Citation: Howlett et al v. 512046 B.C. Ltd.
2000 BCSC 871

Date: 20000602

Docket No.: C984411

Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

**DARRELL HOWLETT,
TREELAND REALTY (1992) LTD.
DOING BUSINESS AS
RE/MAX TREELAND REALTY**

PLAINTIFFS

AND:

**512046 B.C. LTD.
BY ITS RECEIVER/MANAGER
COOPERS & LYBRAND**

DEFENDANT

**REASONS FOR JUDGMENT
OF THE
HONOURABLE MR. JUSTICE BURNYEAT
(IN CHAMBERS)**

Counsel for the plaintiffs: F.G. Potts

Counsel for the defendant 512046 B.C. Ltd.: R.A. Millar

Dates and Place of Hearing: June 16 and 18, 1999
January 17 and 18, 2000
Vancouver, B.C.

[1] Mr. Howlett is a real estate salesperson who claims against the defendant, 512046 B.C. Ltd. ("512046") and against the Receiver and Manager of 512046, being Coopers & Lybrand Ltd. ("Coopers") pursuant to a January 19, 1998 agreement (the "Listing Agreement") whereby 512046 listed certain property (Lot 2, Section 35, Township 8, NWD, Plan LMP 35463) located in the City of Langley (the "Property") for sale with Mr. Howlett and with Re/Max Treeland Realty ("Re/Max"). Mr. Howlett submits that the Listing Agreement provided that, if 512046 was to enter into a contract to sell the Property at any time as a result of the efforts of Mr. Howlett, Mr. Howlett was to receive a commission from 512046. The amount of compensation claimed is 5% of the sale price.

[2] Mr. Howlett claims that he introduced Mr. Ralph Berezan to 512046, that a January 19, 1998 offer to purchase the Property was obtained by Mr. Howlett (the "Offer"), that two corporate entities controlled by Mr. Berezan offered to pay $1,000,000 for the Property, and that, although this Offer did not subsequently complete pursuant to its terms and conditions, Coopers is obligated to pay a commission to Mr. Howlett because an August 10, 1998 Order of the Supreme Court of British Columbia in Action No. A980224 (Vancouver Registry) (the "Order") approved a transfer of the Property to 543897 B.C. Ltd. and 542283 B.C. Ltd. (the "Berezan Companies"), being the same two companies of Mr. Berezan that made the Offer.

[3] In opposing that relief, Coopers submits that it is not liable for the pre-receivership contracts of 512046 and that, in any event, 512046 is not liable under the Listing Agreement with Mr. Howlett as that Agreement was made on the eve of insolvency of 512046 and constituted a preference for Mr. Howlett, that the Agreement was *ultra vires* 512046 and in breach of the fiduciary duties of Mr. Ralph Taylor, the principal of 512046 and of Mr. Howlett to 512046, that Mr. Howlett did not introduce the purchaser to the lands, that Mr. Howlett was aware of the fact that the transfer of the Property to the Berezan Companies was part of a settlement agreement between Coopers and the Berezan Companies, that Mr. Howlett was aware of the terms of the settlement but did not oppose the approval of the settlement including the payment to Royal LePage of a real estate commission payable as a result of a Listing Agreement entered into between Coopers and Royal LePage regarding the Property, that the Order approving the settlement specifically declared that the Offer under which Mr. Howlett claims a commission was void and

that, prior to approving the payment of a commission to Royal LePage, the court was advised that a real estate commission would therefore not be payable to Mr. Howlett.

[4] Coopers submits that it did not at any time adopt the pre-receivership Listing Agreement between 512046 and Mr. Howlett and, while Mr. Howlett may or may not be entitled to judgment against 512046 arising out of the alleged commission agreement, no judgment is available against Coopers. As well, Coopers submits that there are no proceeds from the receivership against which any judgment against Coopers as Receiver and Manager could attach as there were no proceeds recovered from the sale of assets under the administration of the Coopers as the sale proceeds from the settlement approved by the court were used in whole to pay secured charges against the Property.

THE JANUARY 19, 1998 LISTING AGREEMENT

[5] The Listing Agreement was signed on January 19, 1998 on behalf of 512046 by Mr. Ralph Taylor. The Agreement provided in part:

> 3. If the Client enters into a contract to purchase or sell the property within the next 90 days after signing this agreement or at any time as a result of the Agent's efforts on the Client's behalf the Client will pay the Agent the compensation.
>
> 4. The amount of the compensation will be 5% (five percent) payable upon the completion date of any contract entered into by the client (as set out in paragraph 3).
>
> 5. This agreement may be terminated at any time by either party by giving written notice to the other provided that the Agent shall be entitled to receive any compensation that has been earned.

THE JANUARY 19, 1998 OFFER

[6] By the Offer, the Berezan Companies agreed to purchase the Property from 512046 for the sum of $1,000,000 with a $20 deposit and a completion date on April 30, 1998. The offer was subject to the following:

> In the event Vendor cannot deliver title free and clear of all encumbrances on completion date, the Purchasers at their option may extend completion date to a date title can be delivered free and clear of all encumbrances. Irrespective, this extension date cannot extend past December 31, 1998.

[7] The subject clauses in the Offer included the Purchaser being in a position to assume the existing first mortgage of approximately $540,000, the Purchaser "... resolving the development costs to its satisfaction and also subject to "the Purchaser having Goodbrand Construction removing any liens against the subject ppty at terms and conditions acceptable to the Purchaser ... " and: "... subject to satisfactory costs to resolving the continuing sale of 3 smaller lots to Darrell Howlett's Company." The purchase price was to include: "... all development plans, approvals etc. to allow the Purchaser to continue the subdivision of the subject ppty. into approximately 13 to 15 smaller lots." The Offer was accepted on behalf of 512046 by Mr. Ralph Taylor on January 19,1998.

THE RECEIVERSHIP

[8] On the *ex parte* application of Taylor Ventures Ltd. ("TVL") and 402847 B.C. .Ltd. ("402847"), Coopers was appointed the Receiver and Manager of the undertaking of those two companies on January 22, 1998. By a consent executed by Mr. Ralph Taylor as the Sole Director and President and Secretary of 512046, 512046 was added as a Petitioner under Receivership on February 13, 1998.

[9] In his June 4, 1999 affidavit, Mr. Herb Cowan of Coopers states:

> 10. Upon appointment ... [Coopers] formed the opinion that Berezan and TVL had engaged in improper conveyances involving the grant of a mortgage over Lot 1 to Berezan in December of 1997 and contracts of purchase and sale of Lot 1 and Lot 2 on or about January 16 and 19, 1998 respectively.
>
> 11. Berezan demanded specific performance of the contracts of purchase and sale of Lots 1 and 2 in the spring of 1998. The Receiver Manager refused to complete these transactions as they appeared to be at a substantial discount to the true value of Lot 1, and to a lesser extent Lot 2, and it appeared to be a means of perfecting what the Receiver Manager considered to be a fraudulent conveyance whereby 512036 granted a mortgage of Lot 1 to Berezan in the amount of $825,000.00 in December of 1997.

[10] There is nothing in evidence to suggest that Coopers specifically advised Mr. Howlett or Re/Max directly that Coopers intended to adopt or to not adopt the Listing Agreement. However, the solicitors for Mr. Howlett received the following April 17, 1998 letter from the solicitor for Coopers:

> We write to express our view that it is not appropriate that either Darrell Howlett ("Howlett"), Re/Max Treeland Realty ("Treeland") or

> other realtors employed by Treeland continue to participate in the listing and sale of properties in which Taylor Ventures Ltd. ("TVL") claims a beneficial interest.
>
> Both Howlett and Treeland have played an active part in the business dealings of TVL and are intertwined in the transactions surrounding many of the disputed properties. We are disturbed by their continued involvement in the disposal of the properties.
>
> Furthermore, as any sales transactions assented to by Coopers & Lybrand Limited, as Receiver-Manager for TVL, must be vetted through a TVL investors steering committee, the involvement of Howlett or Treeline [sic] is unlikely to assist in obtaining investor approval.

MARCH DISCUSSIONS BETWEEN COOPERS AND MR. BEREZAN

[11] A review of the affidavit of Herb Cowan sworn June 22, 1998 in Action No. C983133 (being an action commenced by the Berezan Companies against 512046) indicates contact between Coopers and Mr. Berezan in February of 1998 and a meeting on March 6, 1998. Subsequent to that meeting, Mr. Berezan submitted a written outline of his proposal for the Property and other surrounding properties.

[12] Enclosed in the March 9, 1998 letter from Mr. Berezan to Coopers outlining his "proposal" was a map which included two properties owned by Mr. Howlett in the same general area. There is also an unsigned "Contract of Purchase and Sale" relating to the Property. It is dated March 9, 1998 and provides for a deposit of $25,000 upon acceptance, a purchase price of $1,000,000, a completion date of on or before April 15, 1998 and this subject clause: "To Purchaser approving feasibility of purchase within seven days of acceptance by the Vendor."

[13] In a March 18, 1998 letter to Mr. Berezan from Coopers, Coopers stated:

> While your offers did appear reasonable, appraisals obtained by us indicate that the two properties owned by 512046 B.C. Ltd. are worth more than the amount you offered. In addition to the above we believe that the estate would probably benefit to a greater extent if we were to expose them to the market. Thank you again for your interest. We will contact you again when we are in a position to market the properties.

[14] Mr. Berezan then responded by letter of March 25, 1998 where he stated: "I have already executed agreements on two pities - copies enclosed." It was only in this letter that the Offer was forwarded to Coopers and Coopers became aware of the Offer.

[15] The solicitors for the Berezan Companies then delivered letters to Coopers stating that they wished to proceed with the purchase of the Property pursuant to the Offer. An April 8, 1998 letter to Coopers stated: "We also wish to confirm that the Purchaser hereby waives the conditions precedent contained in the [Offer] ... ." The letter also enclosed a Transfer in triplicate, the Vendors Statement and Adjustments in triplicate and a Certified Copy of the Resolutions of the Directors of the Berezan Companies. The enclosed Statement of Adjustments required the payment of a real estate commission of $50,000 to Re/Max and a cash payment of $943,677.58 to Coopers. The payment of the latter sum was to be forwarded to the lawyer for Coopers on the undertaking that various mortgages and Claims of Builders Liens on the Property would be discharged. The letter further provided: "We confirm that we hold in our trust account the sum of $1,000,000, and the Purchaser is ready, willing and able to complete the purchase."

[16] On April 9, 1998, the Berezan Companies were informed by Coopers that 512046 would not complete the sale: "It is our view that these agreements are unenforceable in the terms and unenforceable as against Coopers & Lybrand Limited. To that extent, Coopers & Lybrand Limited intends not to proceed with those transactions and will be dealing with the properties of 512046 B.C. Ltd. in another manner." A copy of that letter was not forwarded to either Mr. Howlett or Re/Max Treeland Realty. However, the April 17, 1998 letter quoted above was then forwarded to the solicitors for Mr. Howlett.

LISTING WITH ROYAL LEPAGE

[17] Coopers as Receiver and Manager of 512046 then entered into an "Exclusive Agency to Sell Agreement" dated May 20, 1998 with Royal LePage Commercial Inc. ("Royal LePage"). The term of the Agreement was for 90 days and it was a term of the Agreement that: "... the Receiver will not sell, lease, transfer, trade or negotiate for the sale of the property except through Royal LePage nor will the Receiver give any other broker, firm or any person authority to sell or lease the Property, except subject to this Agreement." The commission set out under the Agreement was 3% of the purchase price of the property and the commission was earned and payable: "... Only if and when a binding Agreement to purchase of the Property for any person, whether introduced to the Receiver by Royal LePage, has been executed during the term of this Agreement and the purchaser has taken possession of the Property or the purchase has closed."

ACTION COMMENCED BY THE BEREZAN COMPANIES (ACTION NO. C983133)

[18] An action by the Berezan Companies was commenced on June 19, 1998 claiming specific performance of the Offer as well as an Offer on the adjacent Lot 1, Section 35, Township 8, NWD,

Plan LMP 35473 ("Lot 1"). In his affidavit sworn June 19, 1998 in C983133, Mr. Ralph Berezan stated that one of his companies entered into an agreement with 512046 in July of 1997 to purchase three of the lots which would be subdivided out of Lot 1, one his companies agreed to purchase four additional lots to be subdivided out of Lot 1 on July 31, 1997, that a total of $775,000 was deposited directly to TVL regarding these purchases, that a further $50,000 was committed by direct payment to a creditor of TVL relating to the purchases and that, because of financial difficulties of TVL and the inability of TVL to complete the subdivision of Lot 1, the Berezan Companies agreed to purchase the whole of Lot 1. Mr. Berezan also states in his affidavit that the next day the Berezan Companies agreed to purchase the adjacent Lot 2 (the Property). The affidavit of Mr. Berezan was sworn in the context of an application that the Berezan Companies be at liberty to proceed with their action for specific performance despite the provision of the order appointing Coopers which provided an automatic stay of any actions.

[19] On June 22, 1998, the Berezan Companies filed Certificates of Pending Litigation against Lot 1 and the Property. By motion originally returnable June 26, 1998, 512046 through Coopers requested an order that the Certificates of Pending Litigation be discharged upon posting the security of $1.00. That motion was adjourned and settlement discussions then occurred between Coopers and the Berezan Companies. As result of those discussions, an application was made on August 10, 1998 to approve a settlement between Coopers and 512046 with the Berezan Companies. Pursuant to that application, there was a consent dismissal order of the actions for specific performance commenced by the Berezan Companies, a vesting order in relation to both Lot 1 and the Property and the settlement agreement was approved.

[20] This action was then commenced on August 31, 1998 claiming a 5% commission on the sale price of $1,000,000 relating to the Property. A Certificate of Pending Litigation was registered against the Property on August 31, 1998 and a Garnishing Order Before Judgment was served on Messrs. Russell & DuMoulin, solicitors for Coopers on September 1, 1998 claiming the balance of $50,000 owing pursuant to the Listing Agreement.

THE AUGUST 10, 1998 ORDER

[21] Mr. Howlett was not given notice of the application to approve the settlement and to vest Lot 1 and the Property into the name of the Berezan Companies. However, the role of Mr. Howlett was before the court that day. Appearing as counsel for Coopers was Mr. Robert Millar. Appearing as counsel for the Berezan Companies was Mr. Robert Sewell. The question of the claim of Mr. Howlett to a real estate commission was raised as follows:

> MR. MILLAR: Now, there is one issue here is that we think Mr. Howlett who has been a major player in this whole process may attempt to claim a commission on the sale of Lot 2. I have not seen a listing agreement which entitled him to a commission but the form of the vesting order that we will seek will have the specific parameter that the commission as agreed to be paid to Royal LePage will be paid and not Mr. Howlett's commission claimed, if any, arises.
>
> MR. SEWELL: My Lord, this is a question that perhaps rather than -- I should jump up now because it makes sense for you to know my position on each of these points but my client's position is that it does not want to become involved in any way in the dispute between Mr. Howlett and the receiver over the question of commission on that sale.
>
> THE COURT: Well, similarly, I think we don't want between now and when the sale completes an LP claim against commission.
>
> MR. SEWELL: It seems to me that the commission is a personal claim that Howlett has against 512046 B.C. Ltd.
>
> THE COURT: Yes.
>
> MR. SEWELL: And there was a considerable amount of to'ing and fro'ing on this point and the only reason I rose is when my friend said that there is going to be some provision in the vesting order dealing with the question of Howlett's commission.
>
> MR. MILLAR: My Lord, I am content to leave it out then and just say that it shall be the commission -- I guess I just want you to clearly understand, we don't think that the January agreement was valid. We say that under this contract he is being given as part of the tug -- the to'ing and the fro'ing on the negotiation that he is entitled to purchase it for a million. It is a little bit under what we think is the fair market value of the property.
>
> THE COURT: Well, I mean I don't think Mr. Sewell has a problem with that. It is the question of whether steps will be taken between now and closing which will stop the closing because of a dispute about real estate commission. Ordinarily the vesting order would say after all the initial adjustments including the payment of real

> estate commission. What is the real estate commission by way of a dollar amount? Let's describe that as "X". Does it makes sense to say in the vesting order that a real estate commission not to exceed x dollars will be paid?
>
> MR. MILLAR: It is 2.75 percent which is the negotiated commission for Royal LePage.
>
> THE COURT: Let me just think out loud. At law he claims I had a listing agreement with the original owner, that listing -- was conduct of sale given on this property?
>
> MR. MILLAR: No. This is a TVL controlled --
>
> THE COURT: I know. So, you cannot argue that conduct of sale was given thereby eliminating the previous commission arrangement or listing arrangement. Was a listing of both properties given to AE LePage?
>
> MR. MILLAR: Yes.
>
> THE COURT: And that was accepted by the Real Estate Board?
>
> MR. MILLAR: Yes, I presume it was. The commission agreement with Royal LePage was for the entire sub-division that we have the ability to control so there isn't a problem.
>
> THE COURT: Subject to what Mr. Sewell and you might say it seems to me that you are safer then to describe that the adjustments will be subject to the payment of a real estate commission not to exceed x and leave it at that.
>
> MR. MILLAR: Yes, and we will take our risk.
>
> THE COURT: And then LePage and the other gentlemen can then deal between them if there is a dispute and the Real Estate Board has mechanism whereby that once the commission has been determined they can --
>
> MR. MILLAR: Just so you know, it is not our intention to pay Mr. Howlett a commission.
>
> THE COURT: You know, I got that clear impression, Mr. Millar. Has Mr. Howlett been notified of the hearing this morning?
>
> MR. MILLAR: No. And he has never advanced a claim and he has no interest in the land.
>
> THE COURT: I think that is the safest way of doing it.

[22] The Order approving the sale of the Property to the Berezan Companies provided that the net sale proceeds would be paid secondly: "... in payment of the commission of the real estate agent who arranged the sale of the Subject Property a commission not to exceed 2.75% of the purchase price." In his June 4, 1999 affidavit, Herb Cowan of the Trustee stated:

> 17. The vesting order specifically provided for the payment of commission at a rate of 2.75% and I am advised by Robert Millar that the Court was advised by him that the commission was going to be paid to Royal LePage. The Plaintiff had not asserted any claim for commission as of that date and did not do so prior to the closing of the sale of Lot 2. The first time that I became aware that the Plaintiff was going to assert a claim for commission was when I was informed by Robert Millar that garnishing orders were issued by the Plaintiff against Russell & DuMoulin and McCarthy Tetrault who were solicitors respectively for the Receiver Manager and Berezan.

MR. HOWLETT'S KNOWLEDGE OF THE LISTING OF THE PROPERTY WITH ROYAL LEPAGE AND THE DEALINGS BETWEEN COOPERS AND THE BEREZAN COMPANIES

[23] In addition to the April 17, 1998 letter forwarded by the solicitor for Coopers, Mr. Howlett appears to have had some knowledge about the status of the negotiations between Coopers and the Berezan Companies as well as the listing of the property with Royal LePage. In his May 27 and June 3, 1999 examinations for discovery, Mr. Howlett was asked the following questions and gave the following answers:

> Q Well, did you know that on or about, I believe it was August 10th, that an application was being made for the approval of the sale of lot 1 and 2 under a settlement agreement with Berezan's companies and the receiver?
>
> A I'm not certain that I knew of the application or the agreement,

but I knew that he was going to complete. And I wasn't certain of the date.

Q Well, you knew that Royal LePage was claiming commission with respect to lot 2?

A I knew that the receiver had listed the properties with them.

Q And did you communicate with Royal LePage?

A Yes. As a matter of fact, I did.

Q Do you have the communication, a copy of it?

A Not specifically. It was a phone call to Bill Randall, Junior.

Q What did he say to you?

A I did most of the talking.

Q Um-hum. So what did you say?

A In our second conversation he felt that what was going on was a little unusual, of course. We didn't discuss that commission. We discussed the fact that they had the listings.

Q Had Berezan told you about a settlement agreement with the receiver?

A I think he did. I - what he told me was --. The part that stands out in my mind is that because - and I got most of my information from Ken Hick. And I confirmed this part of it with Berezan. That Wesik had been the successful buyer, if you will, on lot 1. Berezan had both Goodbrand's position out and gave himself preference on the payout there. So his $825,000 second, which was in third position, was paid firstly. Left over monies then went to - were applied to the Goodbrand lien.

Q Did you have a discussion with Mr. Berezan about payment of the commission to you in respect of his company's purchase of lot 2 at that time?

A Yes.

Q And what did he say to you was going to happen?

A I don't recall.

Q Did he not say to you that as a term of the proposal that Royal LePage was going to be paid a commission and not you?

A I do not recall that, no.

Q Do you recall a discussion with Mr. Berezan where you indicated that you were going to assert a claim for a commission on the sale of lot 2 at that time?

A I don't know whether I informed him or not.

Q Did Mr. Berezan tell you that it was the intention of the receiver not to pay you a commission, and that as a term of the agreement Royal LePage would get it and not you?

A Not to my knowledge.

Q Why did you not assert your claim for commission to the receiver/manager after Mr. Berezan had told you that he'd concluded a transaction on the sale of lot 2?

A We started prior to or about the same time as he concluded with respect to legal action. And I said to the best of my knowledge our conveyance lady got in touch with whoever she could get in touch with to the best of her ability, and we were getting - and I don't know what date. I do not now the date.

[24] At his discovery, Mr. Howlett confirmed that he took no steps after January to assert his claim for commission:

> Q So other than that letter that might have gone out in January, you never took steps, did you, to assert your claim for commission in respect of lot 2?
>
> A I was just waiting for it to unfold.
>
> Q When did you decide to assert a claim for commission?
>
> A I don't know what date it was.
>
> Q In August before you talked to Mr. Delaney about issuing a writ, did you make any inquiry as to entitlement to commission on the sale of lot 2?
>
> A I asked our conveyance girl to check into it. I didn't get a satisfactory answer.
>
> Q Well, did you contact the receiver?
>
> A No. I wasn't speaking with him.
>
> Q So you saw fit to do nothing other than issue a writ?
>
> A I was advised by counsel not to speak to -
>
> MR. DELANEY: Don't be getting into privileged matters.
>
> Q I'm suggesting to you that you knew in early August that the receiver had no intention of paying you a commission; is that true?
>
> A I had that terrible feeling.
>
> Q And when did you have that terrible feeling precisely?
>
> A In January of 1998 when they refused to meet with me and we had a letter sent, written by you, suggesting that if anyone from RE/MAX Treeland Realty or Darrell Howlett was to have anything to do with these listings or sales f these properties, the likelihood of them being approved was slim and none. It's in my affidavit, a copy of your letter to us.

DISCUSSION AND CASE AUTHORITIES

[25] Under s.14.06(1.2) of the ***Bankruptcy and Insolvency Act***, R.S.C. 1985, c.B-3, a Trustee is not liable for claims which arose prior to the Trustee's appointment. For the purposes of that section, the term "Trustee" includes a Receiver and Manager such as Coopers. That section provides:

> Notwithstanding anything in any federal or provincial law, where a Trustee carries on in that position business of the debtor or continues the employment of the debtor's employees, the Trustee is not by reason of that fact personally liable in respect of any claim against the debtor or related to a requirement imposed on the debtor to pay an amount where the claim arose before or upon the Trustee's appointment.

[26] This section incorporates the pre-1997 decisions dealing with the question of whether a Receiver and Manager is personally bound or in any way liable under pre-receivership contracts. If Coopers had decided to be bound by the Listing Agreement, there would be no novation of the contract but Coopers would have been subject to the terms of the Listing Agreement. There is nothing before me which would lead me to the conclusion that Coopers adopted or in any way agreed to be bound by the Listing Agreement. In fact, I can only interpret the effect of the April 17, 1998 letter to the solicitor for Mr. Howlett as a specific rejection of the Listing Agreement. Because of that, any claim of Mr. Howlett and Re/Max can only be against 512046. Now that 512046 has been adjudged a bankrupt, any such claim is as an unsecured creditor ranking equally with other creditors in the bankruptcy.

[27] If Coopers on behalf of 512046 had entered into a new listing agreement prior to when the Listing Agreement expired (before April 18, 1998) then 512046 would have been in breach of the Listing Agreement and Mr. Howlett and Re/Max could have commenced an action for damages against 512046 for that breach. However, there would be no personal liability for Coopers for such a breach. However, there was no such breach as the term of the Listing Agreement had expired when Coopers on behalf of 512046 entered into the new listing agreement with Royal LePage on May 20, 1998.

[28] As there is nothing before me which would suggest that Coopers either adopted the Listing Agreement so as to be personally bound by it or entered into a new listing agreement with the plaintiffs, the only question which remains is whether the plaintiffs should have judgment against 512046. Counsel for Coopers has taken the position that they will not oppose any judgment against 512046 for a commission. While the question of a judgment against 512046 may be academic

in view of the bankruptcy and of no assets being available in the bankruptcy, I am satisfied that no commission is payable pursuant to the Listing Agreement.

[29] Firstly, the 5% commission was only payable: "Upon the completion date of any contract entered into by the client [512046] ... ." It is clear that there was no completion date relating to a contract entered into by 512046. The settlement agreement was not a Contract of Purchase and Sale which completed. In fact, no contract of purchase and sale was executed by Coopers on behalf of 512046 prior to the approval of the Settlement Agreement on August 10, 1998. Secondly, the property was transferred as a result of the August 10, 1998 Court Order and not pursuant to any transfer documents executed by Coopers on behalf of 512046. Having concluded that a commission was not payable as a result of a contract entered into by the client, the question that then arises is whether it can be said that the plaintiffs introduced the Berezan Companies or Mr. Ralph Berezan to 512046 so as to be entitled to the commission.

[30] After reviewing the history between TVL and the Berezan Companies, it is clear that Mr. Berezan had been dealing with TVL and Mr. Ralph Taylor as early as the summer of 1997. In the circumstances of those dealings and the fact that the Listing Agreement with the plaintiffs was not until January 19, 1998, it can hardly be said that the plaintiffs introduced the Berezan Companies or Mr. Ralph Berezan to 512046 even though the Offer was received by 512046 the same day that the Listing Agreement was executed. I am satisfied that it cannot be said that the Offer was entered into "as a result of" the efforts of the plaintiffs on behalf of 512046. Additionally, it is not clear whether the Listing Agreement was signed before or after the Offer was received so that it may not be possible for the plaintiffs to argue that the contract with the Berezan Companies was entered into: "... within the next 90 days after signing [the Listing Agreement] ... ."

[31] In the circumstances, I am satisfied that there is no claim of the plaintiffs against Coopers. Accordingly, the claim for a commission on the basis of personal liability of Coopers for the payment of a commission is dismissed. At the same time, I am satisfied that the plaintiffs do not have a claim as against 512046 for a commission and, accordingly, that claim is dismissed as well. The defendants will be entitled to Party and Party (Scale 3) Costs throughout.

"G.D. Burnyeat, J."
The Honourable Mr. Justice G.D. Burnyeat