

CANADA / JUDGMENT

Panegos v. O'Byrne

2020 BCCA 352

COURT

British Columbia Court of Appeal

DECIDED

9 December 2020

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2020 BCCA 352 Panegos v. O'Byrne

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Panegos v. O'Byrne,

2020 BCCA 352

Date: 20201209

Docket: CA46121

Between:

Attilio Panegos and Paul Mackey Sullivan

Respondents/

Appellants on Cross Appeal

(Plaintiffs)

And

Casey O'Byrne and Angela O'Byrne

Appellants/

Respondents on Cross Appeal

(Defendants)

Before:

The Honourable Madam Justice Newbury

The Honourable Madam Justice Saunders

The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: An order of the Supreme Court of British Columbia, dated
May 2, 2019 (Panegos v. O'Byrne, 2019 BCSC 679, Victoria Docket S183218).

Counsel for the Appellants/Respondents on Cross Appeal
(via videoconference):

J.A. Hall

Counsel for the Respondents/Appellants on Cross Appeal
(via videoconference):

D.J. Mildenberger

Place and Date of Hearing:

Victoria, British Columbia

October 6, 2020

Place and Date of Judgment:

Vancouver, British Columbia

December 9, 2020

Written Reasons by:

The Honourable Madam Justice Newbury

Concurred in by:

The Honourable Madam Justice DeWitt-Van Oosten

Concurring Reasons by:

The Honourable Madam Justice Saunders (Page 15, para. 31)

Summary:

Vendors sued buyers after they failed to complete purchase of real property. Vendors mitigated their loss by relisting and reselling the property at a lower price. Trial judge awarded damages for difference between purchase prices and other costs incurred due to buyers' breach. Judge disallowed claim for real estate commission paid in respect of second sale. Vendors cross appeal concerning that disallowance. Held: Appeal dismissed. The proper measure of damages is that which would place the vendors in the same position they would have been in had the original transaction completed. Normally, this may include an additional real estate commission incurred in an effort to resell the property. However, the judge did not err in finding that the vendors failed to prove they had paid a commission on the failed sale. Without evidence that the vendors had in

fact paid both commissions, awarding damages for the commission on the completed sale would put them in a better position than if the breach had not occurred.

Reasons for Judgment of the Honourable Madam Justice Newbury:

- [1] This appeal concerns the assessment of damages payable by the defendants/appellants (the "buyers") to the plaintiffs/respondents (the "vendors") as a result of the buyers' failure to complete a purchase of real estate from the vendors. Since the buyers were found liable at trial for breach of contract and have abandoned their appeal, the only issue remaining arises on the vendors' cross appeal -- whether their damages should include the amount of real estate commission payable in respect of the later sale (at a lower price than that agreed to by the buyers on the failed transaction). The trial judge below held that an amount equal to this "second" commission should not be so included in the vendors' damages, reasoning that they would receive a "windfall" and be put in a better position than if the breach had not occurred.
- [2] For the reasons that follow, I am of the view that the judge did not err in disallowing the claim for the second commission, and that the cross appeal should therefore be dismissed.

Factual Background

- [3] The facts may be briefly stated. In January 2017, the vendors entered into a listing agreement with a real estate brokerage firm, the defendant Island Group Services Inc., listing the subject property for \$1,850,000. A standard form listing agreement was used, which provided that the realtor's commission would become payable if, inter alia, an enforceable agreement of sale was entered into during the term of the listing. The vendors were liable for the commission, then, whether the transaction closed or not; it was not payable 'out of' the sale proceeds. I believe I may take judicial notice of the fact that this is not an unusual provision in listing agreements.
- [4] On July 17, 2017, the vendors agreed to sell the property to the buyers for \$1,750,000. A deposit of \$50,000 was paid in trust to Island Group Services. The completion date was fixed at February 15, 2018, but the buyers later requested an extension to June 4, 2018. The vendors agreed. Prior to the closing date, the buyers' solicitor undertook to provide the purchase funds on the usual terms to the vendors.
- [5] However, on June 4, 2018, the buyers' solicitor notified his counterpart that for financial reasons, his clients were unable to complete. The vendors' solicitor responded that his clients were "ready, willing and able to complete" and reserved all their rights and remedies in respect of the buyers' default. (Reasons at para. 7.) The completion date went by and the sale did not complete. Four days later, the vendors' counsel advised his counterpart:

I see that your clients did not complete the purchase on June 4, 2018, apparently owing to the absence of financing. My clients accept the repudiation, treat the Contract as if it is at an end and will be seeking the deposit be forfeited to them. My clients will take all reasonable steps to

mitigate their damages by putting the property back on the market in an attempt to sell at the most advantageous price and terms available in the current market. Once my clients' damages are ascertained, they will be advancing a claim against your clients for the amount in [sic] which the damages exceed the deposit. [At para. 8.]

He also asked that the buyers immediately instruct the brokerage firm to release the deposit to the vendors. This request went unacknowledged.

[6] On June 19, 2018, the vendors entered into a second listing agreement, again with Island Group Services, for the sale of the same property. Again a "standard form" listing agreement was used. The term regarding the listing agent's remuneration was not identical to that in the previous listing agreement, but was similar in effect:

5. LISTING BROKERAGE'S REMUNERATION:

A. The Seller agrees to pay the Listing Brokerage a gross equal to the amount set out in Clause 5D, In accordance with this Clause 5, if:

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

[7] After a few false starts with other parties, the vendors finally agreed to sell to a new buyer for \$1,560,000. That transaction completed on November 29, 2018. Evidently, the brokerage fee payable to Island Group Services in respect of this sale was \$52,290, including GST.

At Trial

[8] By notice of civil claim ("NOCC") filed in the Supreme Court of British Columbia on July 20, 2018, the vendors sought damages for breach of contract and an order that the deposit be paid to them. Under the heading "Legal Basis", the vendors pleaded:

5. The Plaintiffs have suffered damages and continue to suffer damages including:

a. Reduction in the value of the Property from the purchase price agreed to by the Defendants O'Byrne;

b. Additional real estate commission on the resale of the Property;

c. Expenses in holding the Property from the completion date of June 5, 2018 to the eventual new completion date including:

i. Strata fees;

ii. Property taxes;

iii. Insurance;

iv. Utilities;

v. Upkeep; and

vi. Interest on bridge financing.

[Emphasis added.]

- [9] The buyers agreed in the court below that if they were liable for breach of contract, the various amounts set forth at para. 13 of the judge's reasons were accurate. These included the difference between the two sale prices (\$190,000), property taxes payable in respect of the intervening period, interest on loans, and "Additional commission [\$52,290] on the second sale, including GST". All these claims totalled \$297,712.64; after deduction of the deposit, the total was \$247,712.64.
- [10] At trial, the main issue was liability. I need not review the summary trial judge's reasons for finding that a breach of contract was proven; they are set forth at paras. 13-39 of his reasons, indexed as 2019 BCSC 679. Having found a breach of contract, the judge turned to the assessment of damages. He noted that the purpose of damages for breach of contract was to place the vendors, to the extent possible, in "the same position as they would have been in had the contract completed". This is a longstanding principle for which the leading authority is often said to be *Robinson v. Harman* (1848) 1 Exch. 850, 154 E.R. 363. The trial judge here cited *Hassel v. Khoshgoo* 2010 BCSC 233 for the same proposition. In that case, the Court referred in turn to *Richter v. Simpson* (1982) 37 B.C.L.R. 325 (S.C.), a decision of McLachlin J., as she then was. She observed:

The fundamental principle in assessing damages for breach of contract is that the plaintiff is to be placed in the same position he would have been in had the contract been performed. A qualification on this principle is that he is not entitled to recover losses which he could have avoided by taking reasonable steps, that is, he is obligated to mitigate his loss. While damages are most often assessed as of the date of the breach, the Court has power to fix such other date as may be appropriate in the circumstances: *Johnson v. Agnew* (1979) 2 W.L.R. 487 at 489 (H.L.). [At para. 4.]

- [11] In the case at bar, the judge found that the buyers had effectively mitigated their damages by moving to resell the property "as soon as possible" and were therefore entitled to the "difference between the original contract price and the resale price." (At para. 39.) There was no suggestion the latter did not represent the market value of the property at the time of resale. The judge also ruled that the vendors were entitled to receive the \$50,000 deposit held by the brokerage firm on the basis that it had been forfeited "on account of damages". (Citing *Tang v. Zhang* 2013 BCCA 52.)
- [12] At para. 40, the trial judge considered the buyers' argument that if they were found liable for breach of contract, they should not be responsible for (i.e., should be entitled to recover) the \$52,290 in real estate commission paid to the vendors' realtor when the final sale completed. On this point, he reasoned as follows:

The question is, are the plaintiffs entitled to this money in order to place them in the same position they would have been if the sale with the defendants had completed? If the initial sale had completed, the plaintiffs would have had to pay their realtor commission on the initial sale, but there is no evidence the plaintiffs paid commission on that failed sale. Indeed, Mr. Sullivan outlined in his affidavit the various costs the plaintiffs incurred when the sale to the defendants failed to complete, and no reference was made to commission being paid on the failed sale.

In my view, to order the defendants to pay the plaintiffs' real estate commission on the second sale would result in a windfall for the plaintiffs. Such an award would put them in a better position than they would have been if the first deal had not collapsed. That is, if the first deal completed, the plaintiffs would have been responsible for paying commission. As a result, I am not satisfied it is appropriate to order the defendant purchasers to compensate the plaintiffs for the real estate commission. The \$52,290 will be deducted from the plaintiffs' damages claim.

I therefore award the plaintiffs damages in the amount of \$245,422.64.

[At paras. 41-4; emphasis added.]

The judge ordered that Island Group Services pay the deposit of \$50,000 to the vendors and that that amount was to be credited against the damages of \$245,422.64. This left the buyers owing the vendors damages in the sum of \$195,422.64 -- i.e., the \$297,712.64 they had claimed (see para. 13 of the reasons), less the deposit and the \$52,290 commission. (At para. 44.)

On Appeal

- [13] As mentioned earlier, the buyers abandoned their appeal on the question of liability. The vendors on their cross appeal sought an order that the trial judge's order be varied. Their notice of cross appeal did not elaborate on what 'variation' was being sought, but their factum clarified that their objective was an order increasing their damages by \$52,290, the amount of the commission or brokerage fee paid in respect of the completed sale. The vendors point out that there was proof this commission was in fact paid, in the form of affidavit evidence both of Mr. Wirk, the vendors' solicitor, and of the plaintiff Mr. Sullivan. As seen above, moreover, the second listing agreement was also in evidence and indicates that the vendors were contractually bound to pay the fee if an enforceable agreement with a new buyer came into existence. Obviously, this occurred.
- [14] The vendors also emphasize that the buyers did not raise any question in their pleading concerning the commission on the completed sale. It was not until their oral argument at trial that the buyers challenged their liability to pay this amount -- a fact the vendors say took them by surprise. They, the vendors, rely on R. 3-3(2) of the Supreme Court Civil Rules, which requires a response to civil claim to indicate for each fact set out in Part 1 of the NOCC whether the fact is admitted, denied, or outside the defendant's knowledge. The Rule also requires that a response to a claim must:

- (b) indicate whether the defendant consents to, opposes or takes no position on the granting of the relief sought against that defendant in the notice of civil claim,
- (c) if the defendant opposes any of the relief referred to in paragraph (b) of this subrule, set out a concise summary of the legal basis for that opposition, .

In addition the vendors cite R. 3-7(12), which states:

Pleading after the notice of civil claim

- (12) In a pleading subsequent to a notice of civil claim, a party must plead specifically any matter of fact or point of law that
 - (a) the party alleges makes a claim or defence of the opposite party not maintainable,
 - (b) if not specifically pleaded, might take the other party by surprise, or
 - (c) raises issues of fact not arising out of the preceding pleading.

[15] Given that the NOCC did seek the "additional real estate commission on the resale of the property", the vendors submit that the buyers should have specifically pleaded the facts and points of law they intended to assert in order to challenge their liability for that commission under each of subparagraphs (a), (b) and (c) of R. 3-7(12). They stress that the buyers gave no indication in their pleading that they would oppose an award for the commission on the basis found by the trial judge -- i.e., that the vendors would be overcompensated if they were able to recoup the second commission. The vendors also assert that the first commission was paid, although the fact of payment per se is not in evidence. As discussed earlier, the first listing agreement, like the second one, provided that the commission became owing if an enforceable agreement of purchase and sale came into existence. Again, there is no question that this occurred.

[16] In short, the vendors submit that the trial judge erred in law as follows:

In absence of this pleading, and there being no application to amend pleadings, the chambers judge erred in his approach on the measure of damages an error of law. The chambers judge disregarded uncontroverted evidence that the commission had been paid on the second sale and that the Multiple Listing Contract imposed liability for commission on the first sale. He relied on the absence of evidence of payment of commission on the collapsed sale, though there was no reason why the record would have included any evidence of payment of a commission on the collapsed sale. [Emphasis added.]

[17] In response, the buyers characterize the assessment of damages as a matter of discretion. They say the court below was not required to do a "precise scientific grammatical calculation and quantification of damages", citing para. 128 of *Ban v. Keleher* 2017 BCSC 1132, a case involving damages for the tort of negligent misrepresentation. They note that the summary trial judge correctly stated the measure of damages for breach of contract -- to place the vendors in the same position as they would have been in had the contract

completed. As well as relying on the fact there was "no evidence" in the court below that the vendors had paid commission on the collapsed sale, they stress that the vendors have not sought to adduce new evidence in this court confirming their payment of that fee.

- [18] In the result, the buyers submit, the summary trial judge made no error in principle concerning the assessment of damages and has not been shown to have exercised his discretion in a manner that would meet the high standard of review for appellate intervention: see *Gonzalez v. Gonzalez* 2016 BCCA 376 at para. 16; *Illingworth v. Evergreen Medicinal Supply Inc.* 2019 BCCA 471.

Analysis

- [19] Like the court below, I would prefer to decide this case on the basis of principle rather than pleadings. As seen above, the trial judge correctly stated the measure of damages generally applicable to a breach of contract. Professor John McCamus in *The Law of Contracts* (2005) characterizes the governing principle as "compensatory" and as based on the expectancy that damages will "provide the victim of the breach with the financial equivalent of performance." Thus, he writes, the "expectancy principle" is "forward-looking" in the sense that it attempts to secure for the plaintiff the benefit of performance rather than merely restoring the plaintiff to his pre-contractual position. (See 813-7; see also G.H.L. Fridman, *The Law of Contract in Canada* (5th ed., 2006) at 751; Di Castri, *The Law of Vendor and Purchaser* (looseleaf, 2016) at 889.)
- [20] The measure would seem to lend itself to exact calculation, but in fact it is an assessment about which reasonable judges might differ, especially when causation is considered. As McCamus writes, *supra*:

The party in default under an agreement is liable to the plaintiff only for such losses as have been caused by the breach. Issues of causation arise more frequently in the context of tort law than of contract cases. Presumably this is because contract law normally deals with economic loss whereas tort law normally deals with personal injury and property damage. Difficult issues of causation may, however, arise in a contractual setting. Moreover, the causation principle appears to underlie other rules relating to the calculation of contractual damages. Thus the proposition that a claim in the reliance measure for wasted expenditures is subject to an expectancy limitation is often explained on the basis of a causation principle. The loss relating from the unprofitability of the agreement is caused by the plaintiff's bad bargaining rather than the defendant's breach. The plaintiff may argue, however, that but for entering into the agreement with the defendant, the loss would not have been sustained. The defendant's response may be that though this is true, it was not the defendant's conduct that was the effective cause of the loss. The contest in such a case, then, is between two competing versions of the concept of causation. [At 850; emphasis added.]

- [21] This case demonstrates the interplay between causation and the measure of damages for breach of contract where commissions are involved. I will use a hypothetical example with simpler numbers than those in this case. Assume the original sale price on a failed real estate purchase was \$100, and on the second, \$60; and that the agent's commission in each transaction was 10% of the purchase price. If the purchaser had performed under the original contract, the seller would have been in receipt of proceeds of \$90 after commission. I will call this the "target" position. Instead, the purchaser failed to complete, another listing had to be agreed upon, and the property ultimately sold for net proceeds of \$54 after payment of the second commission. In fact, however, the seller is not in possession of \$54 'in his pocket' because he also paid the commission of \$10 in respect of the failed sale and that fee was effectively thrown away. Thus the seller's actual "net" position is that he is in receipt of \$44. In order to bring him to the target position, damages of \$90 less the \$44 in hand must be calculated. Here, that amount is \$46. The seller is then in the position he would have been in had the purchaser not breached the first contract.
- [22] The vendors' claim in the instant case was framed slightly differently: they claimed the difference between the two gross sale prices (in the example above, \$40) plus the second commission. (The cases referred to below indicate this is the usual approach.) The main item of the damages sought by the hypothetical seller is the difference between the two gross prices, \$40. He received net sale proceeds of \$54, but again it must be remembered there is 'in his pocket' only \$44 because he paid the first commission of \$10. The main damage award is \$40, so he would end up with \$84 (\$40 plus the cash in pocket of \$44) in total if no adjustment were made. To reach the target position, it is necessary to add to his damages the amount of the second commission of \$6, for an award of \$46. That plus the cash in pocket of \$44 brings the seller to the target of \$90. This equation would appear to apply in all cases in which the claim is framed as described above (i.e., where the main award sought is the difference between the two gross prices), provided both commissions were paid.
- [23] Counsel did not cite any authorities to us that commented on the recoverability of commissions in a situation such as this. The cases I have located on point are all trial decisions and it does not appear that counsel made extensive arguments or researched prior authorities. In *Horton v. Zirul* (1982) 34 B.C.L.R. 234 (S.C.), Mr. Justice Toy (as he then was) observed that the plaintiff's claim for damages was not severely disputed and listed the amounts to be reimbursed by damages as including "loss of second commission". In *Sternberg v. Dunn* [1992] B.C.J. No. 1166 (S.C.), the first sale had been consummated without the services of a real estate agent, but the plaintiff had found it necessary to retain professional help on the completed sale. The Court awarded her the commission on that sale.
- [24] *Krangle v. Gustavson* (1994) 95 B.C.L.R. (2nd) 148 (S.C.) has some similarity to the case at bar. It concerned the collapse of a real estate sale for which the purchaser was found liable. As here, the plaintiffs claimed the real estate agent's commission on the "second" or completed sale as an item of claimed damages; and also as in the case at bar, it was unclear on the

evidence whether the "first" commission had been paid. Mr. Justice Errico observed that if both commissions had been payable by the plaintiffs, "one or the other" would be recoverable as damages flowing from the defendant's breach. But since the evidence concerning the first fee was lacking, he denied recovery of the second commission, stating that there were "no damages flowing from the breach resulting in an additional real estate commission." (At para. 5; my emphasis.)

[25] In *Davidson v. Miller* 2003 BCSC 44, Mr. Justice Halfyard ruled that the real estate commission in respect of the failed transaction should be recovered by the plaintiff. In his analysis:

I find that the contract between James Graham Miller and the plaintiff was made during the period of the listing agreement, and that it was legally enforceable by either party. As a result, the plaintiff was contractually obligated to pay a commission of \$14,498.50 to his real estate agent, on November 23, 1999. The plaintiff later settled and paid the real estate agent's claim in the amount of \$5,350. In my opinion, this sum was part of the loss sustained by the plaintiff as a result of the defendant's wrongful repudiation, and is recoverable as damages. See *Kellner v. Stickland* (1997), 16 R.P.R. (3rd) 125 ((B.C.S.C.) [In Chambers]) (Taylor J.); affirmed September 25, 1998, [1998 CarswellBC 2176 (B.C.C.A.)] [At para. 15; emphasis added.]

[26] In *Hassel*, the Court agreed with the plaintiffs that the real estate commission on the completed sale should be recoverable. The Court observed that "[t]hey spent \$17,325 on a real estate commission that they would not have incurred if the defendant had completed his purchase. This was a reasonable expense, which was necessary in order for them to mitigate their damages by selling the home in a reasonable time." (At. para. 36.) No mention was made of the commission on the failed sale.

[27] As I read the reasons of the trial judge in the case at bar, he took into account the fact that if no breach had occurred the vendors would have had to pay the commission on the first transaction. (Indeed, as seen above, the vendors' liability to pay the first commission arose as soon as the buyers entered the agreement to purchase -- the obligation did not depend on the closing of the transaction.) However, the judge was not satisfied the vendors had in fact paid the fee (the quantum of which is not in evidence). Proceeding on the basis that it had not been paid, he reasoned that if the vendors' damages were increased to include the amount of the second commission, the vendors would be in a better position than if the first sale had closed -- that they would receive a "windfall". To analogize to our simpler hypothetical above, the vendors would receive the difference between the two sale prices, i.e., \$40, and they would have 'in their pocket' the net proceeds of sale of \$54. Together these total \$94 - i.e., more than the target position. This overcompensation is obviously avoided if a comparison of net amounts is done on both sides of the equation such that, as my colleague Madam Justice Saunders suggests, the amount of commission that would have been paid in the failed transaction is used.

- [28] However, the trial judge here followed counsel in using gross amounts rather than net amounts. On the facts of this case and on the methodology he employed, he was correct to conclude that adding to the vendors' damages the second commission of \$6 would indeed overcompensate the vendors -- even though on a broad view of causation, the purchasers' breach made that expenditure necessary. (See *McCamus*, supra at 850.) On the other hand, the second commission is not as closely connected to the purchasers' breach as the first and was not a cost thrown away or wasted. It was a cost the vendors would have had to pay in any event 'out of pocket' and they received the benefit of the brokerage firm's services in return.
- [29] This brings us to the final issue in this appeal -- whether the trial judge erred in finding that the vendors failed to prove they had paid the commission on the failed sale. I am not persuaded the trial judge so erred. We know the vendors were contractually bound to pay it once the buyers signed the first sale agreement. On the other hand, it was not claimed in the NOCC; there is no evidence it was paid; and no fresh evidence was proffered to this effect on the appeal. On balance, I am not persuaded that the high standard of review of "palpable and overriding" error has been met such that our interference on this point would be justified.

Disposition

- [30] In the unusual circumstances of this case -- i.e., without the vendors having shown they paid both commissions -- I conclude the trial judge did not err in denying recovery of the commission on the completed sale. I would dismiss the cross appeal and affirm the Court's order fixing the vendors' (plaintiffs') damages at \$245,422.64.

"The Honourable Madam Justice Newbury"

I agree:

"The Honourable Madam Justice DeWitt-Van Oosten"

Reasons for Judgment of the Honourable Madam Justice Saunders:

- [31] I have had the privilege of reading in draft form the reasons for judgment of Madam Justice Newbury. I agree with her conclusion, but would add these comments. In doing so, I refer, as she did, to the parties as the vendors and the purchasers. Further, as there is no dispute before us on an appropriate accounting of extra taxes, insurance, financing charges and such like, I will speak only of the commission expense.
- [32] It seems to me that the convenient starting point of the damages assessment is not, as was engaged by the parties and the judge, a comparison of the two gross purchase prices. Rather, I would start by comparing two net amounts. The first anchors the claim for damages for the failure to complete - the gross purchase price less the commission that would have been payable under the listing agreement had the transaction completed. That is referred to by my colleague as the "target" amount. The second describes the real situation of the vendors after completion of the sale of the property - the amount of the mitigation of

damages considering the purchase price obtained on the completed sale less the amount of the real estate commission paid, and amounts paid by the vendors on account of the delays and the failed transaction.

- [33] This arithmetic is straight forward. The first net amount is the purchase price of the failed transaction less the commission that would have been paid under the listing agreement, and the second net amount, assuming that the vendors did not pay a commission on the failed transaction, is the purchase price of the completed transaction less the paid real estate commission; the measure of damages is simply the difference between the two sums.
- [34] On the other hand, were it established that the vendors had paid, or would pay, a real estate commission on the failed transaction, the second net amount would be the purchase price of the completed transaction less the total of the paid real estate commission plus the amount of the extra expense of the commission on the failed transaction (or in other words, the purchase price of the completed transaction, less the paid real estate commission, less the amount of the extra expense of the commission on the failed transaction). In this way the amount paid on account of commission on the failed transaction would be reflected in the damages award.
- [35] I consider, therefore, that the commission on the second transaction is only relevant to determining the amount by which the vendors mitigated their damages, but real estate commission paid or payable on the failed transaction would add to the vendors' compensable charges on account of the failed transaction. Following this progression of arithmetic avoids overcompensation postulated in the reasons for judgment of my colleague at para. 27.
- [36] In this case the judge found it was not proved that the commission that would have been paid had the failed sale completed, has been paid or will be paid. I agree with Madam Justice Newbury on this finding. On that conclusion, the amount of the commission that would have been payable on the failed transaction is not a sum that the plaintiffs may recover and its only relevance to the case is to the amount of the 'target', i.e., the first net amount.
- [37] The loss to the plaintiffs here is the difference between that net amount and the amount they obtained by selling the property, being the purchase price less the commission actually paid. Had they paid the commission on the first transaction their loss would have been increased by the amount of that commission, but the commission on the second sale is never recoverable, in my view, except as it is reflected in the mitigation assessment.
- [38] I, too, would dismiss the cross appeal as proposed by my colleague.

"The Honourable Madam Justice Saunders"

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Prepared on 26 October 2026 · Esheria