STATE OF MICHIGAN

COURT OF APPEALS

AGGRESSIVE MARKETING SERVICES, INC.,

Plaintiff–Appellee/
Cross-Appellant,

v

CROSSWINDS, INC., H. GRANT ROWE, THE BELLAIRE GROUP, SHANTY CREEK PROPERTIES, d/b/a SHANTY CREEK RESORT MARKETING, THE REAL ESTATE PLACE OF BELLAIRE, INC., d/b/a VACATION PROPERTIES NETWORK, FIRST NORTHERN HOLDING, RIDGEWALK ASSOCIATES, and RIDGEWALK ASSOCIATES II,

Defendants-Appellants/
Cross-Appellees.

UNPUBLISHED
November 22, 1996

No. 179981
LC No. 93-005992 CK

Before: Markey, P.J., and Hoekstra and J.M. Batzer,* JJ.

PER CURIAM.

This is a breach of contract action arising from defendants' sale of time-shares in four one-week increments referred to as "twelfths" in condominiums that were developed and built by defendant H. Grant Rowe and his various corporate personas. Plaintiff, a marketing company, successfully argued before the trial court that plaintiff had the exclusive right to market and sell "intervals," which impliedly included twelfths, pursuant to a January 12, 1991 marketing agreement [the "agreement"] entered into between plaintiff and defendants and that defendants had breached this agreement by marketing and selling twelfths. Defendants appeal as of right from a judgment in favor of plaintiff in the amount of $260,103. Plaintiff cross-appeals. We affirm.

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* Circuit judge, sitting on the Court of Appeals by assignment.

I.

Defendants argue that the trial court erroneously determined that the 1991 agreement afforded plaintiff the exclusive right to market and sell twelfths and, therefore, that defendants' marketing and selling of twelfths violated the agreement. We disagree.

The 1991 marketing agreement contained the following pertinent provision:

> H. Grant Rowe ("Rowe") is the authorized agent for and has authority to execute this Agreement on behalf of the developer. Developer and/or Rowe currently are the owners of various real property at the Shanty Creek Resort, Bellaire, Michigan, and Developer and Rowe have the exclusive right to develop any and all condominium units at the Shanty Creek Resort, and the Developer and Rowe wish to engage the services of marketer to exclusively market and sell, through licensed Michigan real estate brokers, any and all condominium units located within the boundaries of the Shanty Creek Resort under the concept of *interval ownership* ("Units")[1] and Marketer desires to accept such engagement, all on the terms and conditions hereinafter set forth.
>
> NOW, THEREFORE, in consideration of the foregoing, and other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, the parties hereto consent and agree as follows:
>
> 1. EMPLOYMENT
>
> Developer hereby grants Marketer the *exclusive right to market and sell* the Units through licensed Michigan real estate brokers. Marketer hereby accepts and agrees to act as the *exclusive agent* of Developer for the marketing and sale of the Units. [Emphasis added.]

At issue in this case is the meaning the parties intended to assign the undefined phrase "interval ownership." The determination of whether contractual language is ambiguous involves a question of law. *Port Huron Ed Vacational Ass'n v Port Huron Area School Dist*, 452 Mich 309, 323; 550 NW2d 228, (1996). If a contract's language is clear, its construction is also a question of law for the court. *Id.*; *G & A, Inc v Nahra*, 204 Mich App 329, 330; 514 NW2d 255 (1994). A contract's language is clear when, however inartfully worded or clumsily arranged, it fairly admits of but one interpretation. *Raska v Farm Bureau Mutual Ins Co of Michigan*, 412 Mich 355, 362; 314 NW2d 440 (1982). Contractual language is given its ordinary and plain meaning; technical and constrained constructions are avoided. *Id*. at 330-331.

If the contractual language is ambiguous, its interpretation involves a question of fact. *Port Huron Ed Ass'n*, *supra*. A contract is ambiguous and, hence, open to interpretation when its words may be reasonably understood in different ways. *Raska*, *supra*. Where a contract is open to construction, it is the duty of the court to determine, if possible, the true intent of the parties. In determining this intent, the court should consider the language employed in the contract, its subject

matter, and the circumstances existing at the time the contract was made. *Sobczak v Kotwicki*, 347 Mich 242, 249; 79 NW2d 471 (1956); *Damerau v C L Rieckhoff Co, Inc*, 155 Mich App 307, 311-312; 399 NW2d 502 (1986).

The phrase "interval ownership" appears to be unambiguous on its face when we assign the phrase its plain and ordinary meaning. Black's Law Dictionary (6th ed), p 820, defines "interval ownership" as a

> [t]ype of ownership of [a] second (i.e. vacation) home whereby the property is owned for only an interval (e.g. two weeks or a month) of the year. Each owner receives a deed covering his interval period. *See also* Timesharing.[2] (Emphasis in original.)

Given this definition, the phrase as employed in the agreement apparently admits of but one interpretation, i.e., that the parties intended the marketing agreement to award plaintiff the exclusive right to sell and market time-shares of any length or interval in defendants' condominiums. The trial court agreed with this interpretation and found for plaintiff. Upon de novo review, we also agree.

None of the parties' prior marketing agreements defined the term "timeshare unit" or "interval ownership." The parties substituted the term "interval ownership" for "time sharing" in the 1991 agreement because the term "timesharing" had developed a negative connotation. Consequently, the terms should be interpreted synonymously. Also, neither term is self-limiting with respect to the length of the time-share or interval. Defendants assert that twelfths should be distinguished from weekly intervals because people in the industry refer to twelfths as "fractions" and weekly time-shares as "intervals." The testimony in this regard was equivocal. Further, Black's Law Dictionary (6th ed), p 657, defines "fraction" as "[a] breaking, or breaking up; a fragment or broken part; a portion of a thing, less than the whole," and only defines "fractional" in reference to real property as an irregular division of acreage. If an interval refers to a portion of a year and a fraction or fractional interest refers to a portion of a year or less than a whole year, we see no meaningful distinction between these terms. Thus, we find nothing in the plain and ordinary meaning of the words contained in the parties' agreement that distinguishes between one-week and four-week time-share units or intervals. Also, the court found no credible testimony supporting defendants' assertion on this point, and we will not second-guess the court's judgment in this regard given its superior ability to judge witness credibility. *Stanton v Dachille*, 186 Mich App 247, 255; 463 NW2d 479 (1990).

The evidence adduced at trial further supports our conclusion. Testimony established that plaintiff sold only interval ownership periods of one week duration during the terms of all of the marketing agreements entered into between the parties, including the January 12, 1991 marketing agreement. During this same period, defendant Vacation Properties Network sold full ownership condominiums and "quarters," or twelve one-week periods per month that rotated throughout each month over the course of four years, with respect to Shanty Creek vacation properties. While plaintiff used high volume marketing techniques, such as mass mailings to likely prospects, telemarketing, home visits, and free visits to the property, to sell the one-week intervals, Vacation Property Network sold quarters and full-ownership condominiums via more traditional methods, i.e., someone would see the

property, become interested, and contact the marketing company. Plaintiff's president conceded that the insertion of the phrase "interval ownership" into the 1991 agreement did not change the product that plaintiff was marketing and selling. In fact, plaintiff was using the term "interval" in the 1980s to market one-week time-shares. Regardless of defendant's past practice of selling quarters, however, we agree with the trial court's conclusion that by use of the phrase "interval ownership," the parties intended that the 1991 marketing agreement would give plaintiff the exclusive right to market all interval ownership interests, including twelfths.[3] We also adopt and incorporate herein the trial court's well-reasoned bench and written opinions.

Contrary to defendant's assertion, the agreement's failure to specify a commission rate for sales of interval ownership interests exceeding one week in duration does not negate the exclusive right bestowed on plaintiff to market and sell interval ownership interests. Rather, we believe that the twelfths, or four one-week interests in a condominium spread over the course of one year, more closely resemble one-week units, as both represent a very short, discrete period of time that does not differ from year to year, unlike quarters. Both the one-week time-shares and the twelfths require the purchasers to select set weeks for their use of the facility and both are marketed to the public via the same methods. Most importantly, the term "interval ownership" describes twelfths as well as single weeks according to the ordinary and plain meaning of the agreement. As such, the commission rate applicable to intervals under the 1991 agreement, or 45%, would apply equally to twelfths and single weeks because both constitute "interval ownership" units under the agreement. The 1991 agreement specifically references only a commission rate to be paid on the sale of an interval ownership interest. It does not limit payment of commissions to the sale of one-week interests. Although plaintiff's president stated that he would not sign any agreement that did not specify the commission which plaintiff was to receive upon a sale, we believe that the agreement specified the commission for the sale of "interval ownership" units which includes twelfths as well as the traditional weekly condominium interests.

Also, looking to the circumstances existing at the time of the making of the agreement, *Sobczak, supra* at 249, the evidence adduced at trial established that defendants were not dividing the ownership interests in their condominiums into twelfths at the time the parties entered into the 1991 agreement. Defendants did not decide to market and sell twelfths until sometime during the summer or fall of 1992 and, in fact, defendants did not start marketing and selling twelfths until approximately 1-1/2 years after the 1991 agreement was signed. During this same time period, plaintiff had sold multiple weeks of time sharing to several buyers, but defendants had not asked plaintiff to pursue the sale of twelfths. Despite the fact that twelfths were not specifically identified, or perhaps even contemplated, as saleable time-sharing units when the parties signed the 1991 agreement, we cannot conclude from the agreement's clear and unambiguous language the parties intended to exclude the marketing of twelfths from the agreement.[4]

Based on the foregoing, we conclude that the trial court correctly found that the 1991 agreement granted plaintiff the exclusive right to market and sell all interval ownership interests, including single weeks and twelfths. Accordingly, we affirm the trial court's finding that defendants breached the agreement by marketing twelfths through an entity other than plaintiff, the exclusive sale and marketing agent for Shanty Creek time-share condominiums.

II.

Defendant further asserts that the trial court erred in granting plaintiff the relief it requested because MCL 339.2512a; MSA 18.425(2512a) precludes an unlicensed person or corporation from suing to recover unpaid real estate commissions on the sale of time-share interests in vacation condominiums. We disagree.

The trial court found that under MCL 339.2503; MSA 18.425(2503), the occupational code's licensing requirements did not apply to an individual, partnership, or corporation that is acting on behalf of the owner to market and sell real estate as a principal vocation when that person, partnership or corporation operates through a licensed real estate broker. Rather, if the entity does not operate through a licensed real estate broker, then the individual, partnership or corporation has violated the occupational code. Upon further study, we believe that plaintiff's failure to possess a real estate broker's license did not preclude it from pursuing its breach of contract action against defendant, albeit for a different reason than the trial court cited.

MCL 339.2512a; MSA 18.425(2512a) states, in pertinent part:

> A person engaged in the business of, or acting in the capacity of, a person required to be licensed under this article, shall not maintain an action in a court of this state for the collection of compensation for the performance of an act or contract for which a license is required by this article without alleging and proving that the person was licensed under this article at the time of the performance of the act or contract.

This statute bars a party from recovering a commission or finder's fee in a court of law if the party falls within the statutory definition of real estate broker and is not licensed under the occupational code. C*ardillo v Canusa Extrusion Engineering, Inc*, 145 Mich App 361, 365 n4; 377 NW2d 412 (1985). The term "real estate broker" is defined in MCL 339.2501; MSA 18.425(2501), as follows:

> (a) "Real estate broker" means an individual, sole proprietorship, partnership, association, corporation, common law trust, or a combination of those entities who with intent to collect or receive a fee, compensation, or valuable consideration, sells or offers for sale, . . . lists or offers or attempts to list, or negotiate the purchase or sale or exchange or mortgage of real estate . . .; or who, as owner or otherwise, engages in the sale of real estate as a principal vocation.[5]

Before we can determine whether plaintiff's breach of contract action is barred by the occupational code, we must first determine whether the sale of a time-share interest in a condominium constitutes a sale of real estate within the meaning of the occupational code and, therefore, whether the code governs the transactions involved in this case.

Defendant asserts that the condominium act, MCL 559.101 *et seq.*; MSA 26.50(101) *et seq.*, supports its contention that the sale of time-share interests constitutes the sale of real estate. We disagree. MCL 559.104; MSA 26.50(104) defines the term "condominium unit" as

> that portion of the condominium project designed and intended for separate ownership and use, as described in the master deed, regardless of whether it is intended for *residential*, office, business, recreational, *use as a time-share unit*, or any other type of use. (Emphasis added.)

Further, MCL 559.111; MSA 26.50(111) provides that a "*residential* condominium in this state shall not be offered for sale unless in compliance with . . . article 25 of the occupational code, Act No. 299 of the Public Acts of 1980, being sections . . . 339.2501 to 339.2516 of the Michigan Compiled Laws" (emphasis added). Based upon these two statutory provisions, which we must construe in pari materia with each other and with the occupational code, *State Treasurer v Schuster*, 215 Mich App 347, 352; 547 NW2d 332 (1996), we find that the trial court reached the right result for the wrong reason. *Welch v District Court*, 215 Mich App 253, 256; 545 NW2d 15 (1996).

Indeed, MCL 559.111; MSA 26.50(111) does not indicate that condominium units, including time-share units, shall be offered for sale in compliance with the occupational code. Residential and time-share uses are referenced as separate condominium uses in MCL 559.104; MSA 26.50(104). Instead, MCL 559.111; MSA 26.50(111) specifically states that only "residential condominiums" shall be sold in compliance with the code. MCL 559.104; MSA 26.50(104) specifically distinguishes between residential uses and time-share uses. Had the Legislature intended that time-share units be sold in compliance with the code, the Legislature could have said "condominiums" rather than "residential condominiums" in MCL 559.111; MSA 26.50(111).[6] Accordingly, because 559.111; MSA 26.50(111) refers solely to residential condominiums and not time-share condominiums units or all condominiums, we believe the Legislature did not intend that the condominium act require time-share units or uses in condominiums to be sold in compliance with the occupational code. On de novo review, therefore, we find that the occupational code did not bar plaintiff's breach of contract action.

III.

Next, both defendants and plaintiff challenge the trial court's award of damages. Upon our review, we are not left with a firm and definite conviction that the court made a mistake in awarding plaintiff $260,103 in damages. Thus, the trial court did not clearly err. See *Triple E Product Corp v Mastronardi Produce, LTD*, 209 Mich App 165, 177; 530 NW2d 772 (1995).

A party asserting a claim has the burden of proving damages with reasonable certainty; it is sufficient, however, if a reasonable basis for computing damages exists, even though damages cannot be ascertained with mathematical precision and the result is only an approximation. *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 108; 535 NW2d 529 (1995). The reasonable certainty requirement is relaxed where the fact of damages has been established and the only question is the amount of damages. *Id.* Here, the trial court recognized that plaintiff was entitled to breach of contract damages that place plaintiff in as good a position as it would have enjoyed had the contract been fully enforced. *Om-El Export Co, Inc v Newcor, Inc*, 154 Mich App 471, 478; 398 NW2d 440 (1986). Because the 1991 agreement involved sales commissions, the court properly focused on the measure of damages for lost profits, i.e., gross commissions less expenses that would have been incurred but for the breach. *Id.*

We find that the trial court did not commit clear error in calculating the "expenses that would have been incurred but for the breach." *Id.* Plaintiff failed to present credible testimonial evidence regarding expenses it would have incurred to sell the twelfths and failed to present detailed financial records regarding the costs of its operations. Given the dearth of evidence upon which to based its calculations, the trial court did not err in using the costs and expenses listed in plaintiff's 1991 income tax return to approximate the costs plaintiff would have incurred securing its commissions on $1.6 million in the sales of twelfths. The 1991 return is an appropriate economic indicator because it reflected the last year of plaintiff's and defendants' business relationship before defendants exercised the option to terminate the agreement, and plaintiff earned substantial gross income that year. We also reject defendants' assertion that the trial court should have used a ten-year average of plaintiff's expenses to gross sales and a 35% commission rate because defendants fail to provide citations to authority in support these claims. Moreover, because we find that the 1991 agreement gave plaintiff the exclusive right to sell all interval interests in defendants' condominiums, including twelfths, and no lesser commission rate is contained in the agreement for other than weekly time-share units, the agreement's commission rate of 47% controls.

IV.

Finally, plaintiff argues on cross-appeal that the court erred in failing to award it lost profit damages sustained as a result of the decreased sales of one-week intervals in light of defendants' marketing and sale of twelfths. We find no clear error in the court's refusal to give plaintiff lost profit damages. *Triple E Produce Corp, supra*. The court computed damages by determining what would have happened had plaintiff sold the twelfths, and it determined that the sales of one week intervals would have declined to the same extent and degree had plaintiff been marketing and selling twelfths. As a practical matter, we agree that if plaintiff had been selling one week intervals and twelfths, plaintiff's buyers would have purchased one interval ownership interest to the exclusion of the other interval ownership interest, i.e., the buyers would not have purchased both types of interests. Accordingly, for every twelfth sold, a corresponding one-week interval would not have been sold. We therefore find that by awarding plaintiff damages for lost commissions on the sale of twelfths and refusing to award lost commissions on one-week intervals not sold, the court placed plaintiff in as good a position as it would have enjoyed had the agreement between the parties been fully performed. *Om-El, supra* at 478.

Affirmed.

/s/ Jane E. Markey
/s/ Joel P. Hoekstra
/s/ James M. Batzer

[1] All of the prior contracts between the parties, i.e., the 1984, 1985, and 1989 contracts, as amended, referred to time-share units and specified that plaintiff was the exclusive agent for the sale and marketing of the units. Only in the 1991 contract did the term "interval ownership" replace "timeshare units" within §1 of the contract.

[2] "Timesharing" is defined as a "[f]orm of shared property ownership, commonly in vacation or recreation condominium property, wherein rights vest in several owners to use property for specified period[s] each year (*e.g.*, two weeks each year)." Black's Law Dictionary (6th ed), p 1483.

[3] Moreover, as of 1992, defendant Shanty Creek Resort Marketing started marketing twelfths and began closing those deals by the end of 1992 with the knowledge that the parties' exclusive marketing and sales agreement would terminate in August 1992. Rather than market these twelfths through plaintiff, defendants apparently chose to experiment with the twelfths as a means of determining whether it needed any other exclusive marketing representatives after its contract with plaintiff ended.

[4] See footnote 3.

[5] MCL 339.2501; MSA 18.425(2501) was amended shortly before the 1991 contract terminated. 1993 PA 93, effective July 13, 1993. The amendment did not change the above-quoted language. This provision has since been amended by 1994 PA 333, effective October 18, 1994.

[6] See, e.g., MCL 559.121; MSA 26.51(121) (initial sale of a condominium unit shall be made in accordance with the condominium act); MCL 559.184; MSA 26.50(184) and MCL 559.184a; MSA 26.50(184a) (where the Legislature indicates that the cited provisions governing purchase agreements and escrow accounts apply to condominium unit but expressly exclude application to a "business condominium unit").