(3) Submission of pre-conference pre-trial statements and attendance at the conference will be mandatory. Counsel must be authorized to discuss and conclude settlement and their clients and/or insurance representatives must be available by telephone to answer questions, if necessary.

(4) The Administrator of the Program will submit a report of the conference to the Court, which if the case has not settled, will include the pre-conference statements.

(5) Cases that have settled will be removed from the trial list. Cases that have not settled will remain on the list and proceed to trial in the regular course.

The demurrer will be overruled.

In their motion to strike, defendants allege that plaintiff had a full, complete and adequate non-statutory remedy at law, and thus the complaint in equity should be stricken.

However, this position overlooks the prevailing view that when the subject matter of a contract is real estate, an action for specific performance will lie. *Billow v. Billow*, 96 Dauph. 448 (C.P. Dauphin Co., 1975); *Ecker v. Kurtz, 119 P.L.J. 387 (C.P. Allegheny* Co., 1971). See also P.L.E. Specific Performance §27.

The motion to strike is denied.

ORDER OF COURT

May 7, 1987, defendants' preliminary objections are dismissed.

Defendants are granted thirty (30) days from the date hereof to file an Answer to the Complaint.

Exceptions are granted to the defendants.

BLUE RIDGE ENERGY v. ESHLAND ENTERPRISES, INC., C.P. Franklin County Branch, A.D. 1985-62
Breach of Contract - Loss of Commissions - Net Profits

1. For a breach of contract resulting in a loss of commission, the injured party is limited to recovering net profits.

2. The calculation of net profit is an element of damages that plaintiff must prove by a fair degree of certainty.

Jan. G. Sulcove, Esquire, Attorney for Plaintiff
Denis M. DiLoreto, Esquire, Attorney for Defendant

PRE-TRIAL OPINION

WALKER, J.:*

Plaintiff, Blue Ridge Energy, Inc., and defendant, Eshland Enterprises, Inc., entered into an agreement whereby plaintiff was to market defendant's heating system for a commission. Defendant terminated plaintiff and plaintiff is suing for, among other things, loss of commissions accrued from the date of termination to the date the contract would have expired. A pre-trial conference was

*Editor's Note: Original bears no date, but the record in the Prothonotary's office states the opinion was filed on May 22, 1987.

held and the court requested that the parties provide briefs on two issues: (1) whether plaintiff may recover gross or net commissions for the relevant period and (2) whether plaintiff was defendant's exclusive agent under the contract. Both parties briefed the issues and the matter is now properly before the court.

Under Pennsylvania law, it is clear that, for a breach of contract resulting in a loss of commissions, the injured party is limited to recovering net profits. *Massachusetts Bonding & Ins. Co., v. Johnson & Harder,* 348 Pa. 512 (1943). The measure of damages is compensation for the loss sustained; plaintiff is to be put, as nearly as possible, in the same position he or she would have occupied if there had been no breach. *William B. Tanner Co. v. WI00,* 528 F.2d 262 (3d Cir. 1975) (citing Pennsylvania precedent). To allow plaintiff recovery for gross commmissions, without taking into account expenses defendant would have incurred in earning the commissions, would be to violate the above maxims.

Plaintiff urges this court to adopt the reasoning of *The Pittsburgh Gauge Co., v. Ashton Valve Co.,* 184 Pa. 36 (1898) in their plea for gross commissions. The Pennsylvania Supreme Court in *Mass. Bonding,* supra, cited *Pittsburgh Gauge* yet stil concluded that the proper measure of damages for lost commissions is net profit. *See also, Hahn v. Andrews,* 182 Pa. 338 (1956) (plaintiff limited to recovering loss of value of bargain).

Next, plaintiff contends that it would be speculative to credit defendant for plaintiff's costs of doing business after termination of the agreement. Whatever difficulty this calculation entails, it is an element of damages that plaintiff must prove by a fair degree of certainty. *Aikens Indus., Inc. v. Estate of Wilson,* 477 Pa. 34 (1978). Accordingly, plaintiff shall be limited to recovering the loss of their net commissions, if any, that they suffered as a result of defendant's alleged breach.

The second issue to be addressed is whether, under the terms of their contract, plaintiff was to be defendant's exclusive agent. The relevant language of the agreement provided that plaintiff was to be defendant's exclusive agent. The relevant language of the agreement provided that plaintiff was to "handle the total solid fuel heating equipment marketing program" for defendant within "all states of the United States, except Virginia; Canada and the United Kingdom."

When there is no wording in the agreement capable of being construed to indicate the existence of an exclusive agency, then such a relationship will not be inferred. *Daharth Elec. Co. v. Suburgan Elec. Dev. Co.,* 332 Pa. 129 (1938). However, even if the agreement does not specify that there is a "sole and exclusive agency", such a relationship may exist if the effect of the contract is to put the responsibility of all of a party's sales into another's

hands. *Albright v. Kalbitzer,* 62 F.Supp. 815 (ED PA 1945). Though the wording "handle the total" marketing program is somewhat unclear, it could be construed as creating an exclusive agency. Because of this ambiguity, it cannot be said unequivocally that the parties did not contemplate the creation of an exclusive agency. agency.

When a material term of an agreement is ambiguous, parol evidence may be used to explain the ambiguity. That is, the surrounding circumstances and the course of dealing between the parties may be considered in establishing the terms of the agreement. *Keystone Floor Prod. Co. v. Beattie Mfg. Co.,* 432 F.Supp. 869 (ND I11 1977) (applying Pennsylvania law). As such, the parties may, at trial, introduce parol evidence to clarify the ambiguity as to whether plaintiff was granted an exclusive agency under its contract with defendant.

COMMONWEALTH v. BARRON, C.P. Franklin County Branch, No. 694 of 1986

Search and Seizure - Stop of Vehicle - Consent to Search

1. Where police stop a vehicle for speeding with the intent to issue defendant a warning, the stop is not impermissible.
2. A defendant need not be advised of his right to refuse to consent to a search of his vehicle.
3. Where the defendant orally and in writing agreed to let police look into his trunk, the search is legal.

Bradley R. Bolinger, Esquire, Attorney for Commonwealth
David S. Keller, Esquire, Counsel for the Defendant

OPINION AND ORDER

WALKER, J., May 5, 1987:

On November 23, 1986, Pennsylvania State Policeman Spataccino was on duty, patrolling Interstate 81. At about 11:30 a.m., Spataccino was parked in the median strip of I-81, using radar to check for speeding violations. When defendant, George Barron, came within radar range, he was clocked at 60 miles per hour in a