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CLERK
SUPREME COURT OF VIRGINIA
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JAN 10 1977
RICHMOND, VIRGINIA

IN THE

Supreme Court of Virginia

AT RICHMOND

RECORD NO. 760753

GRENCO REAL ESTATE INVESTMENT TRUST

Appellant

v.

NATHANIEL GREENE DEVELOPMENT CORPORATION

Appellee

APPENDIX

Harold R. Bailes
BAILES, LINDSTROM & TUCKER
400 Court Square
Charlottesville, Virginia

Counsel for Appellant

L. B. Chandler, Jr.
Ralph E. Main, Jr.
415 Park Ave.
Charlottesville, Virginia

Counsel for Appellee

FRED R. SURFACE & ASSOC. INC., HERITAGE BUILDING, RICHMOND, VA. (804) 643-7789

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GRENCO REAL ESTATE INVESTMENT TRUST Plaintiff v. NATHANIEL GREENE DEVELOPMENT CORPORATION Defendant	MOTION FOR JUDGMENT

To the Honorable Judges of said Court:

Comes now the Plaintiff, GRENCO Real Estate Investment Trust, by Counsel and moves the Court for judgment against the Defendant, Nathaniel Greene Development Corporation for the following reasons:

1. The Defendant, Nathaniel Greene Development Corporation, is a Virginia corporation whose registered agent is Larry E. Lamb, Court Square Building, Stanardsville, Virginia.

2. On December 15, 1970, the Defendant entered into an agreement with the Plaintiff, which agreement provided for the payment by the Plaintiff to the Defendant of a thirty per cent (30%) commission based on sales of properties owned by the Plaintiff. (a copy of this agreement is attached hereto as Exhibit A and made a part hereof.)

3. Pursuant to the agreement of December 15, 1970, numerous sales were solicited and consummated through the activities of the Defendant, as agent for the Plaintiff.

4. In consideration of the Defendant's activities as selling agent, the Plaintiff paid to the Defendant such commissions totalling Forty-Nine Thousand One Hundred Six and 53/100 Dollars ($49,106.53).

5. That the Defendant, Nathaniel Greene Development Corporation, at the time of entering into the contract and continuing

until the time of the filing of this motion for judgment was not licensed as a real estate salesman or broker, as required by Virginia law, Virginia Code Annotated, § 54-749.

6. Since the Defendant, Nathaniel Greene Development Corporation, did not have a license issued by the Virginia Real Estate Commission, the aforementioned agreement was entered into by the Defendant in violation of Virginia Code Annotated, § 54-749; and, accordingly, the real estate commissions referred to above were illegally obtained by such Defendant.

7. Because the sum of Forty-Nine Thousand One Hundred Six and 53/100 Dollars ($49,106.53) was paid to the Defendant, Nathaniel Greene Development Corporation, pursuant to a contract entered into illegally by such Defendant, that sum represents monies had and received by the Defendant, Nathaniel Greene Development Corporation, to which it had no lawful claim.

8. On December 4, 1973, the Plaintiff through its Counsel made demand upon the Defendant for the return to the Plaintiff of the sum of Forty-Nine Thousand One Hundred Six and 53/100 ($49,106.53), the commissions paid as aforesaid.

9. The Defendant has refused to meet the demand and has taken the position that no money is owed by the Defendant to the Plaintiff.

WHEREFORE, the Plaintiff, GRENCO Real Estate Investment Trust, moves the Court for judgment declaring the agreement dated December 15, 1970 unenforceable against the Plaintiff, GRENCO Real Estate Investment Trust, and further requests judgment against the Defendant, Nathaniel Greene Development Corporation, for the sum of Forty-Nine Thousand One Hundred Six and 53.100 Dollars ($49,106.53) together

with its costs in this matter expended.

GRENCO REAL ESTATE INVESTMENT TRUST

By Harold R. Bailes
Counsel

ROBERT M. MUSSELMAN

By Harold R. Bailes
Harold R. Bailes
413 Seventh Street, N.E.
Charlottesville, Virginia 22901

ERT M. MUSSELMAN
TTORNEY AT LAW
RLOTTESVILLE, VA.

uff 206

Filed in the Clerk's Office this 12 day of Nov, 1973
Writ 5.00
Fee 25.00
Deposit 1.25
Total Paid 31.25
Teste: Julia D. Bellis, Clerk
D. C.

CONTRACT

The parties hereto understand and agree as follows:

That for and in consideration of a commission fee of 30%, payable by GRENCO to Nathaniel Greene Development Corporation, computed on the gross selling price of GRENCO-owned land, timber sold during the term of the contract and other commodities and services and the gross income received as interest on sales contracts originated by Nathaniel Greene Development Corporation, the undersigned agree and bargain that the Nathaniel Greene Development Corporation will handle the GRENCO real estate project (Shifflett 265 acres) as follows:

Management:

1. Plan, develop, promote and sell the GRENCO lands. Nathaniel Greene Development Corporation would supervise all construction delegated to it insofar as it was directly related to clearing, road construction, building of lakes and water systems as would relate to the project development of land for initial sales.

   (a) GRENCO will bear all construction costs other than supervisory work.

   (b) GRENCO will authorize spending for surveys and construction costs in all areas not specifically delegated to Nathaniel Greene Development Corporation's discretion.

   (c) GRENCO will periodically authorize a sum of money, initially to be $1,000, hereby authorized to be used by Nathaniel Greene Development Corporation's discretion in any phase of construction and purchasing of supplies.

Promotion:

1. Advertisement, Promotion and Sales:

   Nathaniel Greene Development Corporation is to bear all costs of advertising and promotion, securing of salesmen and paying of salesmen's salaries and commissions.

   LIMITATIONS:

   Nathaniel Greene Development Corporation is not obligated to spend either directly or indirectly for advertisement and promotion a sum greater than 5% on the first $50,000 of sales 7 1/2% of next $50,000 of sales, and not more than 10% of total sales in excess of $100,000.

Construction:

1. Any work performed by the Nathaniel Greene Development Corporation for which payment will be required such as construction, mowing, clearing, etc. will be submitted to GRENCO for prior approval or performed on a contractual basis.

April 13, 1971

Commissions:

1. Commissions payable are subject to closure and are considered earned by closure of sale by deed.

2. Nathaniel Greene Development Corporation is to receive 1/2 of its commission at time of sale and the balance of its commission at the end of each month unless otherwise mutually agreed. Commissions are to be adjusted quarterly with respect to overall project gross income. In the event such balances as are owed Nathaniel Greene Development Corporation are not paid in cash when due then such balances will be paid to Nathaniel Greene Development Corporation in notes, with interest to be negotiated not to exceed a six-month term with extensions and rates of interest negotiable after such due date or in secured Real Estate Notes of GRENCO as GRENCO may elect, but GRENCO will repurchase such notes with cash other than from capital when such cash is on hand.

Pricing:

Nathaniel Greene Development Corporation will evaluate property being held for sale and will submit its proposed selling prices to GRENCO for approval before any property is sold unless otherwise mutually agreed. Any reductions in approved pricing greater than 10% must be approved by GRENCO.

Administrative:

GRENCO is to bear all administrative costs such as legal services, contracts, forms and printing costs other than those related to advertisement, promotion and management. Nathaniel Greene Development Corporation will provide all bookkeeping services related to sales and the Shifflett property during the term of the contract and will further handle collections on sales which they originated during the term and said collections are to extend for one year after the term of this contract.

Term of Contract:

This agreement is to run for one (1) year from date hereof with automatic one (1) year extension of terms unless sixty (60) days written notice of rescission is mailed or delivered to the other party prior to the end of any one year term.

In the event GRENCO rescinds this contract, it is agreed that GRENCO will pay to Nathaniel Greene Development Corporation all advertisement and promotional costs incurred to date or the normal 30% commission of gross project income on sales, contracts, etc., originated by Nathaniel Greene Development Corporation, whichever is greater.

During the term of this contract the Nathaniel Greene Development Corporation will be the exclusive marketing agent, and GRENCO will not sell without Nathaniel Greene Development Corporation's permission.

Date: December 15, 1970 Signed: GRENCO INVESTMENT TRUST

By _____ Trustee

By _____ Trustee

Signed: NATHANIEL GREENE DEV. CORP.

By _____ President
Title

OFFICIAL RECEIPT

A. S. 6 Special

OFFICE OF THE CLERK OF THE CIRCUIT COURT
GREENE COUNTY

STANARDSVILLE, VIRGINIA, Dec. 21, 1973

Received of Robert M. Musselman, Atty

Dollars

For the account of

No. 1322

Docket No. 379

Writ Tax and Deposit in the Following Chancery Cause or Action at Law	Account	Amount	
Plaintiff Greene Real Estate Investment Trust	103 Chy Writ Tax		
	104 Law	5	00
	206 Sheriff	1	25
Defendant Matthews Green Development Corp.	303 Chy Fee		
	304 Law	25	00
	315		
	Total	31	25

L. D.

R. W. BICKERS Clerk

Deputy Clerk

BELL CO., LYNCHBURG, VA.

2

PROOF OF SERVICE

Virginia:

IN THE CIRCUIT COURT OF THE COUNTY OF GREENE

LAW NO. 379

Grenco Real Estate Investment Trust

v.

Nathaniel Greene Development Corporation

Returns shall be made hereon, showing service of Notice issued Dec. 21, 19 73, with copy of Motion for Judgment filed Dec. 21, 19 73, attached:

Executed on the 21st day of December, 19 73, in the County of Greene, Virginia, by delivering a true copy of the above mentioned papers attached to each other, to Larry Lambert Nathaniel Greene Development Corporation in person.

SHERIFF, COUNTY OF GREENE, VA.

BY, DEPUTY SHERIFF.

(Use the space below if a different form of return is necessary)

Returned and filed the 28th day of December, 19 73

LELIA D. BICKERS, CLERK.

Marie C. Lewis, DEPUTY CLERK.

VIRGINIA: IN THE CIRCUIT COURT OF THE COUNTY OF GREENE

GRENCO REAL ESTATE INVESTMENT TRUST

Plaintiff

v. DEMURRER

NATHANIEL GREENE DEVELOPMENT CORPORATION

Defendant

Comes now the defendant, Nathaniel Greene Development Corporation, by counsel, and says that the motion for judgment hereinbefore filed by the plaintiff is not sufficient in law.

NATHANIEL GREENE DEVELOPMENT CORPORATION

By L. B. Chandler
Counsel

L. B. Chandler

L. B. Chandler, Jr.
Chandler and Huff
415 Park Street
Charlottesville, Virginia 22901

CERTIFICATE

I hereby certify that on the 10th day of January, 1974, a true copy of the foregoing Demurrer was mailed to Harold R. Bailles, Esquire, 413 Seventh Street, N. E., Charlottesville, Virginia, counsel for plaintiff.

L. B. Chandler

VIRGINIA: IN THE CIRCUIT COURT OF GREENE COUNTY

GRENCO REAL ESTATE INVESTMENT TRUST Plaintiff v. NATHANIEL GREENE DEVELOPMENT CORPORATION Defendant	MOTION FOR A STATEMENT OF GROUNDS FOR DEMURRER

To the Honorable Judges of said Court:

Comes now the plaintiff, Grenco Real Estate Investment Trust, by counsel, and moves the Court under Section 8-99 of the Code of Virginia to enter an order requiring the defendant, Nathaniel Greene Development Corporation, to file a statement setting forth the grounds for its demurrer filed in the above-styled matter on the 10th day of January, 1974.

Respectfully submitted,

By Harold G. Bailey
Counsel

Robert M. Muselman, p.q.
413 Seventh Street, N.E.
Charlottesville, Virginia 22901

CERTIFICATE

I hereby certify that on the 18th day of January, 1974, a true copy of the foregoing Motion was mailed to L.B. Chandler, Jr., Esquire, Chandler and Huff, 415 Park Street, Charlottesville, Virginia, 22901, Counsel for the defendant.

Harold G. Bailey

GRENCO REAL ESTATE INVESTMENT TRUST

Plaintiff

v.

NATHANIEL GREENE DEVELOPMENT CORPORATION

Defendant

ORDER

To the Honorable Judges of said Court:

This day came the plaintiff, Grenco Real Estate Investment Trust, by counsel, and moved the Court for an order directing the defendant, Nathaniel Greene Development Corporation, to supply it with a statement of the grounds for their demurrer filed herein,

And it appearing to the Court that granting such an order is appropriate under Section 8-99 of the Code of Virginia and in futherance of the ends of justice, it is ORDERED that the said defendant file with the Court within ten days from the date of this order, a statement of the grounds for their demurrer.

ENTER: _____

DATE: _____

I ask for this:

Robert M. Musselman

By Harold R. Bailes

413 Seventh Street, N.E.
Charlottesville, Virginia 22901
Counsel for Plaintiff

Seen:

L.B. Chandler, Jr.

L.B. Chandler, Jr.
415 Park Street
Charlottesville, Virginia 22901
Counsel for Defendant

GRENCO REAL ESTATE INVESTMENT TRUST,

Plaintiff

v.

NATHANIEL GREENE DEVELOPMENT CORPORATION,

Defendant

STATEMENT OF GROUNDS OF DEMURRER

Comes now your Defendant, Nathaniel Greene Development Corporation, by counsel, and pursuant to an ORDER entered February 1, 1974 by the Judge of the aforesaid Court, states the grounds of Demurrer relied on to be as follows:

1. That Plaintiff's Motion For Judgment does not state a valid cause of action against Defendant.

2. That Plaintiff's Motion For Judgment does not set forth any injury or damage compensable at law.

3. That Plaintiff is proceeding on the law side of court when it should be proceeding on the equity side of court.

NATHANIEL GREENE DEVELOPMENT CORPORATION
By Counsel

CHANDLER & HUFF
By Ralph E. Huff, II
415 Park Street
Charlottesville, Virginia

Attorneys For Defendant

CERTIFICATE

I hereby certify that a true and accurate copy of the foregoing Statement Of Grounds Of Demurrer was mailed to Robert M. Musselman, Counsel for Plaintiff, in care of Harold Bailes, Esquire, at his address at 413 Seventh Street, N.E., Charlottesville, Virginia, on this 6th day of February, 1974.

CHANDLER & HUFF
By Ralph E. Huff, II

DLER AND HUFF
ORNEYS AT LAW
PARK STREET
LOTTESVILLE, VA.
22901

NARDSVILLE, VA.
22973

MEMORANDUM OF LAW

I. Procedural Posture Of Case

GRENCO Real Estate Investment Trust (GRENCO), Plaintiff, filed its Motion For Judgment in the Circuit Court of Greene County on December 21, 1973, against Nathaniel Greene Development Corporation (NGDC), Defendant, demanding judgment for money had and received by NGDC, and requesting that a contract entered into between the parties be declared unenforceable against GRENCO. NGDC timely demurred to the Motion For Judgment, and the Defendant submits this in support of the Demurrer.

II. Grounds for the Demurrer

NGDC's Demurrer is addressed to the following defects in GRENCO's Motion For Judgment. First, the Motion does not state a valid cause of action. Secondly, the Motion does not set forth any injury or damage compensable at law. Finally, GRENCO is proceeding on the wrong side of court in that it is seeking an equitable remedy in a proceeding at law.

III. Facts Forming Basis of Argument

A demurrer admits as true all averments of material facts which are sufficiently pleaded. Included among such facts are those expressly alleged, those impliedly alleged, and those which may be fairly and justly inferred from the facts alleged. Burks Pleading & Practice (4th ed.), §213. The following facts therefore form the basis of GRENCO's action.

On December 15, 1970, NGDC agreed to develop, manage, promote and sell certain GRENCO lands for a stated consideration. In promoting and selling the GRENCO land, NGDC, by the terms of the contract, acted in the capacity of a GRENCO agent. Pursuant to Execution of the contract, NGDC fully performed its part of the bargain, and received $49,106.53 for its services.

At the time of execution of the contract, and at all times during the performance thereunder, NGDC did not have a license to sell real estate as required by Virginia law. See Va. Code Ann. §54-730 et seq. (1950). Because NGDC did not have such a license, GRENCO maintains that NGDC entered the contract in violation of the law and that it illegally obtained the payments for its services under the contract. Paragraphs 6 and 7 of GRENCO's Motion For Judgment. For purposes of this Demurrer, it is a fair and just inference that GRENCO was

aware at all times that NGDC had no such selling license. See Burks, supra. GRENCO alleges that NGDC had no license throughout the contract's life. The contract referred to NGDC's status of "agent"; therefore, as principal, GRENCO would be put on notice as to NGDC's qualifications to sell real estate. Also, GRENCO did not in its Motion deny such knowledge, which it was obliged to do in order not to have the knowledge of its agent imputed to it.

ARGUMENT I

THAT GRENCO'S MOTION FOR JUDGMENT DOES NOT STATE A VALID CAUSE OF ACTION AGAINST NGDC

I. Establishment of Contract As Illegal

A. Background Information

As indicated in the foregoing introduction, at the time of execution of the contract and during the course of its performance both NGDC and GRENCO knew that NGDC did not have a license to sell real estate. The question thus becomes what effect did the absence of a license to sell real estate have on the contract.

The Virginia statutory scheme regulating the selling of real estate commences by defining real estate brokers and salesmen.

> A real estate broker is any person, partnership, association or corporation, who for compensation or valuable consideration sells or offers for sale, buys or offers to buy, or negotiates the purchase or sale or exchange of real estate, or who leases or offers to lease, or rents or offers for rent, any real estate or the improvement thereon for others, as a whole or partial vocation. Va. Code Ann. §54-730 (1950).

Section 54-731 defines a real estate salesman as any person who for compensation or a valuable consideration is employed directly or indirectly by a real estate broker, to sell or offer to sell, or to buy or offer to buy, or to negotiate the purchase or sale or exchange of real estate, or to negotiate leases thereof, or of the improvements thereon, as a whole or partial vocation. One act of buying, selling, exchanging or leasing the real estate of or for another for compensation or valuable consideration constitutes the person or corporation a salesman or broker under the statutes. Va. Code Ann. §54-732 (1950).

Because NGDC conducted the statutorily defined brokerage activities without a license, its conduct became illegal according to Plaintiff's Motion For Judgment. Upon conviction of such action, the Court can fine an individual not more than $500.00 or imprison him for a term not to exceed 6 months, or a combination of both. If a corporation violates the statute, it faces a fine not to exceed $1,000.00 upon conviction. Va. Code Ann. §54-735 (1950).

B. Effect of Illegal Activity on Contract

As a general rule, a "contract founded on an act forbidden by a statute under a penalty is void, although it be not expressly declared to be so." Middleton for Warren's Heirs v. Arnolds, 13 Gratt. 489, 490 (1856). See also Wilson v. Spencer, 1 Rand. 76 (1822); Niemeyer v. Wright, 75 Va. 239 (1881); Watters & Martin v. Homes Corp., 136 Va. 114 (1923); 4 M.J. "Contracts" §§109, 111 (1949).

The instant contract, as set out in the Motion For Judgment, insofar as it calls upon NGDC to act as a broker, would be void, for reasons that the conduct without the license is illegal and subject to a penalty. Or, to paraphrase, the contract is in violation of the positive terms of a statute and therefore is illegal.

II. Actions Founded On Illegal Contracts

A. General Considerations

That an illegal contract cannot be enforced cannot be disputed.

> Where a contract is illegal because contrary to positive law or against public policy, an action cannot be maintained to enforce it. Neither a court of law nor a court of equity will aid one of the parties to an illegal contract in enforcing it or give damages for a breach of it or set it aside at the suit of the other.

4 M.J. "Contracts" §125 (1949). See also 17 C.J.S. "Contracts" §§189,272 (1963). Once illegal, the fact that it has been fully executed does not validate the contract; it cannot be ratified; and the doctrine of estoppel does not apply to it. Richmond R. Co. v. Richmond, Etc., 145 Va. 266, 299 (1926).

B. Reliance On Illegal Contract to Establish Cause of Action

A contract made in violation of law is void, and when a plaintiff cannot establish his cause of action without relying upon an illegal contract, he cannot recover. In Camp v. Bruce, 96 Va. 521 (1898), plaintiff brought a bill of equity to compel defendant to convey to him a parcel of land purchased by defendant at a judicial sale. In order to obtain the land for himself, defendant hired a third party to enter an upset bid at the sale, which forced another sale and which defeated plaintiff's contract rights. At the second sale, defendant purchased the property. Affirming the lower court's dismissal of plaintiff's bill, the Court commented:

> The first question to be determined is whether that agreement is one which a court of equity will enforce. If it be an illegal contract, as claimed in argument, this suit cannot be maintained, although that defense was not raised by the pleadings, nor relied upon in the Circuit Court. The law refuses to enforce illegal contracts, as a rule, not out of regard for

> the party objecting, nor from any wish to protect his interests, but from reasons of public policy. Whenever, therefore, the illegality of the contract appears, whether alleged in the pleadings or made known for the first time in the evidence, it is fatal to the case. That defect cannot be gotten rid of either by failure to plead it, or by agreeing to waive it in the most solemn manner. The law will not enforce contracts founded in its violation. (Emphasis added)

96 Va. at 524. See also 4 M.J. "Contracts" §125 (1949).

Southern R. Co. v. Wilcox, 99 Va. 394 (1901), involved an action in law-contrast equity suit in Camp, supra- to recover damages for breach of a freight hauling contract. Defendant interposed the defense that plaintiff could not recover because the latter's freight rates did not comply with the Interstate Commerce Commission's published rates. The Court agreed with defendant and noted at 99 Va. at 408 that a plaintiff who could not establish his cause of action without relying on an illegal contract could not recover.

It is NGDC's position that, based on the allegations in the Motion For Judgment and upon the facts to be reasonably inferred therefrom, GRENCO bases its action against NGDC on an illegal contract, and should thereby be denied opportunity to pursue the claim any further.

C. Particular Cases

The cases involving interpretations of the licensing statutes add further dimensions to the settled principles of law discussed above. Several specific instances deserve special attention.

1. Guilty Party v. Innocent Party

Perhaps the most important and the most often cited licensing case is Massie v. Dudley, 173 Va. 42 (1939), which construed the predecessor to the present Virginia real estate licensing statute. There, plaintiff, who did not have the statutorily required brokerage license, contracted orally with one Dearing to sell the latter's farm for a 5% commission. After plaintiff found a purchaser, but before execution of the deed, Dearing died. Dearing's executor then filed a bill in equity praying for guidance in effecting a sale of the property. The matter was referred to a commissioner, before whom plaintiff requested the 5% commission. Over the executor's objection that, because plaintiff did not have a real estate license, the contract was illegal and void, thereby negating recovery, the commissioner allowed the claim and filed his report. The trial court set aside the finding of the commissioner, and plaintiff excepted.

In rejecting plaintiff's claim, Justice Spratley sought to restate the Virginia law pertinent to illegal contracts.

> In this State, we have followed the general rule that a contract made in violation of a statute is void, and there can

be no recovery thereon, unless it is apparent from the statute that the legislature did not intend to make the contract void and unenforceable, but simply to leave those violating its provisions amenable to its penalties.

We find nothing in the language of the statute, or the subject matter of the regulation, which indicates the slightest intention to treat the contract as valid and enforceable between the parties, and simply to provide for the exaction of a penalty. There is nothing by which we can presume that it was intended that a violator should escape the ordinary consequences of his illegal acts.

The agreement upon which the plaintiffs in error rely is illegal, not merely invalid. It is void as being contrary to a positive statute and to public policy. Not merely the mode of its performance, but its substance is unlawful. The imposition of the penalty emphasises the illegality. (Emphasis added)

IDLER AND HUFF

173 Va. at 51. With these words, Justice Spratley not only doomed the Massie contract, but also effectively declared the instant contract void and illegal. The fact that the Massie contract was oral and the present one written does not mitigate the substantive impact of the Justice's comments on this type of contract.

To reinforce the conclusion reached, the opinion stated the established rule that courts will not aid a party to enforce agreements violative of statutes, or to recover damages for the breach of such agreements, or to recover consideration already parted with under such agreements. 173 Va. at 52.

Justice Spratley also looked behind the statutory framework to discern the purpose of the licensing provisions. His conclusions apply with like force to the modern statutory scheme.

> Statutes regulating the real estate business, and requiring brokers and salesmen to procure a license before acting as such, have been enacted in many States. They have the same general purpose and are designed to protect the public from the fraud, misrepresentation and imposition of dishonest and incompetent persons. The reasons are not hard to see. The relations of trust and confidence which lie in the very nature of the business require that honesty and a fair amount of intelligence be exercised by those engaged in its pursuit. The records of the courts disclose far too many instances of litigation arising from unrestricted and unregulated agencies in this field. The regulation is an exercise of the police power, and not merely a revenue measure. (Emphasis added)

173 Va. at 55. The decree of the trial court rejecting plaintiff's claim was affirmed.

In a subsequent case, State Realty Co. v. Wood, 190 Va. 321 (1950), the Court held that a licensed broker to whom assignment of a brokerage contract had been made by an unlicensed broker could not recover on the brokerage contract against the owner of the property sold. Since the unlicensed broker had no rights

under the contract, by reason of the Massie decision, the assignee, although licensed, had no rights. The assignee could not assert any cause of action without relying on the illegal contract of his assignor. 190 Va. at 325.

Colbert v. Ashland Construction Co., Inc., 176 Va. 500 (1940), illustrates Massie's applicability to non-real estate broker licensing laws. The plaintiff in Colbert sued to recover the unpaid balance on a construction contract. The lower court denied relief on the ground that plaintiff, in violation of a statute, had failed to register the assumed name under which he was doing business. Applying the principles enunciated in Massie, the Court denied relief to the "guilty" plaintiff.

> If an unlicensed real estate agent who effects a sale and sues for his commission can not recover, then an unregistered or unlicensed contractor who does work under an assumed name should not.

176 Va. at 507.

The efforts of an attorney to recover the Quantum Meruit value of his services, after the contract upon which the services were based was declared champertous, proved futile in Roller v. Murray, 112 Va. 780 (1911). The original contract was ruled void because by its terms the attorney agreed to conduct the entire litigation at his own expense in return for a portion of the recovery. The Court concluded that to permit

> a recovery upon a Quantum Meruit, instead of discouraging, would encourage the making of such contracts, for if the client kept and performed his unlawful agreement, the attorney would get the benefit of it, and if he did not, the attorney would suffer no loss, since he could recover upon the Quantum Meruit all that his services were worth. Any process of reasoning which leads to such a result we think must be unsound.

112 Va. at 785. If Massie stands for the proposition that a "guilty" party, or one who has not complied with the licensing statute, cannot recover under a contract with an innocent party, then Roller goes one step further and precluded a Quantum Meruit recovery by the "guilty" party outside the illegal contract. In any event, if NGDC were the plaintiff in this action, Massie would effectively cut off all avenues of relief.

2. Innocent Party v. Guilty Party

After the Massie decision, the issue of whether an innocent party could recover from a non-licensed, or "guilty" party, remained unresolved. The Virginia Supreme Court of Appeals squarely faced this issue in Cohen v. Mayflower Corp., 196 Va. 1153 (1955). There, plaintiff hired defendant, a contractor, to

waterproof several of plaintiff's buildings. Defendant performed the work in a defective manner, and plaintiff sued for damages under the contract. Defendant asserted that since he had not registered and obtained a contracting license as required by statute, the contract was illegal and void, and plaintiff could not maintain an action thereon. The Court disagreed and affirmed a lower court judgment for the innocent plaintiff, giving the following explanation of its decision.

> We have held in a number of cases that a contract entered into by one who fails to obtain a license or to register, as required by statute, is void in the sense that it is illegal and unenforceable by him in an action against an innocent party.
>
> * * *
>
> The precise question with which we are here concerned, whether an innocent party may maintain an action for damages for breach of a contract entered into between him and an unlicensed person, has not been previously presented to this court. But it has been frequently considered in other jurisdictions and the authorities are in accord that such an action may be maintained.
>
> * * *
>
> This view is based upon the principle that such innocent party is among the class of persons designed to be protected by such statutes, that he is not in pari delicto with the unlicensed party, and is therefore entitled to relief. Or, to state the matter another way, to deny relief to the innocent party in such cases would defeat the purpose of the statute and penalize the person intended to be protected thereby. (Emphasis added)
>
> * * *
>
> Some courts allow recovery by the innocent party upon the principle that the guilty unlicensed party is estopped to assert as a defense his failure to comply with the provisions of the statute.

196 Va. 1161,1162.

Several aspects of the Cohen case merit further consideration. First, the Court's reference to the estoppel argument would not have an effect on this case, for as already noted, estoppel does not apply to actions dealing with illegal contracts. Richmond R. Co. v. Richmond, Etc., supra. Secondly, the Court's opinion proceeds on the assumption that the innocent party is among the class of persons designed to be protected by such statutes. Such is not the facts in the case at bar. It will be recalled that in Massie, the Court commented that the purpose of the real estate licensing statutes was to provide protection for the "public". 173 Va. at 55. No mention was made of affording protection to the individual or corporation for whom the broker worked.

Lastly, and most importantly, the Cohen Court rested its holding on

the fact that the innocent plaintiff was not in pari delicto with the unlicensed contractor. Defendant in the present case contends that, GRENCO, because it knew of NGDC's lack of a brokerage license, stands in pari delicto with NGDC and is therefore barred from recovery.

D. In Pari Delicto

1. Concept Defined

The term in pari delicto means in equal fault. Black's Law Dictionary (4th ed., 1968); 4 M.J. "Contracts" §129 (1949). Levy v. Davis, 115 Va. 814 (1914), illustrates the use of the concept. There, a plaintiff sold furniture to defendant, knowing that defendant would use the furniture in a house of ill repute. Plaintiff brought an action in detinue to recover the property or its value. The Court expressed no sympathy with plaintiff's plight.

> It is also true as a general rule that if the parties are in pari delicto and equally at fault and one of them has performed the illegal agreement in whole or in part, he cannot recover from the other party that which he has parted with under the contract. The law will leave the parties where it finds them. The rule is the same in equity.

115 Va. at 816. Judgment for defendant was affirmed. "Equal fault" in the instant case denoted knowledge on GRENCO's part at the inception of the contract that NGDC had no brokerage license. This use of in pari delicto accords with its usage in the Cohen case.

2. Application of the Concept

A survey of several cases applying the principle of in pari delicto suggest that its use in the present case would be most appropriate. Waller v. Eanes' Adm'r, 156 Va. 389 (1931), sets out the rule and its exceptions. Waller involved a bill to enjoin a foreclosure sale under a deed of trust. The question arose as to whether both parties to a transaction were equally guilty in perpetrating a fraud on the creditors of one of the parties. In pari delicto received the following treatment.

> The basis of the court's decision on the demurrer, is the equitable maxim that he who comes into equity must come with clean hands, and that since the allegations of the bill disclose Waller's own fraud, he was not entitled to any relief. If the bill shows that Waller and Eanes are equally guilty of fraud and are in pari delicto so far as the deed of trust is concerned, or that it would be against public policy to grant relief, then Waller is entitled to no relief and the ruling of the court in dismissing the bill discloses that they are not equally at fault, though the transaction may have been fraudulent, and Waller was less guilty in degree of the fraud than Eanes, then the bill would not be demurrable because the parties were not in pari delicto. Still another consideration may be given to the transaction, and that is,

> if they were in pari delicto, whether public policy would be more likely to be offended by enforcing the deed of trust in favor of Eanes or his administrator than it would be to require its release to Waller. So if the bill discloses (a) that the parties are not in pari delicto or (b) if they are in pari delicto, public policy will be promoted by granting Waller relief, then in either event the bill would not be demurrable.

156 Va. at 394,395. Here, assuming that GRENCO and NGDC were in pari delicto, no public policy would be promoted by granting GRENCO relief. And since both parties knew of NGDC's want of a license, equal guilt, or the par delictum required by law, has been established. Wise v. Craig, 1 Hen. & M. 578 (1807).

A decision of particular interest in this area is American-LaFrance v. Arlington County, 169 Va. 1 (1937). Plaintiff sued defendant county for the unpaid balance on a contract for fire-fighting equipment. Defendant urged that the contract was illegal in that the expenditure had not been approved by the voters. Plaintiff admitted the illegality, but still demanded relief. The Court ruled that the plaintiff was "charged with the knowledge of the incapacity of the defendant to contract" and to that extent was in pari delicto with the defendant, although the defendant county was more guilty because it knew what it could and could not do. 169 Va. at 9. In ordering that plaintiff's property be returned to it along with a reasonable rent for its use, the Court adopted the theory that since the contract was merely invalid and void, and not illegal, plaintiff was entitled to relief. The Court distinguished "illegal" contracts, or those that involved immorality or a violation of penal laws. The opinion characterized non-illegal contracts as those contrary to some legal provision relating to the manner, method or terms of performance.

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The illegal-invalid distinction mentioned in American-LaFrance has been infrequently resorted to in Virginia cases. Most importantly, it has not been applied in license cases. And even if it were, the present contract, by virtue of Massie, is illegal, and the parties are certainly in pari delicto as regards their knowledge at the time of the contract.

The question of the applicability of the theory of in pari delicto to license cases, alluded to in Cohen, came before the Virginia Supreme Court of Appeals in Enlow & Son v. Higgerson, 201 Va. 780 (1960). That case evolved from a series of construction sub-contracts. The main contractor agreed to construct a highway for the Virginia Highway Department. The main contractor sub-let the work to Higgerson, who in turn sub-let the job to Enlow & Son. At the time the second sub-contract was entered, both parties knew that Enlow & Son did not yet have the required construction license which it had applied for. Enlow & Son breached the contract, and Higgerson instituted action. The matter was trans-

ferred to the equity side of court, and a commissioner took evidence and prepared a report, on the basis of which the lower court awarded judgment to plaintiff.

Defendant, on appeal, contended not only that the contract was illegal because of its lack of a license, but also that it and Higgerson were in pari delicto because both knew that at the time of execution of the contract that defendant had no license. The Court affirmed the judgment for plaintiff, giving several reasons therefor.

First, the Court concluded that the parties were not in pari delicto. The statute in question contained a provision that penalized individuals or corporations who considered bids from unlicensed contractors as plaintiff had done. That particular provision, however, applied to contracts made after the one in question. 201 Va. at 785. As far as criminal sanctions were concerned, the parties were not equally guilty.

Secondly, the fact that the plaintiff, at the time of the execution of the contract, knew that Enlow had not been licensed did not bar its right to enforce the contract. Two reasons underlay this conclusion. One, to deny recovery to the plaintiff would serve to benefit the wrongdoer, thereby defeating the purpose of the statute. Two, the plaintiff fell within the class of persons sought to be protected by the statute. 201 Va. at 786,787.

The situation in the case at bar differs sufficiently from Enlow as to render that case inapplicable. Denial of relief to GRENCO would not benefit NGDC as a wrongdoer. Much of the work called for and performed by NGDC under the contract involved matters unrelated to the need for a brokerage license. GRENCO has lost nothing under the contract, for it had its property developed and sold at an overall net profit to it. The Enlow court felt that the contractor licensing statute sought to protect the individuals or corporations who employed the contractor. Massie, on the other hand, held emphatically that the real estate licensing statute was designed to protect the public. No mention was made of the developer or owner of the property employing the broker. Had such protection meant to be conferred, surely the Massie court would have so held, since the owner and the broker were the parties before the court. Clearly, the General Assembly, in enacting the licensing statute in the instant cause, did not intend to protect GRENCO or parties similarly situated.

In short, Enlow differs significantly enough from the case at bar to justify continued consideration of applying the doctrine of in pari delicto to GRENCO.

III. Agency

The principles of agency have already been invoked to charge GRENCO

with the license status of its selling agent, NGDC. Attention is also called to the fact that under the law of agency, a contract such as that in the instant case is void. An act which, if done by the principal, would be illegal as in violation of common law or of some statutory provision cannot be done for him by an agent, and any agreement that authorizes or requires, or tends to induce, an agent to do such an act is void. 2 A C.J.S. "Agency" §26 (1972). The agreement at bar authorizes and induces the sale of real estate by NGDC without a license because GRENCO knew that NGDC had no such license. Such conditions void the contract.

IV. Application of Law to Facts

It was initially contended that GRENCO's Motion For Judgment did not state a valid cause of action against NGDC. The law of illegal contracts, as applied to these facts, substantiates that conclusion.

Were GRENCO an innocent party, Cohen would be determinative and a good cause of action would be stated. But considering the extent to which GRENCO knew of the illegality at the inception and during the performance of the contract, Cohen cannot be relied upon to found a cause of action.

The Massie decision quite clearly dictates the illegality of the contract. GRENCO and NGDC are in pari delicto. Judicial declaration of the fact that the real estate licensing statute is designed to protect the public excludes GRENCO from the primary in pari delicto exception. GRENCO, because it is not an innocent party, and because it rests its action on an illegal contract, cannot obtain any relief against NGDC.

ARGUMENT II

THAT GRENCO'S MOTION FOR JUDGMENT DOES NOT SET FORTH ANY INJURY OR DAMAGE COMPENSABLE AT LAW

I. Relief Requested

In its Motion For Judgment, GRENCO requests that the contract at bar be declared unenforceable against it, and requests judgment against NGDC for $49,106.53, the commissions allegedly illegally obtained by NGDC.

II. Nature of Contract Damages

Defendants in actions on contracts may be obliged to respond in three different types of damages. The first class of damages, expectation damages, seek to put plaintiff in the position he would have been in had the contract been completed. GRENCO has not alleged that the contract was not completed; in fact, it implies in its pleading that the contract was fully performed. Therefore, it cannot recover expectation damages.

The second type of damages, restitution damages, attempt to restore

to the plaintiff the value of the benefit it conferred on the breaching party. This type of damage most closely approximates the relief requested by GRENCO.

A final classification of damages is commonly labeled reliance damages. Such damages attempt to make plaintiff whole by awarding him the difference between what he expended on the contract and the value he received from the contract. GRENCO's Motion does not on its face ask to be made whole.

Regardless of the type of damages sought, they must be certain and capable of adequate proof. DuPont Co. v. Universal Moulded Prod., 191 Va. 525 (1950). No award of damages on the basis of speculation and conjecture will be allowed. 191 Va. at 572.

III. Rescission

GRENCO having alleged no breach of contract, the only type of damages which it is entitled to sue for are restitution damages. The only theory which would allow restitution damages in this case would be rescission of the contract. No principle of law is more familiar than that an illegal contract can be rescinded. 16 M.J. "Rescission, Cancellation and Reformation" §10 (1951). So although not stated in GRENCO's pleading, rescission of the illegal contract underlies its prayer to have the sums expended under the contract returned to it.

Even though rescission be established as the remedy sought by GRENCO, its Motion does not set forth the factor qualifying rescission. One demanding rescission of a contract must restore or offer to restore to the other that which the plaintiff may have received under the contract. 16 M.J. "Rescission, Cancellation and Reformation" §16 (1951). The Motion For Judgment does not state that GRENCO restored or offered to restore NGDC to its pre-contract status. Obviously, NGDC rendered only "services" under the contract. GRENCO, to obtain rescission, must propose at least to restore the value of NGDC's services.

The prayer that the Court decree the contract unenforceable against GRENCO is inappropriate since GRENCO nowhere avers that NGDC has, is, or is about to seek enforcement of the contract against GRENCO.

The relief sought by GRENCO in this action, then, is either premature or improperly stated. Incidentally, the prayer of relief is defective because it does not apprise NGDC of the true nature of the claim against it. See Rule 1.4 (d) of the Rules of the Supreme Court of Appeals of Virginia.

ARGUMENT III

THAT GRENCO IS PROCEEDING ON THE LAW SIDE OF COURT WHEN IT SHOULD BE PROCEEDING ON THE EQUITY SIDE OF COURT

Rescission being the only apparent remedy sought by GRENCO, the law side of court has no jurisdiction over the claim. Rescission is an equitable remedy. 16 M.J. "Rescission, Cancellation and Reformation" §§2,3 (1949); 7 M.J. "Equity" §7 (1949); Corbin On Contracts, §613 (1952). This action, therefore, cannot be maintained on the law side of this Court.

CONCLUSION

The foregoing authorities supply ample reasons for this Court to sustain NGDC's Demurrer. Furthermore, it is an elementary rule in pleading

> that the declaration must allege all the circumstances necessary for the support of the action, and contain a full, regular, and methodical statement of the injury which the plaintiff has sustained, with such precision, certainty, and clearness that the defendant may be distinctly informed of the specific grounds of the action, and thus be able to answer by a direct and unequivocal plea with evidence to support it. A case in which the declaration fails to conform in its averments to the essential requirements of this rule is therefore held fatally defective and insufficient on general demurrer.

6 M.J. "Demurrers" §13 (1949). See also American S. Insurance Co. v. New Amsterdam Cas. Co., 212 Va. 17 (1971); Klotz v. Fauber, 213 Va. 1 (1972).

GRENCO's pleading does not allege all the facts necessary for the support of a valid cause of action. The Motion does not contain a full, regular and methodical statement of Plaintiff's injury; in fact, it states no injury at all. The precision, certainty and clearness so necessary to the protection of litigants' rights is absent here. Uncertainty exists as to the nature of the claim and the injury suffered. A pleading characterized by so many substantive defects cannot be allowed to stand.

Respectfully submitted

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March 27, 1974

Honorable Lelia Bickers, Clerk
Circuit Court of Greene County
Stanardsville, Virginia 22973

In re: Grenco Real Estate Investment Trust v. Nathaniel Greene Development Corporation

Dear Lelia:

Please file this Memorandum Of Law with the other papers in the above styled case.

Thanking you for your assistance, I remain

Sincerely,

Brad

L. B. Chandler, Jr.

LBC:dt
Encl.

MEMORANDUM OF LAW

Statement of Facts

Nathaniel Greene Development Corporation, hereinafter referred to as NGDC, and Grenco Real Estate Investment Trust, hereinafter referred to as Grenco, entered into a contract on December 15, 1970, pursuant to which, NGDC agreed to manage, promote, and sell certain parcels of land belonging to Grenco. Grenco, in consideration for NGDC's undertakings under the contract agreed to pay NGDC a commission based on the gross selling price of the parcels sold by NGDC.

Pursuant to the December 15, 1970, Agreement, NGDC proceeded to sell and did in fact arrange for the sale of certain of Grenco's parcels of land. Grenco, in turn, and in accordance with the terms of the contract has paid to the Defendant, in consideration of its activities as selling agent, commissions totaling Forty-Nine Thousand One Hundred Six and 53/100 Dollars ($49,106.53).

At the time of the execution of the contract and at all times during the performance of the contract, NGDC did not have a license to sell real estate as required by Virginia law (Va. Code Ann. § 54-730 et. seq. 1950).

Issue Presented

The issue stated very simply is whether or not NGDC should be required to return to Grenco those commissions which were paid to NGDC as commissions for selling real estate for the reason that NGDC did not have a license to sell real estate as required by Virginia law.

Procedural Status

As the memorandum of law submitted on behalf of the Defendant indicates, the Plaintiff, Grenco, filed a Motion for Judgment in the Circuit Court of

Greene County on December 21, 1973, against the Defendant, NGDC, requesting judgment for money had and received by NGDC. NGDC subsequently demurred to the Motion for Judgment. Grenco filed a Motion requesting a statement for the grounds of that demurrer. The Defendant filed the grounds of its demurrer, and filed a memorandum of law in support thereof. A hearing was held on that demurrer, and the Court has taken the matter under advisement.

The grounds upon which the Defendant, NGDC, based its demurrer were the following:

1) That the Motion for Judgment did not state a valid cause of action;

2) That the Motion for Judgment did not set forth any injury or damage compensable at law; and

3) That Grenco is proceeding on the wrong side of the Court and that it is seeking an equitable remedy in proceeding at law.

Law and Argument

As both parties appear to be in agreement with regard to certain of the questions that would have ordinarily been considered, it is believed that time can best be served by limiting the discussion below to those areas where, at the hearing on the demurrer, the parties hereto appeared to be in disagreement. As indicated above, the Defendant has advanced three grounds in support of its demurrer, the first being that the Motion for Judgment did not state a valid cause of action. From the lengthy discussion of the reasons advanced by the Defendant in support of the contention presented in its memorandum of law filed evolve two central points: First, because Grenco is not an innocent party it is *in pari delicto*, and should thereby be precluded from recovering; and Second, Grenco bases its action on an illegal contract upon which there can be no recovery. As both of these contentions revolve around the assumption by the Defendant that the Plaintiff had know-

ledge that NGDC, the Defendant, did not have a real estate license during the period in question, the question that is first presented is whether or not, under the pleadings in question, the issue of the knowledge of the Plaintiff can even be considered since there is nothing on the face of the pleadings which indicates that the Plaintiff did have such knowledge. The Defendant has argued that inasmuch as the Plaintiff has indicated in the pleadings that the Defendant acted as agent for the Plaintiff the common law rules of agency would impute the knowledge of the agent, NGDC, that it did not have a license, to its principal, Grenco. The Defendant continues this line of reasoning to reach the conclusion that since the Plaintiff did not deny in its pleading that it had knowledge the Court should assume for the purposes of a hearing on a demurrer that the Plaintiff did in fact have knowledge. However, it is your Plaintiff's contention that although where third parties are concerned, the general common law rule is that the knowledge of the agent is imputed to its principal, this is not the case when the controversy is not between the principal and third party but instead is between the principal and the agent directly. It is well established that notice or knowledge will not be imputed as between an agent and the principal, and particularly not in those situations where suppression of the information which the agent has would be in his best interest. Clifton v. Tomb, 21 F. 2d 893 (4th Cir. 1927); Fulwiler v. Peters, 179 Va. 769, 20 S.E. 2d 500 (1942). If, as a matter of law, the agent's knowledge under the circumstances presented here would not be imputed to the principal, as is indicated by those cases referred to above, it is your Plaintiff's belief that any consideration of the knowledge of the Plaintiff as to the status of the Defendant with regard to its having obtained or not having obtained a real estate license is inappropriate at this stage in the proceedings for the reason that no knowledge is admitted in the pleadings before the Court. However, because the Court has not ruled on this issue, for the purpose of responding to the memorandum submitted on behalf of the Defendant, the following dis-

cussion of the relevant law will proceed on the assumption that the Plaintiff, Grenco, possessed knowledge of the fact the NGDC did not have a real estate license.

This then brings us to a further consideration of the first of the reasons advanced by the Defendant in support of its first Grounds of Demurrer, that is, that no action is maintainable for the reason that the Plaintiff is in pari delicto with the Defendant and thereby precluded from recovering in this case. It is clear from the oral argument presented at the hearing on the demurrer, that the parties are in direct conflict with regard to this issue. The Defendant has asserted that if Grenco had knowledge that NGDC did not have a real estate license, it was in pari delicto with the Defendant and thereby estopped from recovering against it. The Virginia Supreme Court of Appeals has spoken directly to this issue. In the case of Enlow & Son v. Higgerson 201 Va. 780 (1960), Higgerson, a contractor, subcontracted with Enlow & Son for the performance by the latter of certain highway construction work. At the time of entering into that contract, Higgerson had knowledge that Enlow & Son did not have the license required by Virginia law. Enlow failed to complete the work contemplated by the contract and Higgerson brought suit for damages and was awarded judgment in the trial court. On appeal, Enlow & Son argued that since Higgerson knew at the time of entering into the contract that Enlow & Son did not have a license, Higgerson was in pari delicto with Enlow & Son and could not, therefore, recover against it. In that case there was one further fact which should be considered, that being, that prior to an amendment of § 54-142 of the Va. Code Ann., it had been the law in Virginia that both the person contracting for and bidding upon a construction contract without a license and the person "who knowingly received or considered a bid" from such unlicensed person, were guilty of a misdemeanor. The effect of the amendment was to remove the prohibition against knowingly receiving and accepting a bid on contracts entered into prior to July 1,

1956 but left unimpaired § 54-128 of the Va. Code Ann. making it unlawful for an unlicensed person "to engage in ... general contract or subcontracting in this state."

The Court, in addressing the Defendant's assertion that the knowledge of the Plaintiff barred any recovery said specifically that, "Nor is the Plaintiff's right barred because they knew at the time of its execution that Enlow had not been licensed as required by the statute," Id., at 786. The Court went on to quote from Corbin on Contracts, Vol. 6 § 1540, p. 1070 the following:

> "If a bargain is illegal, not because a performance promised under it is an illegal performance, but only because the party promising it is forbidden by statute or ordinance to do so, the prohibition is aimed at that party only and he is the only wrongdoer. The performance itself is not even malum prohibitum, much less is it malum in se. The other party, being himself subject to no prohibition or penalty, may even be one of the class of persons for whose protection the prohibitory statute was enacted.
>
> "In these cases the refusal of all remedy against a party to the illegal bargain would penalize the very persons for whose benefit the making of such a bargain is prohibited or declared illegal."

The Court went on to say that to deny relief to the Plaintiff in that case would not further the purpose of the statute but instead would benefit the wrongdoer, the person who had not complied with the licensing statute. Enlow, supra, at 786.

It can be seen from the above discussion of Enlow, that the Court there was squarely faced with the issue of the impact of the knowledge of a Plaintiff as to the unlicensed status of the person with whom he contracted upon his ability to recover. The Court clearly said that such knowledge did not make the Plaintiff in pari delicto and did not bar a recover from the Defendant. The Defendant candidly admits that, "Were Grenco an innocent party, Cohen [Cohen v. Mayflower Corp., 196 Va. 1153, the facts of which are recited in Defendant's memorandum at page 6] would be determinative and a good cause of action stated," (Defendant's memorandum at p. 10) but has

attempted in its memorandum to distinguish the facts in that case from those in the case before the Court. However the basis advanced by the Defendant in its attempt to distinguish the two cases does not appear to have a great deal of merit.

The first reason advanced by the Defendant is that denial of relief to Grenco would not benefit NGDC "as a wrongdoer." One finds it difficult to understand the rationale behind this statement for the reason that there can be no question but that NGDC will stand to benefit to the extent of the commissions that it is permitted to retain i.e., to the extent of Forty-Nine Thousand One Hundred Six and 53/100 Dollars ($49,106.53). Not only would the Defendant benefit, but the public policy behind the licensing statute would be frustrated if NGDC were to be permitted to retain commissions paid to it. Clearly, NGDC is prohibited from obtaining commissions for the sale of real estate without a license by statute and by every case that has been decided by the Supreme Court of Appeals of the State of Virginia on this point.

The second basis advanced by the Defendant for distinguishing Enlow is that Grenco is not a member of the public which was intended to be protected by the licensing statute. This contention seems equally without merit. It would seem that there could be no question that every case that has been decided under the statute referred to by both the Plaintiff and the Defendant has in fact involved the application of that statute to parties situated exactly as are the parties before the Court, i.e. where one party has contracted to do something for the other party without a license when he is required by statute to have a license. In view of this fact, it seems that there can be no question but that Grenco and other persons owning real estate, are among that class of persons intended to be protected by the statute.

In view of the above, it is your Plaintiff's belief that Enlow spoke directly to the question of the impact of the knowledge of a Plaintiff

as to the unlicensed status of his agent, that it is controlling, and that its application dictates that even if Grenco possessed knowledge of the fact that NGDC was unlicensed, it would not be in pari delicto with NGDC, and it would not be barred from recovering against NGDC.

However, even if the Court should choose not to follow Enlow and even if the Court should be inclined to believe that the possession of knowledge is sufficient to make the Plaintiff in pari delicto, the Plaintiff in this case should be entitled to relief because of a major exception to the in pari delicto maxim. This exception was set forth in Waller v. Eanes' Adm'r, 156 Va. 389 (1931), which case is cited in detail in the Defendant's memorandum, at page 8. There the Court said:

> "Still another consideration may be given to the transaction, and that is, if they were in pari delicto, whether public policy would be more likely to be offended by enforcing the deed of trust in favor of Eanes or his administrator than it would be to require its release to Waller. So if the bill discloses (a) that the parties are not in pari delicto or (b) if they are in pari delicto, public policy will be promoted by granting Waller relief, then in either event the bill would not be demurrable."

A further statement of the general public policy exception to the application of the in pari delicto doctrine to prohibit recovery is found at 17 Am. Jur. 2d § 222. There it is stated that:

> "Accordingly, if it is necessary, in order to discountenance such transactions and promote the public interest, to enforce such an agreement at law or to relieve against it at equity, it will be done although both parties are in pari delicto. The general rule denying relief will not be applied if its application would give effect to the original purpose and encourage persons who engage in such transactions."

From the above, it can be seen that even if the parties are in pari delicto, relief will be granted if the underlying public policy of a statute will be promoted by the granting of such relief. There can be no question but that the public policy underlying the licensing statute will be promoted

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if relief is granted to the Plaintiff in this case and that public policy will be thwarted by the denial of the relief sought. It is this basic rationale that has formed the basis for the majority of the decisions decided under the licensing statute. In Colbert v. Ashland Construction Co., 176 Va. 500 (1940), the Court indicated that the reason for denying recovery in that case was that public policy would be furthered by that result. The Court there indicated that the reason that the Plaintiff did not recover was not because his claim was without merit, but rather was "because he has failed to do those things which the statute says he must do. The benefit which the Defendant has received is incidental and accidental. The law of contracts is not interested in helping him but in curbing the Plaintiff; in this instance enacted to prevent fraud and for a public purpose." Id. A further, and perhaps the best statement of the public policy embodied in the licensing provision of the Virginia Code is found in the observation of Justice Spratley in Massie v. Dudley, 173 Va. 42 (1939), (hereinafter Massie). In Massie, Justice Sprately made the following statement:

> "Statutes regulating the real estate business, and requiring brokers and salesmen to procure a license before acting as such, have been enacted in many States. They have the same general purpose and are designed to protect the public from the fraud, misrepresentation and imposition of dishonest and incompetent persons. The reasons are not hard to see. The relations of trust and confidence which lie in the very nature of the business require that honesty and a fair amount of intelligence be exercised by those engaged in its pursuit. The records of the courts disclose far too many instances of litigation arising from unrestricted and unregulated agencies in this field. The regulation is an exercise of the police power, and not merely a revenue measure."

From the above it can be seen that there is indeed strong public policy embodied in the licensing statute which has at its core the regulation of the business of selling real estate. It is also apparent that if a person can avoid the penalties of the statute and can reap benefits derived through the sale of real estate without complying with those statutes, but by merely

informing his principal that he has no license then the licensing statutes will be of little avail.

Therefore, although it is your Plaintiff's contention that knowledge should not be considered by the Court at this time, it is your Plaintiff's belief that even if we were to assume for purposes of this hearing that the Plaintiff had knowledge, the Virginia Supreme Court of Appeals has indicated that such knowledge clearly does not render one in pari delicto with the other party so as to deny a recovery. It is further believed by your Plaintiff that even if such knowledge does render one in pari delicto with the other that the public policy embodied in the licensing statute would best be served by the allowance of the recovery sought by the Plaintiff and that accordingly the exception to the rule requiring the application of in pari delicto should be applied so as to permit the recovery sought by the Plaintiff herein.

This then brings us to the second reason advanced by the Defendant in support of its proposition that the Plaintiff's motion does not state a valid cause of action, the reason stated being that Grenco bases its action on an illegal contract upon which there can be no recovery. Because this issue was discussed at length at the earlier hearing on the demurrer, Plaintiff does not believe that a lengthy discussion at this time is needed. The first thing that should be reiterated is that the Plaintiff's action is one for money had and received. This action has its basis in the common law action of assumpsit and lies whenever the one has the money of another which he has no right to obtain. 2A M. J. § 17, at p. 300. As is stated in the discussion in Michie's, referred to above, "In such a case no express promise need be proved, because from such relation between the parties the law will imply a debt and give this action founded on the equity of the Plaintiff's case, as it were upon a contract, quasi ex contractu as the Roman law expresses it, and upon this debt will found the requisite undertaking to pay." Therefore, where, as is the case here, the Defendant holds

money in his hands to which he has no lawful claim and which he ought to return to the Plaintiff, an action for money had and received will lie.

That an action lies for recovery of money does not appear to be contested by the Defendant. In fact, in their memorandum they indicate that "Were Grenco an innocent party, Cohen would be determinative and a good cause of action would be stated." Defendant's memorandum, at p. 10. In Cohen v. Mayflower Corp., 196 Va. 1153 (1955), the Plaintiff hired an unlicensed contractor to waterproof certain buildings belonging to the Plaintiff. When the Plaintiff brought suit to recover on the contract the Defendant asserted that the contract was illegal and void because he (the Defendant) did not have a contractor's license. He accordingly, argued that the Plaintiff could not maintain an action on the contract there involved. The Court there held that the Plaintiff was among the class of persons designed to be protected by the statute that he was not in pari delicto with the unlicensed party and that he was therefore entitled to relief. Accordingly, it would seem that there is no real controversy as to the question of whether or not given the proper circumstances an action will lie to recover commissions paid to an unlicensed real estate salesman or contractor. It is your Plaintiff's belief that a proper set of circumstances is before the Court in this case.

As can be inferred from the above discussion there are no Virginia cases directly on all fours with the case presently before the Court. The only case which the Plaintiff has been able to find which does present the same facts as does the case before the Court is Bleecker Charles Company v. A & D Harrison, Inc., 326 N.Y.S. 2d 214, (hereinafter Bleecker) a copy of which opinion is attached hereto. In that case an action was brought by a limited partnership against a corporation for the return of management fees paid to that corporation for the reason that the corporation was not licensed as a real estate broker as required by New York law. In that case,

the owner of all of the stock of the Defendant corporation was also one of the general partners of the Plaintiff. He contended that the corporation was his alter ego and that accordingly he was really selling his own property and was therefore exempt from the licensing requirement. The Court, in a per curiam opinion affirming a lower Court's granting of summary judgment in favor of the Plaintiff said, "Both the spirit and the letter of the Real Property Law required one so acting to be licensed with the consequent effect for the failure to have a license." (Id. 215). Therefore in view of all of the foregoing discussion, it is your Plaintiff's belief that the law both in Virginia and other jurisdictions would support the recovery by the Plaintiff from the Defendant of the commissions paid to the Defendant, an unlicensed real estate salesman, as a result of sales of real estate.

The second grounds recited by the Defendant in support of its demurrer was that the Motion for Judgment did not set forth any injury or damage compensable at law. The argument advanced by the Defendant is that the relief sought by the Plaintiff is for restitution and that restitution requires rescission and that rescission in return requires that the party demanding rescission must restore or offer to restore the other to its original position. As has previously been indicated, the basis of the Plaintiff's action is for money had and received by the Defendant under an illegal contract. Cases have been referred to in the first part of this memorandum which would permit a recovery of money under the circumstances here and it is believed that they adequately answer the issue raised by the second grounds for the Defendant's demurrer. See, Cohen supra, Enlow supra, and Bloecker supra.

The third grounds advanced by the Defendant is that the Plaintiff has proceeded on the law side of the Court when it should have proceeded in equity. Rule 3:1 of the Supreme Court of Appeals of Virginia has abolished common law forms of action in a court of record where a judgment

in personam for money only is sought. Since its adoption, all such actions are properly brought by Motion for Judgment. Therefore, since the relief here sought is for a judgment in personam for money only it is properly brought on the law side of Court.

CONCLUSION

In view of all of the foregoing it seems clear that this action is properly brought, that an action will lie for the recovery of money paid under an illegal contract, and that a recovery of the commissions paid by the Plaintiff in this matter should be permitted in order to further rather than to thwart the public policy underlying Va. Code Ann. § 54-749.

Respectfully submitted,

Granco Real Estate Investment Trust
By Counsel

Robert M. Musselman, p.q.

By Harold R. Bailes
413 Seventh Street N.E.
Charlottesville, Virginia 22902

C E R T I F I C A T E

I hereby certify that I have mailed a copy of this memorandum on the 19th day of April, 1974 to Brad Chandler, Esq., 415 Park Street, Charlottesville, Virginia 22901, Counsel for Defendant herein.

Harold R. Bailes

ROBERT M. MUSSELMAN
ATTORNEY AT LAW
CHARLOTTESVILLE, VA.

ROBERT M. MUSSELMAN
ATTORNEY AT LAW

413 SEVENTH STREET, N.E.
CHARLOTTESVILLE, VIRGINIA
P.O. BOX 254
22902

April 19, 1974

Mrs. Lelia D. Bickers, Clerk
Circuit Court of Greene County
P. O. Box 86
Stanardsville, Virginia 22973

In re: Grenco Real Estate Investment Trust v.
Nathaniel Greene Development Corporation

Dear Mrs. Bickers:

On Friday, April 19, 1974, I filed a Memorandum of Law with the Circuit Court which referred to a copy of a judicial opinion which was to be attached to the memorandum for the Judge's use. I discovered when I arrived in your office that I had left the copy in my office. Accordingly I am now sending you this copy and would request that you please attach it to the memorandum.

Sincerely,

C. Timothy Lindstrom

C. Timothy Lindstrom
Associate

CTL/jsl
Enclosure

consistently been held that subsequent bribery of a police officer is not affected by the question that a related conviction may be tainted by illegal evidence. Vinyard v. United State, 335 F.2d 176 (8th Cir.), cert. denied, 379 U.S. 930, 85 S.Ct. 327, 13 L.Ed.2d 342; People v. Lauricella, 32 Misc.2d 344, 222 N.Y.S.2d 503; People v. Raymo, 32 Misc.2d 534, 223 N.Y.S.2d 1014.

STEVENS, Presiding Justice (dissenting):

I dissent and would affirm the order in its entirety. In my opinion there is a factual issue affecting not only the conviction of possession of narcotics, but the bribery conviction as well.

37 A.D.2d 935

BLEECKER CHARLES COMPANY, a Limited Partnership, by Oscar Newman, as General Partner, Plaintiff-Respondent, v. A & D HARRISON, INC., Defendant-Appellant.

Supreme Court, Appellate Division, First Department.
Nov. 9, 1971.

Action by limited partnership against corporation for return of management fees. The Supreme Court, New York County, Dollinger, J., granted summary judgment for plaintiff, and directed assessment of damages, and defendant appealed. The Supreme Court, Appellate Division, held that fact that all stock of corporation, which managed building owned by limited partnership, was owned by individual, who also was a general partner, did not establish that general partner was managing his own property, for which no brokerage license was required; thus, limited partnership was entitled to recover management fee paid to corporation, which was not licensed as a real estate broker.

Affirmed.

McGivern, J., dissented and filed memorandum in which Kupferman, J., concurred.

Brokers ⇐42

Fact that all stock of corporation, which managed building owned by limited partnership, was owned by individual, who also was a general partner, did not establish that general partner was managing his own property, for which no brokerage license was required; thus, limited partnership was entitled to recover management fee paid to

corporation, which was not licensed as a real estate broker. Real Property Law §§ 440, 440–a, 442–e, 442–e, subd. 3.

K. B. Newman, New York City, for plaintiff-respondent.

O. K. Fraenkel, New York City, for defendant-appellant.

Before STEVENS, P. J., and McGIVERN, KUPFERMAN, McNALLY and STEUER, JJ.

PER CURIAM.

Order, Supreme Court, New York County, entered on June 30, 1971, granting summary judgment and directing an assessment of damages, affirmed. Respondent shall recover of appellant $50 costs and disbursements of this appeal.

In this action a limited partnership sues a corporation for the return of management fees. The fees were paid for the management of a building owned by the partnership, and the basis of plaintiff's claim is that the corporation was not a licensed real estate broker (Real Property Law, §§ 440 and 442-e, subd. 3). These facts are not disputed.

It appears that all of the stock of the defendant corporation is owned by Arthur S. Harrison, who is also one of the general partners of the plaintiff. It is his contention that the corporation is his alter ego, and for the purposes of this appeal we may take it that this is the fact. Proceeding from this premise defendant argues that he is managing his own property and for this no brokerage license is required. There is a serious gap in this syllogism—the corporation is not managing its own property nor is the individual managing his. Assuming that the individual is the manager, he is acting for all of the general and limited partners. Both the spirit and the letter of the Real Property Law require one so acting to be licensed with the consequent effect for the failure to have a license. There is no factual issue, and the grounds set out in the dissent appear to have been rejected (see Reiter v. Greenberg, 18 A.D.2d 1093, 239 N.Y.S.2d 620, revd. on other grounds, 21 N.Y.2d 388, 288 N.Y.S.2d 57, 235 N.E.2d 118).

All concur except McGIVERN and KUPFERMAN, JJ., who dissent in the following memorandum by McGIVERN, J.:

I would modify the order appealed from to the extent of denying summary judgment to the plaintiff and otherwise affirm. Special Term grounded its disposition on a failure to comply with the "provisions of the Personal Property Law" (sic). Actually, and it is conceded, the applicable section is 440-a of the Real Property Law. But, I would not, on this attenuated record, find a violation of that statute and expose the defendant to the prodigious penalties of section 442–e

of the Real Property Law. In my judgment, the statute (§ 440–a) was never intended for a situation as we have before us, where for many years, the plaintiff suffered the use by Harrison, one of its two general partners, of his solely owned corporation as an instrumentality for the management of partnership property in which the parties had a common interest. And since the defendant never held itself out as a broker, as defined in the law, and since all the funds collected were deposited in the plaintiff partnership account, I cannot conclude on this record that the defendant offended the express public policy of the statute. Since there is no clear showing it did, it should not be summarily subjected to the statutory penalties. See Matter of Wilson Sullivan, Inc., 289 N.Y. 110, 44 N.E.2d 387; Seider v. Fagin, 40 Misc.2d 425, 243 N.Y.S.2d 100. The question as to whether the corporate entity should properly be disregarded should not be summarily determined. Since the ultimate answer depends upon mixed questions of law and fact, the motion of plaintiff should have been denied. "The drastic remedy which disposes of a cause of action or a defense on pleadings and affidavits should not be granted when there is any doubt as to the existence of justiciable questions of fact. (Braun v. Carey, 280 App.Div. 1019, 116 N.Y.S.2d 857)." Johnson v. Johnson, 33 A.D.2d 640, 305 N.Y.S.2d 126.

In any event, where there is any doubt about the application of this statute, it "must not be extended by implication" (Weingast v. Rialto Pastry Shop, 243 N.Y. 113, 117, 152 N.E. 693, 694). As this appellate court said, citing the Court of Appeals, "The court's language establishes that one looks to the nature of the transaction as well as the purpose of the statute". Dodge v. Richmond, 5 A.D.2d 593, 595, 173 N.Y.S.2d 786, 788 [First Department].

Finally, I fail to see how the foregoing rationale was rejected by Reiter v. Greenberg, 18 A.D.2d 1093, 239 N.Y.S.2d 620, reversed, 21 N.Y.2d 388, 288 N.Y.S.2d 57, 235 N.E.2d 118, as intimated by the majority opinion: this case involved a syndicate relative to the sale of an office building in the City of Buffalo, and the corporate broker engaged the defendant Gidzelman, an accountant, to assist in finding participants. At issue was the sale of real property, not the management of property in which both litigants had a commonalty of interest, as in the instant case; there was no long period of sufferance, and above all, the issue in the *Reiter* case was not summarily disposed of. What was before the appellate court in that case was a decision of a Special Referee, the Honorable Meir Steinbrink, after a trial. There was division in the Appellate Division, and the Court of Appeals, in reversing, said of Article 12–A of the Real Property Law (pp. 391–392, 288 N.Y.S.2d p. 61, 235 N.E.2d p. 120): "This article is penal in nature and should be strictly construed. Its provisions are not broad enough 'to cover * * * every transaction in which an

interest in real estate may be part of the subject of transfer.'" (Citing cases.)

To close with an ancient axiom, "Where there is any doubt, there can be no doubt." The subject case, like the *Reiter* case (*supra*), is not suitable for summary judgment.

37 A.D.2d 952

RELIABLE TEXTILE COMPANY, Inc., Plaintiff-Respondent, v. DEPTULA TRUCKING COMPANY, Inc., Defendant-Appellant.

Supreme Court, Appellate Division, First Department.
Nov. 23, 1971.

Action against carrier by truck for loss of merchandise. The Supreme Court, New York County, William Kapelman, J., found for shipper and trucking company appealed. The Supreme Court, Appellate Division, held that where there was no allegation that contract carrier was negligent and shipper of goods sought recovery for loss of merchandise on theory that carrier was insurer, complaint should have been dismissed.

Reversed.

Kupferman, J., dissented in part and filed opinion.

1. Carriers ⇐4

Where trucking company acted as carrier for two companies under long-term contracts and did not publicly hold itself out to carry goods of all persons, trucking company was contract carrier and not common carrier.

2. Carriers ⇐131

Where there was no allegation that contract carrier was negligent and shipper of goods sought recovery for loss of merchandise on theory that carrier was insurer, complaint should have been dismissed.

3. New Trial ⇐161(1)

Trial court was without power, on its own motion, unconditionally to increase verdict.

J. F. McNulty, Niagara Falls, for plaintiff-respondent.

J. D. Ahearn, New York City, for defendant-appellant.

Before MARKEWICH, J. P., and KUPFERMAN, MURPHY, McNALLY and TILZER, JJ.

VIRGINIA: IN THE CIRCUIT COURT OF THE COUNTY OF GREENE

GRENCO REAL ESTATE INVESTMENT TRUST

Plaintiff

v.

NATHANIEL GREENE DEVELOPMENT CORPORATION

Defendant

MEMORANDUM OF LAW

I. Procedural Posture of Case

Grenco Real Estate Investment Trust, hereafter GRENCO, filed its Motion For Judgment against Nathaniel Greene Development Corporation, hereafter NGDC, in the Circuit Court Of Greene County requesting judgment for money had and received by NGDC. NGDC demurred to the Motion For Judgment and, pursuant to GRENCO's request, stated the grounds of the Demurrer. A memorandum of law was filed by NGDC in support of its Demurrer. After a hearing on the Demurrer, the Court requested a memorandum of law from GRENCO, which memorandum has been duly filed. This memorandum of law on behalf of NGDC responds to the arguments presented in GRENCO's memorandum.

II. Statement of Facts

The facts forming the basis of this memorandum have been set forth in detail in the two preceding memoranda, and will not be repeated here.

III. Argument

A. Knowledge of GRENCO of NGDC's Capacity to Act as Agent

GRENCO argues in its memorandum that the question of GRENCO's knowledge of NGDC's lack of a real estate license at the time of the execution of the contract in question cannot be considered on the pleadings so far filed. GRENCO takes the position that the imputation of an agent's knowledge to the principal occurs only where third parties are concerned, which is not the case here. GRENCO Memorandum at 3.

This argument is unresponsive to NGDC's contention that the knowledge of an agent's capacity to act on behalf of a principal is always chargeable to such principal. The distinguishing features of the agent are his representative character and his derivative authority. 1A M. J. "Agency" §2. It is one of the characteristics of the principal-agent relationship that the agent steps into the shoes of the principal

and acts for him. 2A C.J.S. "Agency" §5. It follows from these principles that a principal, absent fraud or misrepresentation, will always be charged with the knowledge of the capacity of its agent, since the agent acts in the principal's stead. To conclude otherwise would destroy the representative character and derivative authority inherent in the agency relationship.

Applied to the case at bar, the law will impute to GRENCO the knowledge of NGDC's capacity--or lack thereof--to act as an agent for the sale of real estate. If the pleadings allege neither fraud or misrepresentation nor affirmatively deny such capacity, then it must be inferred from the pleadings that the principal, here GRENCO, possessed such knowledge. No such allegations or affirmative denial appear in GRENCO's Motion For Judgment.

B. In Pari Delicto

GRENCO misinterprets the Enlow case. The Court in the initial portion of its opinion ruled that the parties were not in pari delicto partly for the reason that the penal statute then in force did not apply to the contract or the parties before the Court. 201 Va. at 785. Nor, according to the Enlow Court, was Higgerson barred from suing on the contract because it had knowledge of Enlow's lack of a contracting

license. However, Enlow did not hold that knowledge standing alone did not bar suit. Knowledge did not bar suit because to hold otherwise would have resulted in benefiting a wrongdoer and because Higgerson fell within the class of persons protected by the licensing statute. 201 Va. at 786, 787. Clearly, Enlow did not reach the question, all other things being equal, of whether knowledge alone would bar suit. And that question is precisely the issue in this case.

GRENCO would have the Court believe that to permit NGDC to prevail here would in fact benefit a wrongdoer because NGDC would retain certain commissions. GRENCO Memorandum at 5. Given GRENCO's knowledge of NGDC's lack of a broker's license, consider the alternative. GRENCO would have profited by the sale of the real estate, and as well recouped the costs incurred in selling the land.

Furthermore, GRENCO cannot rely on the fact that it is among the class of persons sought to be protected by the licensing statute. Again, NGDC reiterates the position taken in its original memorandum. The public sought to be protected by the enactment of the licensing statute is the buying public. The statute does not purport to extend its benefits to the owners and developers of land. Massie v. Dudley, 173 Va. 42 (1939).

GRENCO's reliance on the Enlow case is further misplaced when the comparative positions of the parties in these cases are analyzed. Enlow involved an unlicensed party asserting the illegality of the contract to negate its liability for its unquestioned breach of a road construction contract. In the case at bar, GRENCO is advancing illegality as a basis for the recovery of commission paid under a fully completed and executed contract. Nowhere in its Motion For Judgment does GRENCO aver a breach of contract or defective performance under the contract. This factual distinction undercuts GRENCO's positive assertion that the Enlow case should be determinative of the questions now before this Court.

C. Public Policy

GRENCO suggests that even though it may be in pari delicto with NGDC, it is still entitled to recover the commissions because it qualifies for the major exception to the in pari delicto rule--public policy. GRENCO Memorandum at 6. The public policy undergirding the licensing statute will be promoted in this case only if GRENCO prevails. GRENCO Memorandum at 7.

The authorities to which GRENCO resorts to sustain this position lead in fact to the opposite conclusion. Colbert v. Ashland Construction Co.,

176 Va. 500 (1940) is clearly distinguishable from the instant case. There, an unregistered contractor sought to recover sums due it under a construction contract and was denied relief. In this case, the tables are turned and the unlicensed party is being sued instead of suing. Also, Colbert did not even deal with the in pari delicto issue that figures so prominently in this case.

Massie, supra, is quoted at length in GRENCO's Memorandum (Page 7) in order to highlight the public policy behind statutes requiring licenses for real estate brokers. The statutes "have the same general purpose and are designed to protect the public from the fraud, misrepresentation and imposition of dishonest and incompetent persons." Massie, supra, 173 Va. at 55. GRENCO is not an innocent purchaser of land. It is a real estate investment trust, a creature of statute devoted to the acquisition and development of real estate, which is then sold to the consuming public. GRENCO does not constitute part of the "public" alluded to in Massie. Surely, the purchasers of land from developers such as GRENCO are the ones whom the licensing statutes are designed to protect from "the fraud, misrepresentations and imposition of dishonest and incompetent persons." And not only is GRENCO not a purchaser of land in this case, but also in its Motion For Judgment it does not allege any fraud, misrepresentation or imposition

on the part of NGDC.

What seems to disturb GRENCO here is the fact that NGDC can "reap" the benefits of the land sales without complying with the applicable statutes. GRENCO Memorandum at 7. GRENCO would have the Court believe that public policy would instead be promoted by permitting owners of land to knowingly employ unlicensed agents to sell land, and then to permit such owners to recover the commissions paid to such agents for the sale of the lands. Public policy does not lend aid to GRENCO in this case.

NGDC's position can be briefly summarized. GRENCO's knowledge of the capacity of its agent NGDC can and should be considered in the existing pleadings. Knowledge of the want of a license on NGDC's part renders GRENCO *in pari delicto* and prohibits GRENCO from maintaining any action against NGDC. The Virginia Supreme Court has never held that, notwithstanding knowledge, a party in GRENCO's position can maintain an action against an unlicensed party. The Court in *Enlow* held only that knowledge would not preclude a suit against an unlicensed party when other extenuating circumstances were present. Nor has GRENCO shown that it falls under the public policy exception to the *in pari delicto* rule.

D. Nature of Action and Relief Requested

GRENCO contends that its action lies for

money illegally had and received. GRENCO's Memorandum at 8. Reference to GRENCO's Motion For Judgment discloses that GRENCO also seeks a declaration of the contract's unenforceability against GRENCO. The common count of assumpsit encompasses no more than an action for money had and received. To avoid confusion and to give NGDC full notice of the true nature of this claim, GRENCO should at least be required to elect between the two remedies it requests.

The case of Bleecker Charles Company v. A. & D. Harrison, Inc., 326 N.Y.S. 2d 214 (1971) is cited by GRENCO for the proposition that it can recover the commissions paid to an unlicensed broker for the sale of real estate. Bleecker differs from the case at bar in several important particulars. Bleecker involved a suit by a partnership against a corporation for management fees paid to the latter for its management of a building owned by the corporation. The basis of the suit was that the corporation had no real estate brokerage license. GRENCO in this case is suing for real estate sales commissions, not management fees. Bleecker makes no mention of the sale of any real estate. Virginia law does not require, as New York law apparently must, a real estate license to manage property. Nor does Bleecker present the issue of in pari delicto through the knowledge question. Virginia cases, as shown in NGDC's initial memorandum,

attach considerable importance to the concept of in pari delicto. A finding of in pari delicto by a Virginia court would in most cases bar suit altogether.

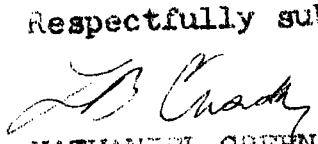
The Bleecker court devoted considerable attention to the defendant's contention that because all of its stock was owned by one of the general partners of the plaintiff partnership the individual was in fact managing his own property for which no license was required. The New York court rejected this claim by reference to the letter and spirit of its own statutory scheme. This particular issue was not raised by NGDC's Demurrer. Moreover, Virginia law permits one who owns land to sell it himself without a brokerage license. Va. Code Ann. §54-734 (1950). The precise issue confronting the Bleecker court has yet to come before the Virginia Supreme Court. Bleecker is irrelevant to the discussion of the questions presented by the Demurrer.

IV. Conclusion

On the basis of the memoranda of law submitted in support of NGDC's Demurrer to GRENCO's Motion For Judgment, several conclusions emerge. First, the contract in question is illegal and GRENCO cannot found an action on such contract. Secondly, the facts giving rise to the illegality of the contract were known to GRENCO at the

inception of and during the course of performance under the contract. GRENCO is therefore in pari delicto with NGDC and barred from suing NGDC. Third, public policy does not protect GRENCO in this case and does not favor the type of recovery which GRENCO seeks to obtain. Fourth, the relief sought by GRENCO is inappropriate. In sum NGDC's Demurrer should be sustained for reason that GRENCO's Motion For Judgment does not state a valid cause of action for damages cognizable by a Virginia court.

Respectfully submitted,



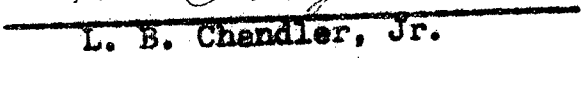
NATHANIEL GREENE DEVELOPMENT
CORPORATION
By Counsel

L. B. Chandler, Jr.
Chandler and Huff
415 Park Street
Charlottesville, Virginia 22901

Counsel for Defendant

CERTIFICATE

I hereby certify that a copy of the foregoing memorandum was mailed to Harold Bailes, Esquire, Attorney for Plaintiff, at 413 7th Street, N. E., Charlottesville, Virginia, on this 29 day of April, 1974.



L. B. Chandler, Jr.

ORDER

This cause came on this 3rd day of June, 1974, to be heard upon the Motion for Judgment filed by the Plaintiff, the Demurrer filed in response thereto by the Defendant, upon oral argument of counsel, and upon written memoranda filed by each of the parties, upon consideration of all of which it is the opinion of this Court that the knowledge of the agent, Defendant, as to the status of its being an unlicensed real estate salesman would not be imputed to the principal, the Plaintiff herein, in a situation such as this where the disclosure of such information would be to the detriment of the agent. Inasmuch as the Defendant based its Demurrer on the assumption that the knowledge of the agent would be imputed to the principal, and inasmuch as it is the opinion of this Court that the knowledge of the agent is not to be imputed to the principal in this case, it is this Court's belief that the issue of the effect of knowledge is not properly before the Court at this time and it is further the opinion of this Court that the Demurrer filed on behalf of the Defendant herein should be overruled, accordingly it is ADJUDGED, ORDERED, and DECREED that the Demurrer filed on behalf of the Defendant is overruled and that the Defendant, Nathaniel Greene Development Corporation, shall have twenty-one (21) days from the date hereof to file Grounds of Defense to the Motion for Judgment filed against it by the Plaintiff in this matter.

ENTER:_____

DATE:_____

We ask for this:

By_____
Robert M. Musselman

Seen:

_____
L. B. Chandler, Jr.

To The Honorable George M. Coles, Judge Of The Above Styled Court:

Comes now the Defendant, Nathaniel Greene Development Corporation, by counsel, and for its pleadings in response to the Motion for Judgment filed by Plaintiff, respectfully states as follows.

Plea Of The Doctrine Of Laches

Defendant, Nathaniel Greene Development Corporation, says that this suit is barred by the application of the doctrine of laches.

Grounds Of Defense

For its Grounds Of Defense, the Defendant, Nathaniel Greene Development Corporation, states as follows:

1. That the allegations contained in paragraph 1 of the Motion for Judgment are hereby admitted.

2. That the allegations contained in paragraph 2 are admitted to the extent that on December 15, 1970, Defendant entered into a contract with Plaintiff, a portion of which contract provided for the payment by the Plaintiff to the Defendant of a thirty per cent (30%) commission, but Defendant specifically denies that such commission was based solely on the sales of properties owned by Plaintiff. In fact, the thirty per cent (30%) figure was based on the gross income of Plaintiff, from all sources originating during the term of the contract, to include interest income and income from the sale of timber from Plaintiff's land.

DLER AND HUFF
ORNEYS AT LAW
5 PARK STREET
LOTTESVILLE, VA.

(a) The figure of thirty per cent (30%) was allocated on a basis of management expenses, 33 1/3%; promotional expenses, 33 1/3%; and selling expenses, 33 1/3%; and such allocations were accepted by Plaintiff and incorporated into the aforesaid contract.

3. That the allegations contained in paragraph 3 are hereby admitted.

4. That the allegations contained in paragraph 4 are hereby denied. Plaintiff paid to Defendant Forty-Eight Thousand Five Hundred Sixty-Nine and 31/100 Dollars ($48,569.31) pursuant to the aforesaid contract for sales, promotion and management functions.

5. That the allegations contained in paragraph 5 are admitted to the extent that Defendant was not licensed as a real estate salesman or broker either at the time when the contract was executed nor at the time the aforesaid Motion for Judgment was filed. The allegation that such license was required by Virginia law, Virginia Code Annotated, Section 54-749, is denied.

6. That the allegations contained in paragraph 6 are hereby denied.

7. That the allegations contained in paragraph 7 are hereby denied.

8. That the allegations contained in paragraph 8 are hereby admitted.

9. That the allegations contained in paragraph 9 are hereby admitted.

10. That since the Plaintiff alleges in its Motion for Judgment that the contract entered into between the parties was illegal because Defendant did not possess the necessary real estate licenses as was required by Section 54-749 of the Code of

LER AND HUFF

Virginia, and since the Plaintiff is relying upon this alleged illegal contract to recover the amount prayed for in its Motion for Judgment, Plaintiff is precluded from recovering any amount whatsoever which is based on a contract which said Plaintiff asserts is illegal.

11. That if in fact said contract was illegal, for the reasons as alleged in Plaintiff's Motion for Judgment, Plaintiff is estopped from relying on such illegality to recover any monies under such contract, because Plaintiff was fully apprised of the fact that Defendant did not possess a real estate license at the time the contract was executed, and therefore Plaintiff would stand in pari delicto with Defendant concerning any such alleged illegality.

12. That the aforesaid contract was a legal and binding contract because at the time of the execution of the contract in December of 1970, Defendant was the owner of Five Per Cent (5%) of the outstanding certificates of interest of Plaintiff and therefore was selling land of which it had a part ownership of and thereby was exempt from any licensing provisions of Section 54-749 Code of Virginia, pursuant to Section 54-734 Code of Virginia, which states as follows:

> (a) The provisions of this chapter shall not apply to any person, partnership, association or corporation who as owner or lessor shall perform any of the acts aforesaid with reference to property owned or leased by them, or to the regular employees thereof, with respect to the property so owned or leased, where such acts are performed in the regular course of, or as an incident to, the management of such property and the investment therein.

LER AND HUFF

13. That if in fact that portion of the contract relating to commissions paid for sales of Plaintiff's property was illegal as alleged by Plaintiff, the contract as a whole was severable and the sales portion in said contract in fact only accounted for approximately one-third (1/3) of the entire contract. The figure of thirty per cent (30%) as set out in the aforesaid contract was allocated between the parties as follows:

(a) Management duties to plan and develop the property of Plaintiff amounted to 33 1/3% of the entire contract. These managerial duties included the supervision of the clearing of land, road construction, building of lakes and water systems, surveying work and various and sundry other related duties.

(b) Promotional duties to include all responsibility for the placing and cost of advertising and promotion of the property of Plaintiff, 33 1/3%.

(c) Selling duties to include the hiring and training of sales personnel as well as the actual selling of the property, 33 1/3%.

14. That if in fact the actual selling of the lots by Defendant was illegal because Defendant did not possess the necessary license, such selling duties only accounted for approximately one-third of the terms of the contract as set out in paragraph 13 above, and the remaining portions of said contract dealing with management and promotional functions would not be tainted by any such alleged illegality, because Defendant was not required to be licensed to perform the aforesaid functions as were required pursuant to the contract.

15. That during the term of the aforesaid contract the

actual amounts allocated to the functions of selling management and promotion by Defendant were as follows:

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(a) Selling 33.84%
(b) Management 36.11%
(c) Promotion 30.05%

16. That Defendant will rely upon any and all properly provable defenses to this Motion for Judgment which may be disclosed subsequent to the filing of this pleading or by evidence of the trial of the cause, and Defendant specifically reserves the right to amend this pleading if at such time it be so advised.

Wherefore, Defendant denies that it is liable to the Plaintiff for the sum demanded, or for any sums whatsoever, and having fully answered it respectfully prays that this action be dismissed and that it recover of the Plaintiff its costs in this behalf expended.

NATHANIEL GREENE DEVELOPMENT
CORPORATION

By L B Chandler
Counsel

L. B. Chandler, Jr.
Chandler and Huff
415 Park Street
Charlottesville, Virginia

Counsel for Defendant

Counterclaim

Comes now, the Defendant, Nathaniel Greene Development Corporation, by counsel, and for its Counterclaim against Plaintiff, Grenco Real Estate Investment Trust, sets forth the following facts and allegations.

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1. That pursuant to the terms of the contract entered into between the parties and filed in this action as Plaintiff's Exhibit A, Defendant was to receive from Plaintiff an amount equal to thirty per cent (30%) of any interest, actually received by Plaintiff as a result of any contracts of sale for the property of plaintiff.

2. That from December 15, 1970, the date of the aforesaid contract, until August 15, 1973, the Plaintiff made regular payments on a monthly basis to Defendant representing thirty per cent (30%) of Plaintiff's interest income.

3. That from August 15, 1973, until the present time, Plaintiff has continued to receive interest income from the aforesaid sales contracts, to which Defendant is entitled to its share of thirty per cent (30%) of same. That on August 15, 1973, an accounting was made between the parties concerning such interest income and it was determined that the Plaintiff had potential interest income remaining under its sales contracts of an amount of Twenty Thousand Seven Hundred Forty-Six and 67/100 Dollars ($20,746.67) of which if Plaintiff actually received all of the aforesaid amount, Defendant would be entitled to receive Six Thousand Two Hundred Twenty-Four and No/100 Dollars ($6,224.00), representing thirty per cent (30%) of the Plaintiff's interest income actually received.

4. That as of August 16, 1973, Defendant has not had access to or been able to determine the exact amount of interest received by Plaintiff, and therefore is not in a position at this time to determine the exact dollar amount owed to it pursuant to the terms of the aforesaid contract.

5. That on several occasions, Defendant has made demand upon the Plaintiff for the payment of all interest due Defendant under the terms of said contract.

6. That the Plaintiff has refused such demands and has taken the position that it owes none of this interest to Defendant.

Wherefore, the Defendant prays that judgment be awarded to the Defendant in an amount equal to thirty per cent (30%) of the actual interest income received by Plaintiff subsequent to August 15, 1973, together with interest and the costs of Defendant expended in this suit.

NATHANIEL GREENE DEVELOPMENT CORPORATION

By L B Chandler Jr
Counsel

L. B. Chandler, Jr.
Chandler and Huff
415 Park Street
Charlottesville, Virginia

Counsel for Defendant

CERTIFICATE

I hereby certify that a true and correct copy of the foregoing pleadings and counterclaim was mailed to Harold L. Bailles, Esquire, 413 Seventh Street, N.E., Charlottesville, Virginia, counsel for Plaintiff this 29th day of June, 1973.

L B Chandler

To The Honorable George M. Coles, Judge of the said Court:

Comes now the plaintiff, Grenco Real Estate Investment Trust, and in response to the pleadings filed on behalf of the defendant, Nathaniel Greene Development Corporation, respectfully pleads as follows:

Your plaintiff respectfully submits that the Doctrine of Laches does not bar the bringing of this suit by your plaintiff and hereby moves the Court to set down for a hearing this issue at the earliest appropriate date.

As to the grounds for defense filed on behalf of the defendant, Nathaniel Greene Development Corporation, your plaintiff comes now and demurs to each and every ground of defense alleged by the defendant for the reason that those defenses taken separately or read together establish no defense, as a matter of law, to the motion for judgment filed by the plaintiff in this matter.

Wherefore, plaintiff respectfully prays that it be awarded judgment in the sums and on the conditions set forth in its motion for judgment heretofore filed in this matter, and that it be awarded its costs in its behalf expended.

GRENCO REAL ESTATE INVESTMENT TRUST

By Harold R. Bailes
Counsel

Robert M. Musselman

By Harold R. Bailes
413 Seventh Street, N.E.
Charlottesville, Virginia
Counsel for Plaintiff

In response to the Counterclaim filed on behalf of the defendant, Nathaniel Greene Development Corporation, your plaintiff comes now by counsel, and demurs to that Counterclaim for the reason that said Counterclaim hereinbefore filed by the defendant is not sufficient in law and does not state a cause of action upon which relief can be granted.

Respectfully submitted,

GRENCO REAL ESTATE INVESTMENT TRUST

By Harold A. Bailes
Counsel

Robert M. Musselman, p.q.

By Harold A. Bailes
413 Seventh Street, N.E.
Charlottesville, Virginia
Counsel for Plaintiff

C E R T I F I C A T E

I hereby certify that on the 15th day of July, 1974, a true copy of the foregoing pleadings were mailed or delivered to L. B. Chandler, Jr., Chandler and Huff, 415 Park Street, Charlottesville, Virginia, 22901, Counsel of record for the defendant.

Harold A. Bailes

Filed 7-15-74 Marie C. Turner Clerk 2:55 PM

GRENCO REAL ESTATE INVESTMENT TRUST,

Plaintiff

v. INTERROGATORIES

NATHANIEL GREENE DEVELOPMENT CORPORATION,

Defendant

INTERROGATORIES PROPOUNDED TO PLAINTIFF

Pursuant to Rule 4:8 of the Rules of the Supreme Court of Virginia, the plaintiff, Grenco Real Estate Investment Trust, is hereby requested to answer the following Interrogatories propounded upon them by defendant, Nathaniel Greene Development Corporation, by counsel, serving sworn answers within twenty-one (21) days of the service of these Interrogatories.

INSTRUCTIONS

A. The terms "reports" and "documents" mean any written, recorded or graphic material, however, produced or reproduced, containing any mention, discussion, notation or conclusion concerning the subject matter in question.

B. Where the identification of a report or document is required, such identification shall be sufficient for characterization of such reports or documents in a subpoena duces tecum, and must include: (1) the date thereof; (2) the name, address, position and legal and technical background of the author; (3) the name, address and position of the recipient; (4) the names, addresses and positions of all persons who received copies or persons to whom copies were circulated or listed

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as having been circulated; (5) a general description of the subject matter and contents (in lieu of such description a copy may be attached); (6) the name and address of present custodian(s) of a copy or copies; (7) a description of the circumstances under which it was sent or received; (8) the location from which it was sent and where it was received.

C. The term "person" as used herein shall mean person, firm, partnership or corporation.

D. Where the identification of a person is required, such identification should be sufficient to notice a deposition of such person and to serve such person with process to require his attendance at a place of examination, and must include: (1) names (2) present or last known home address (3) present or last known business address (4) title or occupation of employer.

E. For each document which plaintiff will contend is privileged or otherwise excludable from discovery, such document shall be identified, its subject matter described and the basis for such claim or privilege or other grounds for exclusion shall be stated.

F. As used herein the singular of any word or phrase, includes the plural.

INTERROGATORIES

1. Identify, and attach copies of same to the answers any and all contracts, agreements, notations of extras, memoranda, correspondence, plans, specifications, or any other documents or written material of any kind and nature whereby

plaintiff agreed to pay to the defendant a thirty per cent (30%) commission for any services performed on behalf of the plaintiff by the defendant, Nathaniel Greene Development Corporation.

2. State whether there were any modifications of any kind or nature of the agreement reached between plaintiff and defendant, Nathaniel Greene Development Corporation, pertaining to the nature or extent of the services to be performed by defendant for plaintiff, Grenco Real Estate Investment Trust, including but not limited to the method and amount of payments to be made, and the time period in which these services were to be performed.

3. If the answer to Interrogatory 2 is affirmative, explain in detail, describing the nature of same, each and every modification and/or amendment thereto, and attach copies of any and all documents of any kind and nature which reflect or are otherwise relevant to such modification and/or amendment.

4. Identify each and every person, who on December 15, 1970 was a trustee of Grenco Real Estate Investment Trust, and for each person so identified, state his position, nature and extent of responsibilities and tenure with plaintiff, and the current address of each person so identified.

5. State whether prior to December 15, 1970, plaintiff, Grenco Real Estate Investment Trust, entered into any negotiations either oral or written with the defendant, concerning the matters which were the subject of an agreement entered into on December 15, 1970, between the plaintiff and the defendant.

6. If the answer to Interrogatory 5 is affirmative, explain the nature and extent of these negotiations in-

cluding the dates and places where they occurred, and identify each and every person whether trustee, officer, agent, employee, servant or otherwise associated with the plaintiff who participated in the aforesaid negotiations on behalf of the plaintiff, Grenco Real Estate Investment Trust.

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7. Identify all persons who were compensated by plaintiff for any services performed by them relating to the aforementioned agreement of December 15, 1970 between the plaintiff and the defendant, and for each person so identified, give the following information: (a) his job classification during his tenure on the job; (b) the dates such person worked and the total hours worked on each such date.

8. (a) State the factual background, and identify any and all supporting documents relevant thereto attaching same to the answers of the statement made in paragraph 2 of plaintiff's Motion for Judgment that "On December 15, 1970, the defendant entered into an agreement with the plaintiff, which agreement provided for the payment by the plaintiff to the defendant of a thirty per cent (30%) commission based on sales of properties owned by the plaintiff".

(b) Identify each and every person known to plaintiff who has any information or knowledge with respect to the language quoted in Interrogatory 8 (a) and describe in detail the scope and extent of said information and knowledge.

9. (a) State the factual background and identify any and all supporting documents relevant thereto attaching same to the answers of the statement made in paragraph 5 of plaintiff's Motion for Judgment that: "the defendant, Nathaniel Greene Development Corporation, at the time of entering into the

contract and continuing until the time of the filing of this motion for judgment was not licensed as a real estate salesman or broker, as required by Virginia law, . . ."

(b) Identify each and every person known to plaintiff who has any information or knowledge with respect to the language quoted in Interrogatory 9 (a) and describe in detail the scope and extent of said information and knowledge.

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10. Explain in detail the basis upon which the plaintiff contends that it paid to the defendant commissions totalling Forty-Nine Thousand One Hundred Six and 53/100 Dollars ($49,106.53).

11. Explain in detail the provisions contained in plaintiff's Exhibit A relating to the "gross selling price of Grenco-owned land," specifically as to the method of computation used by plaintiff in determining gross selling price.

12. State the exact amounts of monies which the plaintiff paid to the defendant for the following items and explain in detail the meaning of the following items as is set forth in paragraph 2 of plaintiff's Exhibit A.

(a) gross selling price of Grenco-owned land

(b) timber sold during the term of the contract

(c) other commodities and services

(d) gross income received as interest on sales contracts originated by Nathaniel Greene Development Corporation

13. Describe and explain in detail the nature and extent of other commodities and services which were to be provided by defendant, Nathaniel Greene Development Corporation, pursuant to paragraph 2 of plaintiff's Exhibit A, and further

describe and explain in detail the nature and extent of any other commodities and services which were actually furnished by defendant during the term of the contract.

14. State whether the term "Grenco lands" as set out in plaintiff's Exhibit A included any property other than the Shifflett tract of two hundred sixty-five (265) acres.

15. If the answer to Interrogatory 14 is affirmative explain in detail the description, location and condition of such land.

16. Describe and explain in detail the nature and amounts of any construction costs other than supervisory work which the plaintiff incurred under the provisions of the contract referred to as plaintiff's Exhibit A, identifying the amount of monies paid to the defendant for such costs and the amounts paid to any and all other persons or corporations for such costs.

17. Identify and attach copies of same to the answers any and all payroll sheets, time sheets, wage and hour records, payroll records, or any other documents of any kind and nature which relate in any way whatsoever to the information made reference to in Interrogatory 16.

18. State and explain in detail the procedures utilized by plaintiff, including but not limited to the identity of any employees, trustees, officers, and/or agents of plaintiff in approving any work performed by defendant, Nathaniel Greene Development Corporation, for which payment was required.

19. State and explain in detail any and all administrative costs borne by the plaintiff during the term of the contract between the parties.

20. State the exact date when plaintiff first became aware that defendant, Nathaniel Greene Development Corporation, did not possess a license as a real estate salesman or broker, as allegated in paragraph 5 of plaintiff's motion for judgment.

21. Explain in detail how plaintiff first became aware of the facts as stated in Interrogatory 20.

22. State whether the contract of December 15, 1970 entered into between plaintiff and defendant was ever reviewed by any legal counsel of the plaintiff or by any other attorney employed by or retained by plaintiff; or by any trustee of the plaintiff who was an attorney at law.

(a) What actions if any did plaintiff take as a result of any advice given them by any attorney concerning the aforesaid contract.

23. If the answer to Interrogatory 22 is affirmative, state the names and addresses of any attorneys so involved, and the substance of any advice given to plaintiff by any such attorney.

24. Describe and explain in detail the nature and extent of any services which defendant, Nathaniel Greene Development Corporation, furnished plaintiff pursuant to the terms of the aforesaid contract of December 15, 1970.

25. State whether defendant, Nathaniel Greene Development Corporation, completed its obligations under the aforesaid contract.

26. If the answer to Interrogatory 25 is negative, state which obligations arising under the aforesaid contract, the defendant failed to complete.

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27. List the names of all shareholders of Grenco Real Estate Investment Trust as of the date of December 15, 1970 and for each such shareholder list the number of shares of record which he owned as of the aforesaid date.

28. With respect to each affirmative allegation set forth in plaintiff's Motion for Judgment, give the following information: (a) identify and produce for inspection or copying all reports and documents of every kind and nature whatsoever upon which plaintiff will rely in support of such allegations; (b) identify each individual known to plaintiff who has information as to the facts or conclusions giving rise to such allegations, and describe in detail the scope and extent of said information and knowledge.

29. Identify each and every individual or individuals who plaintiff intends, as of the present time, to call as witnesses on its behalf at the trial hereof, and state in detail the nature and content of such person's expected testimony.

30. (a) Identify by name, business address and qualifications each person whom plaintiff expects to call as an expert at the trial of this case.

(b) State as to each expert identified in answer to this Interrogatory: (i) the subject matter on which he is expected to testify; (ii) the substance of the facts and opinions to which he is expected to testify; (iii) as to each opinion set forth in answer to this Interrogatory, state a summary of the factual and technical grounds on which he bases his opinion; (iv) identify any and all reports, documents, plans, specifications, blue prints, and any other written material of

any kind and nature made available to any expert identified in this Interrogatory and attach a copy of same to these answers; (v) identify any reports, documents, notes, memoranda, and any other written material of any kind and nature produced or generated by such expert, and attach copies of same to the answers.

31. Separately and for each of the foregoing Interrogatories, identify: (a) each person who in any way contributed to or assisted in the preparation of the answer to the Interrogatory; (b) the contribution or assistance of each person identified in the answer to sub-item (a); (c) each person having direct knowledge of any portion of the facts on which the answer to the Interrogatory was based; (d) which facts the person identified in the answer to sub-item (c) had knowledge of; (e) each report or other document on which the answer to the particular Interrogatory was based.

32. State whether or not from August 15, 1973 until date plaintiff has received interest income from the sale of properties by defendant, Nathaniel Greene Development Corporation, pursuant to the terms of the aforesaid contract of December 15, 1970.

33. If the answer to Interrogatory 32 is affirmative, state the exact amount of any such interest income so received, and attach copies of any and all documents of any kind and nature which relate in any way whatsoever to the amounts so received.

NATHANIEL GREENE DEVELOPMENT CORPORATION

By _____
Counsel

L. B. Chandler, Jr.
Chandler and Huff
415 Park Street
Charlottesville, Virginia

CERTIFICATE

I hereby certify that a true copy of the foregoing Interrogatories was mailed to Harold Bailes, Esquire, 400 Court Square, Charlottesville, Virginia, 22901, on the 11th day of October, 1974.

LB Chandler

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GRENCO REAL ESTATE INVESTMENT TRUST,

Plaintiff

v.

REQUEST FOR ADMISSIONS

NATHANIEL GREENE DEVELOPMENT CORPORATION,

Defendant

Pursuant to Rule 4:11 of the Rules of the Supreme Court of Virginia, the plaintiff, Grenco Real Estate Investment Trust, is hereby requested to make the following admissions, within twenty-one (21) days of the service of these request for admissions upon the plaintiff.

1. That during the period commencing on October 1, 1970 and ending on December 14, 1970 the plaintiff, Grenco Real Estate Investment Trust, at a meeting of its Board of Directors, discussed the fact that the defendant, Nathaniel Greene Development Corporation did not possess a real estate broker's license nor a real estate salesman's license.

2. That on December 15, 1970, the date of the contract sued upon in plaintiff's motion for judgment, the plaintiff was aware of the fact that defendant, Nathaniel Greene Development Corporation, did not possess a real estate broker's license nor a real estate salesman's license.

3. That on December 15, 1970, the defendant, Nathaniel Greene Development Corporation, was the record owner of approximately five per cent (5%) of the outstanding shares of interest of the plaintiff, Grenco Real Estate Investment Trust.

4. That plaintiff and defendant discussed the possibility of selling one share of the stock or certificates of interest of plaintiff to any salesman or employee of defendant,

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Nathaniel Greene Development Corporation.

5. That plaintiff, Grenco Real Estate Investment Trust decided against the suggestion postulated in Admission Number 4, because said plaintiff was of the impression that since the defendant owned approximately five per cent (5%) of the outstanding stock of plaintiff, it would not be necessary for defendant to secure a real estate license to sell property of which said defendant had part ownership of.

6. That C. W. Parker, an attorney and trustee of plaintiff, reviewed the aforesaid contract of December 15, 1970, and did not advise the plaintiff that defendant could not perform its duties under the terms of said contract without first securing a real estate license.

7. That prior to the entering into of the contract of December 15, 1970, the defendant, Nathaniel Greene Development Corporation, submitted a proposal to the plaintiff in which the figure of a thirty per cent (30%) commission fee was allocated among the following functions in the following amounts:

(a) Sales - one-third
(b) Management - one-third
(c) Promotion - one-third

8. That the proposal as set out in Admission 7 was accepted by the plaintiff as being proper, and the various functions of sales, management and promotion as contained in the aforesaid proposal were incorporated into the final contract entered into between the parties on December 15, 1970, at the direction of the plaintiff, Grenco Real Estate Investment Trust.

9. That the initial term of the contract of December 15, 1970 was for a period of one year and in December of 1971, the aforesaid contract was reviewed by both parties and it was renewed for a term of one additional year.

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10. That the plaintiff never claimed that defendant had entered into the contract illegally in December of 1970 nor in December of 1971 when the initial contract was renewed for another year.

11. That the plaintiff first claimed that defendant had illegally entered into the aforesaid contract on December 4, 1973.

12. That on or about December 1, 1972, the plaintiff sent a letter to defendant and/or incorporated a statement into the minutes of a meeting of its Board of Directors, which letter and/or statement contained words to the effect that the defendant, Nathaniel Greene Development Corporation, had satisfactorily performed its obligations under the terms of the aforesaid contract of December 15, 1970, which contract had been renewed until December 15, 1972.

13. That plaintiff, Grenco Real Estate Investment Trust, has received interest income from August 15, 1973 until the date of these admissions, said interest income resulting from the sales of property by the defendant, Nathaniel Greene Development Corporation, pursuant to the terms of the contract of December 15, 1970.

14. That on August 15, 1973, an accounting was made between plaintiff and defendant concerning the interest income from sales of properties by defendant, and it was determined that the plaintiff had potential interest income remaining under its sales contracts in the amount of Twenty Thousand Seven Hundred Forty-six and 67/100 Dollars ($20,746.67).

NATHANIEL GREENE DEVELOPMENT
CORPORATION

By L. B. Chindy
Counsel

L. B. Chandler, Jr.
Chandler & Huff
415 Park Street
Charlottesville, Virginia

CERTIFICATE

I hereby certify that a true copy of the foregoing Request For Admissions was mailed to Harold Bailes, Esquire, 400 Court Square, Charlottesville, Virginia, 22901, on the 11th day of October, 1974.

LB Chandler

MEMORANDUM OF LAW

Statement of Facts

The facts forming the basis of this memorandum have been set forth in detail in previous memoranda and need not be repeated here.

Issues Presented

The issues dealt with in this memorandum are four:

1) Whether or not the present action at law is barred by the equitable doctrine of laches;

2) Whether or not Defendant is exempt from the licensing provisions of Virginia Code Section 54-749 by virtue of its being an "owner" of property within the intent of Section 54-734;

3) Whether or not the contract executed by the parties is severable on the issue of an apportionment of the stated single consideration; and

4) Whether or not the parole evidence rule renders inadmissable evidence of prior or contemporaneous agreements concerning the aforesaid apportionment.

Procedural Status

Grenco Real Estate Investment Trust, (hereafter GRENCO), filed its Motion for Judgment against Nathaniel Greene Development Corporation (hereafter NGDC) in the Circuit Court of Greene County. NGDC demurred to the Motion for Judgment and stated grounds for demurrer. Memoranda of Law were submitted by both sides on the demurrer issues and the Court, finding that knowledge on behalf of the Plaintiff as to the Defendant's lack of a proper license was not before the Court, overruled the demurrer. NGDC then filed its grounds for defense, asserting a plea of laches and

a counterclaim against GRENCO at the same time. GRENCO filed a demurrer to NGDC's grounds for defense and plea of laches. NGDC subsequently filed a request for admissions and interrogatories. A hearing was held on October 15, 1974 at which time this memorandum was requested.

Law and Argument

A. Application of the doctrine of laches

Defendant maintains that the present action is barred by the application of the equitable doctrine of laches. As has been stated in previous memoranda, the Plaintiff's action is one for money had and received, an action having its basis in the common law writ of assumpsit. As such, it is an action at law for money damages. Since at common law, the equitable defense of laches was not appropriate in an action at law, Defendant must, in order to invoke it here, point to a statute which changes the common law and allows a plea of laches in an action of this type.

A reliance by Defendant upon Virginia Code Section 8-241 would be completely unfounded. That statutory provision, which is in derrogation of the common law and thus must be strictly construed, allows a defendant to plead an equitable defense only in action "on a contract" and where defendant is seeking equitable relief "against the obligation of the contract." First of all, the present action is not "on a contract" since the relief sought by the Plaintiff is not grounded upon enforcement of the contract or upon any breach thereof. Rather, Plaintiff is seeking money had and received pursuant to an invalid contract. Secondly, Defendant is not here seeking any relief "against the obligation of the contract." Its grounds of defense are of an entirely opposite nature; that is, Defendant is seeking to show that the contract was valid and that Plaintiff had an obligation to

pay the commissions.

The object of Section 8-241, as explained by the Virginia Supreme Court of Appeals in Hamilton v. Goodridge 164 Va 123, 178 SE 874, was to make available to a defendant in an action at law such equitable defenses as "fraud, failure of consideration and the like" and to prevent multiplicity of suits. Clearly, then, the law was aimed at allowing defenses of a positive nature which an unsuccessful defendant in a law action might turn around and assert in a separate proceeding in equity. The purely defensive doctrine of laches did not come within that contemplation since its preclusion from an action at law would not give rise to the possibility of multiple suits. Thus, since Section 8-241 is clearly inapplicable, the common law prevails and Defendant's plea of laches is improper.

However, if the Court should nevertheless decide that laches is an appropriate defense in actions of this nature generally, it is clear that the Plaintiff in this case is not guilty thereof. When laches is plead, pursuant to the statute discussed above, the rules of equity continue to govern its application to the particular case. Caldwell v. Graig 21 Gratt (62 Va) 132. Under established equitable principles, a mere lapse of time is not sufficient for a successful invocation of the doctrine. Rather, a prejudicial delay must be shown, i.e. a delay that has somehow caused a disadvantage or injury to the defendant. Hagan Estates v. New York Mining 184 Va 1064, 37 SE 2d 75; McNeir v. McNeir 178 Va 285, 16 SE 2d 632.

The purpose behind the doctrine of laches is that because of a time lapse and death of parties, it might become impossible to ascertain all the facts of a case. Absent such a situation, the doctrine serves no purpose and is inapplicable. For example, the Virginia Supreme Court in Lyric Theatre Corp. v. Vaughan 168 Va 595, 191 SE 600, held that in a suit for ascertainment of interest in a corporation and accounting for profits,

laches was properly refused, despite a considerable time lapse, because all the material parties were living, there had been no change in the circumstances and it was not shown that the delay caused any injustice.

In the instant case, there has been no change in circumstances and no disadvantage to NGDC caused by any alleged time lapse. The money itself has been in Defendant's hands the entire time and all the material facts, information, and parties hereto have remained available throughout. Certainly the Defendant has failed to meet the burden of proof which he bears on the issue of laches. See Virginia Land Co. v. Haupt 90 Va 533, 19 SE 168.

In conclusion, the equitable doctrine of laches is improperly plead in the action at law, since no statute has changed the common law to allow it. Furthermore, under established equity principles, the doctrine is inapplicable to the present dispute since there has been no delay causing prejudice to Defendant.

B. Applicability of Statutory Exemption from Licensing Requirements

Defendant contends in paragraph 12 of its Answer that although it possessed no valid broker's license, it was exempt from the licensing provisions of the Virginia Code by virtue of Code Section 54-734, providing that:

> The provisions of this chapter shall not apply to any person, partnership, association or corporation who as owner or lessor shall perform any of the acts aforesaid with reference to property owned or leased by them, or to the regular employees thereof, with respect to the property so owned or leased, where such acts are performed in the regular course of, or as an incident to, the management ofsuch property and the investment therein.

In order to fall within this statutory exception, Defendant must meet two separate but somewhat interrelated requirements. First, the real estate, at the time of contract execution, must have been "owned by"

Defendant within the intent of the statute and secondly, the sales activities of Defendant must have been "in the regular course of, or as an incident to, the management of such property."

Defendant contends that because it owned 5% of the outstanding certificates of interest of Plaintiff, it thereby was an "owner" of Plaintiff's real property. There appear to be no Virginia cases which discuss the degree of interest in property necessary to constitute ownership within Section 54-734, and thus the Court may find it instructive to look to other jurisdictions providing the same or similar statutory exemption.

The New York case of Bleeker Charles Company v. A & D Harrison Inc., 326 N.Y.S. 2d 214, whose facts have been fully stated in previous memoranda, is again on point. In that case the defendant corporation, which had acted as a real estate broker without the required license, had as its sole stockholder, one of the general partners of the plaintiff. The defendant contended that, consequently, it was managing its own property and required no license under New York law. It should here be noted that although the New York Statutes contain no separately stated "exceptions" provision comparable to Virginia Code Section 54-734, it is nonetheless clear from New York's statutory definition of "real estate broker" as one who deals in real estate "for another" or "on behalf of the owner" that no license is required for a corporation acting for itself with respect to land which it owns. N.Y. Code, Real Property, 440. For purposes of the instant case, it is sufficient that the Court in Bleeker recognized such an exception but went on to hold that the corporate defendant, despite its ties to the plaintiff, was not dealing with its own property, and that "both the spirit and the letter of the Real Property Law" required it to be licensed. Thus, Bleeker stands for the proposition that a separate corporate entity,

in spite of certain links with the actual owner of real property, which deals in that property for compensation, cannot avoid the licensing requirement by claiming, as has NGDC in the instant case, to be an owner of the property. The policy behind the New York licensing statute, like that in Virginia, reflects a clear intention to include such entities within its requirements.

Furthermore it is highly instructive to note the clearly established principle, announced by no less an authority than Mr. Chief Justice Taft in Rhode Island Hospital Trust Co. v. Doughton 270 US 69, 46 S.Ct 256, 70 L.Ed. 475 (1926), that the owner of the shares of stock in a company is not the owner of the corporation's property. (At page 81. See also Holly Sugar Corp. v. McColgan 18 C 2d 218, 115 P 2d 8.) The shareholder may share in the company's earnings, through dividends, and may take a proportionate share of the residue upon some future dissolution, but he does not own the property of the corporation. Defendants claim of "ownership" rests solely on its 5% ownership of certificates of interest in GRENCO. Now, while the Virginia Real Estate Investment Trust is not, in a strict sense, a corporation and a certificate holder is not, strictly speaking, a shareholder, for the purposes of this dispute the Land Trust created under Virginia Code Sections 6.1 343-351 may be closely analogized to a corporation with respect to the relative rights and obligations of trustees and certificate holders. It is significant that under Section 6.1-349, certificate holders are treated, for indemnification purposes "as if they were stockholders" under the Virginia corporation law. Applying this analysis, NGDC's ownership of a small minority of GRENCO "shares", as it were, does not amount to an ownership of GRENCO's property.

The policy of the Virginia Statute and the obvious intent of the legislature in enacting the "ownership" exception clearly support this conclusion. Section 54-734 represents an effort to clarify that the harsh

penal nature of the licensing requirement is not appropriate in the case of one who is acting primarily in his own behalf, with respect to property which he owns and manages. In such a case the fear of misrepresentation to sellers of real property by unscrupulous or incompetent salesmen, which underlies the express purpose of the statute, would not come into play. On the other hand, Defendant fits clearly into the class of persons for whom the licensing requirement, rather than the exception, was enacted. Defendant managed, promoted and sold the real property of another separate entity and sought to do so for compensation. To so act, one must submit to appropriate regulation and obtain a valid license.

However, even if it is determined that Defendant "owned" the property within the statutory meaning, it still must be found that his activities were performed "in the regular course of, or as an incident to, the management of such property and the investment therein. (Emphasis supplied). The use of the term "and" in the statute implies that if the activities were not incident to management, one so acting is required to be licensed even though he argues that he was acting incident to his investment.

A recent Wyoming decision interpreting a statutory brokerage license exception nearly identical to Virginia's held that a ranch manager (a "regular employee" of the owner within the statute) required a license to collect commissions for procuring the sale of the ranch on the basis that his actions were not in the regular course of, or, incident to, his farm management. Dixon v. Ringby 405 P 2d 271 (1965). In other words, his actions as a broker did not bear a sufficiently proximate relationship to his duties as manager and employee of the owner. NGDC's situation presents an even stronger case since the only managerial function or power it had over GRENCO's property was that which it was given in the contract. Absent this required proximity between sales activities and management, Virginia law will not permit anyone to so act without a license. The public policy behind such a scheme has already been discussed.

Thus, in consideration of the foregoing discussion, Defendant did not own the real estate on the contract date and did not, at any rate, perform its sales activities as incident to property management. Consequently it cannot claim an exemption from the licensing requirement based on Virginia Code Section 54-734.

C. Severability of Contract

In paragraphs 2, 13, 14 and 15 of its Answer, Defendant admits to having entered into contract with Plaintiff, which contract provided a single 30% commission as consideration for the aggregate of all Defendant's services. However, Defendant then contends that the contract was severable and that the stated commission was in fact allocated one third each for management, promotion and sales.

Under Virginia law, there is no precise rule for determining whether a contract is severable or entire, but it is an issue to be determined based on the language employed and the subject matter of the contract. Atlantic & D. Ry v. Delaware Construction Co. 98 Va 503, 37 Se 13. However, a well established guiding principle is that whenever the stated consideration is single, the contract is entire and indivisible, regardless of the number of separate items embraces in its subject. CJS Contracts 334.

A Virginia case on point is Eschner v. Eschner 146 Va 47, 131 Se 800, in which a divorce property settlement listed several enumerated promises by the husband to the wife, for which the wife in consideration made a single promise to release all rights and claims. The Virginia Supreme Court held that the contract was entire and not severable because of the single consideration.

In the instant case, the contract is complete on its face and succinctly states a single, blanket consideration of a commission fee of 30%. This is a clear indication that the parties intended an entire contract, the usual enumerated duties of the Defendant notwithstanding.

This conclusion is further supported by the fact that under the terms of the contract, NGDC would receive a commission only upon an actual sale. Thus if it had failed to make a sale, NGDC would have been entitled to nothing for the promotional expenses and management expenses which it seeks to isolate from the sales activities. Defendant's compensation was tied to sales, an activity for which it was unlicensed. It is impossible to sever its sales activities from the single consideration upon which the contract was founded.

D. Effect of Parole Evidence Rule

Defendant seeks to introduce evidence of prior or contemporaneous agreements between it and Plaintiff to the effect that the single consideration stated on the face of their contract was to be allocated between management, promotion, and sales. Such evidence, however, is clearly inadmissable under the parole evidence rule.

It is beyond contention that in this state, prior or contemporaneous agreements which vary, modify, contradict, add to, or explain a written agreement which is on its face complete and unambiguous, are not admissable. Walker & LaVerne Co. v. First National Bank of Boston 205 Va 683, 146 SE 2d 239 (1966); King v. Commercial Finance Co. 173 Va 260, 175 SE 733 (1934). Furthermore, when the parole evidence rule applies, all evidence, both oral and written, concerning the contract in issue, is inadmissable. Sale v. Figg 164 Va 402, 180 SE 173.

In Williamsburg Power Co. v. City of Williamsburg 139 Va 787, 124 SE 215, the Virginia Supreme Court excluded parole evidence of conversations and declarations by the parties extending the express duration of the contract. I t would seem that an apportionment of an expressly single consideration and an extension of an express duration are functionally indistinguishable for evidentiary purposes.

The contract executed by GRENCO and NGDC is clearly complete and

unambiguous on its face. It was intended to be a complete expression of the parties' agreement. In consequence, any evidence of prior or contemporaneous oral or written agreements or negotiations between the parties which Defendant might seek to introduce are inadmissable.

CONCLUSION

In view of all of the foregoing, it seems clear that this action is not barred by the doctrine of laches, Defendant is not exempt from the statutory licensing requirements, the contract executed by the parties is entire and not severable, and parole evidence to the contrary is inadmissable.

Respectfully submitted,

GRENCO REAL ESTATE INVESTMENT TRUST
By Harold H. Bailey
Counsel

Bailey, Lindstrom, & Tucker, Ltd., p.q.
By Harold H. Bailey
400 Court Square
Charlottesville, Virginia

CERTIFICATE

I hereby certify that I have mailed a copy of this memorandum on the 4th day of November, 1974, to L.B. Chandler, Jr., Esq., Chandler and Huff, 415 Park Street, Charlottesville, Virginia, 22901, Counsel for the Defendant herein.

Harold H. Bailey

VIRGINIA: IN THE CIRCUIT COURT OF GREENE COUNTY

GRENCO REAL ESTATE INVESTMENT TRUST,
Plaintiff

v.

NATHANIEL GREENE DEVELOPMENT CORPORATION,
Defendant

MEMORANDUM OF LAW

Statement Of Facts

The facts on which this memorandum is based, having been fully developed in previous memoranda, will be omitted from this memorandum.

Issues Presented

This memorandum deals with the following four issues:

1) Whether or not Plaintiff's action at law is barred by the doctrine of laches;

2) Whether Defendant is exempt from the licensing provisions of Virginia Code Section 54-749 by virtue of its being an owner of property as set forth in the statute;

3) Whether or not the contract is severable as to the consideration and the various functions to be performed thereunder;

4) Whether or not the parol evidence rule renders inadmissible evidence of prior or contemporaneous agreements concerning the apportionment of the stated consideration.

Procedural Status

Grenco Real Estate Investment Trust, hereinafter GRENCO, filed its Motion For Judgment against Nathaniel Greene Development Corporation, hereinafter NGDC, in the Circuit Court of Greene County asking for a return of money paid to NGDC under a contract entered into by the parties. To GRENCO's Motion For Judgment NGDC filed a Demurrer, stating the grounds therefor. After studying memoranda of law presented by the parties covering the issues raised by the Demurrer, the Court overruled the Demurrer. NGDC then filed its Grounds Of Defense, asserting a plea of laches and counter claiming against GRENCO. GRENCO demurred to NGDC's Grounds Of Defense and its plea of laches. NGDC then filed a request for admissions and interrogatories. On October 15, 1974, the Court requested

the parties to submit memoranda of law discussing the four issues set forth above.

DISCUSSION

Bias v. DeJarnette circuit ct. (Madison County) Carlton Rhea struck Penn & Parker's opinion at law 703 948-4561 1978 Powell

I. WHETHER OR NOT GRENCO'S ACTION AT LAW IS BARRED BY THE DOCTRINE OF LACHES.

NGDC contends that GRENCO's action to recover money paid to NGDC under its contract with NGDC is barred by the doctrine of laches. Although laches is traditionally an equitable defense, Section 8-241 of the Virginia Code permits its use in actions at law. Section 8-241 provides in part as follows:

> In any action on a contract, the defendant may file a pleading, alleging any matter which would entitle him to relief in equity, in whole or in part, against the obligation of the contract; . . .; and in either case alleging the amount to which he is entitled by reason of the matters contained in the pleading.

GRENCO takes the position that this statute is both legally and actually inapplicable to the case at bar.

The language of the statute commends its use in this case. "Any" action on a contract calls the statute into play. GRENCO's action is on a contract, for the instant contract provided the framework for payment of the money that GRENCO seeks to recover from NGDC. The statute is not limited to action for enforcement or breach of a contract; rather, it applies

generally to any action where, as here, the contract supplies the basis of recovery. Nor does the statute state that it applies strictly to actions on a legal contract. GRENCO's action, even though based on an illegal contract, is nonetheless an action on a contract.

The statute in question enables a defendant to allege "any" matter which would entitle him to relief in equity "in whole or in part." It cannot be disputed that laches is a "matter" which would bar enforcement of a contract, whether in whole or in part. The "obligation" of the instant contract finds expression in NGDC's promise to perform certain tasks and GRENCO's promise to compensate NGDC for performance of those tasks. NGDC has performed its obligation under the contract. Having done so, NGDC has the right to resist GRENCO's effort to escape performance of its own obligations under the agreement. Moreover, the obligation that NGDC defends against by the use of laches is the obligation, implied in the contract, that NGDC will refund GRENCO's money in the event GRENCO finds fault with NGDC's performance under the contract. GRENCO's assertion of the illegality of NGDC's performance is an excellent example of such fault finding. Clearly, the language of Section 8-241 makes it applicable to this contract.

GRENCO further argues that the statute is

inapplicable because it contemplates defenses of a positive nature. However, the statute says "any" matter, not just positive or affirmative defenses. A reading of the cases involving interpretation of the statute does not sustain GRENCO's argument. For instance, in Isbell's Adm'r v. Norvell's Ex'or, 4 Gratt. 176 (1847), plaintiff sued defendant on a bond given in exchange for several slaves. Defendant pleaded specially that plaintiff had falsely represented that the slaves were healthy when one in fact was diseased. The Court allowed a set off on the bond on account of a failure of consideration, i.e., that one of the slaves was sick and not healthy. 4 Gratt. at 179. This decision certainly illustrates the defensive use of the predecessor of Section 8-241.

Keckley v. Union Bank of Winchester, 79 Va. 458 (1884), contains a similar defensive interpretation of Section 8-241's predecessor. There, in a suit on a negotiable note, defendant set up the following special defenses: forgery of notes precluded their use as consideration; common law usury because interest collected twice; mistake in that credit not given for a payment; Deed of Trust insufficient to secure payment of the note even though noteholder assured the maker that it would be; and duress in that maker signed note because

another maker was threatened with a criminal prosecution. Attention is called to the fact that all of these special pleas are defensive in nature. Nowhere did the defendant assert an affirmative claim against the noteholder. Although the Court ruled that the trial court had properly rejected the pleas, want of a "positive" and "affirmative" nature was not offered as a reason for rejection. The forgery plea would not have been a good defense because the facts did not support it. 79 Va. at 463-465. Usury was not properly shown on the face of the plea. 79 Va. at 463-464. The mistake defense was held inapplicable because the defendant did not comply with the special code formalities in setting up the plea. 79 Va. at 464-465. Insufficiency of the deed of trust as a security mechanism did not matter because the note had been renewed on several occasions. 79 Va. at 465. Finally, duress made no difference because the defendant was under no legal duty to sign the note. 79 Va. at 465-467. Laches is a defensive plea and as the cases indicate, Section 8-241 authorizes the use of equitable pleas defensive in nature.

Should this Court rule that laches is an allowable defense, GRENCO suggests that its use would be most inappropriate on the facts of this case because no change in circumstances has occurred and because the

lapse of time has worked no disadvantage to NGDC. NGDC, on the other hand, urges that this case especially warrants application of laches to bar GRENCO's claim. Laches is an inexcusable delay in asserting one's rights so as to work a disadvantage to another. 7 M.J. "Equity" Section 26 (1949). GRENCO has known since the inception of the contract that NGDC had no broker's license. It's delay of almost four years in prosecuting this action is therefore inexcusable. NGDC has been amply prejudiced by the delay. The money paid to it by GRENCO has been consumed in business operations. For NGDC to satisfy GRENCO's claim would virtually force it out of business. This would not be the case had GRENCO made its claim within a reasonable time after payment to NGDC. GRENCO's delay prevented NGDC from attempting to effect a fair settlement of GRENCO's claim while the amounts of money involved were still small. Because GRENCO did not act promptly, a large sum of money was paid, thus making it impracticable to reach a compromise. NGDC is further disadvantaged for the simple reason that the lapse of time has naturally resulted in loss of valuable evidence to NGDC.

In summary, NGDC maintains that Section 8-241 of the Code would allow a plea of laches in this case and that on the facts of the case, application of the doctrine of laches would be most appropriate.

II. WHETHER OR NOT DEFENDANT IS EXEMPT FROM THE LICENSING PROVISIONS OF VIRGINIA CODE SECTION 54-749 BY VIRTUE OF ITS BEING AN OWNER OF PROPERTY AS SET FORTH IN THE STATUTE.

Section 54-749 of the Code of Virginia as amended states:

> The provisions of this chapter shall not apply to any person, partnership, association or corporation, who as owner or lessor shall perform any of the acts aforesaid with reference to property owned or leased by them, or to the regular employees thereof, with respect to the property so owned or leased, where such acts are performed in the regular course of or as an incident to the management of such property and the investment therein, nor shall the provisions of this chapter apply to persons acting as attorney in fact under a duly executed power of attorney from the owner authorizing the final consumation by performance of any contract for the sale, leasing or exchange of real estate nor shall this chapter be construed to include in any way the service rendered by an attorney at law in the performance of his duties as such attorney at law; nor shall this chapter be held to include while acting as such, a receiver, trustee in bankruptcy, administrator or executor, or any person selling real estate under order of any court, nor to include a trustee acting under a trust agreement, deed of trust, or will, or the regular salaried employees thereof.

An exhaustive search of Virginia cases has not found any case that has in any way interpreted

the exemption statute as set out above, with reference to what interest in a corporation or real property constitutes ownership as set forth in the statute. The word "owner" is one of general application, and has no set meaning when used in a statute dealing with real estate. Generally speaking, it includes all persons having a claim or an interest in real property, although the same may fall short of an absolute ownership, and embraces not only the owner of the fee, but any person who has an equitable interest in the land. 95 ALR 1085, 1086 (1935).

In the case at bar the Defendant, Nathaniel Greene Development Corporation (NGDC), owned an approximate five per cent (5%) interest in the Plaintiff, Grenco Real Estate Investment Trust (GRENCO), at the time of the execution of the contract in December of 1970. The question, therefore, for this Court to resolve is whether such an interest in the ownership of the business of the Plaintiff (GRENCO) is sufficient to bring the Defendant within the exemption of "owner" as set forth in Section 54-749 hereinbefore.

The statutes in Virginia relating to the licensing and regulation of real estate brokers and salesmen are contained in Sections 54-730 through 54-775 Code of Virginia, as amended. The chapter has been held

to be a valid excuse of the police power of the State. Massie v. Dudley, 173 Va. 42 3 S.E. 2d 176 (1939). Section 54-735 makes it a criminal offense punishable by fine and imprisonment to violate any of the provisions of the chapter. It is a fundamental rule of common law and of Virginia law that any criminal statute must be strictly construed against the State and favorably to the liberty of the citizen. Michie's Jurisprudence, Vol. 17, Section 67.

note provisions law invoked are not penal but civil in character

The rule of construction of penal statutes was set forth in Buzzard v. Commonwealth, 134 Va. 641, 114 S.E. 664 (1922), where it was stated that penal statutes must be construed strictly in favor of the defendant, not to the extent of defeating the clear intent of the legislature, but so as to resolve favorably to the defendant all reasonable doubts arising from the language used.

In order to assist this Court in interpreting the meaning of Section 54-749, Code of Virginia, the Defendant decided to examine the real estate licensing statutes of the other forty-nine States and The District Of Columbia. During the course of such research it soon became apparent that many of Virginia's sister States have adopted statutes with exemption provisions identical, or at the very least, quite similar to the language of

the Virginia statute. Unfortunately, just as was the problem in Virginia of having no interpretive case law on the subject, the same problem was evident in many of these other jurisdictions.

From an examination of all other jurisdictions the following States appeared to have exemption statutes identical to that of Virginia, but in such jurisdictions no applicable case law was found in which a court interpreted the language of the statute so as to assist this Court in its rulings. Those States are as follows:

A. Maine
B. Connecticut
C. Nevada
D. New Mexico
E. Kansas
F. Arkansas
G. Minnesota
H. Iowa
I. District Of Columbia
J. Wyoming
K. Mississippi
L. Kentucky
M. Texas
N. Ohio

The following States have exemption statutes which although are not identical to Virginia, contain language quite similar to the Virginia statute. Again, the Defendant was unable to find any applicable cases in these jurisdictions which rendered an interpretation of the statutes.

1. New Hampshire
2. Rhode Island
3. Washington
4. Oregon
5. Arizona
6. Montana
7. West Virginia
8. Utah

9. Colorado
10. Nebraska
11. North Dakota
12. South Dakota
13. Oklahoma
14. Missouri
15. Vermont

Of the fifty (50) jurisdictions researdhed by Defendant only five (5) of these jurisdictions did not appear to contain in their statutes any provisions exempting an "owner" from the respective licensing requirements of their statutes. These jurisdictions are as follows:

not true

I. Indiana
II. Louisiana
III. Illinois
IV. New York
V. Wisconsin

In the remaining States, Defendant found statutes, and/or cases, which seemed to be relevant enough to discuss in this memorandum. Only two States were found wherein the exemption statute contained explicit language as to what interest in a corporation was necessary to constitute ownership; and in one of these jurisdictions i.e. Alaska, the statute was recently repealed.

The legislature of Alaska in 1973 enacted Alaska statutes Section 08.88.161 which stated:

> Unless he is licensed as a real estate broker, associate real estate broker, or real estate salesman, no natural person, foreign or domestic corporation, partnership, or any other entity may be compensated for his efforts in buying or selling corporation or group real estate holdings, unless he has an equity interest of at least fifteen per cent in the corporation or group.

However, in 1974 this section was repealed without explanation in the Alaska statutes.

The State of South Carolina is presently the only State in the country where the exemption statute specifically states what interest in a corporation a person must have to be considered an owner of real estate, and thereby be exempt from the licensing provisions of its real estate statutes. Code Of South Carolina Section 56-1545.2 states:

> The provisions of this chapter shall not apply to any transaction involving the sale of real estate by anyone who is the owner thereof or who owns any interest therein, or to the attorney at law of such owner acting within the scope of his duties. Ownership of stock in a corporation is not ownership of an interest in real estate owned by the corporation, and does not exempt such stockholder from the provisions of this chapter, unless stockholder owns or controls at least <u>ten per cent of the stock of the corporation</u>. (emphasis added)

It is clear from a reading of the aforesaid statute that the South Carolina legislature has made a determination that a person must own a ten per cent interest in a corporation's stock before he is entitled to come within the owner exemption of the licensing statute. As was stated previously this is the only State which has

legislatively made such a determination at the present time. Since the Virginia statute is penal in nature and therefore must be strictly construed, the Defendant contends that in the absence of any language requiring a certain percentage of ownership in a corporation, it must be presumed that "owner" means a person or entity owning any part or interest in the said real estate.

It would be wholly illogical to presume that the Virginia legislature intended owner to mean ownership of a one hundred per cent interest in property, because such an interpretation would prevent any person who owned a part interest in a piece of property from selling it without first obtaining a broker's license. In such a case four partners could own a certain piece of property jointly, and yet no one partner would be able to sell the property because he only had a one-fourth interest in said property.

The Idaho Supreme Court has held that an equitable right of redemption is sufficient interest in real property to come within the purview of the "owner" exception of the real estate licensing provisions of the Idaho statutes. See Haney v. Brown, 330 P. 2d 982 (1958).

The statute in question was Idaho Code Section 54-2024:

> The provisions of this act shall not apply to any person who purchases property for his own use or account nor to any person, who being the owner of property, sells, exchanges, leases, rents, or otherwise disposes of the same for his own account, nor to any person holding a duly executed power of attorney . . . *

In Haney, supra, the facts were that one Haney owned and operated a dude ranch which was secured by two mortgages, being a first mortgage of $17,000.00 and a second mortgage of some $5,000.00. The first mortgage had been foreclosed and Idaho law permitted a redemption within one year of foreclosure, of which the last day for redemption was January 29, 1955. Once foreclosure had taken place, Idaho law provided that Haney no longer had title to the dude ranch, but merely possessed an equitable right of redemption.

On the last day for perfecting his redemption, Haney entered into an agreement with one Weller, the second mortgagee, whereby Haney agreed to find a purchaser for the ranch for a price of $35,000.00. From this amount Weller would receive $30,000.00, and Haney, for compensation for procuring a purchaser, would be given three parcels of land. Haney procured a purchaser, the

sale was consumated, but Weller refused to convey the three parcels of land to Haney, setting up as a defense among other things, that Haney was not licensed as a real estate broker, and thereby was not entitled to the three parcels of land, which were in effect a form of commission.

In construing the exemption provisions of the Idaho statute the Court said at 984:

> The agreement alleged does not come within the prohibitions of the real estate brokers act, or the latter section requiring such agreements to be in writing simply because section 54-2024 specifically provides that the real estate brokers act shall not apply to any person "who being the owner of property, sells, exchanges, leases, rents, or otherwise disposes of the same for his own account." It is true that at the time of the oral agreement with Weller, the plaintiffs did not have title to the real property. However, on that day they did have the right to restore their title by redemption, which at least gave them some interest or concern in the disposition to be made of the real property. . . . . Under these circumstances we think that plaintiff Haney had such an interest in the property to be sold that his undertaking to find a buyer did not come within the purview of either the real estate brokers act or the statute of frauds. (emphasis added)

In the case at bar Defendant (NGDC) possessed a five per cent interest in the stock of plaintiff, which amounts to much more than a naked equitable right such as was possessed by the plaintiff in Haney. In that case

plaintiff had been divested of all legal title, yet the court interpreted the owners exemption in the Idaho statute to include equitable ownership. It seems quite obvious that the Idaho Court would have little difficulty in stating that a legal ownership of five per cent would be sufficient to bring Defendant (NGDC) within the purview of the "owner" exemption of the statute.

The statute in Ohio is of interest in that it refers to "ownership"of real estate or any interest therein. Ohio statutes section 4735.01 states that licensing requirements as to Brokers do not apply:

> With reference to real estate or any interest therein owned by such person, firm, or corporation, or acquired on his own account in the regular course of, or as an incident to the management of the property and the interest therein.

The language of the Ohio statute would apply to Defendant, because it owned an interest in the assets of (GRENCO) to the extent of its five per cent stock ownership. — but only to 5%

There are some states which take the position that the "owner" exemption does not apply to individuals or corporations whose main business is the buying and selling of real estate. The states of Maryland, Hawaii and Texas contain such language in their statutes.

See Hawaii Code Section 467-2; Maryland Code Section 56-212 (f) (4) (5), and Texas Civil Statutes Section 6573 (a).

However, the Texas Court Of Appeals ruled that its statute denying exemptions to "owners engaged wholly or in part in the business of selling real estate" was not applicable to a situation where two individuals acting as principals purchased realty to sell and divide the profits, even though one of the partners only contributed his services to the joint enterprise. Gill v. Smith, 233 S. W. 2d. 223 (1950). See also Kaiser Gypsum Co. v. Jordan, 399 S. W. 2d. 588 (1966), and Moore v. Sussdorf, 421 S. W. 2d. 460 (1967).

The state of Florida makes a distinction as to "owner exemptions" between partners who share profits and losses equally and those who do not. Florida Statute Ann. Section 475.01 (2)

> Nor shall the term broker or salesman be applied to a person who shall deal with property in which he is part owner, unless said person shall receive a larger share of the proceeds or profits from the transaction than his proportional investment therein could otherwise justify, such excess share being directly or indirectly the result of the service of buying, selling, exchanging or leasing said property.

The Massachusetts statute -- Mass. Gen. Laws Chapter 112 Section 8722, not only exempts from the

licensing requirements of the statute owners of property, but also exempts management agents. It states

> The provisions of Section 87 RR to 87 DDD pertaining to brokers shall not apply to the following -- any person who, acting for himself as owner, lessor, lessee, tenant or mortgagee, shall perform any of the aforesaid acts of a broker or salesman with reference to real estate owned or leased or rented by or to him . . . . or to a managing agent while acting under a contract with the owner of the real estate or the regular employees of such agent acting in his behalf in the regular course of their employment.

As has been previously stated, only South Carolina in its statute, specifically states that such ownership in a corporation is tantamount to ownership of realty, and further requires that the stock ownership be at least in the amount of ten per cent. A California case held that stock ownership in the corporate title holder of real property is the equivalent of ownership of an interest in land.

In Frick v. Webb, 281 F. 407 (N. D. Cal. 1922), plaintiff proposed to sell 28 shares of the Merced Farm Co. to one Satow, who was a Japanese citizen and who was ineligible for United States citizenship. As such, Satow was forbidden to acquire an interest in real property in California under California's Alien Land Law of 1920. The defendant, the Attorney General of California,

had the power to escheat the alien's interest in real property to the state and threatened to escheat the 28 shares. Frick and Satow instituted action before a three-judge federal district court to enjoin the defendant from escheating the shares and to declare the Alien Land Law unconstitutional.

The three-judge court first examined the nature of the Merced Farm Co., and its by-laws which authorized the corporation to acquire, enjoy, possess, and convey farm lands. In fact, the corporation had already taken title to some 2,200 acres. Given that factual data, the court concluded, "We think the ownership of stock in such corporation would be an interest in real property, which would bring the alien owner of such stock (who is ineligible for citizenship) within the prohibitory provisions of the act . . . . " 381 F. at 408. The court could find nothing in the Constitution or in the treaty with Japan which gave Satow any right to own an interest in California real estate. The decision was affirmed on appeal to the United States Supreme Court. 263 U. S. 326 (1923).

In addition to the theory that ownership of an interest in a corporation is equivalent to the ownership of the real estate of the corporation, several courts have found individuals or corporations to be within

their respective owner exemption statutes on the theory of a joint venture.

The Michigan Supreme Court in Summers v. Hoffman, 341 Mich. 686, 69 N. W. 2d 198, 201 (1955), has defined a joint venture as follows:

> It can be said that a joint adventure contemplates an enterprise jointly undertaken; that it is an association of such joint undertakers to carry out a single project for profit; that the profits are to be shared, as well as the losses, though the liability of a joint adventurer for a proportionate part of the losses or expenditures of the joint enterprise may be affected by the terms of the contract. There must be a contribution by the parties to a common undertaking to constitute a joint adventure.

Joint venturers in real estate dealings are exempt from the requirement of a broker's license under the Michigan owner exception.

In Summers, plaintiff and defendant entered into an oral agreement whereby defendant would furnish the capital for the purchase of a particular tract of land, for clearing title to the land and for developing the property. Plaintiff was to superintend the litigation to clear title, manage the development, and supervise the disposition of the property. After reimbursement of defendant's expenses, plaintiff and defendant were to divide the profits equally. Plaintiff performed numerous

services in clearing title and developing the land. When the actual sales were made, the defendant reneged on the agreement, and plaintiff sued for his share of the profits. The trial court entered judgment for the plaintiff, and defendant appealed alleging, inter alia, that plaintiff did not have a broker's license as required by Section 451.201 et seq., Mich. Stat. Ann. 1953 Cum. Supp.

On appeal defendant argued that he and plaintiff could not be joint venturers as plaintiff could not suffer a loss. However, the court concluded that plaintiff would suffer a loss if the transaction were unsuccessful; "'Loss' does not necessarily mean actual 'monetary loss.' If the land was eventually sold at a loss the result would be that plaintiff's expenditure of time would have been for naught as would defendant's monetary investment." 69 N. W. 2d at 201-202. The court then found that plaintiff came within the owner exemption of Section 451.202:

> What we have previously stated regarding the character and nature of a joint adventure serves to bring this case within the scope of this exception. When we consider for the purpose of this statute as well, a joint adventurer, when selling property of the venture, is doing so as an owner, this exception is applicable. 69 N. W. 2d at 205.

In the case at bar the facts could certainly support a theory of a joint venture between (GRENCO) and (NGDC). Even before the contract of December 15, 1970 was entered into between the parties, (GRENCO) and (NGDC) had discussed the purchase of the "Wildwood Valley Tract", and (NGDC) had made certain recommendations to (GRENCO) concerning the price and value of said land. Certainly Defendant (NGDC) would have suffered a loss if no lots had been sold, and also it shared in the profits to the extent that it was paid from revenues generated by the sale of the lots in "Wildwood Valley".

A similar factual situation led to the suit in Barnes v. Didschuneit, 94 Ga. App. 661, 96 S.E. 2d 216 (1956). There again one party was to furnish the capital for the transaction and take the title to the realty in his name. The other party was to devote his time and effort to locating suitable property and arranging the terms of purchase. Upon resale the profits were to be divided equally. Based on this information the Georgia Court of Appeals overturned the trial court's grant of a non-suit based on the defendant's failure to secure a real estate license:

> As against a general demurrer the cross-action does not show that Barnes dealt solely for the plaintiff. Under the allegations, Barnes could have proved that he did not buy and sell or negotiate

> for the plaintiff alone but for the benefit of both himself and the plaintiff under the terms of their agreement. The fact that the plaintiff furnished the money, and the legal title to the property was taken in the plaintiff's name, did not prevent Barnes from having an interest in the property and the benefits. The legal effect would be the same whether the plaintiff and defendant J. C. Barnes were partners or joint adventurers. 96 S.E. 2d at 219.

The relevant Georgia statute Section 84-1403 stated:

> Except as otherwise provided in this Chapter, the provisions of this Chapter shall not apply to:
>
> (a) any person except a real estate broker or salesman licensed under this Chapter who, as owner, lessor or prospective purchaser or their regular employees, including resident managers, performs any act with reference to property owned, leased or to be acquired by him where such acts are performed in the regular course of, or incident to, the management of such property and the investment therein.

A somewhat different twist was given to the joint venture notion by the California Court of Appeals in McSherry v. Market Corp. 129 Cal. App. 330, 18 P. 2d 776 (1933). Plaintiff in that case was the assignee of a written contract with defendant corporation. Plaintiff's assignor and one Weeks had agreed to form the defendant corporation for the purpose of operating a public market. The assignor received

forty per cent (40%) of the defendant's stock, and Weeks received sixty per cent (60%). The assignor's job was to secure leases for the market space for which he was to receive commissions plus expenses. The corporation failed to honor the contract arguing that the assignor had failed to obtain the necessary real estate license.

The California Court of Appeals found that the corporation had been set up to effect a joint venture. As a joint venturer, the assignor was a part owner of the realty and, therefore, needed no real estate license:

> In the present case it is clear from the contract taken in connection with what was done thereunder . . . that the relation of the parties was so closely analogous to that of partners that their rights should be governed by the same rules. The transaction was a joint adventure . . . . However, the resemblance is so close that the rights of the parties are governed by practically the same rules.

For like holdings under substantially similar factual situations, see Smith v. Guy, 24 Tenn. App. 352, 144 S.W. 2d 702 (1940); Lloyd v. Wiseman, 51 Tenn. App. 401, 368 S.W. 2d 303 (1963); McArver v. Gerukos, 265 N.C. 413, 144 S.E. 2d 277 (1965).

Plaintiff in its memorandum cites Rhode Island Hospital Trust Co. v. Doughton 270 U.S. 69 (1926), in support of the principle of law that ownership of stock in a

corporation, is not the equivalent of ownership of the property of the corporation. However, the facts in that case are so totally removed from the case at bar so as to question the validity of the law of that case as applied to the facts of the case at bar. In Doughton, the State of North Carolina was attempting to assess inheritance taxes in the amount of $77,089.67 on the estate of a resident of Rhode Island.

The testator was domiciled in Rhode Island at the time of his death, and owned shares in the R. J. Reynolds Tobacco Company, a New Jersey Corporation, who was doing business in North Carolina. The theory of the assessment was that the company had two-thirds of its property in North Carolina, and since a shareholder of a corporation is also the owner of the property of the corporation, then he should be taxed on his shares to the extent of the ratio in value of the company's property in North Carolina to all of its property.

The Supreme Court summarily rejected such a foolish theory of law, and in so doing stated that ownership of corporate stock is not equivalent to ownership of corporate property. The principle enunciated by the Court, however, must be read in the context of the factual situation of the case. If North Carolina were to have prevailed in its theory

of law it is not difficult to imagine the "pandora's box" which would have been opened with regards to inheritance and estate taxes among the several states.

Likewise in Holly Sugar Corp. v. McColgan, 18 Cal. 2d 218, 115 P. 2d 8 (1941), the Court is in effect stating that for purposes of taxation, a stockholder is not an owner of corporate property. Both the Houghton case and the Holly Sugar case are expounding principles of law as relating to taxation problems, and they do not necessarily mean that an ownership in a corporation could not be considered an ownership in corporate property for purposes of real estate licensing and exemption laws.

A case cited by Plaintiff in its memorandum, Dixon v. Ringsly, 405 P. 2d 271 (1965), recognizes the difference between the interpretation of laws for taxation purposes and the interpretation of laws for purposes other than taxation. It cites with approval the language adopted by the Court in Haney v. Missouri Valley Electric Co., 268 S.W. 2d 820 which in discussing profit sharing bonus payments said that it does not necessarily follow that because profit sharing bonus payments are deductible in computing net profits that such payments are necessarily deductible in computing the amount due under a profit-sharing bonus plan. This Court as do the majority of courts recognized the legislative policy differences between laws interpreted for taxation

purposes as opposed to laws interpreted for non taxation purposes.

The Plaintiff in its brief also cites the Dixon case to support its contention that the activities of Defendant were not performed in the regular course of, or as an incident to, the management of such property and the investment therein. The facts in the case at bar are quite different from the facts in Dixon, in that in the case at bar the Defendant (NGDC) was acting in the regular course of its business as an incident to the management of property in which it had an interest. The very terms of the contract entered into between the parties set out the management functions which were required to be performed by Defendant (NGDC), and all acts performed by Defendant were performed in its regular course of business, which was to plan, develop, sell and manage the property in question.

In the Dixon case the plaintiff was engaged in the business of managing a ranch from 1953 through 1958. He claimed a separate contract was entered into between him and the owners whereby he agreed to find a purchaser for the ranch. He found a purchaser but the owners refused to pay him a commission and he brought suit. Plaintiff relied upon the exception of Wyoming Statutes Section 33-344 which said:

> Provisions of the act shall not apply to the regular employees of the owner of property, "where such acts are performed in the regular course of, or as an incident to the management of such property and the investment therein."

The Court examined the duties of plaintiff in managing the ranch for six years and found that it was not one of the duties of plaintiff to sell the ranch. These facts are so completely different from the facts of the case at bar so as to make any holdings in the Dixon case unmeaningful to the issue which this Court must determine.

Plaintiff in its brief cites the case of Bleecker Charles Company v. A & D Harrison, Inc., 326 N.Y.S. 2d 214 (1971), for the proposition that it can recover commissions paid to an unlicensed broker for the sale of real estate. However, the Bleecker case turns solely on an interpretation of the New York Real Estate Brokerage Statutes, which are completely different from those of Virginia.

In the first place New York is one of only five states, a clear minority, which does not have a specific statute exempting "owners" of real estate from the provisions of the licensing laws. Evidently the legislature of New York has decided to enact very strict legislation in that State concerning the regulation and licensing of real estate brokers. New York law also requires a person to be licensed

as a broker, before he can manage real estate, or even before he can assist persons in relocating from one property to another. Virginia law does not have any similar requirements.

The Court in Bleecker based its decision on its decision on its interpretation of the Real Property Law of New York; at 215. However, under the statutes of South Carolina a completely different result would be forthcoming given the facts of the Bleecker case. It must be remembered that in Bleecker, the Court is concerned with the policy of New York law with regards to real estate licensing, which appears to be completely different from the policies of the majority of jurisdictions. It is also interesting to note that this case was decided on a three to two decision with a strong dissenting opinion filed by the dissenting justices, and that this decision is a decision of an intermediate court and not the Court of last resort in the State of New York.

It is hereby submitted that a survey of other jurisdictions indicate that the great majority of them provide for exemptions in their licensing statutes for owners of property, but only South Carolina has stated that ten per cent ownership of stock in a corporation is equivalent to ownership in real estate. Since the statute in Virginia

is penal in nature, it must be strictly construed against the State, and since Virginia has not stated a numerical interest necessary to be an owner, it must be presumed that any interest will suffice. If such an interpretation is not rendered by this Court then (NGDC) could have owned 99% of the stock of (GRENCO), and it would still not be an owner under the statute.

There is no evidence in this case that (NGDC) purchased five per cent of (GRENCO's) stock to avoid the licensing laws of Virginia. In fact they owned their five per cent interest for some two years prior to having entered into the contract in December of 1970. Therefore, it is Defendant's contention that it is exempt from the provisions of the licensing requirements of Virginia pursuant to Section 54-749 Code of Virginia (as amended).

III. WHETHER OR NOT THE CONTRACT IS SEVERABLE AS TO THE CONSIDERATION AND THE VARIOUS FUNCTIONS TO BE PERFORMED THEREUNDER.

It is the theory of the Defendant that should the Court find that the Defendant was required to have a real estate brokerage license, that the terms of the contract are severable, and that the illegality of not possessing such a license would only affect that portion of the contract relating to the sale of properties in "Wildwood Valley".

The entirety or divisibility of a contract is dependent upon the intention of the contracting parties. American Chlorophyll v. Schertz, 176 Va. 362 (1940). To arrive at the intention of the parties regard is to be had to the situation of the parties, and the object which the parties had in view at the time and intended to accomplish. See Buchanan v. Buchanan, 176 Va. 255 (1940), Shepherd v. Richmond Engineering Co., 184 Va. 802 (1946).

The evidence in the case at bar will indicate that it was the intention of the parties to allocate an equal one-third share of the total thirty per cent (30%) commissions, to management, promotion and actual sales. The contract itself sets out the three functions

to be performed by Defendant (NGDC) and at all times it was the intention of the parties to interpret the contract in that light.

In discussing the question of severability, Corbin On Contracts Section 1522 states "if a lawful consideration is given for two promises, one of which is lawful and the other unlawful, the lawful promise is enforceable. Citing McCullough v. Virginia, 172 U.S. 102 (1898); Maddox v. Fuller, (Ala.) 173 So. 12 (1937); Sherman v. Pfefferhorn, (Mass.), 135 N. E. 568 (1922); Charles Weaver & Co. v. Phares, (Miss.) 188 So. 12 (1939).

Mr. Williston's comments on the same question are found in Williston On Contracts Section 860 where it is stated:

> The distinguishing mark of a divisible contract is that it admits of apportionment of the consideration on either side so as to correspond to the unascertained consideration on the other side. When such a purpose appears in the contract, or is clearly deductible therefrom, it is allowed great significance in ascertaining the intention of the parties. It is a mistake, however, to suppose that in every case it is conclusive in itself. It is determining only when there are no opposing signs or marks.

The Virginia Supreme Court in Bristol v. Dominion National Bank, 153 Va. 71 (1929), stated that

when a contract covers many subjects, some of whose provisions are valid, and some of whose provisions are void, those which are valid will be upheld if they are not so interwoven with those that are illegal as to make divisibility impossible. In the case at bar, the intention of the parties was that of the total figure of thirty per cent (30%), ten per cent was to be allocated to sales, ten per cent to management and ten per cent to promotion.

Likewise, in Moreland v. Moreland, 108 Va. 93 (1908), the Court said that where a transaction is of such a nature that the good consideration can be separated from the bad, the court will separate them and consider the contract valid so far as it is entirely distinct from and unaffected by the illegal consideration. In Moreland, a couple entered into a separation and property settlement agreement whereby they agreed to live separate and apart for the remainder of their lives. A question was raised as to the illegality of the contract as being in contravention of public policy. In this case the Court said at 103:

> But even if the provision to live separate and apart were contrary to public policy and not enforceable, that fact does not destroy the other provisions of the contract in

> controversy in this suit adjusting property rights and providing a maintenance for the wife. Though the former be rejected, the latter, which in this case are clearly separable, remain valid and enforceable.

The principles of law as to severability of contracts are also set forth in 17 CJS Section 289:

> Where an agreement founded on a legal consideration contains several promises, or a promise to do several things, and a part only of the things to be done are illegal, the promises which can be separated from the illegality may be valid. The rule is that a lawful promise made for a lawful consideration is not invalid merely because an unlawful promise was made at the same time and for the same condsideration.

It has been held that a contract which at its inception was entire, may still be severed in its performance and part of it legalized. See Marshall v. La Boi, 270 P. 2d 99 (1954). And in the early case of Fleetwood v. Jansen et al. 2 ATK. 476, a mortgage was ordered to stand as a security for a bona fide loan, but to be forfeited as to money won in a card game even though the Statute Of Anne, which at that time was governing law, declared that all securities were void if the consideration or any part of it was for money lost gambling.

In American Chlorophyll, supra a case

decided by the Virginia Supreme Court, the facts were as follows. Plaintiff entered into a written contract with Defendant whereby he agreed to provide Defendant with certain secret processes for extraction of chlorophyll and other matters from vegetable leaves, and that such secret processes would be for the exclusive use of the Defendant for twenty-five years. The Defendant was to pay the Plaintiff royalties of five per cent of the net sales of products manufactured using the secret process. Defendant manufactured the products under the secret processes, but never paid any royalties, and when the Plaintiff instituted suit for said royalties the Defendant set up a defense that Plaintiff had breached the contract by having published the same trade secrets in a trade publication, and therefore the entire contract had been breached because the contract was entire and not severable.

The Court found the contract to be severable and at 373 said:

> It will be seen that the provision of an "exclusive license" contemplates a dual performance -- first, the delivery of the secret process, and second, a refraining from the delivery of such process to anyone else. When Plaintiff turned over the secret process to Defendants he completed the first part of the performance required of him, and the contract was to that extent executed upon his part. It is the second part of his agreement which the Complainant, by

> reason of the publication of his article, has broken. We hold however, that this portion of his agreement is not entire, but may be apportioned to every moment of time during which his forebearance to disclose made possible the authorized use of these secrets by the Defendants. (emphasis added)

In the case at bar the Defendant (NGDC) agreed to perform three separate functions for the Plaintiff i.e. to sell the properties in"Wildwood Valley"; to manage the property and thirdly to promote and advertise the property. The functions of management and selling are not necessarily related because the Defendant under the terms of the management provisions of the contract provided services to Plaintiff which in no way were connected with the selling of any lots in "Wildwood Valley".

As has been previously stated, the question of severability of a contract is dependent upon the intention of the parties, and that intention can be shown through a construction of the contract, American Chlorophyll supra; and if the terms of the contract are ambiguous, other evidence of the parties intentions may be introduced to resolve a question of fact. 17 A C.J.S. Section 627.

With regards to the contruction of contracts, the rule of law in Virginia is set out in detail in the case of Young v. Ellis, 91 Va. 292 (1895), where

the Court at 301 said:

> Every contract must receive a reasonable construction . . . . Regard should be had to the intention of the parties contracting, and such intention should be given effect. To arrive at this intention, regard is to be had to the situation of the parties, the subject matter of the agreement, the object which the parties had in view at the time and intended to accomplish. A construction should be avoided if it can be done consistently with the terms of the agreement, which would be unreasonable, or unequal, and that construction which is most obviously just is to be formed as most in accordance with the presumed intention of the parties. (emphasis added)

Applying the principles enunciated in Young v. Ellis, supra, the construction of the contract which is most obviously just is that the contract is severable, and that should the court find that the Defendant was required to have a broker's license, that any resulting illegality applied only to the provisions of the contract relating to sales. No license is required in Virginia for any promotional or management functions as would relate to the developmental phases of the contract. Since the Defendant has fully performed under the terms of the contract, and the plaintiff has accordingly reaped the benefits from its performance, a construction of the contract which would be most just, and yet would not offend public policy would be a construction of severability.

In Kemper v. Kemper, 3 (Rand) 8 (1825), the Court said that a deed executed for the purpose of indemnifying a sheriff for the fines incurred by him arsing from his failure to return an execution was void, but the consideration so far as it was to indemnify him for the returning of the executions, which had before come to his hands was good as to principal, interest and costs. The Court separated the good consideration from the bad.

The Court in a similar case in Skipwith's Executor v. Cunningham, 35 Va. 271 (1837), stated that where a deed is made for the security of various creditors, whose claims are distinct and unmingled with each other, and where part are illegal and fraudulent, and another part is fair and untainted with fraud, the security shall not be avoided as to the latter, provided they have given no aid in any way to the concoction of the fraud. A deed of that character ought to be considered distributively, and while it is avoided in part, it should be effectuated as far as it is good.

One final Virginia case which the Defendant feels is of extreme importance in guiding this Court in its decision on the question of severability is the case of Skipwith v. Strother, 3 (Rand) 214 (1825). The facts in that case were that the defendant executed

a bond for $700.00 to a party, who sold it to a third party, (who today would be considered a holder in due course). The Defendant attempted to get an injunction to stop execution on a judgment rendered against him on the bond based on the fact that the $700.00 was the payment for a gambling debt. There was some evidence that a portion of the $700.00 bond was for payment of a gambling debt, but that another portion of the bond represented repayment of a valid loan.

In deciding that an injunction would not be issued the Court said:

> If any part of the bond in question was on good consideration, although the bond would be void, at law, a Court of Equity, upon the principle that he who asks equity must do it, would not relieve against the judgment except to the extent of the gaming consideration.

The reason why Defendant feels that this case is important is that the Court in Skipwith looked behind the face of the instrument, which was a negotiable instrument, to determine whether or not the consideration could be severable. If the Court was willing to sacrifice a certain degree of negotiability in order to preserve equity, surely such a principle would be even more appropriate in a situation such as is present in

the case at bar, where a negotiable instrument is not involved.

The Defendant has examined the law on the question of severability in other jurisdictions and has found several cases of interest. In Keene v. Harling, (Cal.) 392 P. 2d 273 (1964) the plaintiff sold a coin laundry business and some pinball machines to Defendant for $50,000.00. The contract stated that if the County ruled the pinball machines to be illegal, the price of the contract would be reduced by a sum of $150.00 per month. A California statute made it illegal to sell pinball machines, and after having made several payments, the Defendant defaulted and set up the defense of illegality of contract.

Important to the determination of the issue of this case was a California statute which read:

> If any part of a single consideration for one or more objects or if several considerations for a single object is unlawful the entire contract is void.

The Court after having discussed the statute and issues involved held as follows:

(a) The rule relating to severability of partially illegal contracts is that a contract is severable if the court can consistent with the intent

of the parties reasonably relate the illegal consideration on one side to some specified or determinable portion of the consideration on the other side.

(b) A contract is not rendered non-severable merely because the parties did not expressly make apportionment of the consideration in the contract.

(c) The statute, (relating to the California statute), was not intended to set forth a test of severability, but rather it was intended to state the result where the court otherwise determines that a partially illegal contract is not severable.

(d) The judgment awarded to the plaintiff is affirmed minus an amount of $4,600.00 which had been determined to be the value of the illegal pinball machines.

Given the facts of the case at bar it is clear that the California Supreme Court would have little difficulty in determining that the contract was severable. Virginia has no comparable statute to California, stating that the entire contract is illegal if any portion of the consideration or objects of the contract are illegal, yet faced with such a statute the California Court still found in Keene supra that the illegal portions of the contract were severable from the legal portions therein. In accord: Zayrchek v. Koolvent

Metal Awning Corporation Of America, 283 F 2d (9th Cir. 1960).

In the case of Kessler v. Jefferson Storage Corporation, 125 F 2d 108 (1941), the facts were that the Dant Corporation was a distillery whose president was one Ganellin. The corporation, through Ganellin, entered into a storage contract with the Jefferson Company, and at the same time Jefferson and Gannelin executed a contract whereby he was to receive certain of the profits from the storage contract. The Dant Corporation went bankrupt, and the Trustee claimed that since the contract between Gannelin and Jefferson was fraudulent, because Dant had no knowledge of it, the storage contract was also fraudulent because it was so interwoven and tainted with the fraud.

The Court Of Appeals held as follows:

(a) The rule is that a lawful promise made for a lawful consideration is not invalid merely because an unlawful promise was made at the same time and for the same consideration.

(b) If the obnoxious feature of a contract can be eliminated, without impairing its symmetry as a whole, the courts will be inclined to adopt this view as the one most likely to express the intention of the parties.

(c) Where there are contained in the same instrument distinct engagements or covenants by which a party binds himself to do certain acts, some of which are legal, and some illegal, the performance of those which are legal may be enforced although the performance of those which are illegal may not.

(d) The storage contract was enforceable and was not tainted by the illegality of the other agreement.

Finally in New Products Corporation v. City Of North Miami, 241 So 2d 451, (1970), the facts were that Plaintiff entered into a contract with Defendant City of North Miami, for the purchase of a certain tract of land. A clause in the contract provided that the city would rezone the property to "multiple family use", such provision being illegal as contravening the Florida State Statutes on zoning.

The Court found that the illegal provisions in the contract, as to rezoning were severable, and that the purchaser could waive the illegal provisions, pay full consideration, take the property as it was presently zoned, and could require specific performance of the remaining valid portions of the contract.

Plaintiff in its memorandum cites Eschner v. Eschner 146 Va. 47 in support of the proposition that

a contract is not severable if it has a single consideration. Plaintiff is in error on his citation, as 146 Va. 47 is the case of Dickerson v. Board of Supervisors of Albemarle County. Therefore, Defendant is unable to respond to this case except to state that many courts have found contracts to be severable when it appeared from the face of the contract that there was a single consideration. See Skipwith v. Strother supra; Skipwith v. Cunningham supra.

In conclusion, the facts in this case would warrant a finding by this Court that the contract in question is severable, and should this Court determine that a portion of the contract is illegal, such illegality should be severed from the portions of the contract which are perfectly legal.

IV. WHETHER OR NOT THE PAROL EVIDENCE RULE RENDERS INADMISSIBLE EVIDENCE OF PRIOR OR CONTEMPORANEOUS AGREEMENTS CONCERNING THE APPORTIONMENT OF THE STATED CONSIDERATION

GRENCO's contract with NGDC obligates it to pay NGDC a 30% commission for all of NGDC's services under the contract. The contract then breaks down NGDC's performance into three categories: development and management, promotion, and sales. GRENCO now invokes the parol evidence rule to bar evidence of NGDC showing that the parties intended the 30% commission to be allocated between development and management, promotion and sales. NGDC maintains that such evidence is admissible in the case at bar.

In Virginia, the rule is well settled that parol evidence of prior or contemporaneous oral negotiations or stipulations is inadmissible to vary, contradict, add to, or explain the terms of a complete, unambiguous, written instrument. 7 M.J. "Evidence" Section 130 (1949). An exception to the rule is stated in 7 M.J. "Evidence" Section 146 (1949) as follows:

> It is elementary that parol evidence is not admissible to explain or undertake to qualify a written agreement when it constitutes a complete statement of the bargain, it is equally as elementary that the rule does not apply where the writing on its face is ambiguous, vague or indefinite, or does not embody the entire agreement. In such a case, parol evidence is always admissible,

> not to contradict or vary the terms, but to establish the real contract between the parties.

NGDC advances two principal reasons for the introduction of parol evidence in this case. First, the contract in question does not embody the entire agreement between the parties. Secondly, the consideration stated on the face of the instant contract is ambiguous when read in the context of the entire agreement.

Initially, NGDC contends that the present contract does not embody the entire, or real, agreement between the parties. The parties intended for there to be an allocation of the consideration between the three tasks to be performed by NGDC under the agreement. In this case, the evidence of prior and contemporaneous negotiations would complete, not contradict or add to, the agreement. The parol evidence rule would not interpose a bar to the admission of such evidence. 7 M.J. "Evidence" Section 151 (1949); 32 A.C.J.S. "Evidence" Section 860 (1964).

Secondly, because the contract calls for a single consideration to be applied to three stated and entirely different obligations to be performed by NGDC, the expression of the 30% commission consideration is at once ambiguous and uncertain. Ample authority exists to support the proposition that the consideration clause in a contract

or deed is open for explanation for any purpose where it is ambiguous and uncertain. 7 M.J. "Evidence" Section 159 (1949). In Summers v. Darne, 31 Gratt. 791 (1879), the Virginia Supreme Court put its seal of approval on a party's effort to introduce parol evidence to vary a recital of consideration on the face of a deed.

> No rule is perhaps now more firmly established than that the parties are not concluded by the date of the deed or the recital of the consideration therein. It is competent always to show by any relevant evidence that the delivery was in fact on a day different from the date (stated in the deed), and to show the real nature and character of the consideration. (emphasis supplied)

31 Gratt. at 804. Here, NGDC is attempting by parol to do no more than show the "real nature and character of the consideration."

Blose v. Blose, 118 Va. 16 (1915), states the rule that parol evidence is admissible to show the real consideration for a deed where the consideration was not fully and correctly recited in the deed. The deed in Blose recited a cash consideration when in fact the consideration was cash plus assumption by the Grantee of the obligation to care for the Grantors in their old age. In Protestant Episcopal H. S. v. Parrish, 168 Va. 103 (1937), the Virginia Supreme Court reached a conclusion much like

that announced in Blose. In Parrish, evidence of antecedent negotiations was allowed to explain one of the consideration provisions in a real estate sales contract. Seller agreed to sell certain land to buyer. As part of the consideration for the contract, buyer permitted the seller to live on the premises three years, after which the sale would be consummated. Seller then sued purchaser for three years worth of rent for use of the land under the contract. Although the contract was silent on the rent issue, the trial court allowed evidence of prior negotiations which established that as a part of the consideration for the contract, buyer was supposed to pay rent to the seller for use of the property for three years. The high court upheld the trial court's action.

Other authorities are in accord with Virginia's position in admitting parol evidence to clarify or explain the consideration provisions of a written instrument. In 32 A C.J.S. "Evidence" Section 948 (1964), it is said that a recital of consideration is not conclusive, and that it is always competent to inquire into consideration by parol to show the real and true consideration. The following rule applies to a situation somewhat like that in the case at bar:

> Where an aggregate sum is mentioned in a contract as the consideration for the transfer of several items of property, the actual consideration for each item may be shown by parol.

32 A C.J.S. "Evidence" Section 948 (1964). Here, an aggregate sum is expressed as the consideration for the performance of several different tasks under a contract.

Not only is parol evidence admissible to show that the consideration was greater, less than, or different from that expressed in a writing, but it is also admissible to show the manner of payment of consideration. 30 Am. Jur. 2d "Evidence" Section 1056 (1967). Even more importantly, "The consideration may be apportioned by parol evidence to separate parts of a transaction which is presumably entire but is separate in fact." Ibid. The decision in Field v. Austin, 131 Cal. 379, 63 P. 692 (1901), supports this view.

In Field, plaintiff contracted to sell to defendants his brokerage, insurance and real estate business, plus business property and shares of stock in another corporation. The consideration to be paid by defendants was divided into cash and notes. Defendants defaulted on the notes and plaintiff sued and recovered judgments against defendants. The defenses raised by defendants were three: 1) failure of consideration in that the stock was utterly worthless; 2) that plaintiff had perpetrated a fraud in representing the stock to be valuable; and 3) that the notes were solely in consideration for the stock and not for any of the other property.

On appeal, the high court reversed the lower court judgment, noting that the defendants were entitled to a finding on whether the sole consideration for the notes was the stock or whether the notes were part of the overall payment for the entire transaction. The California court addressed that issue as follows:

> It is true that in the written contract an aggregate sum is mentioned as the consideration for the transfer of the property generally, and that, as the court says, "no valuation was thereby placed upon any of the items composing the consideration;" and, consequently, that prima facie the contract was entire. But it was competent for the defendant to show by parol testimony what the consideration in fact was: that is to say, that the consideration of the notes was the stock, and the consideration for the other property the $10,000.00 paid in cash.

63 P. at 693. Thus, the contract would fall under the general rule that where "a number of articles are bought at the same time, and a separate price agreed upon for each, although they are all included in one instrument of conveyance, yet the contract, for sufficient cause, may be rescinded as to part and may be enforced as to the residue." 63 P. at 294. The case at bar does not differ from Field on the issue of parol testimony being introduced to show the allocation of consideration. In Field, the contract subject

matter is separate types of services. Functionally, the services and physical articles are the same, and the general rule should apply to permit introduction of parol testimony to show the allocation of the aggregate cash consideration to the separate services performed under the contract.

Quite clearly, and for several reasons, the Court should admit parol evidence of prior negotiations and contemporaneous agreements between GRENCO and NGDC to show the allocation of the gross cash consideration paid by GRENCO to the three distinct and separate services performed by NGDC under the contract. The parties intended such an allocation. Thus, the contract does not embody the entire agreement of the parties. Without such evidence, the statement of the consideration is uncertain and ambiguous on account of the stated cash consideration viewed in context of the three services to be performed by NGDC. Parol evidence is always admissible to cure such a defect. What NGDC is attempting to do is to show the real nature and character of the consideration. The parol evidence rule does not prevent such a showing. Two special rules come into play to permit such evidence in this case. First, if an aggregate consideration is stated to be in exchange for several different items, then the actual consideration for each item may be shown. Secondly, as illustrated by Field, consideration may be apportioned by parol evidence to

separate parts of a transaction which is presumably entire but is separate in fact. The services performed by NGDC are indeed separable in fact, and GRENCO's cash consideration should be likewise treated.

Conclusion

Based upon all of the foregoing, it is Defendant's position that (1) the action is barred by the doctrine of laches; (2) Defendant is exempt from the licensing requirements of the Virginia Code; (3) the contract is severable; and (4) parol evidence is admissible to show the severability.

Respectfully submitted,

NATHANIEL GREENE DEVELOPMENT CORPORATION

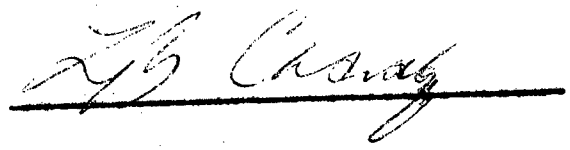
By L. B. Chandler
Counsel

L. B. Chandler, Jr.
Chandler & Huff
415 Park Street
Charlottesville, Virginia

CERTIFICATE

I hereby certify that a true copy of the foregoing was mailed to Harold R. Bailes, Esquire, on the 26th day of November, 1974, at his offices at 400 Court Square,

Charlottesville, Virginia, counsel for the Plaintiff.



REPLY MEMORANDUM

The facts and issues before the Court having been previously set forth in detail, the plaintiff will here attempt to reply briefly to certain points raised in the defendant's memorandum.

First, as to the issue of whether the action brought by the plaintiff herein is barred by the doctrine of laches, it is the defendant's contention that Section 8-241 of the Code of Virginia permits the assertion of the equitable defense of laches in this action at law.

Section 8-241 clearly limits its application to actions on contracts, with the result that the defendant has gone to great length in its memorandum to assert that the plaintiff's suit is an action on contract. However, as the plaintiff has previously pointed out, its action is for money illegally had and received and relies in no way upon any contract for recovery. This being the case, Section 8-241 is, on its face, inapplicable and affords no basis for the pleading of the doctrine of laches in this case.

Moreover, even if the Court were to find that the case is closely enough related to the contract to render Section 8-241 applicable, it seems clear that that section was not intended to and does not permit the legislatively prescribed time limits for the bringing of certain actions to be altered or obfuscated. This clearly was Judge Carleton Penn's understanding of the application of section 8-241, in the case of Dorsey V. Bias v. Edward A. DeJarnette v. Michael R. Vincel, et als. There the question of whether, pursuant to Section 8-241, laches might be plead in actions at law was raised

and Judge Penn, in a letter to counsel involved in that case, which letter was incorporated into an Order entered in that case, (copies of that letter and Order are attached hereto), responded as follows:

> "First, with respect to the plea of laches filed by the defendant asserting Section 8-241 of the Code of Virginia as his authority and basis, even when a statute of limitations exists, it does not appear that said Code section can be construed to authorize a plea, historically equitable, to render uncertain statutes of limitation in actions at law in Virginia in which it is contained, all demonstrate that it applies to payment, set-off and defenses akin thereto."

Judge Penn's decision is the only one that your plaintiff has found in Virginia that has been rendered on the precise issue before the Court in this case and would appear to be dispositive with respect to the issue of laches.

However, one more point should be reemphasized. That is, even if laches were a permissable defense in this case, the failure of there being any harm done or prejudice caused to the defendant by any delay herein clearly renders the doctrine of laches inappropriate in any event.

Second, as to the question of whether or not the defendant is exempt from the licensing provisions of Virginia Code Section 54-749, by virtue of its being an owner of property within the meaning of Section 54-734, the defendant in its memorandum has gone to great lengths to research the law not only here in Virginia, but also in every jurisdiction in this country to try to find some definitive answer as to the meaning of "owner" as embodied in the Virginia statute or similar statutes. As has been indicated by the defendant and by the plaintiff, no cases have been found in Virginia which provide insight as to the answer to this question. Moreover, it is important to note at this point that in no case cited by the defendant in its memorandum was the owner of five percent of the stock of a corporation or the owner of a

five percent beneficial interest in a real estate investment trust found to be exempt under the provisions of the Virginia statute or a similar statute. Although the defendant has gone to great lengths in an attempt to distinguish the case cited by the plaintiff as being most nearly in point, that being Bleecker Charles Company v. A. & D. Harrison, Inc., 326 N.Y.S. 2d 214 (1971), and although the defendant in its memorandum has attempted to indicate to this Court that the New York Statute did not provide an exception to an owner of real estate, such is clearly not the case. As was pointed out by the plaintiff in its memorandum filed previously with this Court, although the New York statutes contain no separately stated exceptions provision comparable to the Virginia Code section, it does, in its licensing statute, define real estate broker as one who deals in real estate for another or on behalf of the owner. Therefore, it is clear that in New York there is no requirement for one who owns land and who sells it for himself to have a license. Accordingly, irrespective of the defendant's position that New York is one of five states in the country which does not provide such exception, this is just not the case. Therefore, as plaintiff has previously stated, Bleecker is the case that it has found which is most clearly related to the facts before the Court at this time and would suggest that if any jurisdiction is looked to for help in interpreting the Virginia statute, that the Bleecker case be given great consideration by this Court.

As to the other cases cited by the defendant in its memorandum, it is not believed that the Court's time would be served by an in-depth attempt to either distinguish or to comment upon all those cases, because as can be seen from even the defendant's memorandum, no case decided in any jurisdiction in this country with the exception of Bleecker, has attempted to construe the word "owner" as used in a licensing exception statute.

Therefore, although it is your plaintiff's contention that none of

the cases cited by the defendant in the section of its memorandum concerning the statutory exception are in any way determinantive of the issue before this Court, perhaps some discussion of certain of the cases cited and certain of the arguments made by the defendant would be helpful to the Court. Accordingly, as to the defendant's discussion of the fact that certain states, including the State of South Carolina, provide legislatively that a certain percentage of stock is sufficient for a person who owns such stock to come within the exemption, it should be noted first of all that that has been a legislative rather than a judicial determination and as such, would appear to have no real relevance to the situation in Virginia. Further, to the extent that it is relevant, it should be apparent that in South Carolina five percent ownership clearly would not be sufficient and therefore, if any weight is given to that statute, it would indicate that a ruling in the plaintiff's favor herein would be dictated. Moreover, contrary to the defendant's statement that South Carolina has determined that ownership in a corporation's stock is sufficient, it should be noted that in the statute the legislature uses the following language;

> "Ownership of stock in a corporation is not ownership of in interest in real estate owned by the corporation and does not exempt such stockholders from the provisions of this Chapter.....

It is true, of course, that the provision goes on to say that the exemption will be applicable if the person owns ten percent, but it is important to note that ownership of stock within the definition of the statute is not in and of itself sufficient to render a person subject to the exemption.

The second area of discussion which perhaps merits some consideration, which was dealt with in the defendant's memorandum, relates to the Idaho statute and particularly to the case of Haney v. Brown, 330P. 2d 982 (1958). The facts of that case are set forth in detail in the defendant's memorandum and need not here be reiterated, but it shoud be emphasized that

the statutory language specifically provides that the exemption is limited to a situation where the owner sells or disposes of the property "for his own account...". Further, as to Haney, it should be recognized that the position of Haney in that case was much stronger than that of a person who merely had a five percent stock ownership, contrary to the defendant's assertion. As has been pointed out by the defendant, Haney possessed an equitable right of redemption following a foreclosure for a period of one year. He had been the owner of the property and he had, as such, after having been foreclosed upon, a right, by law, to redeem the property for a period of one year. Haney, in order to protect his interest in the property, apparently not having the funds to redeem the property by himself, was forced to find someone else to purchase the property in order to redeem whatever equity he might have had in the property. Accordingly, he undertook to find a buyer and redeemed the property and attempted to consumate the sale. Given the facts of Haney, it seems clear that Haney was much more likened to the owner which the statute contemplates than is the situation present before the Court here, where the defendant has only a five percent stock ownership and where the sale of the properties involved in this case bear no relation to his ownership interest therein. Here, the remuneration which is in controversy is solely that of commissions earned for services rendered in making the sale and is in no way related to the defendant's ownership of stock in the plaintiff, Grenco Real Estate Investment Trust. It is these activities, that is those where a person undertakes to sell property for another for consideration resulting from his services as a salesperson, that are prohibited by the Virginia statute and by the statutes of every other jurisdiction cited by the plaintiff or the defendant to this Court.

The language of the statute in Ohio is perhaps also worthy of some discussion at this point. As stated by the defendant, the Ohio statute Section 4735.01 provides that the licensing requirements as to brokers do

not apply:

> "with reference to real estate or any interest therein owned by such person, firm, or corporation, or acquired on his own account in the regular course of, or as an incident to the management of the property and the interest therein."

The defendant points out that under the Ohio statute apparently the defendant herein would be able to retain commissions to the extent of its ownership interest in the corporation. The plaintiff believes that perhaps this is true, but would point out something which perhaps the defendant has not made clear, that is, if we were in Ohio, which we are admittedly not, the extent of the commissions to which the defendants would be entitled would be only five percent of those retained. It seems that if the defendant is urging the Court to accept that rationale, then it must be willing to accept only five percent of the commissions involved in this case.

A further theory advanced by the defendant in its memorandum is that perhaps through some construction of facts in this case, it could be found that the defendant had entered into a joint venture with the plaintiff herein and accordingly, should be permitted the benefit of the exemption statute. It is your plaintiff's belief that in a situation such as this, that is where one of the parties merely has a five percent interest in the property of the other, that under the rationale of none of these cases cited by the defendant, would a court find that a joint venture existed. Moreover, with respect to the first case cited by the defendant, that is one involving Michigan law, there was a specific statutory exemption for joint adventurers. In Virginia, there is no such exemption and therefore any discussion of that matter seemed to be of little persuasion. The important factual distinction between the present case and those cited by the defendant is that there was no undertaking by the parties to enter into this venture and to share the profits and losses therein. Rather the defendant's share of the profits was limited to its five percent interest in the plaintiff's real estate investment

trust and its exposure to loss limited to its investment. Moreover, any joint venture theory contemplates that those parties who undertake a joint venture shall continue through the duration of the joint venture. As has been indicated to this Court, the defendant's interest was, prior to the duration of the development of the Wildwood Valley tract, transferred to some other party. Thus it would seem to the plaintiff herein that any attempt to characterize the arrangement between the plaintiff and the defendant as a joint venture is without merit.

One further area discussed by the defendants in their memorandum under the section dealing with the statutory exemption merits further comment. That area deals with the defendant's attempt to distinguish the cases of Rhode Island Hospital Trust Co. v. Doughton, 270 U.S. 69 (1926), and Holly Sugar Corp. v. McColgan, 18 Cal. 2d 218, 115 P. 2d 8 (1941). The Courts in those cases held that ownership of stock in a corporation is not equivalent to the ownership of the property belonging to the corporation. As was pointed out by the defendant, both these cases did involve the area of law revolving around the field of taxation. The plaintiff also concedes that there are certainly cases in the area of taxation in which words might have peculiar meanings and court decisions should properly be considered in that light. However, although the plaintiff admits that the factual situation certainly had some part to play in the decision of the Courts in each of these cases, as certainly do the facts in all cases, that the Courts, particularly in the Doughton case, a United States Supreme Court case, dealt specifically with the question of whether or not mere stock ownership in a corporation constitutes ownership of the property of the corporation. There the Court held that it did not. The Court went on to point out a shareholder may share in the company's earnings, through dividends, and may take a proportionate share of the residue upon such future dissolution, but pointed out that such shareholder does not own the property of the corporation. This

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does not appear to be the type of decision in the area of tax law which relies on any peculiar definitional problem and being a United States Supreme Court decision on point, would appear to be dispositive as to the issue herein.

In summary, a lot has been said both by the plaintiff and the defendant in their memoranda submitted to this Court concerning the question of the statutory exemption and the meaning of the word "owner" incorporated therein. Yet, in the final analysis, the question that we are ultimately faced with remains; what was the intention of the Virginia General Assembly in enacting Section 54-734 and specifically, what meaning is to be attached to the word "owner" within that section? The defendant contends that the ownership of any stock or of any interest is sufficient under the statute to constitute one an owner. If this is to be the construction that this Court or that any Court should put upon the statute, it must first realize that in so doing it completely frustrates the whole legislative scheme with regard to the requirement of a real estate license for a person who undertakes to sell, for consideration, the real estate of another entity. This is so because if the defendant's construction is to prevail, a corporation, or any person owning real estate, could convey to a third party a share of its stock or some other interest in the property and thereby permit that third party to completely avoid any of the licensing requirements of the Virginia Code. It seems clear that this was not the purpose behind Section 54-734 and for this reason, the Plaintiff urges this Court to construe that section as not permitting the owner of a five percent interest in a real estate investment trust to benefit from the exemption therein provided.

Third, as to the issue of whether or not the contract is severable, the defendant's main thrust is that a portion of the contract may have been illegal while another portion might have been legal, and that that being the

case, that portion which was legal should be severed and continued in effect and only that portion which was illegal rendered void. Numerous cases have been cited by the defendant, such as Bristol v. Dominion National Bank, 153 Va 71 (1929), which stand for the proposition that where a contract deals with a variety of subjects, some of which are valid and some of which are illegal and thus void, "those which are valid will be upheld if they are not so interwoven with those that are illegal as to make divisibility impossible." (See defendant's brief at page 35). Certainly this is the law and the plaintiff would in no way intend to take issue on this point. However, the critical distinction between the cases cited by the defendant and the case present before the Court is that the segments of the contract here involved which may represent activities which are in fact not forbidden by statute are so interwoven with those that are illegal so as to make divisibility impossible. The important element of this contract, a fact which apparently the defendant here either has not or refuses to recognize, is that the entire consideration that the defendant was to receive under the contract was contingent upon there being sales of property. If there were no sales, there was to be no consideration. Therefore, in view of that fact, all consideration was inextricably linked to sales, and since the sale of real property is specifically that activity which is prohibited under the statutes of Virginia where the person so selling, provided he is selling the property of another, is not licensed in accordance with the relevant sections of the Virginia Code, severability is impossible.

Even if this Court were to attempt to segregate out those portions of the contract which represented payments for services which were permissable and which did not require a real estate license, this task would be impossible. As the defendant has pointed out at page 38 of its memorandum, the three separate functions set out in the contract were first, managing, second, selling, and third, promotion. Of these three functions, taken in the best

light, only that of managing, in the sense that it involved some development and other management activities which may or may not have been contemplated by the General Assembly as constituting brokerage activities, could possibly involve activities for which no license is required. Certainly those other two activities, that is the function of promotion and the function of sales, are clearly so interrelated to the activities of selling as to be impossible to segregate on any rational basis. Accordingly, applying all those cases which have been cited by the defendant to the facts before the Court in this case, it seems that there can be no possible construction which would render this contract severable along the lines set forth by the defendant.

The only case which the defendant cites which would appear, on its face, to avoid the question of whether or not the illegal was interwoven with the legal appears to be the case of Skipwith v. Strother, 3 (Rand) 214 (1825). That case involved the question of the severability of a negotiable bond, and the Court in that case permitted the consideration to be allocated to that portion of the bond which represented valid consideration. One crucial distinction between that case and the case before the Court here is the fact that the Court there was sitting in equity. As was indicated in the quotation from that case in the defendant's memorandum at page 41, the Court said the following:

> If any part of the bond in question was on good consideration, although the bond would be void, at law, a Court of Equity, upon the principle that he who asks equity must do it, would not relieve against the judgment except to the extent of the gaming consideration.

Therefore, as the Court there indicated, if the case had been at law, as is the present case, the total consideration would be void.

The defendant goes on to discuss cases in other jurisdictions concerning the question of severability but it is the plaintiff's belief that since there are cases in Virginia which appear to address themselves to

the question of severability, that those cases would be decisive. Thus, in summary, since the contract is on its face complete and unambiguous and since there is no apportionment of the consideration among those elements or designated services for which the consideration is to be paid, and since the Virginia law is that where a contract provides for a single consideration, that the contract is entire and not subject to being severed, the plaintiff urges this Court to find that this contract is not severable.

Fourth, as to the question of whether or not the parole evidence rule renders inadmissable evidence of prior or contemporaneous agreements concerning the apportionment of the stated consideration, the defendant's position, as stated in its memorandum, is that the parole evidence rule would not be applicable in the situation before the Court. As the defendant points out, in Virginia the rule is well settled that parole evidence of prior or contemporaneous oral negotiations or stipulations is inadmissable to vary, contradict, add to, or explain the terms of a complete, unambiguous, written instrument (defendant's memorandum at page 47; 7 M.J. "Evidence" § 130 (1949). The contract before the court is complete; it provides for a stated service to be performed; it provides for a definite consideration and a definite time for performance. Moreover, the contract as written is unambiguous. Finally, the contract is written. Given these facts, any parole statements prior to or contemporaneous with the execution of that document are, by rule of evidence, inadmissable. The defendant has gone to great lengths to argue that there were other intentions that were not embodied in the agreement and it argues that they should be permitted to present evidence on those points. However, before any of that evidence should be considered by this Court and before any of those arguments should even be considered, this Court must first make a determination as to whether the contract is, on its face, complete and unambiguous. It is your plaintiff's belief that on the

face of the document there is a written agreement which is complete in all of its terms, which is specific, and which is unambiguous. This being the case, the parole evidence rule would interpose a bar to the admission of any evidence to vary, contradict or add to its terms. Moreover, one further thing perhaps should be pointed out; that is, that the construction that the defendant urges this Court to believe was in fact the agreement is that the parties contemplated that the defendant would be paid for certain of its services irrespective of whether or not there were sales. This is clearly not the case as the contract provides that all consideration due to the defendant was based upon sales. Not only was there no allocation but there was a specific provision that the consideration was tied directly to sales activities. Therefore, not only does the defendant ask to submit parole evidence to add to what is, on its face, an entire agreement, but to specifically contradict the terms of that agreement. Such evidence, being prior or contemporaneous to the execution of this agreement, is inadmissable.

In conclusion, in view of all of the foregoing, the plaintiff urges the Court to find: (1) that the doctrine of laches cannot properly be plead at an action at law such as that before the Court, and that even if it were proper to assert laches as a defense in this matter that, based upon the facts before this case, the doctrine of laches would be inapplicable; (2) that the defendant is not an owner within the meaning of the Virginia Code Section 54-734 which exempts owners from the requirements of obtaining a license prior to selling real estate; (3) that the contract, being entire and the consideration single and inextricably interwoven, is not capable of being severed; and (4) the contract having been found to be both entire and unambiguous, parole evidence is inadmissable.

Respectfully submitted,

GRENCO REAL ESTATE INVESTMENT TRUST

By: Harold R. Bailes
Counsel

Bailes, Lindstrom & Tucker, Ltd, p.q.

By Harold R. Bailes

400 Court Square
Charlottesville, Virginia

CERTIFICATE

I hereby certify that I have mailed a copy of this reply memorandum on the 6th day of December, 1974, to L.B. Chandler, Jr., Esq., Chandler and Huff, 415 Park Street, Charlottesville, Virginia, 22901, Counsel for the defendant herein.

Harold R. Bailes

ORDER

In this case Plaintiff, Grenco Real Estate Investment Trust, filed a motion for judgment against Defendant, Nathaniel Greene Development Corporation, for certain monies paid by Plaintiff to Defendant under the terms of an agreement between them which Plaintiff alleged was illegally entered into by Defendant. To this motion for judgment the Defendant demurred, after which the Court Ordered Defendant to state its grounds for the demurrer. This was done and argument was had, after which the Court, by Order, overruled the demurrer, to which ruling the Defendant duly objected and excepted prior to filing its plea of laches and grounds of defense to such motion for judgment and its counterclaim for certain monies alleged still due from Plaintiff to Defendant under further terms of such agreement.

Plaintiff responded to the plea of laches by asking that it be set down for argument; and to Defendant's grounds of defense Plaintiff demurred.

To Defendant's counterclaim, Plaintiff also demurred.

Upon consideration whereof be it now ORDERED and ADJUDGED that in accordance with Rule 3:8 of the Rules of Court Defendant's counterclaim (with Plaintiff's demurrer

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thereto adhering) is hereby severed from the claim in chief hereinbefore made by Plaintiff, such counterclaim henceforth to be heard and tried as a separate action.

ENTER: George M. Coles
Judge

DATE: Feb 10, 1976

We Ask For This:

Harold R. Bailes
Harold R. Bailes, p.q.
Bailes, Lindstrom & Tucker, Ltd.
400 Court Square
Charlottesville, Virginia

Counsel for Plaintiff

L. B. Chandler Jr.
L. B. Chandler, Jr., p.d.
Chandler, Huff & Wood, Ltd.
415 Park Street
Charlottesville, Virginia

Counsel for Defendant

ORDER

This case, from which Defendant's counterclaim has previously been severed, came on to be heard upon Plaintiff's demurrer to Defendant's grounds of defense and upon Defendant's plea of laches, which had been set for argument.

Upon consideration whereof, the Court having again maturely considered the memoranda filed by the parties prior to its having overruled Defendant's demurrer to Plaintiff's motion for judgment, now then the Court did, and doth hereby, reaffirm the rulings based upon which it overruled Defendant's said demurrer, which said rulings were set forth in an order of this Court entered on June 6, 1974, said order being a part of the record in this case, and the Court doth further rule that even if Plaintiff had possessed the actual knowledge attributed to it in Defendant's grounds of defense, nevertheless such knowledge would be no defense to Plaintiff's claim herein.

Accordingly, the Court doth hereby ORDER and ADJUDGE that, in consequence of Plaintiff's demurrer to Defendant's grounds of defense and its ruling set forth above, paragraphs 10 and 11 of such grounds of defense are hereby struck out as neither stating any sufficient defense nor alleging anything material to any defense otherwise pleaded. And to every ruling and adjudication in this paragraph the Defendant, having fully stated its contrary view, did duly object and except and continues to object and except, BASED UPON THE GROUNDS SET FORTH IN DEFENDANT'S MEMORANDA WHICH ARE A PART OF THE RECORD OF THIS CASE.

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NEYS AT LAW
ARK STREET
TESVILLE, VA.
22901

DSVILLE, VA
22973

But upon consideration of the further memoranda heretofore filed by the parties, the Court is of the opinion that paragraph 12 of Defendant's grounds of defense, which relies upon an exception in the first sentence of Section 54-734 of the Code of Virginia, would, if proved, be a valid defense to Plaintiff's claim. Accordingly, be it ORDERED and ADJUDGED that Plaintiff's demurrer to Defendant's grounds of defense is, except insofar as sustained in the preceding paragraph hereof, hereby overruled. And Plaintiff having fully stated its position to the contrary, did duly object and except to the ruling and adjudication in this paragraph.

And the Court, having thus disposed of Plaintiff's demurrer upon the basis stated in the two preceding paragraphs, does not at this time rule upon the other questions raised by such demurrer and addressed by the parties in their memoranda, to-wit: whether the said agreement is severable so as to permit apportionment of its consideration with respect to the various functions to be performed thereunder, and whether parol evidence may be received in furtherance of any such apportionment, because the Court is of the opinion that its prior rulings on the Plaintiff's demurrer render it unnecessary to decide these issues at this time.

The Court, upon consideration of counsel's arguments concerning the applicability of the doctrine of laches, doth further ORDER and ADJUDGE the Defendant's plea of the doctrine of laches is insufficient in law; and Defendant having fully stated its position to the contrary, did to this ruling object and except.

Thereupon, Defendant moved the Court for summary

judgment against Plaintiff on the claim stated in Plaintiff's motion for judgment; and as grounds therefor did allege, in addition to the admissions made in the motion for judgment and grounds of defense, that: (1) Plaintiff is a real estate investment trust organized under the provisions of Chapter 9 of Title 6.1 of the Code of Virginia (theretofore §§6-577 et seq. of such Code functioning internally as would a corporation); (2) That at the time Plaintiff was organized it issued certificates of interest totalling 2633 1/3 shares of which 133 1/3 shares or 5.1% of those outstanding were issued to Defendant, and (3) That this state of affairs remained the same throughout the period relevant to this case.

To this motion for summary judgment Plaintiff responded by admitting the facts therein alleged and by alleging that: (1) That the Defendant did not possess a Virginia real estate salesman or broker's license at all relevant times herein; (2) That at no time during said period was the Defendant a trustee of such trust, and (3) That at all times during such period the land which was the subject of the agreement aforesaid was held by Plaintiff in its trust name and not in the name of its trustees, all of which facts the Defendant admitted; and further the Plaintiff denied that, based upon all of the facts admitted herein by both parties and the admissions made in the pleadings, the Defendant was entitled to summary judgment.

After mature consideration of such motion, the Court was of the opinion that based upon the admissions mentioned in the preceding paragraph the Defendant had

substantially made out the defense set forth by it in paragraph 12 of the Grounds of Defense and was therefore entitled to summary judgment in its behalf. Accordingly, be it hereby ORDERED and ADJUDGED that Defendant's motion for summary judgment be, and it hereby is, granted; and Plaintiff, having fully stated its position that the defense set forth in paragraph 12 of Defendant's grounds of defense is insufficient in law, did duly object and except to the ruling and adjudication in this paragraph, BASED UPON THE GROUNDS SET FORTH IN PLAINTIFF'S MEMORANDUM WHICH WAS A PART OF THE RECORD IN THIS CASE.

Upon further consideration whereof, be it hereby finally ORDERED and ADJUDGED that Plaintiff recover nothing of the Defendant in this action and that Defendant recover from the Plaintiff its taxable costs heretofore in such action expended.

And to the judgment contained in the preceding paragraph Plaintiff did also object and except for the reasons it gave in making its other objections set forth hereinabove.

ENTER: George M. Coles
Judge

DATE: Feb. 11, 1976

Seen and Excepted To:

L. B. Chandler, Jr., p.d.
CHANDLER, HUFF & WOOD, LTD.
415 Park Street
Charlottesville, Virginia

Counsel for Defendant

Seen and Excepted To:

Harold R. Bailes

Harold R. Bailes, p.q.
BAILES, LINDSTROM & TUCKER, LTD.
400 Court Square
Charlottesville, Virginia

Counsel for Plaintiff

DLER, HUFF
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EYS AT LAW
RK STREET
TESVILLE, VA.
2901

DSVILLE, VA.
2973

NOTICE OF APPEAL

Pursuant to Rule 5:6 of the Supreme Court of Virginia comes now the plaintiff, Grenco Real Estate Investment Trust, by its counsel, and hereby gives notice of an appeal from that final order entered in the above-styled case by the Circuit Court of Greene County on February 11, 1976. A statement of facts, testimony or other incidents of the case is to be hereafter filed.

ASSIGNMENTS OF ERROR

Also pursuant to Rule 5:6 of the Supreme Court of Virginia further comes the plaintiff, Grenco Real Estate Investment Trust, by its counsel, and assigns hereby the following errors of the trial court in such case: That in such order it did----

A. Erroneously rule that, under the exception contained in the first sentence of section 54-734 of the Code of Virginia, one who owns 5.1% of the capital shares of a real estate investment trust is, without more shown, an owner of real estate held in the name of such trust and thus exempt, with respect to transactions in such real estate, from the requirements of Chapter 18 of Title 54 of such Code;

B. Erroneously determine, in virtue of such ruling, that paragraph 12 of defendant's grounds of defense, which set up the situation referred to in paragraph A above, would, if proved, be a valid defense to plaintiff's claim for the return of commissions paid by plaintiff to defendant for bringing about sales of real

estate owned and held by plaintiff in its trust name during a period when defendant was not licensed as a real estate broker or salesman under Chapter 18 of Title 54 of such Code;

C. Erroneously overrule, in virtue of such determination, plaintiff's demurrer to defendant's grounds of defense;

D. Erroneously decide (where the facts were as admitted by the parties as recounted in such order) that the defendant had made out a complete and sufficient defense under paragraph 12 of its grounds of defense;

E. Erroneously sustain, in virtue of such decision, defendant's motion for summary judgment in its own behalf; and

F. Erroneously render judgment for defendant, based upon its having overruled such demurrer and sustained such motion.

WHENCE the foregoing Notice of Appeal and Assignments of Error:

GRENCO REAL ESTATE INVESTMENT TRUST

BY: Harold B. Bailes
Counsel

Bailes, Lindstrom & Tucker, Ltd., p.q.

BY: Harold B. Bailes
400 Court Square
Charlottesville, Virginia

CERTIFICATE

I hereby certify that on this the 8th day of March 1976 I did mail a true copy of the foregoing to L. B. Chandler, Jr., Esquire. of Chandler, Huff & Wood, 415 Park Street, Charlottesville, Virginia, counsel of record for defendant.

162 Harold B. Bailes

GRENCO REAL ESTATE
INVESTMENT TRUST,

Appellant

v.

NATHANIEL GREENE DEVELOPMENT
CORPORATION,

Appellee

NOTICE OF ASSIGNMENT OF CROSS-ERROR

To The Honorable Lelia D. Bickers, Clerk Of The Above-Styled Court:

Pursuant to Rule 5.6 of the Rules Of The Supreme Court Of Virginia the following are assigned as cross-errors to the judgment of The Circuit Court Of Greene County, Virginia entered on February 11, 1976, from said judgment which the appellant has filed its notice of appeal and assignment of error in this Court on March 8, 1976.

1. That the Court erred in striking out paragraphs 10 and 11 of Defendant's grounds of defense wherein defendant had alleged that Plaintiff could not rely upon an alleged illegal contract as its basis for recovery, and that even if the contract were illegal, Plaintiff would have stood in pari delicto with Defendant concerning the alleged illegality, and therefore would have been precluded from recovering on the contract.

2. That the Court erred in ruling that even if Plaintiff had actual knowledge that Defendant did not possess a real estate license at the time the contract was executed, that such knowledge could not be a defense to Plaintiff's claim as alleged in the motion for judgment.

LER, HUFF
WOOD
YS AT LAW
RK STREET
ESVILLE, VA.
2901

3. That the Court erred in ruling that the Defendant's plea of the doctrine of laches was insufficient in law.

NATHANIEL GREENE DEVELOPMENT CORPORATION

By L B Chandler Jr
Counsel

L. B. Chandler, Jr.
Ralph E. Main, Jr.
CHANDLER, HUFF & WOOD, LTD.
415 Park Street
Charlottesville, Virginia 22901

CERTIFICATE

I hereby certify that a true copy of the foregoing assignment of cross-error was mailed to Harold R. Bailes, Esquire, 400 Court Square, Charlottesville, Virginia, counsel for appellant, on this 15th day of March, 1976.

L B Chandler Jr