1990 S.H. No. 74447

IN THE SUPREME COURT OF NOVA SCOTIA
TRIAL DIVISION

BETWEEN:

WILLIAM S. CLEARY and **700068 ONTARIO LTD.,**

APPLICANTS

- and -

ROBERT G. MARTIN and **THE ATTORNEY GENERAL OF NOVA SCOTIA**

RESPONDENTS

HEARD: At Halifax, Nova Scotia, before the Honourable Mr. Justice David W. Gruchy, in Chambers, on October 5, 1990.

DECISION: October 5, 1990

COUNSEL: Alexander M. Cameron, Solicitor for the Applicants

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GRUCHY, J.

(I rendered my decision orally at the time of the hearing of this matter and indicated that I would supplement it by a written decision.)

The Applicants in this action have commenced their action by way of an Originating Notice Application Inter Parties, and seek a declaration that they are not required to be licensed under the **Real Estate Brokers' Licensing Act**, R.S.N.S. 1989, Chapter 384 and an Order in the nature of a **mandamus** requiring the Respondent, Robert Martin, to grant a license to the Applicant, William S. Cleary pursuant to the **Direct Sellers' Licensing and Regulation Act**, R.S.N.S., 1989, Chapter 129.

I want to indicate that the Attorney General's position is to the effect that the remedies sought herein are inappropriate; that is, that any declaration given would have to be so restricted in its factual basis as to be virtually useless. Nonetheless, the Court does have the required jurisdication and the consideration of the matters raised, I believe, is of some importance to the parties and to the public. I have particularly referred to the cases of **Solosky v. The Queen** (1980), 105 D.L.R. (3d) 745, **R. v. Shore Disposal Ltd.; Ed DeWolfe Trucking Ltd., et al v. Shore Disposal Ltd.** (1976), 16 N.S.R. (2d) 538 and **Whynot et al v. The Queen** (SCA No. 01888) in this regard. I have also considered the usual requirements for **mandamus**

or declaratory relief and in particular the cases of **Smith's Field Manor Development Limited v. Halifax (City)** (1988), 83 N.S.R. (2d) 41 (Trial); 83 N.S.R. (2d) 29 (Appeal) and **Rawdon Realties Limited v. Rent Review Commission** (1983), 56 N.S.R. (2d) 403; 117 A.P.A. 403.

I will review the facts which are before me and as are set forth in the affidavits. In keeping with the Attorney General's position I ought particularly to note that any findings here will obviously be restricted to those facts.

On June 6, 1990, the Applicant, Cleary, entered into a franchise agreement with an Ontario company, 700069 Ontario Ltd., doing business as Peartree Home Marketing Consultants, ("Peartree"). The principal of 700068 Ontario Ltd., is Robert Poirier, the affiant for the applicant. Under the terms of the agreement, the Applicant, William S. Cleary, was entitled to carry on business in a fashion prescribed by Peartree in Hants County and in Kings County, Nova Scotia. According to the Peartree publicity Peartree offers Nova Scotians who wish to sell their own houses a "unique" service. Upon entering into a contact with Peartree,

the homeowner receives commercial advice and a "do-it-yourself" package. The package contains signs, a buyer's guide, a standard form of agreement of purchase and sale, information respecting offers to purchase and a few other items. It consists largely of some relatively glossy material, printed forms and signs. Presumably as well, the service also includes a consultation or a consultative service. The fee for that package and service is $345.00 payable in advance and in addition, $995.00 to be paid to the applicant by the owner upon and from the proceeds of the sale of the house. Regardless of whether the services are discontinued, in the event that the purchaser who buys the house from the homeowner was introduced to the subject property while the homeowner was using the Peartree service, the $995.00 contingent fee is payable.

It should also be noted that the applicant says that at no time does Peartree or presumabley its francisee, act as an agent or intermediary between the homeowner and third parties.

On July 10th, 1990, the Applicant applied to the Nova Scotia Department of Consumer Affairs for a license

under the **Direct Sellers' Licensing and Regulation Act.** That application was denied. The Registrar, Robert G. Martin, who is also the Superintendent under the **Real Estate Brokers' Licensing Act** and the Director of Commercial and Consumer Affairs, after reviewing the nature of the services provided by the Applicant, concluded that the activities would constitute "trading" under the **Real Estate Brokers' Licensing Act.** He advised the Applicant that he ought to seek a license under that **Act.** A letter to this effect was forwarded by the Department of Consumer Affairs to the applicant, it is dated July 27, 1990 and was as follows:

> "The particular type of service which your company provides, assisting homeowners in the sale of their home, brings into play the **Real Estate Brokers' Licensing Act.** The Act defines trading in real estate very broadly, and a streamlined definition for the purposes of our discussion might be as follows:
>
> > 'Trading includes any act or conduct which directly or indirectly furthers any disposition, acquisition, transaction or offer in real estate.'
>
> The service you are providing appears to fall within the definition of trading contained in our Act. This fact is further emphasized by two factors

> pertaining to your company's method of operation:
>
> - The prominence of the Peartree name in the signs provided to homeowners.
>
> - the payment scheme, which included a significant amount payable if the property sells using the Peartree service. This payment very much resembles a commission for the part played by Peartree in the sale of the home.
>
> This being the case, it is the opinion of this Department that your firm should license under the **Real Estate Brokers' Licensing Act** rather than the **Director Sellers' Licensing & Regulation Act."**

This application for **mandamus** has been taken as a result of that letter.

I will now turn to the issues as I see them on the facts before me. I see that the central or seminal issue in this application is whether the business of the applicant constitutes "trading in real estate" for purposes of **Section 3(a)** of the **Real Estate Brokers' Licensing Act:**

"No person shall

> (a) trade in real estate unless he is licensed as a broker or as a salesman of a licensed broker;"

And Section 2(1) defines "trade" as follows:

> "trade" or "trading" includes a dispostion or acquisition of or transaction in real estate by sale, purchase, agreement for sale, exchange, option, lease, rental or otherwise and any offer or attempt to list real estate for the purpose of such a disposition or transaction, and any act, advertisement, conduct or negotiation, directly or indirectly, in furtherance of any disposition, acquisition, transaction, offer or attempt ..."

It is to be noted that this definition is not in exclusive terms. The ordinary meaning of "trade" and "trading" continue to apply together with the additional meaning attributed to htose words by that sub-section.

The word "trade" in ordinary use has a wide variety of meanings. The meaning which I believe the legislature intended to apply in the context of the **Real Estate Brokers' Licensing Act** is that which is found in the **Webster's New**

International Dictionary (2nd Ed.) as follows:

> "Act or business of exchanging commodities by barter, or by buying and selling for money; ..."

The **Concise Oxford Dictionary** (4th Edition) describes "trade", in part as follows:

> "exchange of commodities for money or other commodities, commerce; ..."

Black's Law Dictionary, 5th Ed., defines "trade" in as follows:

> "The act or the business of buying and selling for money; traffic; barter."

The case law in this area of law I found to be quite unsatisfactory; nevertheless, several cases have dealt with certain aspects of this issue and ought to be reviewed. The first case is a Nova Scotia case, **Ritchie v. Mont** (1986), 74 N.S.R. (2d) 211, a decision of the Supreme Court Trial Division wherein the plaintiff was a real estate

salesman but was not representing his broker in the particular transaction considered. The defendant had commenced a property transaction and provided a deposit to the vendor. The defendant was unable to close the sale and employed the plaintiff to negotiate an extension of the agreement. The plaintiff asked for ten percent of the deposit as a fee and the defendant agreed. When the transaction eventually fell through, the defendant refused to pay and claimed that the plaintiff was illegally trading in real estate contrary to **Section 3(a)** of the **Real Estate Brokers' Licensing Act. Tidman, J.**, determined that the plaintiff had not breached **Section 3(a)** but was simply carrying out a business deal. He stated at page 218 of his decision:

> " In any event, I do not believe the plaintiff "was trading in real estate", but rather in this case was carrying out a business deal. It is not a case of earning a commission on a sale of real estate but rather of being paid for a business service rendered."

R. v. Sutcliffe Agencies Ltd. (1980), 17 R.P.R. 245, (Manitoba Court of Appeal) is also of relevance. That case involved an Ontario real estate agent who negotiated

from Ontario for a Manitoba property over the telephone. The Manitoba Court of Appeal held that such activity constituted a contravention of the "trading in real estate" provision in the **Real Estate Brokers' Act** of Manitoba. The provisions of that **Act** are similar to the Nova Scotia provisions. On the specific provision, the Manitoba Court found that because the accused had negotiated for reward a sale of a parcel of land in Manitoba without being registered to do so, he had contravened that **Act.**

A third decision which appears to be more germane to this issue is the case of **R. v. Clark** (1973), 11 C.C.C. (2d) 370. The Alberta Court of Appeal, there considered a business known as "Canadian Homefinders". That business consisted exclusively of compiling lists of residential properties for rent in the City of Edmonton. For such lists, Canadian Homefinders charged a fee of $20.00. The appellant constantly up-dated his lists and customers would often return to the appellant for the revisions to the lists upon payment of additional fees. The appellant was convicted of trading in real estate without a license contrary of **Section 4(1)** of the **Real Estate Agents' Licensing Act,** which is almost identical to **Section 3(a)** of our own **Act.** Upon

Appeal the Alberta Court of Appeal found that the appellant did not contravene that section and stated as follows at page 371:

> "The appellant did not show any properties; did not negotiate any terms of rental; or did not act as rental agent. In substance the appellant supplied information only. The fee he received for supplying the information was not in any way dependent upon any premises being leased."

These cases seem to point toward the notion that trading involves a direct interest in the outcome of a particular property transaction. Selling information in and of itself does not constitute trading for the purpose of the legislation.

It seems to me that the rationale of these three cases is that if the fees to be charged by the "agent" (for lack of a better word to describe all three individuals) are dependant upon, in whole or in part, the eventual sale of the property, then the activity constitutes "trading" in real estate. That is in order to avoid the purview of

the legislation, the agent must not have a direct pecuniary interest in the sale of the property.

In the case at hand, the arrangement of the applicant's fee structure is such that there is a secondary fee payable from the proceeds of the property identified in the contract. That, to my mind, constitutes trading because it ties the applicant to the outcome of the actual property transaction.

It seems clear to me that having a financial interest in the sale of a property places the applicant squarely in the business of buying and selling real property. It is also very clear from the terms of the agreement used that the applicant has a direct pecuniary interest in the sale of the property forming the subject matter of the agreement.

I return to the **Real Estate Brokers' Licensing Act**. I find that by having a contingency fee dependent upon the proceeds of a particular sale then the activity of the applicants relative to that sale does constitute conduct in the furtherance of a real estate transaction.

Having found that I also find that the applicant's business requires licensing under that **Act.**

In reaching this conclusion, I have considered the obvious intent of the legislature in the adoption of the **Real Estate Brokers' Licensing Act.** The title of the statute is "An Act for the Regulation of Trading in Real Estate and for the Licensing of Real Estate Agents." It was clearly passed for the protection of the public. That protection was, I suggest, from unscrupulous or unqualified persons entering into a field where the public could be seriously financially harmed. That statute sets up a means whereby the public, hopefully, will be afforded a degree of protection. It sets conditions for the licensing of salesman, establishes an advisory board, methods of suspending salesmen and requirements for the bonding of salesmen. In particular, the statute establishes a real estate assurance fund to respond to judgments against agents resulting from fraud or breach of trust.

The Direct Sellers' Licensing and Regulation Act, on the other hand, is clearly designed to regulate the traditional "door to door" type of sales. While a degree

of protection is provided to the public by this **Act**, it is clearly not designed to address the intricacies of real estate sales. I was informed at the hearing of this application that the bonding requirements pursuant to this **Act** afford far less protection than does the **Real Estate Brokers' Licensing Act** in its bonding requirement or fund.

The Peartree method is one which encourages the homeowner to sell his own property. That may be a desirable method of selling property in some instances, but it is well known that sales of real estate require a particular kind of expertise. That expertise is precisely what is not being offered by the Applicant. Yet the fees charged by the Applicant are tied directly to the successful sale of the house. The result is, therefore, that the Peartree scheme may well lead to the homeowner being encouraged to sell his home by inexpert sales staff with no recourse and without the protection afforded by the **Act**.

This application is therefore dismissed with costs.

J.

Halifax, Nova Scotia

October 5, 1990