COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Annable v. Devencore Company Ltd.,* 2025 BCCA 221

Date: 20250619
Docket: CA50133

Between:

Mark Graham Annable

Appellant/
Respondent on Cross Appeal
(Plaintiff)

And

Devencore Company Ltd.

Respondent/
Appellant on Cross Appeal
(Defendant)

Before: Registrar T.R. Outerbridge

Settlement of Transcripts

Oral reasons for decision from: An order of the Supreme Court of British Columbia, dated August 16, 2024 (*Annable v. Devencore Company Ltd.*, 2024 BCSC 1503, Vancouver Docket S188380).

Oral Reasons for Decision

The Appellant/Respondent on Cross Appeal, appearing in person:	M.G. Annable
Counsel for the Respondent/Appellant on Cross Appeal:	A. Render
Place and Date of Hearing:	Vancouver, British Columbia June 19, 2025
Place and Date of Decision:	Vancouver, British Columbia June 19, 2025

Summary:

Application to settle the contents of the transcript in an 11-day trial concerning a dispute over real estate commissions between the appellant, a real estate broker, and his former employer, Devencore Company Ltd. Held: The transcript of three of the five witnesses are required, given the grounds advanced and the potential for a new issue to be raised on appeal.

[1] **REGISTRAR OUTERBRIDGE**: The appellant applies in case management to settle the contents of the transcripts in this appeal.

[2] The appeal arises from a dispute between the appellant, a real estate broker, and his former employer, Devencore Company Ltd.

[3] In June 2014, both parties entered into an employment agreement which provided the appellant a two-phase compensation structure. Phase 1 recognized the appellant's status as a junior broker providing a 25% share of Devencore's commission with a guaranteed salary. Phase 2 provided a larger commission of 50% with no guaranteed salary.

[4] In 2017, the appellant and a senior broker closed a large transaction resulting in a gross commission of $1,204,337.80. Twenty percent went to Devencore and the other 80% went to a senior broker, Graeme Bullus.

[5] After the transaction closed, $240,867.56 (20% of $1,204,337.80) was deposited into Devencore's commission trust account and internally credited to the appellant. The appellant eventually received a gross commission of $60,216.89 (25% of the $240,867.56), representing his compensation under Phase 1. Because the appellant had taken advances on his commission, Devencore sought $89,788.46 to be set off from his earnings, resulting in a net negative amount.

[6] Unhappy with this result, the appellant sued Devencore, advancing two main arguments at trial.

[7] The appellant's first main argument was that he should have instead received 50% of the commission under Phase 2 ($120,433.78) instead of 25% under Phase 1 ($60,216.89). He also disputed Mr. Bullus's 80% split, arguing he should be entitled

to 50% of the overall commission, but abandoned that argument in his closing submissions.

[8] Whether the appellant was in Phase 1 or Phase 2 of his compensation cycle was the subject of a detailed credibility analysis. The trial judge found the appellant was in Phase 1 and thus only entitled to a 25% split, either by conduct or contract.

[9] The appellant's second main argument at trial was that the $240,867.56 sum was impressed with a trust when it was deposited into Devencore's trust account and internally credited to him. As a result, he argued he was entitled to the *full sum* rather than the 25% or 50% as governed by the agreement. The trial judge found no such trust existed and, even if it did, that Devencore had complied with its terms.

[10] On appeal, the appellant also advances two main grounds:

a) The first is that the trial judge improperly relied upon the 80/20 commission split, arguing for the first time on appeal, that Mr. Bullus should not have received his share of the commission because he was not a party to any relevant employment or commission agreements. On this basis, and by operation of statute, the appellant claims he is entitled to 25% of the $1,204,337.80 commission, or $301,084.45. Once his advances are deducted, which he argues total $61,151.33, the sum of $239,933.12 remains. The appellant now suggests that Devencore's $240,857.56 deposit represents an *intent* to fulfill their obligations under his employment agreement in accordance with this new theory.

b) The second is that the judge below erred in not finding a trust existed and, even if it did, the judge erred in allocating those funds to Mr. Bullus.

[11] The first ground may be characterized as a new argument or issue advanced for the first time on appeal. The Court does not generally entertain new issues on appeal. It will only do so where an injustice is likely to result and the Court has a sufficient evidentiary record and findings of fact by the judge below: *Quan v. Cusson*, 2009 SCC 62 at paras. 36–37; *Gorenshtein v. British Columbia (Employment*

Standards Tribunal), 2016 BCCA 457 at paras. 44–45. The Court must be satisfied that the evidence bearing on the new argument is as complete as if the controversy had arisen at trial: *Quan*; *Devine v. Devine*, 2012 BCCA 509 at paras. 44–47. As described in *Quan*:

> Unless the parties have fully addressed a factual issue at trial in the evidence, and preferably in argument for the benefit of the trial judge, there is always the very real danger that the appellate record will not contain all of the relevant facts, or the trial judge's view on some critical factual issue, or that an explanation that might have been offered in testimony by a party or one or more of its witnesses was never elicited.

[12] While it is not for me to decide, I raise this issue because of its relevance to the record before the Court and the transcript. Whether Devencore's $240,857.56 deposit represented a different intention than found by the judge or whether Mr. Bullus had any relevant employment or commission agreements are foundational to the appellant's argument. As these points are newly advanced, they likely run afoul of the analysis in *Quan* above. There is very much a live question of whether the evidentiary record, including the transcripts, supports this new argument. And the appellant probably requires leave of the Court to advance it.

[13] A second possibility is that the Court may treat the appellant's challenge to the Bullus split as resiling from a position taken at the trial, because the appellant conceded that split in closing submissions, abandoning his challenge to it: see, e.g., *Argo Ventures Inc. v. Choi*, 2020 BCCA 17 at para. 31.

[14] Setting aside these important issues, which are for the appellant to consider when deciding whether to advance his appeal, I turn to examine the law related to the settlement of the transcript.

[15] Rule 24(3) of the *Court of Appeal Rules* requires the appellant to obtain transcripts of any oral testimony and transcripts other than oral testimony, if they are required to resolve the grounds of appeal advanced. The size of the transcript can be reduced by either agreeing to what is required under Rule 24(6) or having the transcript settled under Rule 28(1) or Rule 48(1).

[16] In *Salloum v. Smith*, 2023 BCCA 175, the Court described the function of the Registrar in settling a transcript:

> [8] The *Court of Appeal Rules*, B.C. Reg 120/2022 [*Rules*] give the registrar a wide discretion to direct parties to organize documents for purposes of an appeal. Rule 28 allows the registrar to settle the contents of an appeal record, transcript, and appeal book. The registrar is permitted to settle or limit the contents of the document, direct parties to add or remove materials, direct that certain documents not be used in the appeal, and provide any other directions that may be required to settle the contents of a document.

[17] When considering limiting transcripts, the main question is whether the appeal can be properly considered by a division if the transcript is limited in size: see *Foote v. Canada*, 2016 BCCA 188 (Registrar) at para. 8 and *Rabanes v. Pureza*, 2014 BCCA 393 at paras. 10–12. I discussed these principles in *J.P. v. K.S.*, 2023 BCCA 374 (Registrar) at para. 13, aff'd 2023 BCCA 408 (Chambers), aff'd 2024 BCCA 26:

> [13] As I found in *Foote,* given its cost, the transcript must be limited in size where reasonably possible, but this exercise must be balanced with authorities requiring that discretion to be exercised cautiously so the Court is not deprived of evidence required to decide the appeal. This is particularly so in "fact-rich" or "fact intensive" appeals: see *Brazeau v. International Brotherhood of Electrical Workers*, 2004 BCCA 333 (Chambers) at paras. 5–7, *Agent E v. Canada (Attorney General)*, 2018 BCCA 492 aff'd 2018 BCCA 491, leave ref'd 2019 CanLII 50900 (SCC) and, more recently, *Chen v. Nip*, 2022 BCCA 101 (Chambers) at paras. 21–26. It is equally the case in appeals where credibility findings are paramount: *Dhillon* at para. 8.

[18] At trial, five witnesses gave evidence. The appellant was his only witness and the respondent called three employees of Devencore plus a witness that gave evidence related to the transaction. The appellant argues he needs none of this testimony because he is advancing pure errors of law that require no transcript.

[19] With respect to the existence of the trust, that is not entirely correct. Though the appellant has agreed to accept the trial judge's factual findings, the judge did not deal with the rationale for the Bullus split in his reasons, given the appellant conceded that argument. Accordingly, I agree with the respondent that the Court will need to know precisely what funds the appellant is claiming a trust over, who

received them, and the "rationale" for Devencore's determination of the Bullus split. For that, it will require transcripts.

[20] On the appellant's new argument, the issue is similar. While the appellant frames the question as simply whether Mr. Bullus was legally a party to the proceedings, the question is more complex, including whether Devencore's $240,857.56 credit to him represents an *intent* by Devencore to fulfill their obligations under his employment agreement. For that purpose, the Court needs to examine the facts surrounding the agreement to understand whether this argument can be sustained (and, for that matter, whether it is to be entertained at all should the appellant seek leave to advance it).

[21] Particularly with respect to this new argument, the appellant is inviting the Court to effectively re-examine portions of his case to determine why Devencore acted the way that it did. In my view, this creates a scenario that will require transcripts to understand the full context of what is being advanced or potentially advanced: see *J.P. v. K.S.*, 2024 BCCA 374 (Registrar) at para. 12.

[22] The appellant has provided a quote for the costs of obtaining the full transcript of the 11-day trial, which is estimated to be $25,700, or approximately $5,000 per witness. The appellant has been clear in his submissions that he will have to abandon his appeal if the full transcript is required.

[23] In 2005, Justice Southin observed that the cost of filing a complete transcript in this Court is "… so far beyond the means of a litigant to make his or her right of appeal illusory": *Dhillon v. Dhillon*, 2005 BCCA 529 (Chambers) at para. 9. Twenty years later, the cost remains. I can understand the appellant's discontent, as the cost of manual transcription still represents an expensive and very real barrier to advancing his appeal.

[24] To account for the cost and achieve efficiency, transcripts should be limited in size where reasonably possible; however, "caution should be exercised so the Court is not deprived of the evidence required to decide the appeal": *Foote* at para. 8. As is

evident from my reasoning above, in this appeal, much of the transcript is required given the grounds advanced.

[25] The appellant must obtain a transcript of:

a) The evidence of Mr. Bullus;

b) The evidence of Mr. Bishop and Ms. Patricelli, the respondent's principal and managing broker, who gave evidence regarding the alleged breach of trust, accounting, and trust procedures; and

c) The reply submissions in closing, where the appellant abandoned his claim with respect to the Bullus split.

[26] These transcripts should be ordered and made available to the Court within 60 days of this decision.

[Discussion with parties]

[27] **REGISTRAR OUTERBRIDGE**: Given the cost and other challenges to properly bring this appeal, the appellant has agreed to file an abandonment or proof he has ordered the transcripts by 26 June 2025. If the appellant proceeds with the appeal, I will provide directions on filing deadlines for remaining steps, including amended factums and a date for the appeal.

"T.R. Outerbridge, Registrar"