SUPREME COURT OF NOVA SCOTIA

Citation: *Millennium Commercial Realty Ltd v. Scothorn Back Forty Farms Ltd*, 2017 NSSC 115

Date: 20170504
Docket: HFX455274
Registry: Halifax

Between:

Millennium Commercial Realty Limited

Applicant

v.

Scothorn Back Forty Farms Ltd.,
Martin de Backer, and Marielle de Backer

Respondents

LIBRARY HEADING

Judge:	The Honourable Justice Michael J. Wood
Heard:	April 18, 2017, in Halifax, Nova Scotia
Written Decision:	May 4, 2017
Subject:	Contracts – Interpretation – Principles – Commercial Reasonableness Real Estate – Brokers – Commission – Sale of Shares and Receivables
Summary:	Company owning farm listed operation for sale with broker. Property described as land and farm assets in Listing Agreement. List price was $8.25 million. Agreement provided

for payment of commission to broker on sale of farm as well as majority interest in company. Shareholders agreed to sell shares and shareholder loans rather than farm assets. Under sale agreement price was calculated based on equity in company and shareholders were paid $3.501 million. Purchaser required to obtain releases of personal guarantees given by shareholders for debt of company which required additional payment to creditor of $3.352 million.

Issues: Is commission calculated based on definition of purchase price in agreement for sale of shares and receivables (ie. $3.501 million) or some other basis?

Result: Court adopted objective assessment of Listing Agreement to reach commercially reasonable interpretation of commission terms. In context of this transaction shareholders negotiated structure for their financial advantage. Purchaser required to pay total of $6.853 million to acquire the farm and court held this was the amount on which commission should be calculated. How price defined in subsequent agreement not always determinative of purchase price for commission purposes in Listing Agreement. Broker should not receive lower compensation simply because seller able to structure sale of farm in particular manner. Seller's suggested interpretation not commercially reasonable.

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Heard: April 18, 2017, in Halifax, Nova Scotia

Counsel: Caitlin Regan-Cottreau, for the Applicant
Tim Hill, QC, and Rilla Banks, for the Respondents

By the Court:

[1] In the fall of 2012, Martin and Marielle de Backer ("the de Backers") decided to purchase a farm and move to Canada from the Netherlands with their children. In August 2013 they acquired a dairy farm located at Hardwood Lands, Nova Scotia. The de Backers owned and operated the farm through Sandy Desert Farms Limited ("Sandy Desert"), a company in which they were the sole shareholders.

[2] In the spring of 2015 the de Backers began to consider selling the farm. It consisted of six hundred acres of land divided into six parcels, two homes, barns and outbuildings, a registered Holstein herd, milk quota, and related equipment. They contacted Ms. Marleen Wolfe who they understood to be a real estate agent experienced in the sale of farm properties. Ms. Wolfe was based in Prince Edward Island, but was licensed to sell real estate in Nova Scotia with Millennium Commercial Realty Limited ("Millennium").

[3] Ms. Wolfe visited the de Backers at the farm on May 31, 2015, to discuss a possible listing and to obtain more information concerning the business. According to the de Backers, ball park listing prices were discussed but nothing was confirmed.

[4] Ms. Wolfe sent a draft Seller Brokerage Agreement ("Listing Agreement") and advertisement for the sale of the farm to the de Backers and another meeting took place on July 12, 2015. By this point the de Backers had done some online research with respect to the sale prices for farm properties. In the meeting with Ms. Wolfe they reviewed a number of farm listings and settled on a figure of $8.25 million for the list price. The parties also discussed Ms. Wolfe's real estate commission, which she said would be three percent of the purchase price. The de Backers said they thought this was high and Ms. Wolfe agreed that she would reduce it to two percent.

[5] The parties discussed the draft Listing Agreement at the July 12th meeting. The de Backers indicated that they wished to have the document reviewed by their advisor before finalizing anything. After the visit Ms. Wolfe forwarded another draft of the agreement with a list price of $8.25 million and a commission of two percent.

[6] Other than a brief email exchange in August 2015, Ms. Wolfe did not hear from the de Backers again until January 2016. The parties met on January 26, 2016, at which time the Listing Agreement was signed. It described Sandy Desert as the seller and the property to be sold as the six parcels of land owned by the company.

The Farm Input Form, which was attached as an addendum, also identified Sandy Desert as the seller and provided more information concerning the farm assets, including the buildings, equipment, and milk quota. The list price was $8.25 million and commission was two percent of the purchase price.

[7] Once the Listing Agreement was signed Ms. Wolfe began efforts to market the property and was ultimately successful in securing an agreement for the sale of the farm. The transaction was formalized in a Share And Receivable Purchase Agreement dated June 3, 2016, with Scothorn Back Forty Farms Ltd. as purchaser and Martin and Marielle de Backer as vendors (the "Purchase Agreement"). The assets being purchased were the shares owned by the de Backers in Sandy Desert, as well as debts owed by that company to the them, which were estimated to be approximately $2.554 million as of the date of the agreement. It was a condition precedent to closing that the de Backers be given releases of all personal guarantees of obligations owed by Sandy Desert to third parties. The purchase price was defined in the Purchase Agreement as follows:

> 3.2 Purchase Price – Subject only to subsequent adjustment pursuant to the provisions of Article 5 hereof, the purchase price payable for the Purchased Shares and the Purchased Amounts Receivable (herein referred to as the "**Purchase Price**") shall be the amount which the aggregate of
>
> (a) Seven Million, Four Hundred and Seventy-Five Thousand Dollars (**$7,475,000.00**), plus
>
> (b) the Company's Current Assets at Closing,
>
> exceeds,
>
> (c) the Company's Debts and Liabilities at Closing.

[8] When the transaction closed on August 2, 2016, the calculated purchase price paid to the de Backers after application of the formula in cl. 3.2 was $3,500,953.00. They paid the two percent real estate commission to Millennium based upon this amount. Millennium disagrees and says that commission should be based upon the gross purchase price of $7,475,000.00.

Analysis

[9] At the hearing the de Backers confirmed that they were personally liable for any commission payable under the Listing Agreement and as a result Millennium did not pursue their alternative claim against Scothorn Back Forty Farms Ltd.

[10] The issue which will resolve the dispute between the de Backers and Millennium is the interpretation of cl. 7.1 of the Listing Agreement which provides that the seller will pay the broker two percent of the "purchase price". There is no definition of that term in the agreement. The seller is described as Sandy Desert and the property to which the agreement applies is the farm at Hardwood Lands and associated assets such as cattle, equipment, and milk quota. The Purchase Agreement was not for the sale of those assets, but rather the shares of Sandy Desert held by the de Backers and the debts owed to them by that company.

[11] The Listing Agreement contemplated the possibility that a sale of shares rather than assets might trigger the payment of commission. Clause 4.3(d) states:

> The Seller agrees that:
>
> …
>
> d) if the property is owned by a limited company, a sale of shares representing a controlling interest in the limited company will constitute a sale for the purposes of this Agreement.

[12] The de Backers' signatures on the Listing Agreement do not specify the capacity in which they are signing the document. Since the agreement refers to the sale of farm assets or shares of Sandy Desert, I believe the proper interpretation is that the company will pay commission on a sale of assets and the individuals will pay if it is a sale of shares.

[13] In order to calculate the amount of commission payable to Millennium it is necessary to interpret the phrase "purchase price" as that appears in cl. 7.1 of the Listing Agreement. In approaching that question the court must attempt to give meaning to words in their proper context which requires consideration of the surrounding circumstances, sometimes referred to as the "factual matrix". It is important to remember that this is an objective exercise and the subjective intent of the individual parties to the agreement is not relevant. The words in the contract must be assessed from the perspective of a reasonable person with knowledge of the circumstances.

[14] In a commercial contract, such as the Listing Agreement, the interpretation must be in accordance with sound commercial principles. In other words, it should be given a commercially sensible interpretation (see: *Nickel Development Ltd. v. Canada Safeway Ltd.*, 2001 MBCA 79 at paras. 32-35).

[15] When one examines the Listing Agreement and how it came into existence, it is obvious that Millennium was retained to market the farm owned by Sandy Desert and to secure the best price possible. The services included providing advice with respect to list price, preparing advertising materials, communicating with potential buyers, presenting offers and counter offers, and generally assisting in bringing the sale transaction to a successful conclusion.

[16] On its face the Listing Agreement contemplated that Sandy Desert would enter into an agreement to sell the farm assets, however by cl. 4.3(d) it was agreed that selling a controlling interest in the company would also constitute a sale. This provision was intended to ensure that the broker would be paid commission whether the resulting transaction was structured as an asset or share sale.

[17] In order to determine the purchase price on which commission is to be calculated it is necessary to look at the nature of the resulting transaction. In this case an agreement was negotiated between the de Backers and Jeffrey Scothorn with input from their advisors. Mr. Scothorn's initial offer was in the form of a draft Letter of Intent, which described a transaction whereby Scothorn Back Forty Farms Limited would purchase the shares of Sandy Desert for a price calculated as follows:

> 4. Purchase Price – The purchase price to be paid for all of the Purchased Shares (in the remainder of this letter referred to as the "**Purchase Price**") shall be the amount by which
>
> (i) the gross amount of $7,400,000.00 (CDN), exceeds,
>
> (ii) the aggregate of all of the Company's Debts and Liabilities (within the meaning of section 4.1), as of the Closing Date.
>
> The parties acknowledge and agree that in the event shareholder advances/loans are made by the Vendors to the Company prior to the Closing Date, either for the purpose of reducing the Company's Debts and Liabilities owed to third parties or otherwise (the "**Shareholders Advances**"), then the Purchase Price as determined above, shall be allocated between payment for the Purchased Shares and payment for such Shareholder Advances.

[18] At the time of making this offer Mr. Scothorn was not aware of the liabilities of Sandy Desert. He said he did not require these amounts in order to make an offer. He testified that all he needed to know was how much he would be paying in total. By the time he presented the draft Letter of Intent Mr. Scothorn had already investigated his financing and determined how much he could afford to pay for the farm. This amount was not dependant on the debts of Sandy Desert.

[19] The parties negotiated changes to the terms of the Letter of Intent. For example, on May 5, 2016, the lawyer for the purchaser sent the following email to Ms. Wolfe:

> Thanks for your e-mail from yesterday and the revised LOI that accompanied it. I have reviewed the revised LOI and have discussed it with the principals of Scothorn Farms Limited.
>
> It appears that we are extremely close on the parameters of an agreeable purchase/sale transaction. Rather than provide a counter revised LOI at this point, I think that it would be most efficient to simply highlight what the outstanding issues are (which are as follows):
>
> 1. Price – The Purchaser is only prepared to increase the Purchase Price to $7,450,000.00. This is the exact mid-way point between the Purchaser's initial offer and the amount that is contained in your client's most recent counter LOI.
>
> 2. Purchase Price Adjustments – The Purchaser is fine with having the Company's cash on hand/deposit, accounts receivable, and its pre-paid expenses (other than as noted below) as of the Closing Time as reflected in the Closing Financial Statements added to the Purchase Price. However, it is not prepared to allow for upward adjustments to the Purchase Price to be made for fuel, seed, fertilizer, feed inventory and crop- input costs that are owned as of the Closing Time or that have been incurred as of that time. Those items are assets/expenses that are required in the ordinary course of the Company's farming operation. It is not commercially reasonably to expect that on a share purchase/sale transaction adjustments would be made for those items.
>
> **I would remind you that by agreeing to structure the transaction as a share purchase/sale transaction as opposed to an asset transaction, the Purchaser is allowing the Vendors to achieve significant tax saving through utilization of available lifetime capital gains exemptions. It would certainly be the Purchaser's preference to acquire Sandy Desert via an asset purchase transaction. We hope that your client does not lose sight of that in considering the Purchaser's above position(s).**
>
> If the foregoing is satisfactory to your client, then kindly advise and I will make the necessary changes to the LOI, have it signed by my client, and presented to you for acceptance by your client.
>
> I will look forward to hearing from you at your earliest convenience. **(Emphasis added)**

[20] Ultimately the parties settled on a figure of $7,475,000.00. When the Purchase Agreement was prepared this was the amount inserted in cl. 3.2. In addition, the description of the purchased assets was expanded to include both the shares of Sandy Desert and the receivables owed to the de Backers by the company. The purchase

price was allocated between these assets with the majority being applied to the receivables.

[21] On the date of closing the purchaser, Scothorn Back Forty Farms Ltd., received advances from Farm Credit Canada totalling $7,475,000.00 from which the following amounts were paid:

1. $3,500,953.00 to the lawyer for Martin and Marielle de Backer, representing the purchase price for the shares and amounts receivable (which had been estimated at $2,554,000.00).
2. $3,352,337.23 to Farm Credit Canada to pay out the existing mortgage over the farm and obtain a release of the de Backers' personal guarantees.

[22] The balance of the Farm Credit Canada advance was used to pay other debts of Sandy Desert as well as the expenses associated with completion of the transaction.

[23] On July 26, 2016, Millennium issued an invoice for commission in the amount of $171,925.00 based upon a purchase price of $7,475,000.00. This was two percent of that figure together with 15% HST. They were paid $81,671.92 being two percent of $3,550,953.00 plus HST.

[24] Clause 7.1 of the Listing Agreement sets out the basis on which Millennium will be compensated for their work. By using a percentage of the purchase price it ties the amount of commission to the value received by the seller. The asset identified as the property to be sold was the farm.

[25] In some cases the purchase price will be readily ascertainable, it will simply be the amount which the purchaser pays for the assets being sold. In other circumstances the transaction may be more complex and include assumption of debt or exchange of other tangible property. How the seller and purchaser choose to define the purchase price in their subsequent agreement is not necessarily determinative of how the real estate commission is to be calculated. This is particularly so where, as here, the agent has limited involvement in drafting the agreements which create the structure for the transaction.

[26] In this case, through the involvement of counsel, the sale of the farm morphed into an arrangement whereby the de Backers sold their shares in Sandy Desert for approximately $1.0 million, their shareholders loans for approximately $2.554

million, and received a release of their personal guarantees for which the purchaser had to pay Farm Credit Canada $3,352,337.23.

[27] The question which I have to answer is what is a commercially reasonable interpretation of the phrase “purchase price” in the Listing Agreement in the context of the transaction described in the Purchase Agreement. The de Backers say that it is the price paid for the Sandy Desert shares and receivables, since that is the cash actually received and the amount arrived at when the formula in cl. 3.2 of the Purchase Agreement is applied. Millennium says that it is $7,475,000.00 because that is the gross purchase price for the farm property before closing adjustments.

[28] In support of their position, the de Backers rely on the decision in *Avison Young Commercial Real Estate (B.C.) Inc. v. 0823069 B.C. Ltd.*, 2014 BCSC 1380. In that case the plaintiff entered into an exclusive listing agreement with the defendant company in relation to commercial property which it owned. After determining that the penalty for assuming or paying out the existing mortgage was too onerous, consideration was given to selling the shares of the company rather than the underlying property. Some, but not all, of the shareholders ultimately agreed to sell their shares and the issue arose as to how commission should be calculated; was it to be based on the value of the underlying property or the sale price of the shares? The court concluded that it should be the share price for the following reasons:

> 41 Another difficulty arises if the plaintiff's approach is used in this case. Three shareholders of the Company did not participate in the sale of the Company to Candou.
>
> 42 Using the plaintiff's approach of applying the percentage commission to the imputed value of the Real Property it would appear that the shareholders and the Company would somehow share the burden of the fee payment. Presumably their respective portions of the fee would be pro rata on the basis of their shareholdings at the time of the sale. No account is taken by the plaintiff of the fact that Mr. Babcock did not receive any portion of the sale price for his shares. While the listing agreement clearly contemplates both a sale of shares and a sale of real property, the only method provided for determining the fee if shares are sold is applying 2 1/2% to the gross sale price of the shares. If less than 100% of the shares were sold then the fee would be based on the sale price thereof. In that case it would not make sense for the fee to be based on the imputed value of the underlying real estate of the company. Indeed, if a share sale is equated to the sale of the Real Property, it is arguable that when less than all of the shares of the company are sold, no commission should be payable.
>
> …

> 53 The plaintiff's characterization of this transaction tends to ignore the difference between the sale of the assets of a company and the sale of its shares. That difference is fundamental to commercial and tax law. The rights and obligations of the parties are quite different depending upon the form that the transaction takes. For example, the tax consequences are quite different depending upon whether the transaction is a sale of assets or a sale of shares. In a transaction like this, the shareholders will face a possible capital gains tax on the sale of their shares. They will not face the tax consequences that would arise if they were treated as having sold the underlying real property of the corporation, unless the company is a sham.
>
> 54 I point this out only to say that the Listing Agreement provides for the possibility of both an asset and a share sale and states how the commission will be determined in each case. Unless the Listing Agreement made it clear that the commission in respect of a sale of shares would be based on the value of the underlying assets, to treat the share sale as an asset sale would overlook the fundamental principle that a corporation has a separate legal existence from that of its shareholders.

[29] In my view there are several factual differences between that decision and the present case, including different language in the listing agreement. In the *Avison Young* case the listing agreement defined “property” to include the shares of the vendor which meant that commission was then calculated on the sale price of those shares. In the Listing Agreement signed by Millennium and the de Backers the “property” being listed was described as the farm land and assets. The shares of Sandy Desert were not included in this definition.

[30] The calculation of commission in cl. 7.1 of the Listing Agreement simply refers to purchase price and does not tie this to the property which is being listed, although I believe that is a reasonable implication. In my view, the terms of the Listing Agreement and the manner in which the negotiations between the de Backers and Mr. Scothorn unfolded are different than the circumstances described in the *Avison Young* decision.

[31] If I were to accept the de Backers’ position the compensation payable to Millennium for the work done in securing the sale of the farm to Mr. Scothorn would be reduced significantly simply because they negotiated a structure that was financially advantageous to them. This would be a commercially absurd result because the work carried out by Millennium would be the same whether it resulted in a sale of assets or of shares and receivables. By optimizing the benefits of the transaction for themselves the de Backers should not be able to unilaterally reduce the commission otherwise payable for the services of Millennium. The

conveyancing vehicle agreed to by the de Backers and Mr. Scothorn does change the underlying objective of the Listing Agreement which was for Millennium to secure a sale of the Sandy Desert farm operation.

[32] I believe that a reasonable interpretation of purchase price for commission calculations under the Listing Agreement is the amount which Scothorn Back Forty Farms Ltd. was required to pay in order to complete the transaction for the acquisition of the farm. This is the purchase price for the de Backers' shares and receivables, as well as the amount required to be paid to Farm Credit Canada to secure the release of their personal guarantees. It does not include the other debts of Sandy Desert, which Mr. Scothorn chose to include in his financing. He said he did this in order to simplify matters, but this was not required in order to complete the purchase. As a result of my interpretation, Millennium is entitled to further commission at a rate of two percent plus HST on the amount of the Farm Credit Canada payment, which was $3,352,337.23. The extra commission totals $77,103.76 inclusive of HST.

[33] If the parties are unable to agree on the issue of costs, they may make written submissions within 30 days.

Wood, J.