

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Annable v. Devencore Company Ltd.*,
2025 BCCA 389

Date: 20251104
Docket: CA50133

Between:

Mark Graham Annable

Appellant/
Respondent on Cross Appeal
(Plaintiff)

And

Devencore Company Ltd.

Respondent/
Appellant on Cross Appeal
(Defendant)

Before: The Honourable Justice Griffin
The Honourable Justice Winteringham
The Honourable Justice Gomery

On appeal 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 Judgment

Counsel for the Appellant/Respondent on
Cross Appeal:

B. Carpenter

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Cross Appeal:

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Place and Date of Hearing:

Vancouver, British Columbia
October 30, 2025

Place and Date of Judgment:

Vancouver, British Columbia
November 4, 2025

Summary:

The appellant contends that the trial judge erred in finding that funds paid into a commission trust account by his former employer, the respondent real estate brokerage, were not held in a statutory trust for him. Held: Appeal dismissed. As the appellant had not earned commission according to his contract with the respondent, he has no claim for breach of trust.

GRIFFIN J.A.:

Introduction

[1] This appeal is brought by the appellant Mark Annable, a real estate licensee, who had an employment contract with the respondent Devencore Company Ltd. (“Devencore”), a real estate brokerage. They had a dispute over whether Devencore owed him a commission for a certain real estate transaction.

[2] Mr. Annable says this appeal is about a question of law: whether funds deposited by Devencore in a commission trust account were held in a “statutory trust” for him and had to be paid to him by operation of s. 31 of the *Real Estate Services Act*, S.B.C. 2004, c. 42 [Act].

[3] Mr. Annable says that he does not seek to relitigate the issue he lost at trial, namely, the judge’s finding that he had no contractual entitlement to payment of the commission and no claim for constructive dismissal.

[4] Devencore says the appeal is about whether Mr. Annable can claim breach of trust over funds that he was never entitled to under his contract with Devencore. It says Mr. Annable has no claim in contract and therefore no claim for breach of trust.

[5] I see the issue on appeal as described by Devencore. I would dismiss the appeal for the reasons that follow.

Background

[6] Devencore employed Mr. Annable as a commercial real estate broker. Their relationship was governed by a written employment contract entered into on June 3, 2014, with subsequent written and oral amendments.

[7] The central factual dispute between the parties at trial had to do with the amount of commission, if any, that Devencore owed Mr. Annable for a real estate transaction, based on their contract.

[8] When Devencore paid the commission amount received from the subject transaction into its commission trust account, its ledger entries initially noted two licensee brokers' names next to a proportionate amount of the commission: Mr. Annable's name was next to an entry of \$240,867.56, and the name of another agent, who was the lead broker on the transaction, was next to an entry of \$963,470.24; plus there was an entry for GST. Devencore was also entitled to a share of the commission based on its contract with each broker, but its share was not shown in the initial ledger entries.

[9] While Mr. Annable initially contested the proportionate split between him and the other broker, by the end of trial he ultimately accepted that it reflected their agreement.

[10] Devencore's position at trial was that the initial ledger entries for the deposit into the commission trust account did not reflect the net share owed to each broker and to Devencore. Rather, the ledger reflected only a gross amount, and Devencore still had to calculate the net share owed to the other broker, Mr. Annable, and itself under the terms of contract.

[11] However, the two parties had different views as to the terms of their contract. Mr. Annable's version was that he was entitled to a 50% commission split with Devencore, that is, half the amount initially noted in the ledger in the commission trust account. Devencore's version entitled Mr. Annable to only 25% of the amount in the ledger entry with the other 75% to Devencore but also required set-off of advances that Devencore had previously paid to him, leaving no amount owing to him.

[12] In reasons for judgment indexed at 2024 BCSC 1503 ("Reasons"), the trial judge accepted Devencore's evidence as to the terms of the parties' contract and

concluded that Devencore owed Mr. Annable no commission under his contract with the brokerage.

[13] Nevertheless, Mr. Annable advanced a second cause of action, breach of trust. He argued at trial and now submits on appeal that Devencore’s payment of funds into a commission trust account created a “statutory trust” in his favour, and Devencore was required to pay to him all the funds initially noted in the ledger next to his name, the full \$240,867.56. He bases this argument on his interpretation of s. 31(2)(b)(ii) of the *Act*. His theory is that it does not matter that he has no contractual right to the funds.

[14] The trial judge disagreed and rejected Mr. Annable’s theory. The judge found that the *Act* did not establish a “statutory trust” in the sense that all monies in the commission trust account were deemed subject to a trust, regardless of the ordinary requirements of trust law: Reasons at paras. 83–94. Rather, the *Act* created a procedural vehicle for dealing with trust property, where the common law requirements for a trust were established.

[15] The judge further found that the *Act* did not preclude Devencore from paying into the commission trust account a gross amount of commission, and doing so did not make the amounts held in the account a licensee’s “net share”. Rather, the parties’ contract governed what amount was owed to a licensee as the net share of remuneration: Reasons at paras. 96–97.

[16] The judge found that even if the *Act* created a statutory trust, Mr. Annable was not entitled to the gross amount deposited into the commission trust account or noted in a ledger entry. The fact that Devencore owed Mr. Annable no money under his contract disposed of the issue, as “[e]quity does not presume a gift” and “[a]ny trust would not extend to money that does not beneficially belong to” Mr. Annable: Reasons at paras. 98–99, citing *BNSF Railway Company v. Teck Metals Ltd.*, 2016 BCCA 350 at para. 39.

Analysis

[17] Mr. Annable’s position turns on the meaning of s. 31(2)(b)(ii) of the *Act*.

[18] An exercise in statutory interpretation requires reading the words of a statute, “in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the *Act*, the object of the *Act*, and the intention of Parliament”: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21, 1998 CanLII 837.

[19] Section 31 of the *Act* provides:

31 (1) Money in a brokerage trust account that is intended as remuneration for a licensee may be withdrawn from the account when it has been earned as determined in accordance with the rules.

(2) Money withdrawn from a brokerage trust account under subsection (1) must be paid by the brokerage as follows:

- (a) any share of the remuneration that is payable by the brokerage to another brokerage must be paid to the other brokerage directly out of the brokerage trust account;
- (b) any net share of the remuneration that is payable by the brokerage to a licensee engaged by the brokerage must be paid, at the brokerage’s option,
 - (i) to that licensee directly out of the brokerage trust account, or
 - (ii) into a commission trust account maintained by the brokerage in accordance with the rules and, from that account, to or on behalf of the licensee.

[Emphasis added.]

[20] Mr. Annable submits that s. 31(2)(b)(ii), applied to the facts here, must be read as meaning that the initial ledger entry for the commission trust account became Mr. Annable’s “net share” of the commission and that the brokerage “must” pay it to him. This is so despite the fact he did not earn the commission under his contract with Devencore.

[21] Mr. Annable’s interpretation is not supported by the wording of the section, the context of the provision, or the legislative purpose of the statute.

[22] I accept that money in a commission trust account that is in fact the *earned* “net share” of an individual licensee’s commission, based on that person’s contract

with a brokerage, must be paid out to the licensee or on the licensee's behalf pursuant to s. 31(2)(b)(ii). But s. 31 does not set out any method or formula for determining each licensee's "net share" of gross commission held in a commission trust account.

[23] There can be more than one licensee entitled to share in a commission, including another broker who worked on the transaction and the brokerage, which itself is a licensee under the *Act*. I agree with the trial judge that the *Act* does not preclude paying the gross commission into the commission trust account and then paying out each entitled party's "net share".

[24] The full context of s. 31 supports the view that the *Act* does not determine the quantum of a licensee's net share of commission.

[25] Section 31(1) refers to the brokerage withdrawing money from the brokerage trust account that is "intended as remuneration for a licensee ... when it has been earned". This is the source of the money that may be deposited into the commission trust account: remuneration that has been earned. This language engages consideration of the contractual rights and obligations of the licensees involved in the transaction, as it is their contracts that determine the remuneration they have earned.

[26] The reference to "net share" in s. 31(2)(b) is qualified by the words "remuneration that is payable by the brokerage to a licensee engaged by the brokerage". These words are also consistent with the parties' contracts determining their entitlement to an amount of commission. Since here the terms of his contract provided that no remuneration had been earned by Mr. Annable, the brokerage was not required to pay him funds from the commission trust account.

[27] Also relevant are the *Real Estate Services Rules*, B.C. Reg. 209/2021 [*Rules*], particularly Rules 61 and 70 (formerly ss. 5-15 and 7-2 of Ministerial Order No. M417). These rules provide further guidance for brokerages regarding how to manage their brokerage trust account and commission trust account. Rule 70

contemplates that only money intended as remuneration for the brokerage itself, or for a licensee engaged by the brokerage, may be paid into a commission trust account. This is consistent with Devencore's reading of the *Act* as permitting it to deposit into the commission trust account a gross amount, representing commission earned by licensees (including itself) and then permitting it to pay out net shares to those who earned it.

[28] Devencore initially made a mistake in its internal accounting for the funds deposited into the commission trust account. It does not claim to have made a mistake in paying the gross amount of commission into the commission trust account.

[29] Nevertheless, if Devencore had erred in paying funds into the commission trust account due to itself, as a licensee entitled by contract to share in the commission, this was a mistake without consequence to Mr. Annable. Mr. Annable appears to argue that Devencore could not correct such a mistake by withdrawing the funds. Mr. Annable submits that the legislature could not have intended to allow a brokerage to withdraw funds paid into a commission trust account by mistake because s. 30(1)(a) of the *Act* specifically provides for the ability to withdraw funds paid into a brokerage trust account by mistake, and there is no parallel provision in respect of a mistaken payment into a commission trust account in s. 31. Rather, once funds are paid into such an account, they can only be paid out to a licensee, and according to him, that is the broker whose name is in the internal ledger. He submits there is only one exception: where there is a dispute, the brokerage must pay the funds into court pursuant to s. 33.

[30] The provisions Mr. Annable relies on read:

30 (1) Money in a brokerage trust account, other than money that the brokerage holds as stakeholder, may be withdrawn only if it is one or more of the following:

- (a) money paid into the trust account by mistake;
- (b) interest paid in accordance with section 29 [*interest on trust account*];
- (c) money authorized to be withdrawn under section 31 [*payment of licensee remuneration*];

- (d) unclaimed money transferred under section 32 [*unclaimed money held in trust*];
- (e) money paid into court under section 33 [payment of trust funds into court];
- (f) money paid in accordance with a court order;
- (g) money paid to or in accordance with the instructions of the principal to whose credit the money was deposited.

(2) Money in a brokerage trust account that the brokerage holds as stakeholder may be withdrawn only

- (a) as provided in subsection (1) (a) to (f),
- (b) in accordance with a written agreement of the parties to the trade in real estate, or
- (c) in accordance with the regulations under this Act or under section 43 [regulations for residential real property right of rescission] of the Property Law Act.

...

33 (1) If, in relation to money held in trust by a brokerage, it appears to the brokerage that

- (a) there are adverse claimants to the money,
- (b) the identity of one or more of the persons entitled to it is unknown, or
- (c) there is no person capable of giving, or authorized to give, a valid discharge for it,

the brokerage may apply to the Supreme Court for an order for payment of the money into court.

(2) An application under this section must be accompanied by an affidavit setting out the following as applicable and to the extent possible:

- (a) the nature of the real estate services in respect of which the money was held or received;
- (b) the names and addresses of the principals in relation to those real estate services;
- (c) the date and terms on which the brokerage received the money;
- (d) the names and addresses of all claimants to the money of whose claims the brokerage is aware;
- (e) particulars of any claim for remuneration by the brokerage, or a related licensee of that brokerage, arising out of the real estate services.

(3) An application under this section may be made without notice to any other person unless otherwise ordered by the court.

(4) On an application under this section, the court may make an order for payment of the money into court, and payment into court under the order discharges the brokerage from liability for the amount paid.

(5) Money paid into court under an order under this section must not be paid out of court except by order of the court, which may do one or more of the following:

- (a) order payment of all or part of the money to the person or persons entitled to it on terms the court considers appropriate;
- (b) direct the trial of an issue;
- (c) make any other order that the court considers appropriate, including an order for the payment of costs to the brokerage that made the application.

[Emphasis added.]

[31] I do not see this argument as assisting Mr. Annable. The judge found that Devencore’s deposit of a lump sum commission into the commission trust account, as a gross amount before calculating net shares, was not a mistake and complied with the statute: Reasons at para. 97. I see no error in that finding.

[32] Where there is disagreement over each person’s net share of a gross commission, s. 33 is permissive: the brokerage “may” apply for an order to pay the money into court when there is a dispute over money held in trust. That provision is intended to preserve the money while the court determines the dispute or the parties to the dispute settle it. As an example of when this section might be employed, a brokerage might use this option when two real estate brokers cannot agree between them as to each person’s share of a commission, and the brokerage wants to remove itself from the dispute.

[33] Here, there was a dispute as between Devencore’s share of the commission and Mr. Annable’s share, if any. It is true that Devencore could have chosen to employ s. 33, but it was not required to do so. In any event, the trial judge resolved the dispute between Mr. Annable and Devencore by determining that Devencore had the right to the balance of the commission after payment of the other broker, and Mr. Annable had no contractual claim to the commission. Practically speaking, the end result is no different than had Devencore employed s. 33 and paid the money into court first.

[34] It may well be true that Devencore took a risk, because if Devencore paid itself money, contractually owed to another licensee, out of a commission trust account, Devencore could be offside the *Act* and *Rules*. That hypothetical situation could potentially lead to regulatory sanctions and a claim for breach of trust. But that hypothetical situation is not before us. Instead, Devencore paid out to itself its own share of commission. That conduct does not support a claim by Mr. Annable for breach of trust.

[35] As for the broader purpose of the legislation, the *Act* regulates the licensing and conduct of self-governing real estate professionals. The provisions are largely directed at protecting the public and enhancing consumer confidence in the real estate industry. The *Act* creates a compensation fund for members of the public who have suffered fraud or theft. In this regard, see British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, 37th Parl., 5th Sess., No. 5 (6 May 2004) at 10913; British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, 37th Parl., 5th Sess., No. 7 (10 May 2004) at 10963.

[36] I accept that s. 31 may have a purpose of providing trust protections to commissions contractually earned on a real estate transaction. But this provision can only be intended to protect contractual earnings. No logical purpose would be served by the interpretation urged on us by Mr. Annable. The *Act* does not have a purpose of creating windfalls for brokers employed by brokerages by deeming them to be beneficiaries of money they did not earn.

[37] In conclusion, the trial judge's findings as to the terms of Mr. Annable's contract were findings of fact. The judge found that no commission funds were owed to Mr. Annable under the terms of his contract. Mr. Annable has not shown any palpable and overriding error in the findings of the trial judge and indeed does not submit that the judge erred in his findings regarding the terms of the parties' contract. Since there was no contractual right to the funds, the trial judge did not err in dismissing Mr. Annable's claim for breach of trust.

Disposition

[38] For these reasons, I would dismiss the appeal.

[39] **WINTERINGHAM J.A.:** I agree.

[40] **GOMERY J.A.:** I agree.

[41] **GRIFFIN J.A.:** The appeal is dismissed. As Devencore advanced a cross-appeal as an alternative position dependent on the main appeal being allowed, the cross-appeal is also dismissed.

“The Honourable Justice Griffin”