

CANADA / JUDGMENT

Century 21 Seaside Realty Ltd. v. Armstrong

2022 BCSC 646

COURT

Supreme Court of British Columbia

DECIDED

25 April 2022

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2022 BCSC 646 Century 21 Seaside Realty Ltd. v. Armstrong

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Century 21 Seaside Realty Ltd. v. Armstrong,

2022 BCSC 646

Date: 20220425

Docket: S201321

Registry: Vancouver

Between:

Century 21 Seaside Realty Ltd.

Plaintiff

And

Michael Armstrong and Jessica Armstrong

Defendants

And

Fabian Saul

Third Party

Before: The Honourable Madam Justice Tucker

Reasons for Judgment

Counsel for Plaintiff and Third Party:

H. Dunton

Counsel for Defendants:

A. Krekovic

Place and Date of Trial:

Vancouver, B.C.

August 13, 2021

Place and Date of Judgment:

Vancouver, B.C.

April 25, 2022

Table of Contents

I. Introduction.. 3

II. The Application.. 3

III. Background.. 5

IV. Issues.. 8

A. Is the Sale Agreement an Enforceable Contract?. 9

B. Fraudulent Misrepresentation.. 12

C. Breach of Fiduciary Duty. 16

V. Disposition.. 20

I. Introduction

[1] This case is a dispute under contract for the listing and sale of two property lots near Mission, BC.

[2] The plaintiff, Century 21 Seaside Realty Ltd. ("Seaside"), is a real estate brokerage. The defendants, Michael and Jessica Armstrong (the "Armstrongs"), own two lakeside lots ("Lots"). There is a cabin on each Lot.

[3] The Armstrongs entered standard form multiple listing agreements ("MLS Contracts") with Seaside. The named third party, Fabian Saul, was Seaside's agent in its dealings with the Armstrongs.

- [4] The Armstrongs entered into a purchase and sale agreement ("Sale Agreement") for both Lots. The buyer paid deposits, but did not tender the remainder of the purchase funds on the completion date. The Armstrongs did not seek to enforce the Sale Agreement against the buyer. No other contract of sale regarding the Lots was entered into under the MLS Contracts. As of the date of hearing, the Armstrongs continued to own the Lots.
- [5] Seaside claims the Sale Agreement was an enforceable contract of sale and seeks commission from the Armstrongs under the MLS Contracts. In response, the Armstrongs deny any commission is owing. They also make a third party claim against Mr. Saul alleging a breach of fiduciary duty owed to them as their real estate agent.

II. The Application

- [6] This matter was brought before me by Seaside and Mr. Saul as a summary trial application under Rule 9-7 of the Supreme Court Civil Rules, B.C. Reg 168/2009, with Seaside seeking judgment on its claim for commission and Mr. Saul seeking a dismissal of the third party claim. Dismissal of the third party claim is sought on the basis that there was no breach of fiduciary duty, and also on the basis that Mr. Saul is an agent of Seaside and ought not to have been named as a third party.
- [7] I note that the Armstrongs did not apply for judgment on their third party claim. They made submissions in support of the third party claim in their application response.
- [8] I also note that the Armstrongs' pleadings raised issues and grounds that were not pursued by them on this application. Only the three issues below were pursued and only to the extent set out. All other issues and grounds raised in the Armstrongs' pleadings were, by necessary implication, abandoned.
- [9] All parties submitted that the matters in dispute were suitable for resolution by summary procedure. All submitted that, to the extent findings of credibility were required, it would be fair and appropriate to make those findings based on the affidavit evidence before me.
- [10] The suitability of a matter for summary trial depends on the facts and legal issues in each case. In *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 1989 CanLII 229 (C.A.) at para. 48, 36 B.C.L.R. (2d) 202, the Court of Appeal identified a number of factors to be considered in determining whether a summary trial would be unjust. These factors include:
- the amount of money involved;
 - the complexity of the matter;
 - the urgency;
 - the prejudice likely to arise by reason of delay;
 - the cost of taking the case forward in relation to the amount involved;

- the course of the proceedings; and
- any other matters which arise for consideration.

[11] I find that the matters before me are suitable for determination by summary trial. I agree with the parties' submissions regarding proportionality here given the amount at issue. While there are facts in dispute that cannot be resolved without making findings of credibility, the matters in dispute can be determined on legal grounds that do not require those particular facts to be determined.

III. Background

[12] The Armstrongs say that Mr. Saul represented that he would be able to list the Lots in the United States through Sotheby's (i.e., in addition to listing them in Canada through Seaside) and that this representation induced them to enter into the MLS Contracts.

[13] On or about May 27, 2017, the Armstrongs met with Mr. Saul ("May Meeting"). The MLS Contracts were signed by the Armstrongs at the May Meeting.

[14] Remuneration is addressed in the MLS Contracts under the fifth term ("Term 5"). Term 5A reads:

5. LISTING BROKERAGE'S REMUNERATION:

The Seller agrees:

A. To pay the Listing Brokerage a gross commission of 5% of the sale price of the Property, plus applicable Goods and Services Tax and any other applicable tax in respect of the commission (commission + tax = remuneration) if:

- (i) A legally enforceable contract of sale between the Seller and a Buyer is entered into during the term of this Contract; or
- (ii) A legally enforceable contract of sale between the Seller and a Buyer who is introduced to the Property or to the Seller, by the Listing Brokerage, the Designated Agent (as herein defined) a Cooperating Brokerage or any other person including the Seller during the term this Contract is entered into:
 - (a) within sixty (60) days after the expiration of this Contract; or
 - (b) any time after the period described in (a) where the efforts of the Listing Brokerage, the Designated Agent (as hereinafter defined) or the Cooperating Brokerage were an effective cause;

provided, however, that no such commission is payable if the Property is listed with another licensed brokerage after the expiration of the term of this contract and sold during the term of that listing contract; or

(iii) an offer to purchase is obtained from a prospective buyer during the term of this Contract who is ready, willing and able to pay the Listing Price and agrees to the other terms of this Contract, even if the seller refuses to sign the offer to purchase;

[15] For the purposes of these reasons, I will refer to Term 5A(i) as the "Commission Clause".

[16] The MLS Contracts also contain a term addressing Mr. Saul's relationship with Seaside and with the Armstrongs:

7. DESIGNATED AGENCY:

A. Subject to Clause 12A and 7C(iii) the Listing Brokerage designates Fabian Saul (the "Designated Agent") to act as the sole agent of the Seller in respect of the Property and will designate one or more licensees of the Listing Brokerage to act as the sole agents of all buyers and other sellers also represented by the Listing Brokerage.

[17] Mr. Armstrong attests as follows with respect to Mr. Saul's statements and conduct at the May Meeting:

13. During our May 27, 2017 meeting with Mr. Saul, he stated that we would pay a 5% commission once our Properties were sold. He did not confirm nor explain that the MLCs allowed Century 21 Seaside to charge a commission [on] upon the creation of a legally enforceable contract of sale between us and a buyer during the term of the MLCs. He did not explain, highlight, or underline any of the clauses. He did point out in Schedule "A" of the MLCs that we could cancel the MLCs at any time, unconditionally. He did not explain what this meant.

[18] A prospective buyer for the Lots, Vans Intrust Investments Ltd. ("Vans"), was identified by Mr. Saul. Vans was represented by Michael Tran.

[19] There is no road access to the Lots. On or about August 4, 2017, Mr. Tran, an associate of Mr. Tran's, Mr. Saul, and Mr. Armstrong toured the Lots together. The viewing party crossed the lake using a barge owned by the Armstrongs.

[20] By email dated August 18, 2017, between Mr. Tran and Mr. Saul, Mr. Saul advised that the Armstrongs would not accept an offer that would be conditional for longer than a week.

[21] Later on August 18, 2017, the Armstrongs entered a limited dual agency agreement ("Dual Agency Agreement") with Seaside and Vans. The Dual Agency Agreement was contemplated by Terms 7, 8 and 12 of the MLS Contracts.

[22] After signing the Dual Agency Agreement, also on August 18, 2017, Vans and the Armstrongs entered the Sale Agreement.

[23] The Sale Agreement is a modified standard form contract from the BC Real Estate Association. The Sale Agreement provided for an April 26, 2018 completion date, a purchase price of \$1,300,000, and a deposit of \$60,000.

[24] Term 3 of the Sale Agreement ("Term 3") reads:

3. TERMS AND CONDITIONS: The purchase and sale of the property includes the following terms and is subject to the following conditions:

General condition of both cabins as viewed.

Buyer to visit properties before completion date with the help of Seller.

Each condition, if so indicated is for the sole benefit of the party indicated. Unless each condition is waived or declared fulfilled by written notice given by the benefitting party to the other party on or before the date specified for each condition, this contract will be terminated thereupon and the Deposit returnable in accordance with the Real Estate Services Act.

[25] On September 15, 2017, Vans paid the \$60,000 deposit directly to Mr. Armstrong.

[26] On September 23, 2017, Mr. Tran launched onto the lake where the Lots are located. Mr. Tran had his children with him and was in his own boat. Mr. Armstrong invited Mr. Tran to come and visit the Lots while he was out on the lake, but Mr. Tran declined the offer.

[27] On or about April 24, 2018, Vans sought an extension of the time period to close under the Sale Agreement.

[28] In considering whether to agree to the extension, Mr. Armstrong suggested that Seaside agree to reduce its commission in order to induce him to grant the extension. Seaside agreed to do so. Seaside produced a "disclosure of remuneration" document ("Disclosure Document") dated April 23, 2018, capping Seaside's commission under the Sale Agreement at \$52,500.

[29] On April 24, 2018, the Armstrongs signed an addendum ("Addendum") to the Sale Agreement. The Addendum increased the purchase price by \$50,000 (to \$1,350,000) and the deposit by \$10,000 (to \$70,000 total), and extended the completion date to July 27, 2018. The additional deposit was paid directly to the Armstrongs.

[30] No one from Vans contacted Seaside to make arrangements for the closing, and the July 27, 2018 completion date passed without a closing taking place.

[31] Following July 27, 2018, the Armstrongs continued to hold the \$70,000 in deposit monies.

[32] The parties before me agree that the \$70,000 deposit is non-refundable.

[33] There is no evidence that Vans ever sought to have the deposit returned.

[34] Vans expressed interest in entering a new purchase and sale agreement for the Lots. In an August 2018 email between Mr. Saul and Mr. Armstrong regarding Vans' continued interest, Mr. Armstrong expressed pleasure that the Sale Agreement had failed to complete and the belief that the Lots had since doubled in value.

- [35] In or about October 2018, Mr. Saul left Seaside and began working at a brokerage associated with Royal LePage.
- [36] In November 2018, the Armstrongs learned Mr. Saul was with Royal LePage.
- [37] In or about August and September of 2019, Mr. Armstrong, Mr. Tran and Mr. Saul exchanged emails regarding Vans' continued interest in buying the Lots.
- [38] Subsequently, Mr. Saul withdrew, saying that he would not be further involved in selling the Lots, and Seaside's notice of civil claim was filed.

IV. Issues

- [39] Seaside's claim for commission is founded on the assertion that the Commission Clause is triggered by the existence of an enforceable contract of sale and there is no requirement for a closing to complete. That assertion was not contested by the Armstrongs.

- [40] The following issues require determination:

- Is the Sale Agreement an enforceable contract of sale for purposes of the Commission Clause;
- Can the MLS Contracts be rescinded due to fraudulent misrepresentation; and
- Did Mr. Saul breach a fiduciary duty by failing to expressly explain to the Armstrongs that commission could become payable under the MLS Contracts without a completed closing?

A. Is the Sale Agreement an Enforceable Contract?

- [41] Again, Term 3 reads:

3. TERMS AND CONDITIONS: The purchase and sale of the property includes the following terms and is subject to the following conditions:

General condition of both cabins as viewed.

Buyer to visit properties before completion date with the help of Seller.

Each condition, if so indicated is for the sole benefit of the party indicated. Unless each condition is waived or declared fulfilled by written notice given by the benefiting party to the other party on or before the date specified for each condition, this contract will be terminated thereupon and the Deposit returnable in accordance with the Real Estate Services Act.

- [42] The Armstrongs contend the Sale Agreement is unenforceable because the second clause written into Term 3 constitutes a condition, and it was neither met, waived, nor declared fulfilled by written notice. The second clause reads: "Buyer to visit properties before completion date with the help of Seller" ("Visit Clause"). No argument was advanced with respect to the first clause (relating to the state of the cabins).

- [43] The Armstrongs' argument relies on answers given by Mr. Tran to questions asked by the defendants' counsel at an August 6, 2021 examination for discovery. Mr. Tran's statements are to the effect that he could not get his "people onto the property and see it" and was thus unable to "put together an investment". The defendants say that they failed to convey Mr. Tran across the lake to see the Lots on occasions after the Sale Agreement and before closing. The Armstrongs submit that as they (the Armstrongs) failed to fulfil the Visit Clause, they could not have enforced the Sale Agreement against Mr. Tran.
- [44] That submission implicitly interprets the Visit Clause as imposing an ongoing obligation on the Armstrongs to ferry Mr. Tran across the lake to see the Lots whenever and as often as Mr. Tran wished before the closing date. The defendants did not advance any argument in support of that interpretation.
- [45] Seaside says the Visit Clause is not a true condition. Seaside also submits that if the Visit Clause is a condition, it is one in favour of Mr. Tran and the Armstrongs cannot rely on their own non-compliance.
- [46] Assuming without deciding that the Visit Clause amounts to a condition, I will deal first with its interpretation. The modern approach to the interpretation of contracts is set out in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53:
- [47] the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding". To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:

No contracts are made in a vacuum: there is always a setting in which they have to be placed. In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.

(*Reardon Smith Line*, at p. 574, per Lord Wilberforce)

- [48] The meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement. As stated by Lord Hoffmann in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*, [1998] 1 All E.R. 98 (H.L.):

The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. [p. 115]

[Citations omitted.]

- [47] I have considered the Visit Clause both as read on its own, as part of Term 3, and in the context of the Sale Agreement as a whole: *Gordon Nelson Inc. v. Cameron*, 2017 BCSC 1269 at paras. 87- 88, aff'd 2018 BCCA 304. On a plain reading, the Visit Clause provides Vans with the right to the seller's help to make a visit.
- [48] The Visit Clause does not impose an ongoing obligation on the Armstrongs to arrange for any Vans representative to cross the lake to conduct a visit whenever and howsoever many times Vans might wish. That would be an onerous and extraordinary obligation and one would reasonably expect it to be set out with some specificity. Had such an obligation been intended, the terms could be expected to read something along the following lines: "The Seller agrees to help Vans visit whenever ".
- [49] Mr. Tran had been specifically forewarned by Mr. Saul that the Armstrongs would not be receptive to any offer containing conditions that would be in place for more than a week. The Armstrongs do not reside on the lake nor even nearby, but rather a significant distance away in White Rock. I am satisfied the Armstrongs would have refused to agree to the Visit Clause had they understood it to impose the obligation they would now have me attribute to it.
- [50] Mr. Saul attests, buttressed by reference to calendar entries, that he visited the Lots with Mr. Tran as follows in January and July 2018:
- January 13, 2018, 9:30-10:30 "Visit Lake Errock". Description: "see the adjacent property, McNeilage's and check cabins"; and
 - July 7, 2018, 11:30-14:30 "Lake Errock". Description: "Visit property check cabins and lunch with Michael's parents at Golf Course".
- [51] Mr. Tran provided an affidavit specifically confirming he made the January and July 2018 visits described by Mr. Saul. He further attests to having visited the property "many times on behalf of [Vans] before the completion date with the help of Mr. Fabian Saul".
- [52] Mr. Saul helped Mr. Tran visit the Lots after the Sale Agreement was entered and before the closing date. I am satisfied that he did so at least once before the original completion date, and then at least once again during the extended completion period. Mr. Saul did so as the Armstrongs' agent.

- [53] Further, Vans has not asserted that the Armstrongs breached the Sale Agreement and has not sought a return of its deposit: see 1050438 B.C. Ltd. v. Penguin Enterprises Ltd., 2019 BCSC 2138.
- [54] While Vans did not provide formal notice that the Visit Clause had been fulfilled, it was unnecessary given that Mr. Saul had personal knowledge of the relevant facts.
- [55] If the Visit Clause was a true condition, it was a fulfilled condition. The Armstrongs cannot rely on the Visit Clause to say the Sale Agreement was unenforceable.

B. Fraudulent Misrepresentation

- [56] The Armstrongs assert that Mr. Saul promised them that he could market the Lots in the United States through Sotheby's. They claim he represented this to them knowing it was untrue or, alternatively, did so recklessly, and that the promise induced them to enter the MLS Contracts: Wang v. Shao, 2018 BCSC 377 at para. 196. They argue this misrepresentation makes the remedy of rescission available to them as a defence, citing Laidar Holdings Ltd. v. Lindt & Sprungli (Canada) Inc., 2018 BCSC 66 at para. 296 and LBEL Inc. v. Ten Veen, 2018 BCSC 1991 at para. 36.

- [57] The Armstrongs' position falls to be assessed against the following facts:

- On August 4, 2016, Mr. Armstrong found an ad for Mr. Saul as a realtor, stating that Mr. Saul provides services in both British Columbia and Washington State as a dual citizen and dual real estate agent (licensed in both the US and Canada).
- Mr. Saul stated to the Armstrongs in a May 18, 2017 email that he could provide services in B.C. through Seaside and in Washington State through Sotheby's.
- On June 19, 2017, Mr. Saul and Mr. Armstrong had a conversation in which Mr. Saul advised he was having problems with listing the Lots with Sotheby's.
- In an email dated June 23, 2017, from Mr. Saul to Mr. Armstrong:

About Sotheby's, I am still working at it. They can only suggest I move office here in Canada too. Problem is that my new Broker mislead me thinking I could use the Sotheby's websites to promote my Canadian business. From default, it cannot open up any other country than the USA only. So at corporate office they are still debating how to solve this offer from my Broker. It is not only affecting my business with you, but with many more than I offered. And those are expensive homes I cannot dare to lose. So, please give me a few more days to sit down with you to discuss this issue.

- Mr. Armstrong responded later that same day writing:

Hope the Sotheby's plan works, as I think American buyers are the best bet. I suppose you can still market the properties there anyway, if not on the Sotheby's website?

· After Mr. Armstrong learned that Mr. Saul had changed brokerages in Washington State from Sotheby's to Engel & Volker, he emailed Mr. Saul on June 1, 2018, asking whether Mr. Saul could market his Canadian listings with Engel & Volker in Washington State.

[58] In his affidavit, Mr. Armstrong states:

16. On June 19, 2017, I emailed Mr. Saul confirming that he will be posting our Properties on the Sotheby's website that day. Shortly thereafter, I had a conversation with Mr. Saul where he informed me he is having problems with listing our properties with Sotheby's. On June 23, 2017, Mr. Saul confirmed that he cannot list with Sotheby's.

[59] Mr. Saul denies having promised that he could and would list the Lots through Sotheby's. Thus, there is a direct conflict in the evidence. There are also credibility issues with respect to the Armstrongs' claimed reliance. However, it is unnecessary to make factual findings on either of these points to resolve the claim.

[60] In 0981352 B.C. Ltd. v. Sarpal, 2020 BCSC 1881 [Sarpal], Hinkson C.J. faced facts involving an alleged affirmation of contract following upon a claimed unilateral mistake. While the issue here is misrepresentation rather than a mistake, the principles with respect to affirmation are the same. In Sarpal, Hinkson C.J. summarized the law as follows:

[100] In Yourside Club Consulting Solution Ltd. v. Exfone Exchange Inc., 2006 BCSC 862, Mr. Justice Maczko wrote:

31 The law on affirmation is quite clear. Once a plaintiff knows the facts of a misrepresentation, he will lose his right to rescind if he does any act which is inconsistent with the intention to rescind the contract. Chitty on Contracts, Twenty-ninth Edition, volume 1 at page 491 describes it as follows:

If the representee, having discovered the misrepresentation, either expressly declares his intention to proceed with the contract, or does some act inconsistent with an intention to rescind the contract, he is bound by his affirmation

[101] In Kupchak et al. v. Dayson Holdings Co. Ltd. et al.; Dayson Holdings Co. Ltd. v. Palms Motel Ltd., 53 D.L.R. (2d) 482, [1965] B.C.J. No. 153 at para. 21, Mr. Justice Davey, as he then was, adopted the following passage from Halsbury's Laws of England (3rd ed.), vol. 26, pages 884-5:

1643. Affirmation of contract. A fourth defence is that the representee has elected to affirm the contract. It follows, from what has already been stated, that if, after discovery of the whole of the material facts giving him a right to avoid the contract, the representee has, by word or act, definitely elected to adhere to it, the representor has a complete defence to any proceedings for rescission. The acts and conduct relied upon as evincing the representee's affirmance must be such as are more consistent, on a reasonable view of them, with that than with any other theory. It is not sufficient to point to acts of a neutral character, or acts which are equally consistent with a possible ultimate intention to disaffirm, or with a mere

suspension of judgment.

[104] 478649 Ontario Ltd. (c.o.b. Green Acre Estates) v. Corcoran, [1996] O.J. No. 1779; 63 A.C.W.S. (3d) 744 (ONCJ) [Green Acres cited to O.J.], aff'd [1997] O.J. No. 4852, 75 A.C.W.S. (3d) 764 (ONCA), is similar to the case before me. In Green Acres, the plaintiff purchased 10 acres of rural land at a price of \$4.8 million. It alleged there was a misrepresentation that the Property could be commercially developed as a shopping centre with a septic tank system for sewage while, in reality, environmental regulatory requirements severely restricted the nature of any development. Mr. Justice Cumming allowed the defendants' motions for summary judgment on the basis that there was no genuine issue for trial. He found that the plaintiff could not have reasonably relied on the misrepresentation, and, further, that the plaintiff had affirmed the transactions.

...

[108] In Green Acres, Cumming J. also dealt with the affirmation of the contract in that case, writing:

53 A party which alleges misrepresentation, but which has affirmed the transaction induced by the alleged misrepresentation either verbally or through conduct, cannot then seek to set aside the transaction: Hinchey v. Gonda, [1955] O.W.N. 125 at 128-129 (H.C.J.). Similarly, a purchaser who discovers an alleged mistake fundamental to its contract with a vendor, and who elects orally, in writing or by conduct to affirm the contract, is barred from rescission and cannot refuse to specifically perform the contract on the ground of such mistake. Possession and payment are unequivocal acts and are consistent only with an election to affirm the contract. Such an election, once made, is irrevocable: DiCasteri, *The Law of Vendor and Purchaser*, 3rd edition (1988) at p. 8-6.

54 In the present case, the plaintiff has affirmed the transactions. The purchaser had possession of the property from March 6, 1989, and made mortgage payments to September 6, 1990. In my view, the lapse of time constitutes affirmation. Therefore, even if there otherwise was an operative misrepresentation or mistake (and I find there is not), I would find that the plaintiff is unable to pursue its claim because of its affirmation of the agreement.

[61] Assuming without deciding that there was a misrepresentation and that the Armstrongs were induced by that misrepresentation, rescission is precluded by affirmation in any event. I find that the Armstrongs repeatedly affirmed the MLS Contracts after Mr. Saul advised that he could not list the Lots through Sotheby's in the U.S. They affirmed when, among other things, they: continued with Mr. Saul as their agent after he advised them he could not list with Sotheby's; by signing the August 18, 2017 Dual Agency Agreement; and in seeking and obtaining the Disclosure Document.

C. Breach of Fiduciary Duty

[62] The Armstrongs allege Mr. Saul breached a fiduciary duty by failing to advise them that commission could be payable under the MLS Contracts without a completed closing.

[63] In their submissions, the Armstrongs identify the alleged breaching conduct as follows:

80. Based on Mr. Saul's representations about the commission being payable upon the sale of the Properties, and his not explaining the significance of clause 5A(i), the Defendants were induced to enter into the MLCs with Century 21 Seaside, or in the alternative, were deprived of the opportunity to amend the MLCs to remove clause 5A(i). This was a breach of his fiduciary duty to the Defendants.

[64] I will address the alleged representation first. The evidence that a representation was made consists of this statement in Mr. Armstrong's affidavit:

During our May 27, 2017 Meeting with Mr. Saul, he stated that we would pay a 5% commission once our Properties were sold.

[65] Mr. Armstrong does not set out a quote or provide words or phrases said to have been actually used by Mr. Saul.

[66] Even if I were to assume that Mr. Armstrong's evidence is meant to convey that Mr. Saul literally said that the Armstrongs "would pay a 5% commission once [the Lots] were sold", that statement would be neither untrue nor misleading. The term "sold" could as easily mean "having entered an enforceable contract of sale" as "after a completed closing". Further, nothing in the attributed statement implies that commission could only be payable under the MLS Contracts once the Lots were "sold".

[67] The evidence does not establish that Mr. Saul made a representation, let alone a misrepresentation.

[68] The Armstrongs say that Mr. Saul did not state to them before they signed the MLS Contracts, that commission could be payable under the contracts in the absence of a completed closing. Mr. Saul agrees that he did not, but disputes that he had any fiduciary obligation to do so.

[69] The defendants rely on *Mulligan v. Stephenson*, 2016 BCSC 1941 at paras. 108-114 [Mulligan], for the proposition that Mr. Saul was their fiduciary. They rely on para. 112 in further asserting that Mr. Saul breached his duty:

The Scope of a Realtor's Fiduciary Duty

[112] The fundamental undertaking of a realtor is to act, loyally and transparently, in the best interests of the client. The precise scope of his or her duty is informed by applicable professional conduct rules and relevant case law: Galambos, at para. 29. In *S. MacLise Enterprises Inc. v. Grover*, 2014 ABQB 591, Gates J. summarised many of the duties typically owed by a real estate agent to his or her principal. He stated:

89 A real estate agent owes both contractual and fiduciary obligations to her principal. These include the duty to make full and fair disclosure of all material circumstances and of everything the agent knows regarding the subject matter to its principal [citations omitted].

90 The duties also include an obligation to make full disclosure of all facts within the agent's knowledge which might affect the value of the property or the principals' decision [citations omitted].

91 The test of what an agent must disclose is objective, determined by "what a reasonable man in the position of the agent would consider, in the circumstances, would be likely to influence the conduct of his principal" [citations omitted].

[70] As para. 112 specifically addresses the duty to make full and fair disclosure, I take the Armstrongs' assertion to be that the Commission Clause was not fully and fairly disclosed to them.

[71] While the amount of time spent by the Armstrongs reviewing the MLS Contracts before signing is unclear on the evidence, it is undisputed that they did review the MLS Contracts before signing them. There is no evidence that the Armstrongs sought any additional time for review.

[72] Term 5 is found under an appropriate, bolded heading in the MLS Contract. In its entirety, it reads:

5. LISTING BROKERAGE'S REMUNERATION: The Seller agrees:

A. To pay the Listing Brokerage a gross commission of 5% of the sale price of the Property, plus applicable Goods and Services Tax and any other applicable tax in respect of the commission (commission + tax = remuneration) if:

(i) A legally enforceable contract of sale between the Seller and a Buyer is entered into during the term of this Contract; or

(ii) A legally enforceable contract of sale between the Seller and a Buyer who is introduced to the Property or to the Seller, by the Listing Brokerage, the Designated Agent (as herein defined) a Cooperating Brokerage or any other person including the Seller during the term this Contract is entered into:

(a) within sixty (60 days) after the expiration of this Contract; or

- (b) any time after the period described in (a) where the efforts of the Listing Brokerage, the Designated Agent (as hereinafter defined) or the Cooperating Brokerage were an effective cause;

provided, however, that no such commission is payable if the Property is listed with another licensed brokerage after the expiration of the term of this contract and sold during the term of that listing contract; or

- (iii) an offer to purchase is obtained from a prospective buyer during the term of this Contract who is ready, willing and able to pay the Listing Price and agrees to the other terms of this Contract, even if the seller refuses to sign the offer to purchase;

B. The remuneration due to the Listing Brokerage shall be payable on the earlier of the date the sale is completed, or the completion date, or where no contract of sale has been entered into seven (7) days after written demand by the Listing Brokerage; and

C. That to assist in obtaining a buyer for the Property, the Listing Brokerage will offer to Cooperating Brokerages a portion of the Listing Brokerage's commission in the amount of 2.3% of the sale price of the Property, plus applicable Goods and Services Tax and other applicable tax in respect of that portion of the commission.

D. The Listing Brokerage and Designated Agent will advise the Seller of any remuneration, other than that described Clause 5A, to be received by the Listing Brokerage in respect of the Property.

[Emphasis added]

[73] The Commission Clause does not refer to a closing or completion. Further, Term 5B expressly contemplates commission becoming payable in the absence of a closing on the completion date (i.e., "the earlier of"). Term 5A(iii) expressly contemplates commission becoming payable in the absence of a contract of sale, and thus necessarily without a completion at closing under a contract of sale. The Commission Clause read on its own discloses that commission is tied to the existence of an enforceable contract. The Commission Clause read as a part of Term 5 as a whole discloses the possibility that commission can be owing under the MLS Contracts without a closing on a completion date.

[74] Further, and notwithstanding their reliance on Mulligan, the Armstrongs are asserting that Mr. Saul was under a fiduciary duty to them before they signed the MLS Contracts, and that duty obliged him to describe how the Commission Clause would operate in factual circumstances (i.e., should a seller opt not to enforce an enforceable contract of sale) that might potentially exist in the future.

[75] The execution of the MLS Contracts is what gave rise to the per se fiduciary client-agent relationship discussed in Mulligan. Prior to the execution of the MLS Contracts, the Armstrongs and Mr. Saul were independent, arms' length parties contemplating entering into a contract together.

- [76] As stated by Justice Weiler (for the Court) in *978011 Ontario Ltd. v. Cornell Engineering Co.* (2001), 198 D.L.R. (4th) 615 (Ont. C.A.), 53 OR (3d) 783, leave to appeal ref'd [2001] S.C.C.A. No. 315, at para. 32:
- [32] we have a judicial system that emphasizes individual responsibility and self-reliance. Generally, parties negotiating a contract expect that each will act entirely in the party's own interests. Absent a special relationship, the common law in Canada has yet to recognize that in the negotiation of a contract, there is a duty to have regard to the other person's interests, namely, to act in good faith: see *Bell v. Lever Brothers Ltd.*, [1932] A.C. 161, [1931] All E.R. Rep. 1 (H.L.), and more recently, *Martel Building Ltd. v. Canada*, [2000] 2 S.C.R. 860, 2000 S.C.C. 60 at para. 73. In keeping with the principle of self-reliance imposed by law on each party to a contract, the failure to read a contract before signing it is not a legally acceptable basis for refusing to abide by it. Nor is the fact that the clause was not subject to negotiations sufficient in itself: see *Fraser Jewellers (1982) Ltd. v. Dominion Electric Protection Co.* (1997), 34 O.R. (3d) 1 at p. 10, 148 D.L.R. (4th) 496 (C.A.); *L'Estrange v. Graucob (F.) Ltd.*, [1934] 2 K.B. 394 at p. 403, [1934] All E.R. Rep. 16.

[Emphasis added]

See also *Concord Pacific Acquisitions Inc. v. Oei*, 2019 BCSC 1190 at paras. 371-373.

- [77] The Armstrongs have not advanced any basis for a finding that Mr. Saul owed them a fiduciary duty before or at the time they signed the MLS Contracts. To the contrary, the evidence is that the Armstrongs did not know Mr. Saul prior to meeting to potentially engage him as their real estate agent; Mr. Armstrong is a professional accountant; and, the Armstrongs had bought and sold property on prior occasions.
- [78] Finally, the Armstrongs contend that neither Mr. Saul nor Seaside advised them that a commission had become payable under the Sale Agreement prior to these proceedings. The MLS Contracts did not require any notice to be given. To the contrary, Term 5D specifically requires notice of remuneration other than under Term 5A, implicitly excluding an obligation, fiduciary or contractual, to give notice regarding remuneration owing under Term 5A.
- [79] No breach of fiduciary duty has been established by Mr. Saul (either on his own part or as Seaside's agent). Accordingly, it is unnecessary to address the issue of whether the third party claim was properly made.

V. Disposition

[80] To summarize:

- Assuming without deciding that the Visit Clause constitutes a condition, it was fulfilled. The Sale Agreement is an enforceable contract of sale;

· Assuming without deciding that Mr. Saul represented he could list the Lots in the U.S. through Sotheby's, the Armstrongs affirmed the MLS Contracts after Mr. Saul advised that he could not. Having affirmed, the Armstrongs are precluded from seeking rescission; and

· No breach of fiduciary duty has been established.

[81] Seaside is entitled to commission with respect to the Sale Agreement. However, Seaside capped the commission payable under the MLS Contracts under the Disclosure Document. Seaside did not establish that the Disclosure Document was conditional on the Armstrongs making voluntarily or timely payment, or Mr. Armstrong referring other clients to Seaside. The Disclosure Document is binding and applicable.

[82] My orders are as follows:

· Seaside is entitled to judgment against Michael and Jessica Armstrong, jointly and severally, in the amount of \$52,500;

· The third party claim against Mr. Saul is dismissed; and

· Seaside and Mr. Saul are entitled to one set of costs at Scale B

"Tucker, J."

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