JOSEPH BENTLEY AND TOM WEAR (DEFENDANTS) ..... } APPELLANTS;

AND

SAMUEL J. NASMITH (PLAINTIFF) .. RESPONDENT.

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*Feb. 26.
*March 21.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Broker—Sale of land—Principal and agent—Disclosing material information—Secret profit—Vendor and purchaser—Agent's right to sell or purchase—Specific performance.

A broker being informed by the owners that they would sell certain lands entered a description of the property in his list of lands for sale through his agency. The lands being still unsold about three months later, the broker, in consideration of a payment of $50, obtained an exclusive option from the owners for the sale or purchase by himself, within 30 days, of the lands at a price named, which was to include his commission in the event of his effecting a sale, but without disclosing information of which he was then possessed that there was a probability of the lands selling within a short time at an increased price. Within a few days after the date of the option he effected a sale, in his own name, of the lands for double the price named therein, notified the owners that he exercised his option to purchase and demanded a conveyance. In an action for specific performance, brought by the broker on refusal of such conveyance,

Held, per Fitzpatrick C.J.—That by the terms of the written agreement the broker became an agent for the sale of the lands with the option of purchasing them for himself; that he could not become purchaser until he had divested himself of his character as agent; that he was, as agent, bound to disclose to his principals the knowledge he had acquired respecting the improved prospects of a sale at enhanced value, and his exercise of the option to purchase did not relieve him of this obligation. He was, therefore, not entitled to a decree for specific performance.

Per Davies, Idington, Anglin and Brodeur JJ.—That the broker was an agent for the sale of the lands at the time he procured the

*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Anglin and Brodeur JJ.

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option and, having failed in his duty to disclose to his principals all material information he had as to the probability of the lands selling at a higher price than that mentioned, specific performance of the agreement to sell to him should be refused. The judgment appealed from (16 B.C. Rep. 308) was reversed.

APPEAL from the judgment of the Court of Appeal for British Columbia(1), affirming, on an equal division in opinion, the judgment of Clement J., at the trial, by which the plaintiff's action was maintained with costs.

The circumstances of the case are stated in the above head-note, and the questions raised on the appeal are discussed in the judgments now reported.

J. C. Bird, for the appellants.

E. A. Lucas, for the respondent.

THE CHIEF JUSTICE.—The facts are fully set out in the notes of the other judges. By the memorandum of 21st November, the appellants gave to the respondent "the exclusive right to purchase or sell for the term of one month" the property in question in these proceedings. This memorandum of itself undoubtedly established a very peculiar relation between the parties. In my opinion, Nasmith became thereunder an agent for sale and he also had an option to purchase. He could have sold the property as agent, or, finding himself unable to sell, he could have purchased it for himself. The dual relation should have been severed, however, before the option to purchase was exercised; otherwise, Nasmith continued to be an agent obliged, as such, to make full disclosure up to

(1) 16 B.C. Rep. 308.

the very moment that he exercised his option to purchase. The confusion in the legal relations between the parties resulting from such conditions is quite sufficient to shew how necessary it was to regularize his position towards the appellants. Not having done so, Nasmith was bound to them by the rule of law which regulates the relations of principal and agent as to disclosure, etc., and the exercise of his option to purchase did not relieve him of that obligation. In the peculiar circumstances of this case it would require but very slight evidence to justify the conclusion that the respondent was dealing as agent.

In answer to a question from me during the argument, Mr. Lucas admitted that the entry on the regular listing card made as the result of the first interview was just such as would have been made by Nasmith, he being a real-estate agent, if he had taken the property to sell as the agent of the appellants. In case of doubt it might fairly be assumed from the way the respondent treated the transaction at the time that he considered himself an agent for sale. That he did not, as he says, make any effort to sell the property cannot in any way effect the character of the relations established previously with the appellants. On the other hand, if he did not try to sell, what is the meaning of his reference to a prospective buyer; and why did he mutilate the listing card by taking off the owner's name ?

Finally, in the agreement of 25th November, there is quite sufficient to satisfy me that the relations of principal and agent still existed at that time between the parties and that the vendees might, on discovery of that agency have their recourse against the appellants on the ground that the sale was made

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under the terms and authority of the memorandum. *Bryant, Powis & Bryant* v. *La Banque du Peuple*(1), at page 180.

I would allow this appeal with costs.

DAVIES J.—This action was one brought to enforce specific performance of an agreement for the sale to plaintiffs by the defendants of certain lands.

The main questions debated on the argument in the appeal to this court were whether at the time the plaintiffs obtained the option for the purchase of the land they were the agents of the defendants for the sale of such land and bound to disclose to them before obtaining the option all material facts which had come to them or were within their knowledge respecting the selling value of such lands.

I have no difficulty on the facts in reaching the conclusion that at the time the plaintiff obtained the option for the purchase which he afterwards sought to have enforced he was the defendants' agent for the sale of the same land. It seems to me equally plain that being such agent and having become possessed of material information affecting the selling value of the lands it became his duty to disclose such information to his principals before attempting to purchase for himself. This disclosure he did not make. He deliberately concealed the facts within his knowledge; facts which largely affected the selling value of the land in his opinion and would in all probability have affected the judgment of the owners of the land in giving him the option.

Having reached these conclusions as to the agency

(1) (1893) A.C. 170.

of the plaintiff and his neglect to disclose material facts affecting the selling value of the land before obtaining an option to purchase for himself, it seems to me to follow as of course that a court of equity would not lend its aid to enforce at his instance such an agreement for the purchase of the land by himself obtained under such circumstances.

I would allow the appeal and dismiss the action with costs in all courts.

IDINGTON J.—The respondent, as a real estate agent, had in August agreed with appellants to list their property consisting of forty-six acres of land for sale at a price of $210 an acre. On the 19th November following he induced them to sign, in consideration of $50 then paid, an agreement giving him the exclusive right for thirty days to sell or purchase said lands at $200 an acre. This was done so late in the afternoon of that day that the agreement was dated as of the 21st, being the Monday following. On the 23rd or 24th of November he had the assurance to ask the first man inquiring $500 and then $400 an acre. On the 25th he sold to another at the latter price. He admits that he made no disclosure of anything he knew relative to the material circumstances which, if known to appellants, might have changed their minds and led to their refusing him this option.

He says, or rather tries to lead the court to believe, in the first place that he did not know anything material, and in the next place that what he did know was of the nature of suspicion, or mere rumours which were common property. He has not given anything in evidence to explain why, in two or three days, he had the assurance to demand $400 or $500 an acre

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from the first man he met likely to become a purchaser.

If he could have satisfied the court by reference to some sudden discovery after making the bargain, that would have removed the suspicion of unfair dealing, I have no doubt he would have given it.

The evening newspaper announcements may account for much, but I do not think the whole.

It is clear to my mind that if the appellants had known all respondent knew, or had reason to know to excite his expectation, he never would have secured the option.

It is also pretty clear that there was a something that induced the respondent suddenly to change his attitude of apathy taken relative to this property, from August, to that taken on the 19th of November as one of zealous anxiety.

He swears he did not know of the Canadian Pacific Railway developments. He may not actually have known, but I have not the slightest doubt he had good reason to suspect important developments. And especially so as he has failed to contradict or explain the evidence of Williams, who tells of the respondent saying some one had given a tip or hint. Indeed, he himself tells much that shews he had some reason to suspect things were moving, as it were.

The appellants were entitled to have these reasons that moved him disclosed to them. In saying so I have not overlooked the remark of Dart, "Vendors and Purchasers," at page 39 of the 5th edition, that an agent

> need not have pointed out a merely speculative advantage (such as the possibility of an unplanned though contemplated railroad running near the property) which might be reasonably supposed to be equally in the knowledge of both parties.

This is, in substance, a quotation from the judgment of Vice-Chancellor Wigram in the case of *Edwards* v. *Meyrick*(1), and is, therefore, as well as from its adoption by the author, entitled to great respect in every case involving similar conditions of fact.

This case has only a very slight sort of resemblance in its facts to that, but, nevertheless, the dictum has given me such concern as to lead me to seek for authorities wherein it may have been applied in cases exhibiting facts more closely resembling those here in question. I have failed to find any. It is, of course, desirable that the doctrine of fiduciary relationship binding an agent for sale should not be stretched to cover cases where disclosure has taken place and through honest oversight an incidental circumstance presumably known to both parties has been overlooked in the disclosure made.

In this case there was no attempt at disclosure or recognition of the duty requiring it and the respondent frankly says he would not have told appellants if they had asked him.

Indeed, the case, at the trial and throughout, has been treated as if the disclosure had not been made. But it seems to have been held that the mere listing of property with an agent for sale created no fiduciary relation.

With respect I cannot accept this latter view of the matter. The business of the respondent was to procure for those (listing property or in other words) entrusting him with the sale of property, purchasers thereof.

The naming of the rate of commission to be paid or

(2) 2 Hare 60.

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terms upon which it is to be paid has nothing to do with the legal question as to what will constitute the relationship of principal and agent between the parties.

The sole question in such cases must always be whether or not the alleged agent has by his language or conduct, or both, constituted himself the agent of a principal assenting thereto and has undertaken the duty flowing therefrom.

In *McPherson* v. *Watt*(1), the Lord Chancellor points out in effect that it mattered not whether Watt was a gratuitous adviser or paid adviser; the sole question being whether or not in fact he had become the adviser.

In the case before us I have no doubt the question of commission was as well understood by both parties as it was by the respondent when the entry was made by him on his listing card shewing what is admitted to have been *primâ facie* the usual rate.

There are some curious features in the case. Amongst others one is tempted to doubt whether or not the respondent did not in truth hesitate to take the position he now does.

The receipt given the sub-purchaser for the deposit got on the resale contains the following:—

> This receipt is given by the undersigned as agent and subject to the owner's confirmation.

The respondent himself signed his firm's name to this with a doubtful "pro S. J. Nasmith." What owner did he mean? Or was it that the printed form merely said what he ought to have thought?

When one looks at it thus and considers the facts

(1) 3 App. Cas. 254, at p. 263.

and that the respondent seems to have been far from clear in his own mind when speaking to appellants later on the point of whether or not he should set up a claim to the commission, some curious speculations flit across one's mind.

I think the appeal must be allowed with costs here and in the courts below and the action be dismissed with costs.

ANGLIN J.—The plaintiff, a real estate agent, sues for the specific performance of an agreement for the sale to him of certain lands of the defendants which he says resulted from his exercise or acceptance of an option to purchase such lands procured from the defendants on the 19th of November, 1910, in consideration of a cash payment of $50 which he then made to them. The document, under which the plaintiff claims, gave him for one month an exclusive agency to sell as well as an option to purchase the property in question at a stipulated price, $200 per acre, and upon terms specified. He effected a sale of it on the 25th November, he alleges on his own behalf, at $400 per acre.

In answer to the action, the defendants plead that the plaintiff did not in fact exercise his option to purchase and that the sale of the property at $400 per acre was effected by him on their behalf and as their agent. They also assert that in August, 1910, the plaintiff became their agent for the sale of the property in the ordinary way, that he was still such agent when he procured the option in November, and that, when seeking the option, he concealed from them certain material information which it was his duty to disclose. They maintain that the option which he ob-

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tained was thus vitiated and was voidable at their election.

It appears that the plaintiff sought the option to purchase in November because, as he himself says, he had reason to expect and did expect "a sharp rise in real estate values there." He had heard rumours of prospective industrial developments in the neighbourhood, the announcement of which he believed would precipitate a marked increase in the market price of this property. He knew that an adjacent property which had been in his hands for sale, had been "taken off the market for some good reason." These were circumstances which admittedly influenced his judgment as to the probable market value of the property in question. He must have known that they would be likely to influence the judgment of the defendants in deciding whether they should accede to his request for an option to purchase. "This excitement that was on," he says, "was the prime cause for my going there," *i.e.,* to the defendants, to secure the option.

Instead of imparting this information to the defendants (he says he would not have given it had they asked for it), the plaintiff apparently sought to mislead them. Although he had in view no purchaser other than himself or his partner, he talked to them as if he had a prospective purchaser and discussed the agricultural possibilities of the land. He practically admits that he did this in order "to throw the defendants off the track."

If, when he went to them on the 19th November, the plaintiff was the defendants' agent to procure offers for the purchase of the property in question, he was, in my opinion, bound to disclose to them all

material information which he had before taking from them for his own benefit an option to purchase it, and his deliberate concealment of such information — if not active misrepresentation of the situation — rendered the option which he secured voidable at their election. The materiality of that which he admits influenced his own judgment and action in the matter he cannot very well dispute.

But he insists that prior to the 19th November he was not the defendants' agent in any such sense as would impose upon him this duty of disclosure. The plaintiff first saw the defendants in August, 1910, with a view to purchasing another property from them. In the course of the negotiations about this other property, which came to naught, the defendants informed him that they owned the property now in question and wished to sell it. He admits that he told them that he handled "outside properties" and will not deny that he stated that his business was that of a real-estate broker. The defendant Wear says that he made this statement and that he then understood from him that he "sold on commission." The defendant Bentley also says that he knew the plaintiff was a real-estate agent. I have no doubt that this was the fact, and the evidence makes it abundantly clear to me not only that the character of the plaintiff's business was known to the defendants, but that, to the knowledge of all parties, it was in his character as a real-estate agent that the defendants offered to place with him the sale of their property and that he took the "listing" of it. His own story is that, when the defendants told him he might sell it if he could, he took a memorandum of the description of the land and of the price and terms of sale on the spot. When he

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returned to his office he immediately "listed" the property on a card in the following form:—

DIST. LOT.	BLOCK.	LOT.	STREET AND NO.	PRICE, INCLUDING 5 PER CENT COMMISSION.	TERMS.
Westerly Section Line	46 Acres of 7 Tp. Above Govt. 46 Acres	S ½ of 40 Dyke Cleared	S.E. ¼ of Gp. 2N. W.D. Soil A1	$210 Ditched all around	¼ cash Balance in 4½ years

Remarks: Give as full particulars as possible on the other side.

I HEREBY GIVE you the exclusive sale of the above property for .....

This, he admits, is precisely the course he always takes with properties placed in his hands as an agent for sale. He also says he thought later of offering the property under the authority thus given him to a prospective buyer.

Upon these facts I have no doubt that the plaintiff took the listing of the property in the ordinary course of his business as a real-estate agent, intending the defendants to understand, as they did, that he was assuming towards them the duties and obligations which such an agent undertakes when an owner of property places it in his hands to secure a purchaser. While such an agent has no implied authority to enter into binding contracts on his principal's behalf — while he may not be entitled to his commission, although he submits an offer in the terms stated by his employer, unless he procures the latter to accept it, it is his duty to exercise all reasonable diligence in procuring offers for the purchase of the property and

to submit them to his principal. He is in his principal's employment from the moment of his retainer to procure offers. The consideration for the promise of the contingent remuneration or commission, which is implied, if not expressed, in the placing of the property in his hands, or the listing of it with him, is his undertaking not that he will merely sit idle and bring to his principal such offers as may come his way, but that he will exert his skill and energies to procure such offers, and that he will in every respect conduct the business entrusted to him to the best advantage and in the best interests of his employer, giving to the latter the benefit of all information which he has or may obtain that might influence his judgment in regard to the price or terms at or upon which the property should be sold. These, in my opinion, were the obligations which the plaintiff assumed towards the defendants as a result of their August interview, and the defendants had the right to rely upon his discharging them. That whatever relationship was then constituted between the parties continued until the 19th of November the plaintiff himself admits. He says that nothing had occurred to change it. In fact by the very document which he then procured he continued his agency on somewhat different terms. It follows, I think, that without disregarding a duty of his employment as a real estate agent the plaintiff could not procure a binding contract for the purchase of his employers' property for his own benefit unless he first placed them in as good position as he himself occupied to form a sound judgment as to the present and prospective value of such property.

This is an action for specific performance. In order to succeed in obtaining that equitable relief the

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conduct of the plaintiff in bringing about the contract upon which he claims it must have been irreproachable from the point of view of a court of equity. The court will refuse this relief if it appears that there is in the circumstances surrounding the making of the contract anything which renders it not fair and honest to call for its execution. This is so in the case of unintentional unfairness. *A fortiori,* will this course be followed when the unfairness results from the plaintiff having intentionally failed to discharge a duty which he owed to the defendant. Even if the facts established should be deemed insufficient as a defence to a common law action for damages for breach by the defendants of their agreement to sell, or to support an action by them for rescission (questions upon which I refrain from expressing an opinion), they are, in my opinion, clearly sufficient to require the court, in the exercise of its ample discretion in regard to granting or withholding the relief of specific performance, to dismiss this action.

In the view which I have taken it is unnecessary to determine the question whether, if he had an enforceable option to purchase, the plaintiff exercised it in such a manner that he would be entitled to assert the rights of a purchaser from the defendants.

With respect, I would, for the foregoing reasons, allow this appeal with costs in this court and in the provincial Court of Appeal, and would dismiss the action with costs.

BRODEUR J.—The first question that we have to consider is whether the respondent was the agent of the appellants when they gave him an option on their property.

It appears by the evidence that a few months before the respondent, who is a real-estate agent, met the appellants and, as a result of that interview, the property in question was listed with him.

It was entered on a card which he was using in his office for the lands he had for sale and the price was entered on that card under the heading "Price, including 5 per cent. commission, $210." That sum represented the price of $200 asked for by the proprietors and the $10 were for the commission. It was impossible for me to come to any other conclusion than that the respondent was the agent of the appellants.

Once that relation established, it became the duty of the respondent to acquaint his principals with all the information he had as to the value of the land. An agent is bound to disclose to his mandator all the circumstances that might alter his views.

The vital principle of all agencies is good faith, for without loyalty the relation of principal and agent could not well exist.

The agent must make a full and fair disclosure of all the facts and circumstances within his knowledge in any way calculated to enable the principal to base his opinion.

In this case, Nasmith, when he approached the appellants to have an option on their property, should have disclosed the knowledge he had of a rise in the value of that land: and, not having done so, he will be responsible to the appellants for the sum obtained.

The appeal should be allowed with costs.

Appeal allowed with costs.

Solicitors for the appellants: *MacNeill, Bird, Macdonald & Bayfield.*

Solicitors for the respondent: *Lucas & Lucas.*