Certa Homes Ltd. v. Brown

Ontario Judgments

Ontario Court of Justice - General Division

Toronto, Ontario

Cavarzan J.

Heard: September 30, October 1, 2, 3, 4, 7, 8, 9, 11, 1991

Judgment: November 18, 1991

Action No. 22652/87

[1991] O.J. No. 2021

Between Certa Homes Limited, Nissim Eini and Eini Real Estate Limited, Plaintiffs (Defendants by Counterclaim), and Maurice Russell Brown, Defendant (Plaintiff by Counterclaim)

(57 paras.)

Case Summary

[Ed. note: Supplementary Reasons for judgment, released December 19, 1991, appended to judgment.]
David M. Marcovitch, for the Plaintiffs. Peter E. Brodey, for the Defendant.

CAVARZAN J.

1 This is a breach of contract action brought by the plaintiffs Certa Homes Limited and Nissim Eini. The plaintiff Eini Real Estate Limited sues for commission due under a listing agreement. The defendant counterclaims against Certa Homes Limited and Nissim Eini for loss of part of the defendant's personal investment in the subject property, and against Eini Real Estate Limited for a declaration that the exclusive listing agreement dated December 26, 1986, is not valid.

2 The defendant, plaintiff by counterclaim seeks from Certa and Eini particulars of materials, supplies and wages paid for from their moneys, and an accounting of all funds received from the defendant and a reference to the Master at Toronto, if necessary.

Issues

3 A host of issues is raised in this case. Is the contract for renovations oral or written? Who are the parties? What type of contract is it? Can terms be implied? When was the work completed? Was the contract breached by the parties or any of them? Was there a valid listing agreement?

4 A fairly complex matrix of interrelated facts and assertions must be reviewed as a preliminary

to addressing these issues. I have attempted to outline those matters in the background section which follows. My findings of fact and discussion of the law together with my conclusions are set out following the background section.

Background

5 Nissim Eini (Eini) is a real estate broker who owns and operates Eini Real Estate Limited. Eini also operates a house renovation business through a company called Certa Homes Limited (hereinafter referred to as Certa). Eini's former wife was the sole shareholder in Certa until April 15, 1989, when she formally transferred all of her shares to Eini.

6 Eini and the defendant Maurice Russell Brown (Brown) met in late 1985. On December 2, 1985, Brown listed his residence at 301 Bridletowne Cr. for sale through Eini. Eini effected a sale and received a commission. Eini then assisted Brown in his search for a new residence which he and his friend Charlene Watson and her son could occupy. Brown was seeking an income property, part of which might be rented out to tenants. On January 4, 1986, Brown and Watson agreed to purchase a duplex at 132 Belsize Drive in Toronto. The purchase price was $185,000.00, and the transaction closed on February 27, 1986. Title was taken in Brown's name alone. Events during the period between Brown's purchase of the property and its sale by him to one Gregory Kalogiros (In Trust) on March 3, 1988, gave rise to this litigation. Eini received a commission on the Brown purchase of Belsize.

7 Brown testified that it was his intention to move to the top floor of the duplex and live there with Watson and her son. Notice to quit was given to the tenant of that unit in late February. Brown obtained vacant possession at the end of April. Upon viewing the upper unit, he realized that it would be too small so he proceeded to arrange to obtain vacant possession of the lower unit as well. That unit was vacated at the end of June. By early May, Brown began to make plans to convert the duplex into a single family dwelling.

8 Eini, who had done other renovation projects, offered his assistance. He arranged for another company, Belvedere Construction, to provide a written estimate to Brown. On June 2, 1986, Brown wrote to his parents seeking funding for the renovation work. He estimated that it might cost $75,000.00. The proposal was that the funds be raised through a mortgage loan on his parents' residence at 250 Glenview Avenue. On about June 23, 1986, Eini and Brown discussed the Belvedere Construction estimates. Belvedere estimated $74,000.00 for renovations which did not include removing walls, installing insulation, installing new windows and doors, and installing new drywall. The more extensive work, including the items excluded from the lower estimate, was said to cost $116,000.00.

9 Brown is a self-employed consultant. During the relevant period he was working for Air Canada on contract and was spending much of the work week at Air Canada's offices in Montreal. He would fly to Montreal early on Monday morning each week and return to Toronto on Thursday or Friday evening. His work did not permit him to be present in Toronto while renovation work was in progress. Brown owns a personal computer which he used to generate

floor plans of all three levels of the Belsize property. Many of these were placed in evidence at trial bearing notations made by Brown and Eini.

10 Brown maintains that as a result of reviewing the Belvedere Construction proposal, Eini indicated that he could complete the renovations for less than $100,000.00. No written agreement was entered into between Brown and Eini at the outset, but it is common ground between the parties that Brown opened a joint bank account by mid-July, 1986. The purpose of this account was to provide funding for the renovations; both Brown and Eini had signing authority. On July 17, 1986, a mortgage was given by Brown's parents on their house to secure a $100,000.00 loan. The proceeds were turned over to Brown who deposited them in the joint account referred to above. Shortly after the joint account was opened, Eini arranged for renovation work to begin. Eini had no employees; he hired tradesmen and contractors to do the various jobs.

11 On August 6, 1986, Brown was to leave for three weeks of vacation in British Columbia, returning to Toronto on September 2, 1986. On the date of his departure Eini presented him with a one-page document entitled "Renovation Proposal for 132 Belsize". Brown reviewed it and endorsed the following at the foot of that document: "Approved up to $130,000.00, M.R. Brown 6 Aug.".

12 Between August 6 and September 2, 1986, when Brown returned, all but $10,000.00 from the joint account had been expended. Most of the rest was expended within a day or two of Brown's return. The interior of the building had been "gutted" and was not habitable when Brown returned on September 2, 1986. Brown was advised by Eini that more money was required to complete the renovation. On September 3, the City of Toronto issued a stop work order for failure to apply for a building permit. Each party blamed the other for this oversight.

13 On October 9, 1986, Brown gave a second mortgage on 132 Belsize to raise a further $37,000.00, $29,000.00 of which went to Eini for the renovations. In addition, Brown advanced further sums to Eini from time to time obtained through SECUL, Brown's credit union; these sums were said to total $42,900.00. By November, 1986, Brown had exhausted his ability to fund the renovations. Eini then indicated that he could obtain additional funding provided that he had an acknowledgement in writing from Brown. Brown demanded a list and a cost estimate of the work to be completed. A list dated November 9, 1986, was produced by Brown with Eini's assistance. This list showed that work estimated to cost $25,800.00 remained to be completed as of that date. Eini and Brown then signed three documents. Two are identical, except that one is dated November 9, 1986, and the other is dated November 10, 1986. They provide as follows:

> Agreement between Nissim Eini, 157 Roehampton Ave., Toronto and M.R. Brown, 132 Belsize Drive, Toronto with reference to the property located at 32 (sic) Belsize Drive. Mr. Eini, through his company CERTA homes, has undertaken major renovations. Upon sale of the property the proceeds are to be used first to repay monies advanced by CERTA homes.

A third document dated November 9, 1986, and signed by both parties provides as follows:

> Agreement between Nissim Eini, 157 Roehampton Ave., Toronto and M.R. Brown, 132 Belsize Drive, Toronto with reference to the property located at 32 (sic) Belsize Drive. Mr. Eini, through his company CERTA homes, has undertaken major renovations. In return for this work he will receive one half of all profits from said property, upon its sale.
>
> The property was purchased for $185,000 and to this cost is to be added all carrying, construction and other costs to the date of sale. When these are subtracted from the proceeds the remainder is to be divided equally between the two parties.

14 On November 10, 1986, the City issued a second stop work order because reconstruction of the front steps to the dwelling caused them to extend beyond the required set-back.

15 Brown maintained that Eini had promised to complete the renovations by September 2, 1986, when he was to return from his vacation. Brown expected to be able to occupy at least the upper level while work was completed on the lower levels. He found the property uninhabitable, so he arranged alternative accommodation in the interim and placed his movables in storage. When the renovation project dragged on into November, he and Watson resolved to find another residence and to use the proceeds from the sale of Belsize to pay off that indebtedness. Accordingly, the purchase of 12 DeQuincy Blvd. was arranged through Eini who received a commission on this transaction from Watson. The agreement of purchase and sale was signed by Watson on November 28, 1986; the transaction closed on December 18, 1986. The vendor was one Spyros Gionas, a person engaged by Eini to do renovation work on the Belsize property. Gionas took back an open second mortgage which was to mature on February 27, 1987, a brief two months or so after the closing. Brown testified that it was his intention to use the proceeds from the sale of Belsize to retire that second mortgage. Brown moved into DeQuincy with Watson as soon as she obtained possession of those premises in December, 1986. Even though, according to Brown's testimony, Belsize was habitable by the end of November, 1986, he had decided to complete the renovations, sell it and live elsewhere. Hence the move into DeQuincy and the removal of his belongings from storage into DeQuincy.

16 The next significant event was the signing of one or more listing agreements on December 20, 1986. Brown alleged that Eini represented to him that he was being asked to sign the multiple listing agreement appointing Eini as agent for the vendor on the Belsize property. Later, after some conversation Eini asked him to sign and to leave undated a copy of that listing which he, Eini, needed "for his company". Brown swears that those documents were blank forms and that he was never given a copy by Eini. Eini alleges that one document was signed on that date, that it was an exclusive listing to sell 132 Belsize for $535,000.00 that the document was completed before signing, and that Brown was given a copy of the signed document at that time. A multiple listing dated February 5, 1987, was also introduced into evidence at trial. The exclusive listing expired April 11, 1988 - a sixteen month listing. The multiple listing expired on October 31, 1987 - a nine month listing.

17 Brown testified that he was not aware until much later that Eini had listed Belsize for sale at $535,000.00. He would never have permitted a listing beyond the "psychological barrier" of one-half million dollars, nor would he have agreed to a listing for sixteen months, particularly not an

exclusive listing. In fact, by letter of January 12, 1987, Brown authorized Eini to sell 132 Belsize Ave. "for whatever the market will bear, in excess of $399,999.99". Brown also provided Eini with a letter of January 12, 1987 as follows:

> To whom it may concern
>
> re. negotiations w.r.t. selling 132 Belsize
>
> As I am away frequently on business, Mr. Nissim Eini is authorized to negotiate for me concerning the sale of 132 Belsize Ave., including the rejection of offers that he feels I should not accept.
>
> Mr. R. Smith of Cox, Armstrong and Smith, 366-2504, has signing authority should that need arise.
>
> M.R. Brown

18 Brown's bottom line was $400,000.00. The above tends to confirm that the asking price he discussed with Eini was from $479,000.00 to $489,000.00 as alleged by Brown, and not $535,000.00.

19 The property did not sell; in fact, Eini received no offers. In the Spring of 1987, Brown realized that some of the outside renovation work made the property appear very unattractive to prospective purchasers. There was very little communication between Brown and Eini at this point. The property was not attracting interest and Brown's carrying charges were mounting. He arranged to have certain outside repairs done such as repairing the driveway, and planting of shrubs and grass. In June, Brown instructed that the property be taken off the market. He was of the view that it was better that the property be off the market after being for sale unsuccessfully since December, 1986. Brown used the summer months to do repairs to what he alleges was defective workmanship on some of the interior and exterior renovations.

20 On the assumption that Eini's multiple listing was for the usual sixty days and had long hence expired, Brown arranged a new multiple listing with Ms. Mason, a Re/Max agent, on September 8, 1987, to offer Belsize at $449,000.00. Eini then advised the Toronto Real Estate Board that he had a multiple listing for this property until October 31, 1987. As a result, Re/Max withdrew its listing. Brown renewed his listing with Re/Max on November 27, 1987, again for $449,000.00. Between September 11, 1987, and November 30, 1987, Brown tried unsuccessfully to sell the property privately.

21 On September 16, 1987, Brown mortgaged Belsize to his parents as mortgagees to secure their contribution of $100,000.00 towards the renovation costs. Certa commenced this action on September 23, 1987 and a certificate of pending litigation, which has since been removed, was registered on title on September 24, 1987.

22 The sale price was reduced by agreement on January 25, 1988, to $429,000.00. This had the effect of generating offers of $385,000.00 and $380,000.00 which came with conditions that made them unacceptable. By agreement of purchase and sale of February 9, 1988, Gregory Kalogiros (In Trust) submitted a cash offer for $370,000.00 with a $30,000.00 down payment. Brown signed it back at $375,000.00. This was accepted and the deal closed on March 3, 1988.

23 Eini testified that he complained that a sale at that price was too low. He had made an offer to Brown to purchase Belsize for $330,000.00 plus the money owed by Brown to Eini, plus the commission claimed by Eini. Eini reckoned that his offer was worth $417,000.00. Brown's counsel disagreed and reckoned that it was worth less than the Kalogiros offer because Eini specified a closing date in July, 1988, with an option to the purchaser to extend for a further two months. No cash deposit was offered. Brown testified that that would force him to absorb the carrying charges of about $4,000.00 per month on Belsize for five months.

24 Eini's concerns were compounded by learning that Belsize was sold on April 29, 1988 for $470,000.00 and on January 10, 1989, for $555,000.00.

Findings

25 After a careful review of all of the evidence I have concluded that it was Brown's intention since early May, 1986, to convert Belsize into a single family dwelling. The documents filed as exhibits, including Brown's letter of June 2, 1986, to his parents confirm the intention to eliminate a rear staircase, an essential change in the conversion from a multiple to a single dwelling.

26 I must reject Eini's contention that he undertook merely to supervise the conversion work "as a friend", and without remuneration initially. Eini had done renovations before; he represented himself to Brown as an experienced renovator. It is not plausible to suggest that Brown was to resume supervision of the renovations upon his return from his vacation in British Columbia. Brown's work in Montreal made it difficult, if not impossible, for him to supervise the renovations. For that reason he turned the project over to Eini and he opened a joint bank account giving signing authority to Eini. On August 6, 1986, when Brown departed for the West, he authorized Eini's list of renovations and gave him a power of attorney which gave Eini carte blanche "to act on my behalf on all matters concerning 132 Belsize" until September 2, 1986. On August 11, 1986, Eini withdrew $50,000.00 from the joint account and placed it into the Certa account. When Brown returned on September 2, 1986, all but $10,000.00 had been withdrawn from the joint account; most of that balance was withdrawn by Eini within 48 hours of Brown's return.

Was there a contract?

27 There can be no question that a contract was entered into between the parties. A major renovation of 132 Belsize was effected which resulted in subsequent resales of the property at more than double the price paid by Brown in 1986. There is no dispute that the renovation work began about three weeks before Brown's departure on August 6, 1986. The "Renovation Proposal For 132 Belsize" approved by Brown on August 6, 1986, "up to $130,000" forms part of this contract. I find, as well, that the plans approved by the City of Toronto on September 8, 1986, and filed as Exhibit 59 in this action, form part of the contract. Both Brown and Eini acknowledged in their testimony that these plans come closest to representing the work on the list of August 6, 1986, filed as Exhibit 8.

28 The plaintiffs called Ron Faulkner, an experienced house renovator, to give expert testimony

concerning the house renovation business. He testified that there are essentially two kinds of contract arrangements for this type of work. One is an "end price" contract whereby a list of renovations is specified for a fixed contract price. The other is a detailed written contract specifying the duties of each party at each step of the renovations. In the end price contract, the renovator purchases materials, arranges for work to be done, and pays the tradesmen. The renovator's only duty to account to the homeowner is to present him with the completed project for the "end price" agreed upon. Having done so, he is under no obligation to open his business records to the homeowner and account to him for the individual expenditures made. Faulkner also testified that the work listed on Exhibit 8 could be done in as little as four to five weeks if no problems were encountered. He agreed that he could do the work listed for $130,000.00.

29 This testimony tends to confirm Brown's evidence that Eini undertook to complete the work commenced in about mid-July, 1986, by Brown's return on September 2, 1986.

30 Eini claimed that many items of work done were "extras", such as marble flooring in the main entrance and the cedar deck at the rear of the property. Brown was equally insistent that those items, as shown on Exhibit 59, were part of the original contract. Indeed, Brown points to omissions such as the fireplace on the main floor, the french doors leading to the patio, and the opening in the wall between the kitchen and the dining room. Brown denies that Eini ever described any of the work done as "extras". I accept Brown's evidence on that point. Brown testified that he never calculated the cost of the omissions such as those mentioned above; he assumed that work omitted was compensated for by work done which was part of the understanding between the parties but not specifically reflected in the documents. In his words, "the pluses cancel led out the negatives".

31 Brown agreed after September 2, 1986, at Eini's insistence, to advance more moneys. These moneys came from the second mortgage on 132 Belsize and from Brown's credit union.

32 As for the quality of the renovations, it is clear from the evidence that some of the work was not properly executed. In particular, the inside staircase was not properly measured and the installation was poorly finished leaving unsightly gaps between the stairs and the adjoining wall. The retaining wall in the front yard was poorly constructed; it was not properly braced as a result of which it leans from the vertical. Stucco applied to the rear wall of the residence began to crumble after the first winter because no lath was installed over the old wall surface before the stucco was applied. These defects along with many other more minor defects such as plumbing leaks, reversal of the cold and hot water lines in at least one area of the renovation, and improperly installed wall fixtures and plates, made the property less attractive than it might otherwise have been to prospective purchasers. I find that these defects in workmanship contributed to the delay in selling 132 Belsize Drive, a delay which is attributable to Eini. The renovations were not of "high quality".

33 Eini alleges that Brown ignored the property in the period between February and June, 1987. Brown denies this. In fact, the evidence in this case confirms that Brown arranged for the driveway to be repaved in April, 1987. I accept, as well, that Brown effected repairs to the defective renovation work during those months and during the summer of 1987.

34 On the matter of the listing agreements, I find that both the multiple listing and the exclusive listing were signed by Brown in blank on December 20, 1986, and that he was not provided with a copy of either upon signing as required by s. 35 of the Real Estate and Business Brokers Act. Under cross-examination, Eini admitted that he did not know when Brown signed the multiple listing, that Brown could have signed it and left it, and that Eini witnessed his signature later.

35 With respect to the alleged exclusive listing, Eini insists that it was signed on February 5, 1987. Brown denies this. Brown's evidence proving that he was in Montreal that day and could not have returned to Toronto before 7:30 p.m. was not contradicted. I accept Brown's testimony that he would not have agreed to an exclusive listing, let alone one which expired only after 16 months. Nor would Brown have agreed to a sale price of $535,000. I accept Brown's evidence that he was never provided by Eini with a completed copy of either the exclusive or the multiple listing, that the forms signed by Brown on December 20, 1986, were in blank, and that Brown did so because of the trust which he placed in Eini.

36 The plaintiffs called Mr. Robert Height to give his expert opinion as to the value of 132 Belsize Drive as of February 9, 1988, when it was sold by Brown. Mr. Height's conclusion as to fair market value on that date was $440,000.00. Against this, the defendant called evidence concerning three arm's length offers made on the property at that time. I accept the evidence of Ms. Mason, a very experienced and successful real estate agent, that those offers were the best indication of the fair market value of that property at that time. The $375,000.00 sale price represented, at that time, what a willing purchaser and a willing vendor were prepared to agree upon.

37 Finally, I reject the suggestion made on behalf of Eini that Brown and his solicitor, Raymond I. Smith, conspired to take the listing away from Eini. No reliable evidence was led to substantiate this claim. The audiotapes of three telephone conversations between Eini and Smith made by Eini and received in evidence are accorded little or no weight by me. Eini could only guess at the dates of those conversations. Those conversations were out of context because Eini, in his own testimony, admitted that while he recorded all business calls, he kept only a selected few.

The Law

38 As indicated above, a contractual relationship was established between Eini and Brown. The contract was partly oral and partly written. To the extent that Eini effected the renovations through Certa, Brown tacitly agreed to be bound contractually to Certa. That agreement was made explicit in the written agreement of November 9, 1986, quoted above.

39 With respect to the terms of the contract between the parties, I would respectfully adopt the views expressed in Fridman, The Law of Contract, second edition (1986) at pp. 448-449:

> The law has long recognized that it is not always possible to confine the terms of a contract, whether written, oral, or partly written and partly oral, to those which have been expressly stipulated between the parties. There are circumstances in which a

> court is entitled to conclude that everything agreed by the parties is not contained in the written document or documents, or the oral statements of the parties, that appear to make up the contract. Some additional term or terms must be implied. The acceptance of what Duff J. once called "an unexpressed incident" requires more than that a court might think it reasonable to make such an implication. It is firmly based on the idea that courts are seeking to discover what the parties intended, not what a court thinks reasonable.

40 In my opinion, the intention of the parties was that the renovations on 132 Belsize Drive would be done on the basis of an "end price" contract, initially for no more than $130,000.00. Although Mr. Brodey argued that "up to" $130,000.00 carried with it an obligation on the part of Eini to account strictly for every penny spent, I cannot agree with that submission. The conduct of the parties makes it clear that they were guided generally by the list of August 6, 1986, and by the City-approved plans. They did agree from time to time, however, to make changes in both the work to be done and in the amount required to complete the work. With respect to the work to be done, for example, Brown agreed to an alternative arrangement when Eini advised him that a doorway between the kitchen and the dining room was not permitted because it would have to be cut through a load-bearing wall. With respect to the end price, Brown agreed to increase that figure and continued to advance moneys to Eini beyond the original maximum authorized amount of $130,000.00. In his submissions, Mr. Marcovitch maintained that the total cost of the renovations was about $170,000.00 of which $31,000.00 was money provided by Eini. Assuming for the sake of argument that those figures are correct, Eini concedes that Brown contributed $139,000.00 towards the cost of the renovations. Mr. Brodey maintained that Brown spent $142,800.00 on the renovations plus the cost of paving the driveway.

41 I find as a fact that the final "end price" agreed to by the parties corresponds with the total amount advanced by Brown, namely, $142,800.00. As explained by the expert witness Faulkner, the renovator realizes his profit in an "end price" contract by including his profit margin in the "end price". There is no duty on the part of the renovator to account for the monies spent, only to present the homeowner with the completed work.

42 The nature of the contract and the conduct of the parties support Eini's position that Brown had not requested an accounting prior to November, 1986. At the time of the agreements signed on November 9, 1986, however, Brown made it clear to Eini that a detailed accounting of any further expenditures for the renovations would be required.

43 By the end of November, 1986, Brown was of the view that the work contracted for had been substantially completed. Brown alleged, however, that the work was not completed in a timely manner and that the workmanship was not of a high quality. I am satisfied, as a matter of law, that it is an implied term of the contract between the parties that the renovation work was to be completed within a reasonable time. Mr. Faulkner's evidence provides a reliable guide as to what is reasonable in the circumstances of this case. Applying his outside estimate of eight weeks, the contract should have been completed by mid-September, 1986, at the latest, had the work been prosecuted with reasonable diligence. A second implied term is that the work will be performed in a good and workmanlike manner using materials of good quality.

44 In my opinion, it is incumbent upon Eini to account for and to justify the expenditure of any funds, whether they be Brown's or his own, beyond the $142,800.00 "end price" contract sum mentioned above. In paragraph 35 of Brown's statement of defence, he expresses his willingness to reimburse for any provable claims by Eini and Certa respecting materials, supplies, and wages incurred by them or either of them with respect to the renovations. In this regard, Brown requests that the matter be referred to the Master for assessment. I agree that this is the appropriate course to be followed in the circumstances. The agreements of November 9, 1986, were the conditions precedent to Eini contributing any of his own moneys. The Master's inquiry should deal, therefore, with any expenditures between November 9, 1986, and February 9, 1988, the date of the sale of 132 Belsize Drive. Part of such a reference should be an inquiry into amounts spent by Brown to correct defects in the renovations effected by the plaintiffs. Those amounts should be set off against any sums found owing to Eini and Certa.

45 With respect to the exclusive listing agreement relied upon as the basis for the claim for lost commission, I have concluded that such agreement is void and unenforceable. Suffice it to say that failure on the part of Eini to deliver to Brown a true copy of a properly executed listing agreement renders that agreement invalid. Section 35 of the Real Estate and Business Brokers Act, R.S.O. 1980, c. 434, as amended, provides as follows:

> 35.(1) Every broker and salesman shall, immediately after the execution of an agreement to list real estate for sale, exchange, lease or rent with a broker, deliver to the person who has signed the agreement a true copy thereof.
>
> (2) An agreement with a broker to list real estate for sale, exchange, lease or rental is not valid,
>
> (c) if a true copy of it is not delivered by the broker or his salesman to the other party immediately after its execution.

46 With respect to the agreements of November 9, 1986, I disagree with Mr. Brodey's arguments that they are directly contradictory or otherwise unenforceable. The claim for reimbursement of Certa from the proceeds of the sale will fall to be decided in the reference to the Master on proper proof being made of the expenditures. As for the agreement to turn over to Eini one-half of the profits on the resale of 132 Belsize Drive, no profits were realized on the resale. In fact, the evidence shows that Brown suffered a loss when he sold the property.

47 Finally, I should note that the defendant has abandoned his claim for loss of profits. His counsel submitted in writing, correctly in my view, that the volatility and unpredictability of the real estate market affected equally both parties. The Court is unable to determine from the evidence adduced what was the effect of the delays in completing the renovations and the failure on the part of both Eini and Brown to promote aggressively the sale of the property. The expert witness on real estate values during the period in question established only that they fluctuated during that period, but not that there were any critical high or low water marks that would have impacted dramatically on the sale price of 132 Belsize Drive. When finally sold by Brown, it sold for fair market value at that time.

Result

48 The claim of Eini Real Estate Ltd. for the commission due under the listing agreement is dismissed.

49 The claims of Nissim Eini and Certa Homes are dismissed except to the extent that any sums may be found owing to them as a result of the reference herein to the Master at Toronto.

50 The defendant Maurice Russell Brown has abandoned his counterclaim for loss of profits. His counterclaim for a reference to the Master at Toronto is allowed for the purpose only of determining what moneys were expended by the plaintiffs from their own funds for renovation work undertaken on 132 Belsize Drive after November 9, 1986, and what moneys were expended by the defendant Brown after that date to repair defective renovation work done by the plaintiffs.

51 There will be a declaration that the exclusive listing agreement dated December 20, 1986, is not valid and not enforceable.

52 The defendant has been largely successful in this action. If the parties cannot agree on costs, I may be spoken to on that matter. Costs of the proceedings before the Master, including G.S.T. associated with those costs, are reserved to the Master.

53 Finally, I have been asked to deal with the moneys held in trust by the solicitors for the plaintiff in Guaranty Trust Account No. 700846. At the time of the sale of 132 Belsize by Brown, the plaintiffs agreed to lift the certificate of pending litigation on the understanding that $100,000.00 from the proceeds of sale would be paid to their solicitors in trust pending the outcome of this action. In view of my findings, the maximum provable claim by the plaintiffs will be $31,000.00. If Brown can prove an amount for repairs which can be set off against the plaintiffs' claim, their recovery will be for less than $31,000.00. In the circumstances, it seems appropriate and just to me that $75,000.00 of the moneys held in trust be paid out to the defendant in this action forthwith, and I so order. The balance of the moneys held in trust, including accrued interest, may be paid into Court to the credit of this action pending the outcome of the reference before the Master or continue to be held in trust, as the parties may agree.

CAVARZAN J.

* * * * *

Supplementary Reasons

Released: December 19, 1991

CAVARZAN J.

54 Following the delivery of my written reasons for judgment, counsel for the parties attended

and made submissions on costs. Those oral submissions were supplemented by written submissions, the last of which was received from counsel for the plaintiff on December 16, 1991.

55 The defendant made an offer to settle on September 9, 1991, which was not withdrawn. That offer was that the claim and counterclaim be dismissed without costs and that all monies held in trust be paid out to the defendant. The plaintiffs made an offer to settle at the opening of the trial which was withdrawn at the conclusion of the trial. The plaintiffs' offer was the same as the defendant's except that all monies in trust were to be paid to the plaintiffs.

56 As indicated in my reasons for judgment, it is my view that the defendant has been largely successful in this action. Defendant's offer to settle might ordinarily be considered to be quite reasonable in the circumstances and in accord with the policy underlying Rule 49, and Rule 49.13, in particular. Against this apparently bona fides attempt to bring the litigation to a negotiated end, I must weigh the defendant's determined efforts at trial to depict the plaintiff Eini's conduct as fraudulent. I made no such finding of fact. Mr. Brodey persisted in this characterization of the plaintiff Eini's conduct in his oral and written submissions on costs. Clearly, this attitude tends to nullify the salutary effect which the offer of September 9, 1991, might otherwise have had in promoting settlement of this dispute without the need for a trial. In these circumstances, no portion of the costs awarded to the defendant should be on a solicitor and client basis.

57 The defendant shall receive his costs of this action to date on a party and party basis. Costs of the reference are reserved to the Master including G.S.T. associated with those costs.

CAVARZAN J.
