Limited commission is 10%, inclusive of the project management. The commission is subject to HST. All cooperating brokers are compensated from this commission.”

[35] On November 24, 1997 Mr. Murphy wrote Mr. Walters stating:

“Dear Tony

I want to thank you for taking the time to meet with Deirdre and Robert the other day. They enjoyed meeting with you and went away with a better understanding of your perspective on this project. This is just a note to say that we received your delivered document concerning your proposed marketing plan for Hells Point. It was much appreciated and well considered. We are still in the process of mulling over the options and we will let you know as soon as possible. We look forward to talking to you then.”

[36] By letter dated November 24, 1997 Mr. Murphy wrote the following letter to Fran Shea, another real estate broker:

“Dear Ms. Shea,

As you probably know, we are planning to sell portions of our property on Hells Point in Lower Kingsburg. A new road has been installed and the survey work is almost complete. As yet we have made no formal contractual commitments to list our real estate.

We would appreciate your opinion as to how your firm might market this land and what sort of contractual arrangements including sales commission, terms of listing agreement, and marketing plan you might propose. As a courtesy, we would kindly ask that our request be kept in confidence until such time as the matter is formalized. Thank you for looking at our proposal and we look forward to hearing from you.”

[37] It is to be noted Fran Shea previously had been a real estate agent for AA Walters, the Plaintiff former Company. The word confidence was underlined when she received it. Mr. Murphy told the Court he had written to Fran Shea as Mr. Walters had previously suggested he do if not satisfied with Mr. Walters. In his evidence, he told the Court he did not want Mr. Walters to know he had written to Ms. Shea. He said at this time he wanted Mr. Walters to come down on the 10%. He felt it was negotiable. He also said the first time Mr. Walters knew it was a problem was when he met with his daughter and husband in Halifax.

[38] In response to Mr. Murphy, Fran Shea wrote Mr. Murphy on November 27, 1997. It appears as follows:

“Dear David,

Thank you for your letter of November 24, 1997. I am pleased to inform you that Tradewinds will be operating from our Lunenburg office as of December 5th.

As you know I am very familiar with the land in Lower Kingsburg area and have been involved with almost all of the twenty plus transactions that have taken place there in the last four or five years. This year my listings on the Beach Hill have sold and I have sold the Lorraine Mossman house on the beach. When Jon Allen and I joined Tradewinds all of our Kingsburg vendors kept their properties listed with us.

Re: The marketing of the lots on Hells Point. I would be more than pleased to meet with you at your convenience and discuss a marketing plan (I’ve been thinking about it for the last year). There is too much information to cover in a letter and of course there is material that you should see--our catalogue,

new listing brochures, internet site, ad placements, etc.

The commission structure is also negotiable. As there are several lots to be sold, Tradewinds would be prepared to charge only six percent commission, with a side agreement at a reduced rate for any clients that you personally introduce to the property. This is also open for discussion.

I may be reached at the Lunenburg office after the 5th of December. Of course you are welcome to call my cell (902-527-6643) or my home (902-688-3172) at any time. I look forward to hearing from you.”

[39] On January 8, 1998 Ms. Shea wrote to Mr. Murphy by e-mail. Both her letter and Mr. Murphy’s reply appear as Exhibit Number 5. They are as follows:

“Dear David,

Thought that I would touch base and inquire whether you have made a decision re: the marketing of your land on Hells Point. My office number is 902-634-1250.

Regards,

Fran Shea

Fran Shea

Tradewinds Realty Inc Chester, Nova Scotia
Home 902-688-3172 Fax 902-275-2215

Thanks for the follow up - no we haven’t made a decision on the marketing of the point yet although we were very favorably impressed with the tentative figures you mentioned in the letter. What is the hold up is the step wise red tape involved in converting so many little and big pieces of land with seven deeds into something that is acceptable to planning and also the bottom line health. Bob Becker and I are making pretty good progress and should have some hint of finality by late February. We will certainly be in touch. I was in Toronto yesterday talking to Dr. Chris

Feindel and your name came up..it sounds like he also will be giving you a call. Yours sincerely David murphy... Love this e-mail--I don't need to worry about capitals and punctuation.”

[40] On December 3, 1997 Mr. Walters wrote to David Murphy. This letter appears at

Exhibit Number 1 Tab 23:

“Dear Dave:

Our catalogue was sent to the printers while we were still of the understanding that AA Walters was the listing broker for your Hell Point properties, therefore, the lands have been included.

How should we respond to inquiries?

Advertising, production of brochures, placement in the Who's Who web site etc. are on hold until we hear from you. I assume this is your wish.

Please let me know how you want to proceed.

If you are in Kingsburg this weekend please stop by our open air Nikolaus Celebration in Lunenburg. AA Walters is sponsoring the event for local children and in support of Christmas Daddies. It's for children of all ages!

With kindest regards,

Tony Walters.”

[41] On December 11, 1997 Mr. Walters wrote to Mr. Murphy. It appears as Court Exhibit Number 1 Tab 24. It reads as follows:

“11 December 1997

Dear Dave and Sonia:

There have been a number of distressing events over the past several weeks, some of which I referred to in previous correspondence.

On 13 November I met with Deirdre and Robert at which time they both advanced the position that AA Walters commission of 10% was the subject of further negotiation and that even our role as exclusive listing broker was in question. I was quite surprised because Deirdre was present at our first meeting at your house in Kingsburg at which time we all discussed the 10% commission which would be inclusive of project management and payable upon the sale of the lots. On that day no decision was made about AA Walters Limited managing the development and the sale of your property. Sonia was not there and you said that you would have a family meeting and then let me know your decision.

Some time later I received a telephone call from you confirming that the family had decided to proceed and AA Walters was hired. The 10% commission was confirmed by you at that time. We proceeded in good faith.

Our agreement was as follows: AA Walters Limited and Tony Walters would be responsible for management and development, and the exclusive listing and sale of your lands at Hell's Point. We agreed that AA Walters Limited would be compensated for its service both in the development of the lands in question and the sale of the lots on the basis of a commission of 10% of the selling price of the lots payable upon the completion of each sale. We further agreed that if at any time you were not satisfied with our work you could notify me and if we could not remedy the situation then AA Walters would withdraw from the project.

Our agreement was straightforward and clear.

At no time subsequent to that did I have any indication

that you were not satisfied with our work. In fact, on numerous occasions when we were on the property together and on the telephone you expressed your delight with the way things were proceeding. Deirdre said to me during one of our meetings in Kingsburg that she and Robert had walked the new road and how pleased everyone was with its design and construction and the overall development concept. Never, never was there a single complaint.

So, perhaps you can understand my surprise when the subject of our commission, and even our firm's continued involvement with the project, came up at my meeting with Robert and Deirdre.

I became more concerned when I received your fax dated 24 November in which you said: "We are still in the process of mulling over the options and we will let you know as soon as possible."

Then after my -3 December letter to you, I received your telephone call stating the subdivision of the lots had encountered difficulty and everything was on hold.

Given the statements made by Deirdre, as your daughter, and Robert acting on our behalf and speaking for you as your solicitor, and your statements to me, I can only conclude that you are telling me that you do not intend to be bound by the terms of our agreement.

Please provide me with written confirmation of your intentions within seven days. If you do intend to abide by the terms of our agreement please forward to me all documentation with respect to the subdivision application and the problems which you referred to in our telephone conversation and I will meet with Robert Becker and the planning office to see how the issues can be resolved.

With kindest regards,

Tony Walters"

[42] Mr. Murphy was very concerned Mr. Walters had put a time stipulation on this matter. No request was ever made by Mr. Murphy to Mr. Walters to assist in the solving of any problems concerning the sub-division as Mr. Walters had noted in the last paragraph of this letter.

[43] On December 19, 1997 Mr. Murphy wrote to Mr. Walters. It appears in Exhibit Number 1 Tab 25:

“Dear Tony:

RE: Hell’s Point Property, Nova Scotia

Thank you for your letter dated December 11, 1997 which I received on Monday. As a courtesy I am responding within your stated time limit of one week.

I am sorry if I caused you any distress in our negotiations. I am also sorry if you believe that I have mislead you into thinking, mistakenly, that we had agreed that you would be the exclusive developer and agent for our property.

You must realize that I am not a business man and that I depend on the advice of numerous professional advisors such as accountants and lawyers, prior to making significant commitments such as the sale our property at Hells Point. In our discussions you said that you were more comfortable with a verbal agreement but that on occasion you would proceed with a written agreement. I expressed that I wanted to arrange a “meeting of the minds” on paper, such that numerous key terms could be negotiated and committed to on paper. I wanted input from lawyers, accountants, and other agents prior to signing the proposed written agreement. In gathering information from these professional sources, I learned that there were numerous fundamental terms and issues which we had not even discussed. That is when I arranged for you to meet with Robert Kapanen and my daughter, Deirdre, and that why’s I am seeking input from various other professionals including those who deal with real estate sales.

Your letter imposes a deadline of one week for me to respond to your proposal of a 10% commission on sales. This rate has always been a matter for discussion, and I had wanted to clarify other terms prior to committing to a written agreement. At the present time the sale of the

lands is on hold until we complete our deliberations and obtain more information, at which time we would like to continue talking with you if you so wish.

Yours very truly,

David Murphy”

[44] Both Mr. Murphy and Mr. Becker did meet with the Planning Authority. In order to reach approval, it was necessary to re-configure the lots in three different phases but as Mr. Becker said when approval came the plan as shown in Exhibit Number 1 Tab 32, resulting from the work of Mr. Walters, was strikingly similar to Exhibit Number 4 the final plan approved by the Planning Board.

[45] After the sub-division was approved, the property was listed for sale with Mr. Duckworth. Four of the lots have been sold for a total of \$875,000.00. There are three lots yet to be sold set at prices of \$300,000.00, \$350,000.00 and \$500,000.00 respectively.

[46] Before the land was sub-divided, Ms. Girvan, another realtor, had hinted the property was worth \$850,000.00 in a bulk sale.

[47] With the letter of December 19, 1997, all contact between Mr. Murphy and Mr. Walters re Hell Point came to an end.

ISSUE #1:

[48] Was there an oral agreement for payment of a fixed commission between the parties? I find there was. I find there was an oral agreement between the Plaintiff and the Defendant for the payment of a fixed commission of 10%. I find at the first meeting on December 2, 1996 the parties discussed the sale of the property as a bulk sale for which a commission of 6% was to be charged. I find they discussed the sub-division of Hell Point and what Mr. Walters’ duties would be. If he were to lay out the sub-division and prepare it for Mr. Becker to get planning approval and sell the property, he was to be paid 10%. I find Mr. Walters was not to lay out and prepare this sub-division in anticipation of getting the property to sell. At that time, both parties knew what Mr. Walters’ role was going to be and the difference between the 6% for sale of bulk land and the 10% was to cover the development work by Mr. Walters to lay it out for sub-division approval with the thought always in mind of keeping that property as a prestigious and undisturbed area. To lay this area out to comply with the desire of Mr. Murphy and to meet Planning Board approval was no small matter and required someone with appropriate expertise and concern for the eventual development.

[49] I find the terms of this agreement were discussed between Mr. Walters and Mr. Murphy on December 2nd, 1996 at Mr. Walters’ office at Lunenburg on December 9th, 1996, at the same office with Mr. Murphy, Mr. Walters and Mr. Becker present; out on “Hell Point” between Mr.

Walters and Mr. Murphy in April, 1997 and at the home of Mr. Murphy in April, 1997.

[50] At that meeting in April, 1997, the 10% and the work Mr. Walters was to perform were all on the table. Mrs. Murphy raised the amount of 10% and Mr. Walters responded. Mr. Murphy did not comment at this time about the amount of commission. That meeting was an amicable one. The meeting ended with Mr. Murphy wanting to discuss it further with the family after which he was to get back to Mr. Walters. Later that week, Mr. Murphy called Mr. Walters and told him they were going ahead. In my notes, the following comment appears “once I told him we were going ahead, he said I’ll call Becker and we will go out and lay out lots”.

[51] At that point, the oral contract was consummated and the work that eventually led to sub-division approval was commenced. I find the parties worked closely and amicably together. This continued right up to November 5, 1997.

[52] Up to November 5, 1997 Mr. Murphy and his family were pleased with the road and the work Mr. Walters had done.

[53] I further find Mr. Murphy breached the oral agreement by his letter of December 19, 1997 and by his actions both before and after that date.

ISSUE #2:

[54] If there was an oral agreement, what were its terms? I find the following were its terms.

- (a) to develop a concept and strategy for the development, sub-division and marketing of the land at “Hell Point”.
- (b) to manage and be responsible for the laying out of the sub-division of the land to bring it within the approval of the Planning Board.
- (c) to manage and be responsible for the laying out and construction of a road running over the land to accommodate the lots in the sub-division.
- (d) to meet with the Defendant, his surveyor, accountants and solicitor.
- (e) to market the land for sale on an exclusive basis.
- (f) for this work the Plaintiff was to be paid a commission of 10% which work included the preparatory work to allow the surveyor to present it to the Planning Board for approval and the actual sale of the property. Mr. Walters was to be paid upon sale of the land.

ISSUE #3:

[55] If there was an oral agreement is such an agreement enforceable by the Plaintiff?

[56] In this case, I find the **Real Estate Brokers Licensing Act** has no application because the agreement was made in April, 1997 after this Act was repealed on January 21, 1997.

[57] I find the **Real Estate Trading Act**, Chapter 28, 1999 R.S.N.S. applies to this agreement. Section 31 of the **Real Estate Trading Act** reads:

Requirements respecting agreements

31(1) Every agreement entered into by a licensed person
for the purchase or sale of real estate shall

(a) contain an expiry date; and

(b) be executed by all parties to the agreement,

and the licensed person shall, upon execution, provide a true copy
of the agreement to each party to the agreement.

(2) An agreement is not invalid by reason only that it does not
comply with subsection (1) but, where a licensed person,
acting in bad faith, does not comply, the licensed person
may not recover any commission under the agreement
with respect to the trade.

[58] Section 31(2) provides an agreement is not invalid by reason it does not comply with s. 31(1). It goes on to say “but, where a licensed person, acting in bad faith does not comply, the licensed person may not recover any commission under the agreement with respect to the trade”. In the converse it is saying if you have an agreement such as here the licensed agent may recover the commission under the agreement, if that person is acting in good faith. I find Mr. Walters was a licensed agent, was acting in completely good faith and he is entitled to his commission.

[59] The next question is does this agreement fall within the terms of the **Statute of Frauds**, Chapter 442 R.S.N.S. Section 7 reads:

- 7(a) No action shall be brought
- (e) upon any agreement that is not to be performed within the space of one year from the making thereof, unless the promise, agreement or contract upon which the action is brought, or some memorandum or note thereof, is in writing, signed by the person sought to be charged therewith or by some other person thereunto by him lawfully authorized. R.S., c. 290,s.6.”

[60] As to the duration of the agreement, the evidence sets forth Mr. Walters said: “I looked at it as a long term project. I said we shouldn’t push it. There was a time frame of 5 years. I said you need to talk to your accountant. One was sales tax and also his personal tax. I told him lets do a good job”. Mr. Murphy seemed to go along with these comments.

[61] As to agreements that falls within and without the **Statute of Frauds** supra Fridman on **The Law of Contract** 3rd edition at page 214 say:

(iii) Contracts not to be performed within a year

This is a strange category. It might be thought that contracts which bound one person to guarantee another’s debt and contracts relating to land were clear instances of the need to establish liability by some form of writing. To extend the Statute to all contracts, whatever their subject-matter, if they involve a longer period than a year for their completion, seems an unnecessary extravagance. Perhaps the situation at common law, long since changed, by which the parties to a contract (although potentially the best witnesses) were excluded from giving testimony, may explain this inclusion within the **Statute of Frauds**. Furthermore, the chances of false or perjured evidence, or merely mistaken evidence, when the contract had been made some years before the litigation to which it gave rise, were high (although if the contract were within the Statute it did not matter that the action arose the day after the contract was made, and, if such a thing were possible, the case was heard the very

next day, that is, while recollection was still fresh and clear). It suffices to say that, perhaps because of the strangeness of the statutory provision, and the dislike of the courts of the technical defence of the statute succeeding where it lacked merit, the decisions reveal a peculiar interpretation of the phrase “not be performed within a year”.

To begin with there are clear instances where a contract is for more, or, as the case may be, less than a year. Thus the contract, from its terms may be incapable of being performed by either party within the year from its making. This is exemplified by the old English case of **Boydell v. Drummond**, which concerned a subscription to a forthcoming edition of Shakespeare that would have taken longer than 12 months to appear. Or the contract cannot be performed by one of the parties within the year and it does not manifest any intention that the other party should fully perform his side of the bargain within the year. Thus a contract for a two-year period under which one party agrees to take orders for, and sell to customers the maximum volume possible of the other party’s product was within the Statute. So was a contract under which the plaintiff was to pursue training as a nurse in the defendant’s hospital for two years. So, too, was a contract of employment under which the employee’s salary was to rise from \$700 per annum to \$1,000 per annum by annual increases. Another example is provided by a contract for a perpetual term under which one party was to pay the other \$10,000 per year for ten years.

On the other hand the contract may be intended to be performed and may actually be performed by one party within the year. Thus in **Spencer v. Spencer**, in which there was a promise to convey land in return for a promise to support for life, it was held that the contract was one to be performed within the year, as the conveyance would clearly occur within the requisite period; so, too, where the contract is one of service for one year commencing the day after that on which the contract is made.

In contradistinction, however, are cases where it is not clear whether the contract is to be performed within or beyond the statutory period. If the contract is for an indefinite period which (according to circumstances that may or may not occur) may or may not be coterminous with the statutory year, then

the contract is not within the **Statute of Frauds**. On the other hand, if the contract is so worded as to show distinctly that the parties contemplated the duration of the contract for a definite period of more than one year, although it contains an express or implied term by which it *may* be terminated within the year, then the contract is within the Statute. As Lord Alverstone said in the leading case of **Hanau v. Ehrlich**, which has been approved and followed in Canada.

...if there is no mention of time, and the time is uncertain, the agreement is not within the Statute...if the time mentioned is more than one year, but there is power to determine, the agreement is within the Statute.

In the words of Kerwin J. of the Supreme Court of Canada, the Statute does not apply if it is possible that the provisions can be performed or are not incapable of being performed within a year.

Thus, where there was a contract of employment to last the life of the employee, though the employee could terminate at any time if not satisfied with the salary or bonuses, it was held that the contract, was not within the Statute because it might be wholly performed within a year, since the employee might terminate it, or might die (a lugubrious thought which was instrumental in another case involving a contract for the support of a child - who, it was said, might not live for more than one year). As Mackay J.A. said,

...[t]he statute has no reference to cases in which the whole contract may be performed within one year, but there is no definite provision as to its duration, even though it may appear as a fact that the performance has extended beyond that time;...where the contract is such that the whole may possibly be performed within a year and there is no express stipulation to the contrary, the statute does not apply...

So, too, an agreement to pay a stated price for milk from a herd of Guernsey cows, in consideration of the owner of the herd taking stock in a dairy company, was not within the Statute, despite the vagueness of the period, since the owner might sell the herd within the year, have no milk to deliver, or could die before the year was out. Where one contracting party obliged himself not to do a certain thing,

no time limit being mentioned, and where one party made a promise to marry, without mentioning when the marriage was to take place, the Canadian court accepted the principles laid down in **Hanau v. Ehrlich**, which involved an employment contract for two years that could have been terminated at any time. Similarly, in **Boutilier v. Everett**, a contract of loan was an agreement capable of being performed within a year from its making because the borrower was at liberty to pay off the loan at any time; therefore, he could have paid it within a year. The Statute did not apply.

It would seem, therefore, that, in the absence of some definite stipulation as to time, which undoubtedly decides the issue, and leaves no room for judicial manoeuvres, there is considerable scope for interpretation of contractual terms as to duration or the time of performance, in such a way as to provide maximum flexibility and allow the courts to prevent the abuse of the Statute.”

[62] In **Boutilier v. Everett**, 1979 40 N.S.R. 2nd 527 (N.S.T.D.) C.J. Cowan said this:

“At the commencement of the hearing, the defendant applied for leave to amend the statement of defence, by pleading that the transactions with regard to the three amounts in question came within the terms of s. 6(e) of the **Statute of Frauds**, R.S.N.S. 1967 c. 290, which provides as follows: -

No action shall be brought:

(e) upon any agreement that it is not to be performed within the space of one year from the making thereof; unless the promise, agreement, or contract upon which the action is brought or some memorandum or note thereof is in writing signed by the person sought to be charged therewith or by some other person thereunto by him lawfully authorized.

Counsel for the plaintiff objected that the application was made too late and that such an application should not be granted at the present time. I am of the opinion that the amendment should not be permitted at this late date, but

I also express the opinion that, even if it were pleaded, the agreements in question were not such as come within the provisions of the statute. As I understand the arrangement, it was that loans of cash were made by the plaintiff to the defendant and the defendant agreed to make certain payments. The initial arrangement was that he would pay \$300.00 per month and the additional advances were merely added on to the amount originally advanced. The authorities indicate that the statute does not render unenforceable agreements which are capable of being performed within the space of one year from the making. In this case, it appears to me that the agreement between the plaintiff and the defendant was one that was capable of being performed within the year. The defendant was at liberty to pay off the loans at any time. I also find that if, as happened, the defendant did not make the monthly payments which he promised to make, the plaintiff was entitled to require payment of the full amount of the advances, less payments on account of principal to date. The loan can, therefore, be called in before one year in the case of default and there was default within the year. I therefore find that the section of the **Statute of Frauds** referred to does not apply in the present case and that, if the amendment were allowed, it would not render unenforceable the agreements in question.

[63] In this agreement, it was contemplated for tax reasons suggested by Mr. Walters this agreement could go as long as 5 years but there was nothing preventing it being performed completely within one year. The contract came into being in April, 1997. By November 5, 1997 the road was in and all of Mr. Walters' work was performed save what Mr. Murray and Mr. Becker needed. It remained for Mr. Becker to obtain sub-division approval which even though took some time could have been done sooner if preference had been given to the project. It is noted the lots already sold had sold very quickly with little or not advertisement. It is noted by Mr. Walters' letter of December 3, 1997 he had already included the advertisement of the land in his catalogue.

[64] It is also noted in Mr. Murphy's letter of January 8, 1998 to Ms. Shea he stated they should have some hint of finality by late February. The only reason this agreement could have taken over the year was really for tax purposes which did not seem to overly concern Mr. Murphy at this time.

[65] I find this oral agreement did not offend the **Statutes of Frauds** as it was capable of being performed in one year.

[66] I therefore find the oral agreement entered into between the Plaintiff and the Defendant was not only valid but enforceable insofar as the commission for 4% of the lands sold by Mr. Duckworth. The 4% represented the development work done by Mr. Walters.

[67] Four lots have been sold for a total of \$875,000.00. The Plaintiff is awarded 4% of \$875,000.00 for a sum of \$35,000.00.

[68] **ISSUE #4** Should I have erred in my finding in the alternative, the Plaintiff is entitled to an award either in a claim for unjust enrichment and/or **quantum meruit**.

[69] In **Sorochan v. Sorochan** (1986) 29 D.L.R. (4th) the Supreme Court of Canada articulated the three requirements which must be satisfied in order to found an action for unjust enrichment:

- (1) an enrichment
- (2) a corresponding deprivation and
- (3) the absence of any juristic reason for the enrichment

[70] The Defence concedes the services provided to Mr. Murphy by the Plaintiff were of benefit to him. It is also noted the services done by the Plaintiff were satisfactory to Mr. Murphy.

[71] I find there was an enrichment to the Plaintiff and a corresponding deprivation to the Defendant. The Defendant as agreed obtained a benefit from the services of the Plaintiff while the Plaintiff lost all of his effort to build the road and lay out the lots to comply with the Planning Board and yet keep their presence as desired by Mr. Murphy.

[72] As to the third condition in **Campbell et al vs. Campbell**, Borins J.A. for the Ontario Court of Appeal set forth what was required to satisfy such requirement. At Page 794 he stated:

“Thus, what is at the heart of the third requirement is the reasonable expectation of the parties, and whether it would be just and fair to the parties considering all of the relevant circumstances, to permit the recipient of the benefit to retain it without compensation to those who provided it.”

[73] The benefit conferred by the Plaintiff to the Defendant falls within the third requirement. The Plaintiff’s services were both requested and encouraged by the Defendant. It would be unfair and unjust to permit the Defendant to retain this benefit without compensation to the Plaintiff.

[74] Issue #5 The only question is the quantum of damages. The Defendant is of the

opinion this award should not be great. The Plaintiff counsel argues that the Plaintiff is entitled to the 4% agreed to in the oral contract.

[75] The Plaintiff's services not only benefited the Defendant for the land already sold but the three lots still unsold on which the Defendant has set a price of \$1,500,000.00. He may not obtain that price but it does give a value the Defendant believes is the worth of the remaining land. These values are in line with the land already sold.

[76] The services of the Plaintiff greatly enriched the value of the Defendant's property. Here the task of Mr. Walters was not only to lay out this land to get sub-division approval, but to keep the property prestigious and as an undisturbed area. As I said earlier, to lay this area out to comply with the desire of Mr. Murphy and to meet Planning Board approval was no small matter and required someone with appropriate expertise and concern for the eventual development. You cannot just count hours. You also have to consider the expertise of Mr. Walters.

[77] This expertise was sought after when Mr. Murphy first approached Mr. Walters. Mr. Walters did his work and never was there any complaint except over the question of the commission and that did not come from Mr. Murphy personally to Mr. Walters before November 13, 1997. All the Plaintiff's work has been completed on the development. It is not usual to set a commission fee in an unjust enrichment case but here the 4% was an amount both parties agreed for the development work. In my opinion, it is better to place a figure based on what the parties thought the work was worth rather than place a figure at random when the Court has no real amount upon which to set a value. It is hard to quantify Mr. Walters' expertise in this area considering the work he had to do of taking all the lots and configuring them to meet Planning Board approval.

[78] All of the land has not been sold but the Plaintiff's services have enriched same as well as it enriched the land already sold.

[79] When one considers the Defendant purchased this land for somewhat over \$200,000.00 for which he has already received \$875,000.00 with three valuable lots remaining, it can be seen the Plaintiff's work greatly enriched its value.

[80] When I consider under the contract the Plaintiff is entitled to 4% of the land already sold and the fact there are remaining three lots which the Defendant considers are worth over one million dollars, I am of the opinion to award less than the \$35,000.00 for unjust enrichment would be inappropriate and unjust.

[81] On the claim for unjust enrichment, I set the amount at \$35,000.00.

[82] I set the rate for pre-judgment interest at 4.4% per annum.

[83] Any determination on costs will be reserved as I indicated I would hear the parties at a later date re the dismissal of the claim against Mrs. Murphy. I encourage the parties to settle the issue of costs, otherwise I ask they each submit short briefs after which I will make a

determination.

DATED this 9th day of March, 2001.

HJC