



Nos. C833383 and
 C833758
 Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

No. C833383)

BETWEEN:)

INTERRA INTERNATIONAL INC.)

PLAINTIFF)

AND:)

MORAY DEVELOPMENT LTD.)

DEFENDANT)

AND)

No. C833758)

BETWEEN:)

CHARTWELL AND ASSOCIATES REALTY)

PLAINTIFF)

AND:)

MORAY DEVELOPMENTS LIMITED)

DEFENDANTS)

AND:)

INTERRA INTERNATIONAL INC.)

THIRD PARTY)

REASONS FOR JUDGMENT

OF THE HONOURABLE

MR. JUSTICE LOCKE

Counsel for Chartwell and
 Associates Realty:

F. G. Potts, Esq.

Counsel for Moray
 Developments Ltd.:

R. E. Turner, Esq.

Counsel for Interra
 International Inc.:

W. J. Rogers, Esq.

Place and Date of Trial:

Vancouver, British Columbia
 February 4 to 7, 1985

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These two actions were ordered tried together and it was agreed that a third party notice issued by the defendant Moray Developments Ltd. (Moray) against Chartwell and Associates Realty (Chartwell) would be heard at the same time.

Moray is a development company and owned in part by one William Mosier and John Murray. In 1982 it purchased certain commercial property with premises to lease located at 3709 East 1st Avenue in Burnaby ("3709"). It was decided to sell the property after certain reconstruction occasioned by a fire had been done and the principals of Moray commenced to lease the premises to various tenants.

In the Fall of 1982 Mosier was the operational officer of Moray assisted by his comptroller Mr. Bruce Curry and he let it be known to various real estate agents that 3709 was for sale. Mosier had been in the development business for a number of years and had an extensive acquaintance among agents dealing in commercial property and he or others on his behalf got in touch with Macaulay Nicolls, A. E. LePage, the plaintiff Chartwell and perhaps three or four other agents and advised them they were prepared to sell the building and gave them each what was described as an "open listing".

An exclusive listing, by the Rules of the Vancouver Real Estate Board, is required to be in writing, is given for a term certain and whether the holder of the exclusive listing is the actual person who brings about a sale or not, he always gets his negotiated commission, though practice dictates certain rates.

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An "open" listing need not be in writing and can be made on such terms as the parties agree upon, continues until the property is withdrawn from the market or sold, and commission is paid (and I speak without technical connotation at this point) to the agent who effectuates a sale.

Mosier is not in the custom of giving exclusive listings or giving any listings in writing and dealt with real estate agents more or less all on the same basis and had a conversation with Mr. Glenn Pirie of Chartwell with whom he had done business on or off for about 10 years who at a meeting introduced a new salesman of Chartwell's named Gerry McBride. Mosier gave them a listing, according to him in the witness stand, which was that Chartwell would be paid a commission if it was instrumental in helping to cause a sale. Mosier considered that he as vendor was liable to pay a commission so long as the agent was involved in bringing about the sale. No commission amount was mentioned and it seemed to be assumed by all parties that the going Vancouver rate of five percent on the first \$100,000.00 and two and one-half percent on each \$100,000.00 thereafter would apply, though there was some joking reference during the meeting to a higher commission rate.

We do not know the details of listing arrangements with the other agents, and it is not relevant. There seems no reason to believe that the contracts were any different than those given to Chartwell but McBride, having now met Mosier obtained from him but mostly from Curry, material to make up a brochure such as drawings, square footage, tenant lists and other matters found appropriate for a real estate listing. He also took a photograph and this brochure was distributed quite widely among those who McBride thought might be

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5 interested in buying. In addition, advertisements were placed in the newspaper
6 concerning 3709, and 2000 to 3000 flyers were also printed and distributed.

7 The other agents appear to have done little or nothing though at least
8 one other agent appears to have pretty well copied materials circulated
9 originally by Chartwell but nothing more is heard of this. McBride called Mosier
10 from time to time and made general inquiries such as the progress of leasing etc.
11 and he produced a couple of offers which were rejected and one or two other
12 firms also produced offers which were likewise rejected. Mosier and Moray
13 wanted \$900,000 for their property.
14

15 Interra International Inc. (Interra) is a company consisting apparently
16 of the principal Mr. John Relling who has had a real estate licence since 1966,
17 and worked for various companies in and about real estate. In 1976, he, being
18 fluent in German, was approached by the German principals of a corporation
19 called Barop Construction Ltd. and asked to assist in investing in condominiums
20 in British Columbia. In 1976 and until 1978 Relling did considerable work with
21 Barop including buying and reselling the shares of a subsidiary company of
22 Barop's, and had frequent contacts with a Vancouver director called Neweling.
23 Business relations with Barop seem to languish somewhat for a few years though
24 it is plain that Relling kept in touch with Neweling, the other principals of the
25 company, and a selective list of German clients whom he endeavoured to keep
26 interested in purchasing British Columbia property and whom he would represent
27 from time to time. Neweling would also drop into Relling's office and would
28 apparently generally keep abreast of real estate developments and, in particular
29 pick up brochures of offerings Relling might know of.
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5 Relling knew some of his German clients were going to visit
6 Vancouver in the Spring of 1983 and on January 11, 1983 he put an advertisement
7 in the newspaper indicating he had clients who were prepared to purchase
8 property and make down payments of as much as two million dollars. McBride
9 saw this advertisement and telephoned Relling and as a result of the
10 conversation, wrote a letter of January 14th enclosing the brochure he had
11 compiled on 3709 and another property known as the Scott-Town Plaza Shopping
12 Centre.

13 The brochure apparently contain some figures concerning net leasing
14 space which did not seem to jibe and in the result Relling had his secretary check
15 the figures with Chartwell which she did. Relling then put together his own
16 brochure in a sense: he took a new photograph of the front of the building but
17 mainly recapitulated the material he had obtained from Chartwell and also had,
18 before he sent this out, at least one conversation with McBride concerning the
19 leasing space as evidenced by McBride's letter of February 18, 1983.
20

21 Exhibit 21 is Relling's own brochure compiled in a slightly different
22 way and prepared, according to him, for distribution to his largely German
23 clientele and he gave a list of four to whom, on April 29, 1983, he sent the
24 brochure. He seemed reluctant on the witness stand to admit that he had
25 prepared this brochure for the purpose of obtaining a sale but characterized it
26 rather as an effort to keep his clients interested in the Vancouver real estate
27 market.
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4 At some time in April, Relling attended the New Westminster Land
5 Registry office to search a number of titles, among them being 3709. He said
6 this was his usual practice in order to find out exactly who owned the property,
7 what encumbrances there were, etc. When asked why he did not telephone
8 McBride, and simply ask him who the owner was, he gave somewhat evasive
9 answers.

10
11 On or about May 15th, he called Moray and spoke to Mr. Curry,
12 attended Moray's office and asked for certain information which was provided
13 including descriptions of the building, floor plans and tenant schedules. Relling
14 said that at the meeting with Curry he asked if the property was listed and said
15 that he was told "no". Curry gave evidence later and was asked whether Relling
16 had asked this question and he said first that he did not remember but later in his
17 testimony indicated he thought he might have been asked the question. Nobody
18 asked him what his answer was, if the conversation did indeed take place.

19
20 Relling placed his first personal telephone call to Curry followed by
21 the visit in the week prior to May 16. He then called Mosier and there is a
22 record of a telephone call asking if he could meet with Mosier in the afternoon
23 of the 16th, which he did. Mosier was anxious to sell and Relling had indicated
24 that he had a party who was interested and he would like to discuss the
25 possibilities face to face with Mosier. He said he confirmed with Mosier the
26 property was for sale and asked if it was listed and testified that Mosier said
27 "no". He indicated on the witness stand that by his question he was really
28 inquiring about the existence of an exclusive listing agreement because he said,
29 he knew that if there was no such listing and there was only an "open"
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5 agreement, he would be at liberty to approach the owner directly without going
6 through another agent.

7 Mosier testified that he first talked with Relling, he believes by
8 telephone on Friday, May 13th and met him on the 16th or the 17th with Curry
9 and with Murray. It seems on the 17th that he had a general conversation with
10 Relling about price and other relevant details and Relling indicated he would be
11 able to make an offer of he thought \$810,000.00 but Mosier wanted \$900,000.00.
12

13 Next day, however, on May 18th, Relling returned with a written
14 offer from Barop Construction in the amount of \$810,000.00 and Mosier and
15 Murray were present and they haggled about the price. Eventually, they settled
16 one of \$850,000.00 and the form of the agreement presented was apparently
17 satisfactory to Mosier and Moray so they initialled it.
18

19 During the course of this discussion - it is not clear whether it was
20 before or after the signing of the actual agreement - Relling produced a
21 commission agreement which was out of the ordinary to the extent that it was a
22 flat three percent on the entire purchase price instead of the going rate of five
23 percent on the first \$100,000.00 and two and one-half percent on each
24 \$100,000.00 thereafter which resulted in a greater commission on this sale by
25 about \$2,000.00.
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27 Mosier said that he had had a conversation with Curry the previous
28 day concerning Relling's visit. Curry had indicated that he was puzzled as to
29 how Relling had heard of the property. On seeing the rather unusual commission
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4 agreement, some silent alarm bells began to ring in Mosier's mind and he himself
5 asked Relling how he got to hear of 3709, and was told that Relling had been
6 driving by one day and seen the leasing signs and because of this had assumed
7 that the building might be for sale. He said Relling seemed rather nervous and
8 Mosier asked him if there were any other real estate agents involved and: "...he
9 looked me in the eye and said no..." Shortly thereafter, being reassured, Mosier
10 signed the agreement together with Murray and also signed the commission
11 agreement. When Relling left Mosier said he assumed he had a deal provided the
12 subject clauses within the agreement themselves could be fulfilled. As it
13 happened, the subject clauses were in fact lifted by May 25 and the transaction
14 completed on May 31.

15
16 A few days later Mosier began to call the various agents who had
17 been interested in the property and told them the property had been sold. Most
18 of them asked him who had been the selling agent and he had told them Interra -
19 or John Relling - had made the sale.

20
21 On May 26 McBride made what he described as a routine telephone
22 call to Mosier to ascertain the state of the building and was told that it looked as
23 if the property had been sold for \$850,000.00. He congratulated Mosier on the
24 price and asked who had been purchaser and he was told that it had been sold
25 through Relling. He said that he was astounded and told Mosier that he had
26 dealt with Relling since January and he could not understand why Mosier had
27 been dealing directly with Relling. McBride testified Mosier said: "...look, don't
28 worry, if Chartwell participated in the sale, he would get paid..." McBride
29 talked to Pirie and asked what he should do and in the result wrote a letter of
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5 May 27 to Interra in which he referred to previous correspondence and
6 information obtained by Relling from Chartwell and said: "...I have not yet
7 received any advice from you regarding the payment of Chartwell's commission
8 and I would appreciate hearing from you by return mail..." He never got an
9 answer to the letter. In the meantime, however, Mosier who is a very
10 experienced real estate man and knew some of the problems of the market called
11 his lawyer and asked him to make sure he was looked after in what was
12 apparently a brewing dispute as Pirie had told Mosier that Chartwell would be
13 claiming half the commission. Mosier told his lawyer to protect him and in the
14 result an amount sufficient to pay one commission was held back from the
15 closing fund and sits today in some lawyer's trust account and no commission has
16 been paid to anyone.

17 I have not attempted to recite all the evidence and the lengthy
18 cross-examinations in particular, but I make here certain findings of fact:
19

- 20 1. When Relling's evidence is in conflict in any material matter with any
21 other witness in the action I decline to accept it.
22
- 23 2. Relling first heard of the property through McBride's telephone call
24 and literature in January and February of 1983. He subsequently
25 acquired probably much the same information from Curry in May
26 1983. I can see no reason for obtaining further information from
27 Curry except as part of an elaborate charade, to build up some facts
28 designed to establish that he was acquiring information for the first
29 time directly from Curry, when in fact he knew most or all of the
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5 relevant facts long before, as witness in his dealings with McBride.
6 This, together with his personal search in Land Registry office,
7 convince me that the whole was nothing but an elaborate scheme in
8 an attempt to ensure as far as he could the entire commission for
9 himself to the exclusion of Chartwell or anyone else.

10 3. I do not believe he initially asked either Curry or Mosier whether the
11 property was listed for sale or not. If he had done so, the answer in
12 each case would have been yes and Mosier said unequivocally that if
13 such a question had been asked him, he would not have signed the
14 agreement but would have sent Relling away and told him to adjust
15 his relationships with anyone else involved.

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17 4. Relling deliberately deceived Mosier as to how he first heard of the
18 building. He heard of it through Chartwell not because he drove by
19 it.

20
21 5. He deliberately made a false and misleading answer to Mosier's
22 question as to whether any other real estate agent was involved.
23

24 On June 6, 1983 the action No. C833383 Interra v. Moray was
25 brought. The claim is for \$25,750 commission being 3% of the sales price
26 pursuant to the written agreement of May 18, 1983.

27 Moray denies and defends on the basis that:

28 a. Interra became Moray's agent for the purposes of sale and owed
29 a duty to Moray to make full disclosure of his activities but
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5 negligently or fraudulently did not do so, and negligently or
6 fraudulently misled Moray by advising it that no other agent
7 particularly Chartwell was involved and nor did it advise that
8 Chartwell had a potential claim for commission: and Interra by its
9 conduct has disintitled itself to any commission.

10 b. By counterclaim, alleges it is exposed by Relling's conduct to a
11 claim for commission by Chartwell and claims damages (amounting to
12 indemnification).

13 On June 21, 1983 action No. C833758 Chartwell v. Moray was
14 commenced and claims that in November 1982 Chartwell secured an open listing
15 for sale for 5% of the first \$100,000 and 2 1/2% on the balance, should it be the
16 effective cause of a sale; that it had dealings with Interra; that Interra had
17 actual or implied authority to act as agent for Barop Construction Limited; that
18 Barop bought the property with an agreed commission with Interra of \$25,750
19 and has not paid Chartwell. Alternatively, it claims \$25,750 as compensation on
20 a quantum meruit for services rendered by itself or its agent in locating an
21 ultimate purchaser, Barop.
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23 Moray denies, says the agreement to pay commission was not
24 exclusive, that the plaintiff Chartwell played no part in locating the purchaser
25 and is owed nothing.
26

27 On July 13, 1983 Moray issued a third party notice directed to Interra
28 alleging:

29 a. Interra was Moray's agent for sale.
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5 b. That Interra negligently or fraudulently failed to disclose to
6 Moray that Chartwell had performed such services in relation to the
7 sale, that it had a potential claim for commission against Moray and
8 that Interra thereby breached its fiduciary duty to Moray.

9 c. Claims indemnity or contribution from Interra against any
10 Chartwell claim.

11 In its Defence to the Third Party claim Interra:

12 a. Denies it was aware Chartwell had permission to sell the
13 property.

14 b. Denies that it failed to disclose anything.

15 c. Denies it was in breach of any fiduciary duty to the defendant
16 Moray.

17
18 In addition, I was also advised by counsel that on February 1, 1985
19 just prior to the trial of this action Chartwell issued a Writ against Interra
20 claiming damages as compensation on a quantum meruit basis for services
21 rendered by Chartwell to Interra in locating a purchaser for 3709 or in the
22 alternative, for unjust enrichment.

23
24 I have considered the many cases cited to me by counsel and have
25 reached the following conclusions.

26 1. That Interra - or Relling - was never a true agent for Moray but
27 Relling was actually an alter-ego of Barop and was simply a
28 spokesman for them and is not entitled to a commission from Moray
29 as he was not in fact acting as a real estate agent for Moray.
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2. Alternatively, if Relling was an agent he was an agent for both Barop and Moray. Because of his actions the transaction for commission as between Interra and Moray is void: the law is stated in Canada Permanent Trust Company v. Christie by Esson, J. (as he then was) (1979) 16 B.C.L.R. 183:

"The onus is upon the agent to prove that the transaction was entered into after full and fair disclosure of all material circumstances and of everything known to him respecting the subject matter of the contract which would be likely to influence the conduct of his principal. The burden of proof that the transaction was a righteous one rests upon the agent, who is bound to produce clear affirmative proof that the parties were at arm's length, that the principal had the fullest information upon all material facts and that having this information he agreed to adopt what was done." Charles Baker Ltd. v. Baker, [1954] O.R. 418 at 432, [1954] O.W.N. 455, [1954] 3 D.L.R. 432 (C.A.), per McKay J.A.; which was applied in Northbrook Realty Ltd. v. R. C. Jeffs Const. Ltd., B.C.S.C., Vancouver No. 38663, Macdonald J., 26th February 1976 (unreported), appeal dismissed B.C.C.A., Seaton J., 27th May 1977 (unreported)."

3. Moray is not liable for two commissions as Interra's alleged commission agreement with it was induced by the misrepresentations of Relling.

4. Chartwell is entitled to a full commission according to the terms of its "open" listing at the rate of 5% on the first \$100,000.00 and 2 1/2% thereafter as it was instrumental, by whatever the route, in introducing a purchaser to Moray who subsequently completed.

I refer to Bow's Emporium Limited v. A. R. Brett & Company Limited (1927) 44 T.L.R. 194 where Lord Shaw said at p. 198:

"The appellant's counsel seemed to maintain that no commission was due because there was not an 'introduction' of the two parties, seller and buyer to each other. My Lords, such transactions may be conducted and concluded without any"

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"introduction in that sense whatsoever. Introduction is not a vox signata; all that is meant is that the agent shall have been the means of bringing a willing seller and a willing buyer into relations with each other in regard to a business transaction and that a business transaction resulted."

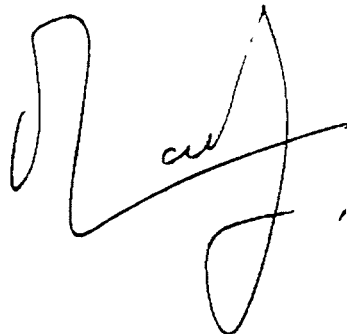
And see also Quinton v. McGregor (1948) 1 W.W.R. 831 at 840.

5. Alternatively, I would award Chartwell the amount in paragraph 4 on a quantum meruit.

As to costs:

1. The action Interra v. Moray is dismissed with costs and the counterclaim is dismissed without costs.
2. The Chartwell v. Moray action is allowed with costs.
3. The third party proceeding by Moray brought against Interra in the action Chartwell v. Moray for indemnification is allowed with costs, the amount of the indemnification to be:
 - a. Solicitor and client costs of defending the action Chartwell v. Moray;
 - b. The party and party costs payable by it to Chartwell in the action Chartwell v. Moray.

There will be an Order accordingly.



Vancouver, B.C.

April 4, 1985