

1998 CarswellOnt 3306  
Ontario Court of Justice (General Division)

Enterprise Property Group Ltd. v. Key Property Management Corp.

1998 CarswellOnt 3306, [1998] O.J. No. 3309, 79 O.T.C. 23, 81 A.C.W.S. (3d) 922

**Enterprise Property Group Limited, Plaintiff and  
Key Property Management Corporation, Defendant**

Somers J.

Heard: July 23, 1998

Oral reasons: July 23, 1998

Docket: Toronto 96-CU-104959

Counsel: *David Shiller*, for the plaintiff.

*F. Scott Turton*, for the defendant.

Subject: Contracts; Torts; Property

**Table of Authorities**

**Cases considered by *Somers J.*:**

*Dominion Trust Co. v. Kesmark Ltd.* (1981), 21 R.P.R. 313, 129 D.L.R. (3d) 357 (Ont. H.C.) — considered

*Simpson v. Toronto Factory Properties Ltd.* (1974), 4 O.R. (2d) 357, 48 D.L.R. (3d) 48 (Ont. H.C.) — referred to

*Strangier v. Liebeck* (1974), 5 O.R. (2d) 767, 51 D.L.R. (3d) 519 (Ont. H.C.) — referred to

**Statutes considered:**

*Courts of Justice Act*, R.S.O. 1990, c. C.43

Generally — referred to

*Loan and Trust Corporations Act*, R.S.O. 1990, c. L.25

Generally — referred to

*Real Estate and Business Brokers Act*, R.S.O. 1980, c. 431  
s. 1 "trade" — considered

*Real Estate and Business Brokers Act*, R.S.O. 1990, c. R.4  
s. 22 — considered

**Rules considered:**

*Rules of Civil Procedure*, O. Reg. 560/84  
R. 126 — referred to

Motion by plaintiff for judgment in action for payment of commission.

***Somers J. (orally):***

1 This is a motion for judgment brought by the plaintiff for the sum of \$67,761.90 plus prejudgment interest from December 14, 1995. The claim arises as a result of certain services performed by the plaintiff on behalf of the defendant relative to a commercial mall property that the defendant owned. The plaintiff is a property management company handling shopping malls, office buildings and the like. At all relevant times, the chairman of the company was Mr. John Topping, since deceased.

2 In early 1994, there were discussions between Mr. Topping at Enterprise and Mr. Randy Ferguson at the defendant company concerning the subject mall and, in particular, the defendant's desire to obtain, if possible, Zellers as a tenant. The defendant was aware that Zellers had recently closed up a store and left a different mall and were probably looking for space elsewhere. The defendant was also aware that Mr. Topping had connections with Zellers and would be in the position to introduce the two parties.

3 Mr. Topping introduced Mr. Frank McGurk of Zellers to Mr. Ferguson and, in due course, a lease was entered into between the parties. The action is based upon a letter sent by the defendant to the plaintiff of September 27, 1994 which reads as follows:

September 27, 1994

Enterprise Property Group Limited

480 University Avenue

Suite 200

Toronto, Ontario

M5G IV2

**Attention: Mr. John Topping**

Dear John:

***Re: Zellers Oxbury Mall, London***

Further to our numerous discussions with regard to the captioned lease, we hereby confirm the following arrangements:

1. Enterprise will be paid a commission in an amount equal to 15% of the average annual fixed rent during the initial term.
2. Enterprise will be paid a commission in an amount equal to 15% of the average annual fixed rent for the expansion space contemplated in the agreement with Zellers.
3. 30% of commission due is payable upon receipt of the one million dollar loan contemplated in the agreement.
4. Balance of the commission is payable upon the opening of Zellers to the public.
5. Commission due (if any) for the expansion space is payable upon opening of the expansion space to the public.

Thank you for your attention to this matter.

Yours very truly,

**KEY PROPERTY MANAGEMENT CORPORATION**

R. Randy Ferguson

Vice President

Commercial Division

4 I note that this letter was written after some arrangement had already been arrived at between the defendant and Zellers.

5 On November 3, 1994, Mr. Ferguson sent a cheque to Enterprise Property to the attention of Mr. Topping in the amount of \$29,040.81. The letter read as follows:

November 3, 1994

Enterprise Property Group Limited

480 University Avenue

Suite 200

Toronto, Ontario

M5G IV2

**Attention: Mr. John Topping**

Dear John:

***Re: Zellers Oxbury Mall, London***

Further to our letter of September 27, 1994, please find enclosed our cheque in the amount of \$29,040.81, which represents the (30%) portion of the commission presently payable.

As previously agreed, the (70%) balance of the commission will become due and payable upon the opening to the public of Zellers at Oxbury Mall.

Thank you for your attention to this matter.

Yours truly,

**KEY PROPERTY MANAGEMENT CORPORATION**

by its duly authorized agent herein

Ferguson Commercial Property Management Group

R. Randy Ferguson

6 It does not appear to be in dispute that the financing contemplated in the letter of September 27, 1994 was obtained before November 3<sup>rd</sup> nor does it appear to be in dispute that Oxbury Mall was open to the public on November 27<sup>th</sup>. It also appears to be undisputed that the balance owing on the commission was \$67,761.90.

7 When payment of this balance was not forthcoming, written requests were sent by the plaintiff to the defendant. By this time, Mr. Topping had died and the requests were made by Michael P. Mackenzie, partner of the plaintiff company. As it also happens, Mr. Ferguson had left the defendant company and the responses that followed were sent by A.H. Graat. Graat's letters made it clear that his company wanted further particulars and Mr. Mackenzie made reference to the original letter from Mr. Mackenzie confirming the arrangement. He then pointed out, without supplying any particulars, that Mr. Topping had taken part in a number of the negotiations and discussions.

8 This claim was commenced on May 28, 1996 and the statement of defence and counter claim were filed in July 1996. The defence raised is that the plaintiff is not a registered real estate broker as required by the provisions of the *Real Estate and Business Brokers Act*, R.S.O. 1990, c. R[.]4 and, accordingly, under s.22 of that *Act*, such an action is barred. The section reads:

No action shall be brought for commission or for remuneration for services in connection with a trade in real estate unless at the time of rendering the services the person bringing the action was registered or exempt from registration and the Court may stay any such action at any time upon motion.

9 The plaintiff's response to that suggestion and, of course, to the counterclaim which seeks return of the money that has been paid was that the services performed by Mr. Topping were not in the nature of his acting as a real estate agent or broker. What is urged upon the court is that Mr. Topping was, in fact, acting more as a consultant and advisor based upon his company's experience in dealing with these matters and his connection with Zellers.

10 Mr. Ferguson was examined as a witness in support of this motion on August 15, 1997 and he gave answer to two lines of questioning on which the plaintiff places a good deal of reliance as follows:

61. Q. Now, what discussions did you have with Mr. Topping about what his role would be and what compensation he would be paid?

A. In terms of the role that John would play, John played the role of providing an introduction to senior management at Zellers. He attended the meetings, provided us with market insights, provided us with insights into the compelling reasons why Zellers would want to make a relocation in that particular market node.

62. Q. When you say "us", you mean...

A. I mean collectively Key Property.

63. Q. Did you consider him to be Key Property's real estate agent or broker?

A. No. John's role was a consulting role. That is what he did. He helped people.

11 At page 18 of the same transcript, Mr. Ferguson had answered an earlier question that he felt without the assistance of Mr. Topping, there would not have been a Zellers store at the Oxbury Mall. He was asked why that was, with this result:

117. Q. Why is that?

A. Well, it is a case of what we laughingly call in our business "but for" test. But for John Topping, there would be no deal. John facilitated the relationship, John provided us with market insights that allowed us to do the best possible real estate deal that we could do with Zellers. John made the introductions. John counselled us in terms of how to craft the offer to lease, advised us on some of the terms of the lease in terms of what would be motherhood clauses with Zellers and what would not be.

12 As against this, the defendant points to the fact that, firstly, the amounts to be paid to the plaintiff were entirely dependent on the transaction closing. If there was no lease, there would be no payment. Secondly, in the letter of September 27, 1994, Mr. Ferguson refers three times to "commission". It is clear that Mr. Topping did not transmit any offer to lease from Zellers to the defendant or any counter-offer back from the defendant to Zellers. He took no role in preparing the lease other than as stated by Mr. Ferguson to advise on the sort of clause that, according to his experience, Zellers considered to be important.

13 This court has held that the purpose behind the passing of the *Real Estate and Business Brokers Act* was to protect the public in its dealings in a relationship of trust of confidence where the average member of the public is at a disadvantage in dealing with a professional, thereby creating an imbalance which the legislation saw fit to even. *Simpson v. Toronto Factory Properties Ltd.* (1974), 4 O.R. (2d) 357 (Ont. H.C.) was cited with approval by Justice Lacourcière, then sitting as a member of this court, in the case of *Strangier v. Liebeck* (1974), 5 O.R. (2d) 767 (Ont. H.C.). I have been referred by defendant's counsel to the case of *Dominion Trust Co. v. Kesmark Ltd.* (1981), 21 R.P.R. 313 (Ont. H.C.). In that case, the plaintiff company sought a finder's fee for obtaining a purchaser for property. The defendants applied to strike out the statement of claim and dismiss the action under old rule 126. Justice Henry came to the conclusion that the definition of trade in s.1 of the *Real Estate and Business Brokers Act* was sufficiently wide to apply. "Trade" is defined in the *Act* as follows:

Trade includes a disposition or acquisition of or transaction in real estate by sale, purchase agreement for sale, exchange, auction, 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 of advertisement, conduct or negotiation directly or indirectly in furtherance of any disposition, acquisition, transaction, offer or attempt on the "trade" has a corresponding meaning.

14 However, in that case, that company was registered under the *Loan and Trust Corporations Act* then in force and had acted as an agent of a predecessor of the defendants in the sale of certain real property assets, namely three shopping centres. Enterprise Property is not a real estate agent and has not acted as an agent in these proceedings. I am satisfied, on the evidence before me, that Enterprise was acting in a consulting capacity and the fact that the fee to be paid it was stated to be a "commission" was simply a convenient method of determining the amount of the plaintiff's fee. In the result, therefore, I find that the plaintiff has satisfied the onus to establish that this amount of money is properly owing and that the defence raised discloses no reasonable defence.

15 Accordingly, there will be judgment for the plaintiff in the sum of \$67,761.90 together with prejudgment interest thereon in accordance with the provisions of the *Courts of Justice Act* from November 27, 1995 to date.

16 In addition, the defendant will pay to the plaintiff its costs of this action, including today's motion, hereby fixed at \$2,500.

*Motion granted.*