

GEORGE SELKIRK (*Defendant*) . . . . . APPELLANT;

1959

AND

May 4, 5  
\*Jun. 25

J. A. WILLOUGHBY & SONS LIMITED AND A. E. LEPAGE LIMITED  
(*Plaintiffs*) . . . . . } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Agency—Real estate sale—Undisclosed purchaser—Objection of vendor to purchaser after acceptance of offer—Refusal to pay agent's commission—Whether identity of purchaser material—Whether conflict of interest on part of the agent—Whether agent entitled to commission.*

\*PRESENT: Locke, Cartwright, Abbott, Martland and Judson JJ.

<sup>1</sup> (1859), 4 Drew. 366 at 376, 62 E.R. 141.

<sup>2</sup> (1886), 12 S.C.R. 466 at 475.

<sup>3</sup> (1956), 18 W.W.R. 85, 2 D.L.R. (2d) 351.

1959  
 SELKIRK  
 v.  
 J. A.  
 WILLOUGHBY  
 & SONS  
 et al.

The plaintiff, a real estate agent, obtained a prospective purchaser for the defendant's property at the price fixed by the defendant vendor, but the purchaser made it a condition of his offer that his identity would not be disclosed to the vendor. The offer was submitted by the agent, acting as the nominee for the undisclosed purchaser—a fact which was clearly set out in the offer. The defendant vendor accepted the offer, but refused to pay the agent his commission on the grounds that he would not have dealt with the purchaser in question if he had known his identity and that the agent had been working for such purchaser to the sacrifice of the vendor's interests. The trial judge dismissed the action taken by the agent, but this judgment was reversed by the Court of Appeal.

*Held:* The agent was entitled to his commission.

Assuming that the purchaser's identity was material, there was no evidence to support the finding of the trial judge that the agent had sacrificed in whole or in part the interest of the vendor. It was his duty to submit the offer to the vendor. There was the fullest disclosure of the fact that the agent was acting as the agent of an undisclosed principal and was under a duty to that principal not to disclose his identity. It was open to the vendor, (i) to refuse to consider the conditional offer, or (ii) to say that he would not accept the offer if the purchaser were a certain person, or (iii) to accept the offer. Having chosen to accept the offer, the vendor could not now be heard to say that the failure to disclose the name of the purchaser was a breach of the agent's duty to him.

APPEAL from a judgment of the Court of Appeal for Ontario<sup>1</sup>, reversing a judgment of Ferguson J. Appeal dismissed.

*W. B. Williston, Q.C.*, and *R. J. Rolls*, for the defendant, appellant.

*J. T. Weir, Q.C.*, for the plaintiff J. A. Willoughby & Sons Ltd., respondent.

*R. S. Joy, Q.C.*, for the plaintiff A. E. LePage Ltd., respondent.

The judgment of the Court was delivered by

CARTWRIGHT J.:—This is an appeal from a judgment of the Court of Appeal for Ontario<sup>1</sup> which by a majority set aside the judgment of Ferguson J. and directed judgment to be entered in favour of the respondents against the appellant for \$15,890. Laidlaw J.A., dissenting, agreed with the reasons of the learned trial judge who had dismissed the action.

<sup>1</sup> [1958] O.R. 235, 11 D.L.R. (2d) 677.

In these reasons, I shall refer to the respondent J.A. Willoughby and Sons Limited as "Willoughby" and to the respondent A. E. LePage Limited as "LePage".

1959  
SELKIRK  
v.  
J. A.  
WILLOUGHBY  
& SONS  
et al.  
Cartwright J.

The action was brought to recover payment of commission on the sale of a parcel of land consisting of 132.4 acres owned by the appellant and sold through the agency of the respondents to one Joseph Tanenbaum. The land had been purchased by the appellant under an agreement made in May, 1954, which provided that the transaction should be closed on June 1, 1954: it appears to have been actually closed on June 11, 1954, on which date a deed to one Catherine Waters, a nominee of the appellant, was registered. The price stated in the agreement was \$143,000, but in the affidavit under *The Land Transfer Tax Act* attached to the deed it was said that the total consideration was \$125,000.

The appellant had had difficulty in raising funds to close this transaction and had been approached by one Donnelley, a salesman in the employ of the respondent LePage who put forward Joseph Tanenbaum as a possible purchaser. The appellant negotiated with Tanenbaum and thought that he had sold the property to him although no agreement in writing had been signed. Immediately prior to the closing of this supposed sale the negotiations with Tanenbaum broke off and the appellant was left with only a few days to raise the money to complete his purchase. He stated in his evidence that he was upset by this and resolved to do no further business with Tanenbaum.

On September 9, 1954, the appellant entered into an agreement with the respondent LePage giving it exclusive authority until the 10th day of November, 1954, to sell or exchange the property at a price of \$1,450 per acre. The respondent LePage was unable to negotiate a contract for the appellant. The appellant then entered into an agreement dated February 19, 1955, with the respondent Willoughby giving it exclusive authority until the 23rd day of February, 1955, to sell or exchange the property at a price of \$1,250 per acre. This agreement expired as did also a subsequent agreement dated July 20, 1955, giving the

1959  
 SELKIRK  
 v.  
 J. A.  
 WILLOUGHBY  
 & SONS  
*et al.*  
 Cartwright J.

respondent Willoughby exclusive authority to sell or exchange the property until the 10th day of August, 1955, at a price of \$1,650 per acre.

On October 5, 1955, the appellant entered into a listing agreement with the respondent LePage giving it exclusive authority until the 5th day of December, 1955, to sell the property at a price of \$227,000. This agreement reads as follows:

THE TORONTO REAL ESTATE BOARD  
 PHOTO CO-OP

Co-Operative—Exclusive Listing Agreement

To (name of the listing broker) A. E. LePage Limited, in consideration of your listing, photographing and agreeing to offer my property known as Part Lot 39 & 40 Cons. 4 Etobicoke for sale or exchange I hereby give you sole and exclusive authority, irrevocable until the expiration hereof to sell or exchange my said property at the price of \$227,000 and upon the terms particularly set out on the reverse side of this authorization or at such other price or terms to which I may agree. You are authorized to distribute this listing through the photo-co-operative listing system and send to all members of the Toronto Real Estate Board who will act as your agents to offer my said property co-operatively.

I agree to pay you a commission of 7% of the sale of my property on any sale or exchange effected during the currency of this agreement from any source whatsoever. In case of a sale or exchange being effected by a co-operative agent, the agent shall pay all sub-agent's commissions.

All inquiries from any source shall be referred to you and all offers submitted to me shall be brought to your attention before acceptance. I will allow you to show prospective purchasers over the property during reasonable hours, and you may place your FOR SALE sign upon the property.

This agreement to list shall expire at one minute before midnight of December 5, 1955.

I have read and I clearly understand this agreement, and I acknowledge this date having received a copy of same.

DATED AT Toronto this 5th day of October, 1955.

(Sgd.) P. Donnelley

(Sgd.) George Selkirk

Witness.

Vendor's Signature.

BROKERS COPY

We were informed by counsel that, under the practice of the Toronto Real Estate Board, in the event of a sale being negotiated pursuant to this agreement through an agent other than the listing agent the commission of 7 per cent. would be divided in the ratio of 2.80 to the listing agent and 4.20 to the selling agent.

The respondent Willoughby received a copy of this co-operative listing agreement and their salesman Glaser continued his efforts to find a purchaser. He approached Joseph Tanenbaum whom he regarded as a good prospect and discussed the property with him several times but Tanenbaum said he would not deal with the appellant. Glaser without success tried to find another purchaser and again approached Tanenbaum who agreed to submit an offer of purchase through Willoughby on the condition that his identity should not be disclosed. The suggestion that the offer should be made in the name of Willoughby appears to have been made by Glaser.

1959  
 SELKIRK  
 v.  
 J. A.  
 WILLOUGHBY  
 & SONS  
*et al.*  
 Cartwright J.

More than one form of offer was prepared; each opened with the words "The undersigned J. A. Willoughby and Sons Limited or nominee (herein called "Purchaser") having inspected the real property hereby agrees to and with George Selkirk, Trustee for a Limited Company (herein called "Vendor") through J. A. Willoughby and Sons Limited and A. E. LePage agent for the vendor to purchase all and singular the premises . . .".

The agreement which was finally signed and carried out was prepared by Mr. Maldaver the appellant's solicitor. While in form it was an offer from Willoughby or nominee, it was in fact an offer from the respondent, the words towards the end of the document as drafted:— "This offer shall be irrevocable by the *purchaser* until one minute before midnight the tenth day of November, 1955" having been altered by deleting the word "purchaser" which I have italicized and substituting the word "vendor". What was in form the acceptance by the vendor was signed on November 5, 1955, by the appellant. This reads:

The undersigned accepts the above offer and agrees with the Agent above named in consideration for his services in procuring the said offer, to pay him on the date fixed for completion, a commission of 7% of an amount equal to the above mentioned sale price, which commission may be deducted from the deposit, if and when sale completed.

The terms set out were: a deposit of \$10,000, cash on closing \$70,000, first mortgage to be assumed \$62,700 and second mortgage to be given back by vendor \$84,300, making a total of \$227,000. It was also provided: "The Purchaser his nominee or directors of a limited company to give their personal covenants and guarantee for the second mortgage."

1959  
SELKIRK v. J. A. Willoughby and Sons Limited,  
WILLOUGHBY & SONS 46 Eglinton Avenue East,  
et al. Toronto 12.  
Cartwright J. Dear Sirs:—

You are about to act as my nominee in signing an offer to purchase to George Selkirk part of Lots 39 and 40, in the Fourth Concession of the Township of Etobicoke containing 132 acres more or less at the price of \$227,000 by offer to purchase dated November 5th, 1955.

In consideration of your so doing I hereby agree to provide the funds required to complete the purchase and to save, harmless and indemnify you against all payments, claims, actions and proceedings (including all legal costs that you may incur therein) which may arise or result from you so acting in my behalf.

Yours very truly,  
(Sgd.) J. Tanenbaum.

There was some difficulty in locating the appellant and it was not until November 12, 1955, that the agreement, duly executed by the respondent Willoughby and a cheque for \$10,000 were delivered to him. He at first took the position that this was too late but changed his mind and cashed the cheque.

By an assignment dated the 14th day of November, 1955, the respondent Willoughby assigned the agreement to Harold Wayne Tanenbaum, the son and nominee of Joseph Tanenbaum. The respondent refused to close the transaction and an action for specific performance was commenced by Tanenbaum. A settlement of this action was reached, under which Tanenbaum instead of giving back the second mortgage, paid cash less a discount of 30 per cent., and the transaction was closed. The record does not disclose the grounds on which the appellant had refused to complete or the defence pleaded by him in the action for specific performance.

The appellant refused to pay the commission of 7 per cent. of the sale price claimed by the respondents and this action followed.

The statement of claim alleged the making of the listing agreement of October 5, 1955, the obtaining of the offer of \$227,000, described above, and the refusal of the appellant to pay the commission and claimed judgment accordingly.

A statement of defence was delivered on March 23, 1956, and was amended pursuant to an order of the Senior Master of April 13, 1956. It contains no hint of the defence now relied on. On January 8, 1957, on the application of the defendant the statement of defence was struck out and leave given to deliver a fresh statement of defence. This was done on January 10, 1957. The fresh statement of defence contained the following paragraphs:

1959  
SELKIRK  
v.  
J. A.  
WILLOUGHBY  
& SONS  
et al.  
Cartwright J.

8. The defendant says that the plaintiffs are experienced in real estate transactions and that it was their duty to obtain the best price possible for the defendant's property and to otherwise advance and protect the defendant's interests but that the plaintiffs were in fact at all material times representing and advancing the interests of the said Tanenbaum and themselves. The defendant says that contrary to the plaintiffs' obligation to him the plaintiffs induced him to sign as vendor a purported offer of a sum less than the actual value of the property at the time.

9. The defendant says that the plaintiffs had at the time the said document was presented to him been negotiating for the sale of the said property to Harold Wayne Tanenbaum referred to in paragraph 5 hereof and other persons the names of whom are not known to the defendant and failed to disclose any details of such negotiations to the defendant.

The other grounds of defence raised in this statement of defence do not require consideration as they were not substantiated. It will be observed that the appellant did not set up in his pleadings in any form the ground of defence upon which he now relies, until January 10, 1957.

The following facts are established by the appellant's own evidence: (i) that he knew that Willoughby was not the purchaser but was acting for the real purchaser who refused to have his identity disclosed, (ii) that both Donnelley and O'Rourke, a salesman in the employ of Willoughby, made it clear to the appellant that Willoughby was not at liberty to disclose the name of this purchaser, (iii) that the appellant stipulated that the purchaser had to be a person who could go through with the deal and whose guarantee on the second mortgage would be good, (iv) that Joseph Tanenbaum was such a person, and (v) that the appellant did not tell any representative of either respondent that he would not enter into the agreement for sale if the undisclosed purchaser were Tanenbaum.

1959  
 {  
 SELKIRK  
 v.  
 J. A.  
 WILLOUGHBY  
 & SONS  
*et al.*  
 Cartwright J.

The appellant, however, testified further that at the time of his abortive dealing with Tanenbaum in 1954 he had told Donnelley that he did not want to deal with Tanenbaum, that if he had known Tanenbaum was the undisclosed purchaser he would not have dealt with him through either of the respondents but would have dealt with him face to face and would have expected to get a better deal from him, that he thought that both Donnelley and Glaser were friendly to Tanenbaum and consequently would not make the best possible deal for the appellant in a transaction to which Tanenbaum was the other party.

Had I been called upon to decide the case upon the written record, I would have shared the view of Mackay J.A. that the proper inference to be drawn from the evidence was that the appellant did not consider that the identity of the purchaser (provided he was solvent) was a material circumstance and that this ground of defence was an after-thought advanced for the sole purpose of attempting to defeat the respondents' claim to commission. However, the learned trial judge has stated that he believes the respondent "when he says that it would have made a material difference to him had he known that Tanenbaum was in fact the purchaser"; and I propose to deal with the appeal on the assumption that that finding should not be disturbed.

It appears from the evidence of Donnelley that, at some time after the offer of \$227,000 had been submitted to the appellant and after he had been told that Willoughby could not disclose the name of the purchaser, the appellant asked Donnelley if it was Tanenbaum who was making the offer and Donnelley replied:— "Well, I think if it was Mr. Tanenbaum, that he would be making an offer through me, don't you?"

It is argued for the appellant that this was the equivalent of a statement by Donnelley that Tanenbaum was not the purchaser and amounted to a false statement on a matter material to the principal made by the agent to the principal with knowledge of its falsity.

Donnelley testified that he did not know until after the agreement was entered into that the purchaser was Tanenbaum. I can find nothing in the record to indicate that his evidence on this point was weakened in cross-examination.



It is not contradicted by any direct evidence and the circumstantial evidence does not appear to me to raise any inference that Donnelley had this knowledge. On this point the learned trial judge said:

1959  
SELKIRK  
v.  
J. A.  
WILLOUGHBY  
& SONS  
et al.  
Cartwright J.

I have no doubt that Mr. Bertram Elmore Willoughby was not personally familiar with the arrangements but Mr. Emil Glaser, who was in charge of the deal for the Willoughby firm, was intimately connected with the matter. He in fact had asked Donnelley of LePage's to procure Selkirk's signature as he had failed to do so, and both firms pressed Selkirk to sign and highly recommended the deal, well knowing that they were representing Tanenbaum whose interest was diametrically opposed to Selkirk's. Donnelley says that he did not know that Willoughby was acting for Tanenbaum. I do not believe him. The negotiations could not in my opinion have been carried on as they were without Donnelley's knowledge. At any rate he knew from Exhibit 6 itself that Willoughby was acting for someone. He knew Tanenbaum well; he had acted for him; and he was asked to procure Selkirk's signature to a document which on its face showed Willoughby acting for someone. If they intended to ask Selkirk for a commission it was their duty to inform Selkirk of that person's identity.

The learned trial judge quoted the following passage from the judgment of McRuer C.J.H.C. in *S. E. Lyons Ltd. v. Arthur J. Lennox Contractors Ltd.*<sup>1</sup>:

If it turned out that a man was not acting entirely as agent for his principal, but was directly or indirectly working for the other party to the contract, in such a way as possibly to sacrifice, in whole or in part, the interests of his principal, he is not entitled to his commission.

and continued:

It is my opinion that that principle is particularly applicable to this case.

He concluded his reasons as follows:

The result of this case in my opinion does not depend on Selkirk's liability to close or whether he did or did not close, but whether the plaintiffs were working directly or indirectly for the other party to the contract in such a way as possibly to sacrifice in whole or in part Selkirk's interest. I find that they were so acting for the other party.

In the Court of Appeal, Mackay J.A. expressed his agreement with the statement of the general principles of the law of agency made by the learned trial judge but took a different view as to the application of those well settled principles to the facts of this particular case, and I agree with his conclusion that there was no breach of any duty owed by the respondents to the appellant.

<sup>1</sup> [1956] O.W.N. 624 at 627.

1959  
SELKIRK  
v.  
J. A.  
WILLOUGHBY  
& SONS  
*et al.*  
Cartwright J.

It was the duty of the respondents to use their best efforts to find a purchaser at the price fixed by the appellant and this they did; but their endeavours produced no purchaser who was willing to pay that price other than Tanenbaum and he would make the offer only on the condition that his identity should not be disclosed to the appellant. I think it was the duty of the respondents to submit this offer to the appellant. Had they failed to do so the result might well have been that no sale of the property would have been effected. They made full disclosure of the fact that the offer was made on behalf of a purchaser who had expressly stipulated as a condition of making it that his identity should be withheld. Under these circumstances it was open to the appellant, (i) to refuse to consider the offer unless the purchaser would withdraw his condition and disclose his identity, or (ii) to say that he would not accept the offer if in fact the purchaser were Tanenbaum, or (iii) to accept the offer. He chose the last mentioned course.

In my respectful opinion there is no evidence to support the finding of the learned trial judge that the respondents were working directly or indirectly for Tanenbaum in such a way as possibly to sacrifice in whole or in part the interest of the appellant. There was the fullest disclosure to the latter of the circumstance that Willoughby was acting as the agent of an undisclosed principal in submitting the offer and was under a duty to that undisclosed principal not to disclose his identity. Having accepted the offer with full knowledge of this circumstance the appellant cannot now be heard to say that the failure, and indeed the repeated refusal, of the respondents to disclose the name of the purchaser was a breach of their duty to him.

With respect, I am of opinion that the learned trial judge was in error in holding, in the passage from his reasons quoted above, that: "If they (the respondents) intended to ask Selkirk for a commission it was their duty to inform Selkirk of that person's (Tanenbaum's) identity". They could not give this information without violating the condition on which alone Tanenbaum authorized the making of the offer and that this was the situation was fully disclosed to the appellant. The only choice open to the agents was either not to submit the offer at all or to submit it on

the condition on which it was made making it perfectly clear to the appellant, as they did, that they could not disclose the purchaser's name. On this branch of the matter I am in substantial agreement with the reasons of Mackay J.A. for holding that the non-disclosure of Tanenbaum's name was not a breach of the respondents' duty to the appellant.

1959  
SELKIRK  
v.  
J. A.  
WILLOUGHBY  
& SONS  
et al.  
Cartwright J.

Any other breaches of duty which were suggested were negatived by the evidence.

I would dismiss the appeal with costs.

*Appeal dismissed with costs.*

*Solicitors for the defendant, appellant: Fasken, Robertson, Aitchison, Pickup & Calvin, Toronto.*

*Solicitors for J. A. Willoughby & Sons, plaintiff, respondent: Evans, Noble & Hunter, Toronto.*

*Solicitors for A. E. LePage Ltd., plaintiff, respondent: Taylor, Joy, Baker & Hall, Toronto.*

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\*PRESENT: Kerwin C.J. and Taschereau, Locke, Judson and Ritchie JJ.  
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