

CANADA / JUDGMENT

## Summit Staging Ltd. v. 596373 B.C. Ltd.

2008 BCSC 198

COURT

Supreme Court of British Columbia

DECIDED

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2008 BCSC 198 Summit Staging Ltd. v. 596373 B.C. Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Summit Staging Ltd. v. 596373 B.C. Ltd.,

2008 BCSC 198

Date: 20080220

Docket: S067751

Registry: Vancouver

Between:

Summit Staging Ltd.

Plaintiff

And

596373 B.C. Ltd. doing business as "Re/Max Westcoast" and

Salinder Burmy

Defendants

Before: The Honourable Mr. Justice Rice

Reasons for Judgment

Counsel for Plaintiff:

S. Antle and M. Sherkat

Counsel for Defendants:

K.A. Murray

Date and Place of Trial:

January 14, 15, 16, 17, 18

and 24, 2008

Vancouver, B.C.

## INTRODUCTION

- [1] This is an action for damages against a realtor for negligence, breach of fiduciary duty and breach of contract on the sale of 9.32 acres of undeveloped land at 25695 - 102nd Avenue, Maple Ridge, B.C. The plaintiff submits that the realtor caused it to sell this property in November 2005 for \$1,000,000 which it claims was \$400,000 under fair market value.
- [2] The plaintiff, Summit Staging Ltd., is a British Columbia company owned by John and Janet McLaughlin who live together in Maple Ridge, B.C. The property in question is not their residence, but an investment property located in the Thornhill area of Maple Ridge. It was purchased by Mr. McLaughlin, his father and another person in 1998 for about \$320,000. In about 2003, they sold it to Summit for around \$420,000. The intention of Mr. and Ms. McLaughlin before the sale was to hold the property through Summit as a long term investment for their two young sons.
- [3] In late October 2005 the defendant, 596373 B.C. Ltd. doing business as Re/Max Westcoast, was and remains a real estate company with an office in the Maple Ridge area. The defendant, Salinder Burmy, was a realtor employed by Re/Max Westcoast since 1994 and licensed since 1991. Before 1994, he had worked as a realtor in the Richmond/Surrey area.

## FACTS

- [4] In late October 2005, Mr. Burmy contacted Mr. McLaughlin by telephone. Mr. McLaughlin was in Alberta at the time on some work assignment for his employer, Canadian Industrial Mill Services Ltd. ("CIMS"). Mr. Burmy identified himself and asked Mr. McLaughlin if he was interested in selling the subject property in Thornhill. Mr. McLaughlin testified Burmy told him that he had people who were interested in it. Mr. McLaughlin said that he told Mr. Burmy that the property was not listed and that he did not have a realtor. He suggested that he and Mr. Burmy meet somewhere mutually convenient to discuss the idea.
- [5] They met at the CIMS office in Richmond, B.C., on October 28, 2005. Mr. McLaughlin says that he advised Mr. Burmy he was not interested in selling the property, but being curious, he asked Mr. Burmy what he thought the property was worth. Mr. Burmy, according to Mr. McLaughlin, said that he knew of a recent sale of a nearby 7.275 acre parcel for \$725,000 to \$750,000. Mr. McLaughlin said he asked Mr. Burmy what he thought the subject property was worth bearing in mind that it was about two acres larger and Mr. Burmy replied that he thought he could get around \$800,000 for it. Mr. McLaughlin said that they didn't discuss any

other sale and the only document he saw that Mr. Burmy had was a map of the Thornhill area.

- [6] Mr. Burmy testified that Mr. McLaughlin said he would consider giving Mr. Burmy a listing of the property if Mr. Burmy had a buyer. He said that he discussed two recent sales in the area. One was an 8.5 acre parcel at 25909 - 102nd Avenue that had sold in August or September 2005 for \$738,000. The other was a 9.5 acre parcel. According to Mr. Burmy, Mr. McLaughlin said that there had been a previous unsolicited offer on the subject property of around \$800,000. Mr. McLaughlin denied that there had ever been any such unsolicited offer or that he had said any such thing to Mr. Burmy.
- [7] According to Mr. Burmy, he asked Mr. McLaughlin what selling price he would like for the subject property and Mr. McLaughlin said that he would consider an offer in the range of \$800,000. He said that he allowed Mr. McLaughlin to look at the documents he had brought with him, hoping it would give Mr. McLaughlin some idea as to the value of the property.
- [8] During the same conversation Mr. McLaughlin told Mr. Burmy that he also owned another property at 240th Street which he and Ms. McLaughlin wanted to sell, and he gave Mr. Burmy the telephone number of Horst Romani, a person dealing with the property on the McLaughlin's behalf.
- [9] Mr. Burmy testified that after the meeting with Mr. McLaughlin, he canvassed seven to ten potential buyers whom he knew, including one person, Avtar Johl. Mr. Johl testified that Mr. Burmy came to him and told him about the subject property, and said that the seller wanted \$800,000 for it. Mr. Johl said that he would think about it and he conducted some computer searches of his own to get a feeling for the price. Subsequently, he contacted Mr. Burmy by telephone and asked him to write up an offer for him to buy the subject property for \$800,000. The name of the purchaser was to be C.S. Seran, Mr. Johl's wife.
- [10] The versions of events diverge at about this point. Mr. McLaughlin testified that on November 1, 2005, Mr. Burmy telephoned him while he, (Mr. McLaughlin) was working in Lantzville, British Columbia, on Vancouver Island. Allegedly, Mr. Burmy told him that he had an offer for the property and had to see him about it. Mr. Burmy stated that it was on the subject property, at which Mr. McLaughlin reacted with surprise because he remembered telling Mr. Burmy that he was not interested in selling that property. According to Mr. McLaughlin, Mr. Burmy said, "I got you the \$800,000. That's what you wanted." Mr. McLaughlin says that he replied, "No, that's not what I said I wanted. That's what you told me it was worth." Mr. McLaughlin told Mr. Burmy that he was very busy and asked him to fax the offer to his home. He said he also wanted to find out what his wife's reaction would be.
- [11] Mr. Burmy testified that on November 1, 2005, he told Mr. McLaughlin that he had an offer to purchase the property for \$800,000. He said that he explained it as well as the proposed Exclusive Listing Contract that he had prepared with a commission for 10 percent. According to him, Mr. McLaughlin told Mr. Burmy to fax the documents to his home.

- [12] Mr. Burmy testified that he faxed an Exclusive Listing Contract, Limited Dual Agency Agreement and a brochure called "Working with a Realtor" to the McLaughlin's home. With those documents he also sent an offer by S. Seran to purchase the property for \$800,000. It provided for a commission of 10 percent plus GST payable by the vendor.
- [13] Janet McLaughlin's evidence is that she received only part of a fax from Mr. Burmy on November 1. It was only the cover sheet and a piece of another page. After that their machine jammed and the rest never came through. On the contrary, Mr. Burmy testified that he telephoned John McLaughlin who confirmed with him that the documents had been received.
- [14] When Mr. McLaughlin returned home from Lantzville, on November 4, 2005, he and Mrs. McLaughlin discussed the \$800,000 offer and agreed to reject it. They said they felt strongly about keeping the property for their two children, and they agreed that Mr. McLaughlin would seek to get rid of Mr. Burmy. Mr. McLaughlin accordingly faxed a note to Mr. Burmy saying politely that they, the McLaughlins, would be seeking an appraisal of their property, and then Mr. McLaughlin left home to drive to Kamloops again on business for CIMS.
- [15] In fact, the McLaughlins did not obtain any appraisal. Their reason, they said, was that they were not interested in selling the property in the first place.
- [16] Mr. McLaughlin testified that while he was on the Coquihalla Highway on November 5 driving to Kamloops, Mr. Burmy telephoned him to ask about the \$800,000 offer. Mr. McLaughlin told Mr. Burmy that his wife was not interested in selling the property and that he was very busy with work, but he suggested that Mr. Burmy should contact Ms. McLaughlin if he wanted to continue discussions.
- [17] Mr. Burmy's evidence was that he also spoke by telephone with Mr. McLaughlin and was told by Mr. McLaughlin that they would get back to him in a few days.
- [18] Apparently the next step was Mr. Burmy calling Janet McLaughlin at home. They both admit the conversation occurred but their evidence on it differs. Ms. McLaughlin testified that Mr. Burmy first called her on November 5 or 6 saying that he wanted to talk about the \$800,000 offer. She testified that she told him that they were not interested in selling the property. However, "Well, maybe if I get \$1 million in my pocket, we can talk." She said she just pulled the number out of the air. She assumed that she would not hear from Mr. Burmy again.
- [19] Mr. Burmy's version was that he spoke to Ms. McLaughlin on November 6 regarding and asked if they had gotten an appraisal. She replied that she was getting an opinion and would not sell for under \$900,000. He said she advised him that she would get back to him in a day or two.
- [20] Ms. McLaughlin testified that on November 7, 2005, Mr. Burmy telephoned her again to say that he had a \$1 million offer, but that there was about to be a rush of offers on the property so she should decide and then not delay in signing the deal.

- [21] Ms. McLaughlin testified that Mr. Burmy never said anything to her about the value of the property or the appropriateness of \$1 million as a sale price for it.
- [22] Mr. Burmy testified that when he talked to Ms. McLaughlin on November 7, she told him that she had an opinion on the property and she told him that they would accept \$1 million, provided that the subject removal date was changed from December 16, 2005, to January 5, 2006, and the closing date was changed from July 31, 2006 to March 31, 2006. She added as well certain details regarding the tenant on the property.
- [23] Ms. McLaughlin expressly denied that she told Mr. Burmy any such thing about an opinion. She never obtained an opinion or appraisal. Neither, she testified, had she instructed Mr. Burmy to make a counter-offer on the \$800,000 offer. She had never seen the \$800,000 offer, and did not know what its terms were, so she could hardly be seeking to change dates.
- [24] Mr. Johl, the ultimate buyer, gave evidence that after Summit rejected the \$800,000 offer by Ms. Seran, Mr. Burmy called him and said that the seller now wanted \$1 million for the property. Mr. Johl said that he considered this and decided to counter offer at \$1 million, and did so accordingly through Mr. Burmy.
- [25] There is no dispute that on November 7, 2005, the McLaughlins agreed that Summit would sell the property for \$1 million. After speaking to Mr. Burmy, Ms. McLaughlin called Mr. McLaughlin and in a brief conversation they confirmed their agreement to sell. Mr. McLaughlin says that he told Ms. McLaughlin to have Mr. Burmy meet with her brother, Duncan McPherson, who was a director, president and secretary of Summit with signing authority for the company. Mr. McLaughlin said that he asked that Ms. McLaughlin and Mr. McPherson make sure that the documents were sent to Summit's lawyer, James Radelet, for review.
- [26] According to Mr. McLaughlin, the increase to \$1 million is what persuaded them to sell. It seemed like a lot of money to them. They figured that they could re-invest some of it in another property for their sons as well as put some away for their sons' education.
- [27] Mr. McLaughlin testified that Mr. Burmy telephoned him to say that he netted the offer for the amount that Ms. McLaughlin had insisted upon. Mr. McLaughlin understood that to mean the \$1 million "in her pocket". Mr. McLaughlin claimed that Mr. Burmy insisted that Summit would have to accept this offer quickly. Mr. McLaughlin told him to deal with Ms. McLaughlin as he was very busy dealing with a work crisis in Kamloops. Mr. Burmy did not deny that this telephone conversation took place.
- [28] On November 7, 2005, a meeting took place during which the documents to complete a \$1 million offer were executed on behalf of Summit. They were identical in form to the \$800,000 offer except for numbers and dates.

- [29] Mr. McLaughlin said he contacted Mr. McPherson to confirm that Mr. McPherson would attend to sign the documents for the sale of the property. Ms. McLaughlin arranged with Mr. Burmy to meet him at Maple Ridge Chrysler. They met there and Mr. Burmy produced the documents to be signed, including the Exclusive Listing Contract, the Limited Dual Agency Agreement, the "Working with a Realtor" document and the Contract of Purchase and Sale. Those documents, Ms. McLaughlin said, were foreign to her and Mr. McPherson.
- [30] Ms. McLaughlin testified that there were no other signatures on any of the documents at that time, and Mr. McPherson testified that he couldn't recall any other signatures. They said that Mr. Burmy did not draw their attention to any specific parts of the documents, nor did he explain anything in the documents to them. They said that the process of execution took no more than five minutes.
- [31] Mr. Burmy agreed that it was a short meeting, but he disagreed that the shortness was due to him. His testimony was that he took his briefcase out of his car when he met Ms. McLaughlin and Mr. McPherson and suggested that they go somewhere inside to sign the documents. His evidence was that Ms. McLaughlin disagreed, saying that she had already been through nearly all of the same provisions when she reviewed the \$800,000 offer, and that all she wanted to check was the changes from that document. Mr. Burmy spread the documents out on the hood of his car while she looked through them, finding the places for signature and directing Mr. McPherson where to sign. Neither Ms. McLaughlin or Mr. McPherson carefully reviewed the documents, and this was obvious to Mr. Burmy.
- [32] According to Ms. McLaughlin, when the documents were signed, she said that she needed to take them to Mr. Radelet, the lawyer for Summit, to review them before they were signed by the other side. She said that Mr. Burmy volunteered to take care of this as she wished. Mr. McPherson said he recalled at the time hearing Ms. McLaughlin tell Mr. Burmy that she needed to send the documents to her lawyer.
- [33] Mr. Burmy denied that there was any such conversation. Remembering that he had been directed earlier to contact Mr. Radelet about details concerning Summit, he sent the documents to Mr. Radelet, but not until after he had had the purchasers sign up documents. He assumed that Mr. Radelet was going to act on the conveyance for Summit.
- [34] The following day, Mr. McLaughlin returned home from Kamloops where, for the first time, he perused copies of the executed documents. Apparently he spoke by telephone with Mr. Radelet about the agreement and Mr. Radelet called his attention to the 10 percent commission.

- [35] Displeased with the commission and the fact, he said, that Mr. Radelet had not been provided with the documents to review before the completion by the purchaser, Mr. McLaughlin went to see another lawyer. The other lawyer complained on Summit's behalf to Re/Max about the 10 percent commission. The evidence does not disclose, however, a complaint at that time of a failure by Mr. Burmy to deliver documents to Mr. Radelet for review.
- [36] On January 4, 2006, all subject conditions were removed from the Contract of Purchase and Sale and in due course Summit closed the sale of the property, received \$1 million subject to the usual adjustments and paid Mr. Burmy the commission of \$100,000 plus GST. In November 2006, the McLaughlins, convinced that the property had been sold for significantly less than its fair market value as of November 7, 2005, commenced this action.

## THE CLAIMS

- [37] The action against Re/Max Westcoast is based on a claim of vicarious liability, that Mr. Burmy acted at all times on behalf of Re/Max Westcoast, and Re/Max Westcoast admits that if the claims alleged against Mr. Burmy are proven, the vicarious liability is also proven.
- [38] In paragraph 20 of the statement of claim, Summit alleges negligence on the part of the defendants on grounds that the defendants owed Summit a duty of care and breached this duty by:
- (a) not knowing the value of Summit's property;
  - (b) not taking all reasonable steps to learn the value of the property;
  - (c) not advising Summit of the value of the property; and
  - (d) not advising Summit that the proposed commissions were unusual.
- [39] In paragraph 21 of the statement of claim, Summit alleges that the defendants owed a fiduciary duty which they breached by:
- (a) not disclosing to Summit the relationship between Mr. Burmy and Ms. Seran;
  - (b) acting in their own and Ms. Seran's interests, rather than in Summit's interest;
  - (c) not advising Summit that the proposed purchase prices were inappropriate; and
  - (d) not advising Summit that the proposed commissions were unusual.
- [40] Paragraph 22 of the statement of claim alleges breach of contract on the part of the defendants by:
- (a) being disloyal to Summit and not protecting its negotiating position;
  - (b) not exercising a reasonable care and skill in performing their assigned duties, by not knowing, or taking all reasonable steps to learn, the value of the property;

- (c) not dealing with Summit and Ms. Seran impartially, but favouring Ms. Seran; and
- (d) not disclosing to Summit the relationship between Mr. Burmy and Ms. Seran, the value of the property, the inappropriateness of the proposed purchase prices and that the proposed commissions were unusual.

## NEGLIGENCE

- [41] Real estate agents have a duty to "exercise reasonable care and skill in the performance of their undertakings": William F. Foster, *Real Estate Agency Law in Canada*, 2nd ed. (Scarborough: Carswell, 1994) at 214-15; see also G.H.L. Fridman, *The Law of Agency*, 7th ed., (Toronto: Butterworths, 1996) at 158. Counsel for Summit submits that the duty began when Mr. Burmy agreed to find a buyer (on or about October 28, 2005).
- [42] To prove negligence, Summit must establish what standard of care was owed and that Mr. Burmy failed to meet this standard. The authorities show that the price, if it was accepted in reliance upon the advice of the agent, must be adequate and the transaction must be a righteous one: *Re Crackle and/or Greyfriars Realty Ltd.* (1983), 47 B.C.L.R. 256 (C.A.); *Kingpin Investments Ltd. v. Melton Real Estate Ltd.*, (1977), 7 A.R. 567, 3 Alta. L.R. (2d) 324 (S.C. (T.D.)).
- [43] Counsel for Summit submits that it is implicit in the duty that the agent must know the value of the property or take all reasonable steps to learn it. Summit argues that expert evidence is not required to prove the standard of care. The trier of fact may determine standard of care based on common experience: *Burbank v. B.* (R.T.) 2007 BCCA 215, 65 B.C.L.R. (4th) 290 at para. 57.
- [44] With respect, the courts recognize that property evaluations and the methodology of the evaluations are not simple, and no one's evaluation is any more than an opinion. While it may be so in some cases that an expert is not required to assist the court in determining the standard of care, in others, it is necessary.
- [45] The evidence of Mr. Burmy was that prior to his first meeting with Mr. McLaughlin, he had conducted a tax search of the entire Thornhill area, perused municipal maps and ascertained that the property was within a zone known as "Urban Reserve". He testified that he also undertook multiple listing services searches of all recent listings in the area, and that he had found at least a couple of comparable properties that seemed to be helpful. Overall, there was a problem, however. The market included very few other sales or listings of properties nearly as large as the subject property within the Thornhill area and neighbouring areas. Extrapolation had to be made from the prices of smaller properties listed and sold. That, naturally, introduced uncertainty into the process, and a broader range of estimated value.

- [46] Counsel for Summit submits that Mr. Bury's research was incomplete in that he failed to do a market analysis. What that meant, and how much more meaningful it would have been than the results of Mr. Burmy's efforts, was not explained. In fact there was practically no evidence adduced as to what was customarily required of the agent: see *Haag v. Marshall* (1989), 39 B.C.L.R. (2d) 205 (C.A.); *Shaak v. McIntyre*, [1991] B.C.J. No. 2607 (QL) (S.C.); *Phelan v. Realty World - Empire Realty Ltd.* (1994), 38 R.P.R. (2d) 128, [1994] B.C.J. No. 752 (QL) (S.C.); *Snijders v. Morgan* (9 October 1996) Nelson No. 4747 (B.C.S.C.)
- [47] When the McLaughlins advised Mr. Burmy that they were going to seek an appraisal, it was reasonable for Mr. Burmy to conclude that they were not relying on him to do any more than bring an offer.
- [48] It is fair to say that Mr. Burmy's presentations of the two offers carried his endorsement that the offers were at a fair market value. It doesn't matter that in the first offer he may have been wrong, because the McLaughlins rejected it. In a way, however, it was a door opener, and arguably a softener for the \$1 million dollar offer, but the evidence doesn't support any deliberate attempt on those lines.
- [49] Counsel for Summit pointed out that the \$800,000 offer differed from the fair market value by 75 percent based on Summit's appraisal, and by 23 percent on the defendants' appraisal. The trouble with that analysis is that it depends on the court finding a fair market value in accordance with Summit's appraisal, and it does not allow for any margin of error.
- [50] Neither can it simply be said that Mr. Burmy was negligent because his market analysis led him to recommend a sale at substantially less than fair market value, although it would be a factor to consider. However wrong Mr. Burmy may have been, if he observed a proper standard of care, he was not negligent. At any rate it is for Summit to establish that standard of care, and in my view it has not been established. Therefore, it is not possible to find the degree, if any, to which Mr Burmy failed to meet a standard.
- [51] In my view, Mr. Burmy's actions did not reveal on a balance of probabilities insufficient knowledge of the value of the property or failure to take reasonable steps to learn about the value of the property. There was little evidence raised as to what more he ought reasonably to have known and did not know before bringing the two offers to the McLaughlins. His testimony as to the investigations he undertook and his experience as a realtor generally was not successfully contradicted.
- [52] In my view, Mr. Burmy did not take on any duty toward the McLaughlins until they confirmed their acceptance of the \$1 million dollar offer. There was no agreement nor reliance until then, nor any relationship.
- [53] On the evidence of the McLaughlins, he brought the \$800,000 offer to them cold. They rejected it and made no effort to engage him for anything further. It was when Mr. Burmy came back with the \$1 million dollar offer that the McLaughlins confirmed their acceptance of it, and impliedly, their acceptance of the Limited Dual Agency Agreement.

[54] I find that a duty arose then, or if I am wrong, earlier, to act for and in the best interests of Summit, but there was insufficient evidence adduced to establish the standard of care. In any event, in the absence of evidence to the contrary, I find that the efforts that Mr. Burmy took to make himself knowledgeable were not sub-standard on a balance of probabilities. Mr. Lathrope, the appraiser for the defendants, noted, incidentally that until he had completed his investigation, he, himself, saw that the property was being worth somewhere closer to \$800,000.

## FIDUCIARY RELATIONSHIP

[55] A fiduciary relationship arises where "one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power": *Guerin v. The Queen*, [1984] 2 S.C.R. 335 at 384.

[56] The relationship of principal-agent is within the categories of relationships that are considered to be inherently or intrinsically fiduciary: *Atlanta Industrial Sales Ltd. v. Emerald Management & Realty Ltd.*, 2006 ABQB 255, 399 A.R. 1 at para. 160. As *La Forest* stated in *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 at 409:

[C]ertain relationships have as their essence discretion, influence over interests, and an inherent vulnerability. In these types of relationships, there is a rebuttable presumption, arising out of the inherent purpose of the relationship, that one party has a duty to act in the best interests of the other party. Two obvious examples of this type of fiduciary relationship are trustee-beneficiary and agent-principal.

[57] In *Lee v. Royal Pacific Realty Corp. and Chan*, 2003 BCSC 911, the British Columbia Supreme Court stated at para. 30 that "[t]he usual relationship with a real estate agent is presumed to have as its essence discretion, influence over interests by the agent and inherent vulnerability of the principal. (*Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 at page 409)."

[58] In G.H.L. Fridman, *The Law of Agency*, 7th ed., (Toronto: Butterworths, 1996) the author states at 174-75:

[O]nce the relationship of principal and agent exists a complex of duties attaches to the agent. These duties are equitable in character, and may be lumped together under one general principle; namely, that the agent must not let his own personal interest conflict with the obligations he owes to his principal. This general idea is manifested in various ways.

[footnotes omitted]

[59] An agent's fiduciary duties include the duty to make full disclosure to its principal: *Atlanta Industrial*, supra, at para. 162; *Re Crackle and/or Greyfriars Realty Ltd.* (1983), 47 B.C.L.R. 256 (C.A.) at 263. In *Ocean City Realty Ltd. v. A & M Holdings Ltd.* (1987), 36 D.L.R. (4th) 94, 44 R.P.R. 312 (B.C.C.A.) the court stated at 98-99:

The obligation of the agent to make full disclosure includes "everything known to him respecting the subject-matter of the contract which would be likely to influence the conduct of his principal" (*Canada Permanent Trust Co. v. Christie*, *supra*) or, as expressed in 1 Hals., 3rd ed., p. 191, para. 443, everything which "would be likely to operate upon the principal's judgment".

The test is an objective one to be 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.

[60] In *F.M.B. Reynolds, Bowstead and Reynolds on Agency*, 18th ed. (London: Sweet & Maxwell, 2006), the author states at para. 6-063:

Where an agent enters into an contract or transaction with his principal, or with his principal's representative in interest, he must act with perfect good faith, and make full disclosure of all the material circumstances, and of everything known to him respecting the subject matter of the contract or transaction which would be likely to influence the conduct of the principal or his representative.

[61] On the evidence in this case, there was a reasonable expectation of trust and reliance in Mr. Burmy to act in Summit's best interest. Nonetheless, and again, the duty imposed upon Mr. Burmy as a fiduciary was subject to the limitations created by the Limited Dual Agency Agreement. This Agreement particularly affected the duty to disclose everything known about the matter in question that might influence the decision of a principal to proceed with the transaction: *Re Crackle*, *supra* at 263.

[62] The Limited Dual Agency Agreement, a standard form of the Real Estate Board of Greater Vancouver, differs from the usual single agency standard form in that it establishes the agent as agent for both parties. The Agreement specifically requires the agent to act impartially between the vendor and the buyer. The agent may not disclose whether the buyer is willing to pay a price or agree to terms other than those contain in the offer, nor may the agent disclose that the seller is willing to accept a price or terms other than those contained in the Listing. Nor may the agent disclose the motivation of either party to the other unless authorized in writing. Nor may the agent disclose personal information of one party to the other unless authorized in writing.

[63] In the additional two-page document called "Working with a Realtor" there were the same terms as those just mentioned within the Limited Dual Agency Agreement. It also provided that the agent was obligated to protect and promote the interests of his principal as he would his own, and that the agent had a duty of undivided loyalty. It provided that the agent must protect the principal's negotiating position at all times and disclose all known facts which may affect or influence the principal's decision. It provided that the agent must obey all lawful instructions of the principal, keep the confidences of the principal, and exercise reasonable skill and care in performing all assigned duties. These, I am afraid, could suggest obligations in conflict with the Dual Agency Agreement. I take it as understood by both parties that the Dual Agency provisions were paramount.

[64] Both parties, said the "Working With a Realtor" document, must carefully read all documents and understand what they are signing, and if special or expert advice is needed, they must seek the help of other professionals such as lawyers.

[65] The onus rested with Mr. Burmy to show that he acted in accordance with his fiduciary duties in this sales transaction.

The burden of proof that the transaction was a righteous one rests upon the agent, who is bound to produce clear affirmative proof that the parties were at arm's length, that the principal had the fullest information upon all material facts, and that having this information he agreed to adopt what was done": *Charles Baker Ltd. v. Baker*, [1954] O.R. 418 at 432, [1954] 3 D.L.R. 432 (C.A.); see also *Re Crackle*, *supra*, at 262-63; *Kingpin Investments*; *supra*, at paras. 29-34.

[66] I do not accept the allegation that Mr. Burmy failed to disclose the facts that could reasonably have affected the decision of Summit to enter into the transaction. Counsel for Summit emphasized that the standard of disclosure is whether information "could" have made a difference, not "would". That may be so, but again that obligation was curtailed by the limitations on disclosure in the Dual Agency Agreement. In fact, there was nothing hidden, there was nothing undisclosed that could have made a difference.

[67] Mr. Johl purchased the property for the same reason that Summit had kept it which was for investment over the same lengthy period of time that the McLachlins previously intended to hold it. The fact that Mr. Johl was a developer could have made a difference, if there was some information that he knew about the development possibilities that the McLachlins didn't know. But there is no evidence of that. To say that simply knowing him to be a developer could have made a difference was not enough in this case. It was also personal and excluded from disclosure under the Dual Agency Agreement.

[68] It was submitted on behalf of Summit that the McLaughlins, being unsophisticated real estate investors, required much more guidance with respect to the transaction. The facts do not support that argument. Mr. McLaughlin, the directing mind of Summit, had been involved in approximately 12 real estate transactions over the years. Most of these involved residential properties, but they also included three development properties. Mr. McLaughlin was an experienced businessman. He had always acted through realtors on his property transactions. He admitted to familiarity with listing agreements and particularly with Dual Agency Agreements. Ms. McLaughlin was not as well versed in real estate transactions, but she had some experience and she appealed to me as an assertive, bright and fairly knowledgeable person. There is nothing about these transactions that either of them was incapable of understanding.

[69] Mr. McPherson, on the other hand, a very good natured gentleman and self-employed landscaper, did not exhibit what I would call reasonable knowledge in real estate matters. However, it was well understood by him and the McLaughlins that his role was simply to sign the documents on behalf of Summit as the McLaughlins instructed. His inability to understand the documents is not material because, to repeat, the McLaughlins themselves

took full responsibility on behalf of Summit for what was signed and delivered on Summit's behalf.

- [70] It is alleged that Mr. Burmy failed to act impartially. No evidence was adduced of that, however.
- [71] For all the foregoing reasons, I find that Mr. Burmy did not breach any fiduciary duty, including any duty of disclosure to Summit.

## TEN PERCENT COMMISSION

- [72] It was submitted on behalf of Summit that Mr. Burmy owed a duty to disclose the fact that the commission was unusually high and that it was negotiable. It is undisputed that a commission of 10 percent is unusually high. The evidence indicated that the normal fee of a realtor on a transaction is 7 percent of the sale price up to \$100,000 plus 1½ percent to 2½ percent of any amount above that. One or two witnesses suggested that a straight 3 percent or 4 percent commission was not unusual either. One witness testified that a commission of 10 percent, although rare, was not unheard of. Mr. Burmy admitted that 10 percent was unusually high. He offered no excuse. He admitted that he did not ever advise Summit that his proposed commission was unusually high or that it was negotiable. Ironically, he testified to being surprised when the McLaughlins did not complain or counter the proposal.
- [73] I agree that details of the commission might affect a party's decision to sell or buy, and that if the principal is unaware that it is unusually high, circumstances may dictate some form of disclosure of that fact.
- [74] Counsel for the defendants submits firstly, that the fact of the 10 percent commission was clearly communicated, and that is true. It is clearly set out in the documents that Mr. McPherson signed, and in the earlier \$800,000 offer. Certainly, Mr. McLaughlin at least was knowledgeable enough to see readily that the commission was unusually high. There was no need to explain obvious. It seems to me that Mr. Burmy had every reason to expect that the McLaughlins had perused the earlier offer, and had discussed between themselves the terms of the second offer, and that if they signed the documents, they had agreed to accept ten percent as a commission.
- [75] There were signs, to be sure, that the McLaughlins were acting hastily and not taking the trouble to read the documents. The rush to sign at the end was one indication. The fact that Mr. McLaughlin did not ask to see the documents before they were signed is another. The fact that neither of them raised with Mr. Burmy the amount of the commission was yet another factor that indicated a possibility that they had overlooked the matter. Those are not, however, sufficient grounds for me to conclude that Mr. Burmy connived or breached a duty.

- [76] How much they were willing to pay was something within their power to decide. What Mr. Burmy offered was not hidden from them. It was not an amount that was illegal or unconscionable. It was generous. It was a matter of negotiation open to the McLaughlins. It was not anyone's responsibility but their own to read the documents and satisfy themselves on whether they would accept it. They did not take the proper care that they should have in perusing the documents. Mr. McLaughlin did not even ask to see the documents. He was content to rely on Ms. McLaughlin's perusal of the documents after discussing the terms with him, and to have her brother sign them. They knew that Mr. McPherson would not be of any help beyond that, although this was not told to Mr. Burmy.
- [77] The evidence does not establish that Mr. Burmy knew that the first offer was not received or that Mr. McLaughlin had not viewed any of the documents.
- [78] It is open to question whether they in fact overlooked it or whether they thought it was fair considering the very good bargain they believed that they were getting at a price of \$1 million.
- [79] Counsel were unable to provide authorities on the question of what, if any, is the extent of a fiduciary's duty to assist the client in the process of negotiating the fiduciary's fees. The evidence persuades me that on a balance of probabilities Mr. Burmy made adequate disclosure on the question of his commission and owed no further duty to assist Summit in determining his estate agent's fees.

## REVIEW BY LAWYER

- [80] Mr. and Ms. McLaughlin relied, in the alternative, upon Ms. McLaughlin's claim that she said she wanted to take the documents to her lawyer to peruse before the purchasers signed the documents. She says that Mr. Burmy volunteered to do that for her, and that she trusted him to do so. She was categorical on the point; however, Mr. Burmy was equally categorical in denying it.
- [81] The first time that the McLaughlins raised this issue was in materials submitted for application for summary trial in October 2007. I have to consider that.
- [82] It was pointed out that Mr. McPherson who also submitted an affidavit for the summary trial in October 2007 made no mention at that time of having heard Mr. McLaughlin give that instruction to Mr. Burmy on November 7, 2005.
- [83] Ms. McLaughlin in her cross-examination expressed herself to be unsure as to whether she actually told Mr. Burmy that the documents needed to go to Mr. Radelet before the buyers signed it. She conceded that she may have only said that she wanted copies sent to Summit's lawyer. She changed that evidence at the end of her testimony saying that she told Mr. Burmy that Mr. Radelet was going to review the documents. No evidence was adduced to confirm that Mr. Radelet had been notified in advance that he would be received these documents.

- [84] The process that ought to have prevailed on November 7, 2005, did not prevail. Instead of taking place in a calm, deliberate atmosphere it took place outside with documents spread out over the hood of a vehicle. It took five minutes or less with very little attention directed to the contents of the documents being signed. It is possible to criticize Mr. Burmy for allowing this to happen. At the same time, my impression from the evidence as a whole is that Ms. McLaughlin equally wanted to hurry through the execution of the documents. For lack of authority establishing such a duty on the agent's part, I hesitate to charge him with the strict responsibility to enforce discipline upon the Vendor.
- [85] On a balance of probabilities, I am unable also to accept that Ms. McLaughlin clearly directed Mr. Burmy to send the documents to Mr. Radelet for review before the purchasers signed. The corroborating evidence of Mr. McPherson I find unreliable because it was evidence that he could have raised before but didn't.
- [86] I am also mindful of the seriousness of an allegation that a real estate agent would countermand instructions of this nature from a client. Mr. Burmy was seemingly an experienced agent. As such he would have been aware of the risk to his career that such an act would present. He was forthright and clear in his denial of the allegation, and I cannot find a basis to prefer Ms. McLaughlin's testimony over his on this point. I find that the balance of probabilities weighs in his favour.
- [87] I find in conclusion that Mr. Burmy did not breach his fiduciary duty to Summit in relation to the transaction or in relation to his fee agreement.

## BREACH OF CONTRACT

- [88] The contract document included the same documents mentioned earlier, the Exclusive Listing Contract, the Limited Dual Agency Agreement and the "Working with a Realtor" document.
- [89] The plaintiff submits that the contractual obligations to exercise reasonable care and skill, and to provide thorough competent service were indistinguishable from their duty of care generally. The plaintiff submits that contractual duties of undivided loyalty and disclosure were also indistinguishable from their fiduciary duty. As those claims have been dealt with earlier and dismissed, for the same reasons the claims of breach of contract are also dismissed.

## DAMAGES

- [90] Summit bases its measure of damages on the value of the Property as appraised by their appraiser, Ms. Reilly. She appraised the property at \$1.4 million.

- [91] To begin with, I have some concern about the independence of Ms. Reilly's report. This is due to the number of drafts that she sent to counsel, and the extensive consultation that went on between her and counsel before the delivery of her final report. There were letters from counsel including suggestions as to what she should emphasize.
- [92] Ms. Reilly's testimony as well calls into question her impartiality in that she revealed a practice of hers. It was to disclose as little about her adjustments as possible so as not to give the other side something to attack. To make that process more difficult by holding back on explanations placed a strain on the appearance of impartiality.
- [93] Addressing her opinion, Ms. Reilly was unable to explain her rationale for a great many of her adjustments. She valued the improvements on the comparable properties significantly below assessed value. This was without inspecting any of the improvements, without speaking to any of the realtors involved, and while admitting that the tax assessments of the improvements were generally below market value in a rising market.
- [94] Ms. Reilly used a number of much smaller properties as comparables. This was understandable given the few sales of properties as large or nearly as large as the subject property existing for comparison purposes.
- [95] Of particular concern was her use of one comparable, 25909 - 102nd Avenue, which was the closest comparable in size and location to the subject property. Ms. Reilly adjusted the property by increasing its value by \$425,000 on grounds including that it looked like a "good deal". There was no reason for this other than her subjective impression. She did not speak to the listing realtor. The property was for sale with the multiple listing service for over a month and there was no evidence that the buyer or seller knew each other or that the buyer received any special terms to justify a lower price.
- [96] The defendants called G.E. Lathrop, an appraiser of ARC Appraisals Ltd. and submitted his appraisal report. Mr. Lathrop's appraisal valued the subject property at \$980,000.
- [97] Mr. Lathrop also faced the difficulty of not being able to find enough properties of comparable size and type. Counsel for Summit challenged Mr. Lathrop on one comparable that was not within the urban reserve and out of the agricultural land reserve. Mr. Lathrop also did not adjust for time at the rate of 6 percent per month that is customary in comparison of sales. By the calculations of Summit's counsel, the failure to adjust for time and the decision to adjust for the lack of a view operated to reduce his valuation mistakenly by \$117,398. Mr. Lathrop accepted the criticism on this factor, but maintained that it did not warrant a major readjustment.

- [98] In valuing improvements, Mr. Lathrop took assessed values from a valuation date of July 31, 2005, rather than July 31, 2006. This may have affected his valuation as well, but not nearly so seriously as Ms. Reilly's estimates affected hers in my view. Neither of the appraisers seem to disagree on the long-term potential for development of the subject property. My impression from hearing the two experts, and from reading their reports, was that the uncertainties at hand called for some fair margin for error.
- [99] I found Mr. Lathrop's report and testimony the more credible of the two. He was able to express himself with greater precision, consistency and objectivity.
- [100] In the result, and on the balance of probabilities, the evidence does not satisfy me that the value of this subject property as of November 7, 2005, was greater than the price of \$1 million. Accordingly, I am unable to find any loss due to underpricing of the property.

## CONCLUSION

- [101] On the whole, I find that negligence has not been proven. The standard of care has not been established, but even so, the evidence does not satisfy me on a balance of probabilities that Mr. Burmy acted with less than the reasonable knowledge, care and skill to be expected of a realtor in these circumstances.
- [102] I find that there was a fiduciary relationship established when Mr. Burmy brought the \$1 million dollar offer to the McLaughlins. If the relationship was established earlier than that it makes no difference to my findings in the end. I find that Mr. Burmy disclosed all that he was required to disclose, explained all that he was required to explain, and acted in the best interests of the client. This was subject to the Dual Agency provisions included to resolve the conflict of interest arising from Mr. Burmy acting for both parties.
- [103] There was no negligence proven, nor breach of fiduciary duty, nor breach of contract. There was no damage or loss.
- [104] Accordingly, the action is dismissed, and the defendants shall have their costs at Scale B subject to the right of either party to apply to speak to costs within ten days of these reasons.

"THE HONOURABLE MR. JUSTICE RICE"

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