

Indexed as:

Goldstein v. Davison

Between

Jacob Goldstein in trust and 1480 Derry Road East Holdings
Ltd., Plaintiffs, and
Marie Davison, Dorothy S. Rae, D.E. Budd Real Estate Ltd.,
and Dallas Budd, Defendants

[1994] O.J. No. 1018
Action No. 92-CQ-17019

Ontario Court of Justice - General Division
Toronto, Ontario
Ground J.

Heard: January 31, February 1 - 4, 7 - 11 and 14, 1994.
Judgment: May 12, 1994.
(43 pp.)

*Sale of land — The contract — Mistake, misunderstanding and misrepresentation —
Misrepresentation, what constitutes — Failure to disclose heritage designation.*

This was an action for rescission and damages arising out of an agreement of purchase and sale of a property. The City had advised the vendor that it was interested in designating the house as a heritage building. No one informed the purchaser, who did not proceed with his proposed redevelopment plans and the property remained rented as a residence. The purchaser argued that the failure to disclose the heritage designation proposal constituted fraudulent misrepresentation. He also raised breach of duty of care and negligence. The purchaser spent money on the development of an acceptable design and site plan for a commercial development.

HELD: The action was allowed against the agent, the agency and the vendor. There was a negligent misrepresentation on the part of the agent in failing to disclose the potential heritage designation and both the vendor and the agent were liable in damages to the purchaser. Rescission was not available since the transaction closed and there was no substantial error. There had to be a reference to the Master to assess the difference between the purchase price and the value of the property on closing with the potential designation in place and to assess the cost of integrating the main house into the development. Some professional fees also incurred were allowed but carrying costs were not allowed. Damages for loss of expected revenue were not awarded, as the reason for the purchaser abandoning the development was that it was not economically viable.

STATUTES, REGULATIONS AND RULES CITED:

Ontario Heritage Act, R.S.O. 1990, c. 18.

Real Estate and Business Brokers Act, R.S.O. 1990, c. R.4, s. 31.

Messod Boussidan, for the Plaintiffs.

Eric M. Kelday, for the Defendants, Dorothy S. Rae, D.E. Budd Real Estate Ltd. and Dallas Budd.

1 **GROUND J.**— This is an action for rescission and damages arising out of an agreement of purchase and sale entered into on October 24, 1989 between Jacob Goldstein in Trust ("Goldstein") as purchaser and Dorothy S. Rae ("Rae") as vendor relating to a property located at 1480 Derry Road East, Mississauga, Ontario ("the Property"). Title to the property was taken in the name of 1480 Derry Road East Holdings Ltd. ("the Property"). The only agent acting on the transaction was D.E. Budd Real Estate Ltd. ("Budd Real Estate") acting through its principal Dallas Budd ("Budd"). The action has been discontinued as against Marie Davison.

Facts Not in Dispute

2 The following facts are not in dispute as between the parties.

3 The Property had been owned and occupied by Rae and her family for many years. Certain of the buildings on the Property, particularly the three brick buildings referred to in this judgment as "the main house", "the barn" and "the blacksmith shop", were built in the first half of the 19th century. Mr. K.D. Robb ("Robb"), who acted as Rae's personal solicitor throughout, approached Budd the fall of 1988 to advise Budd that Rae might be interested in selling the Property. Budd spoke to Rae at that time but she said it was premature. Subsequently, on February 3, 1989, Rae did enter into an exclusive listing agreement with Budd Real Estate. The list price of the Property was \$999,000. At that time Rae advised Budd that the Property was zoned "highway commercial" but, on checking with the City, Budd found that it was in fact zoned "agricultural" although in the City's Official Plan the Property was designated for commercial use to service the nearby industrial areas. In September, 1989, Rae decided to move into a senior citizens' building and accordingly vacated the Property and permitted Budd to erect a "For Sale" sign on the Property. Budd had a number of discussions with Rae during the period from February to September 1989 wherein they discussed the sale of the Property and to where Rae might move.

4 On September 19, 1989, an offer was submitted on the Property by the Firepit Inc. at a purchase price of \$650,000 and containing the following provision:

"The vendor agrees and warrants that the above mentioned property is not registered as a historic dwelling, and is not registered for expropriation and the property can be demolished if the purchaser desires. Said warrants as recognized at time set for closing."

The offer was signed back by Rae at a price of \$800,000 and the above provision was deleted. The offer did not proceed further. At the time of this offer, Rae advised Budd that

she had been contacted by the City's heritage people and that they were interested in designating the house. Budd had a conversation with Mr. Mark Warrack ("Warrack"), the Heritage Co-ordinator for the City of Mississauga, on September 21, 1989, to discuss the heritage designation process. On September 27, 1989, an amendment to the listing agreement was entered into reducing the list price to \$850,000. On September 28, 1989, a further offer was submitted on the Property by Peter Naccarato and Lorenzo Savella in Trust at a purchase price of \$650,000 and containing the following provision:

"The said mortgage shall further provide that the mortgagor shall have the right to remove or demolish all existing structures on said lands and carry out grading, excavating or other operations thereon as may be incidental to the construction of said lands, without such activity constituting waste under the terms of said mortgage."

This offer was rejected by Rae and not signed back.

5 On October 3, 1989, Warrack had a telephone conversation with Rae in which he told her that the City wished to proceed with the designation of the Property and Mrs. Rae reacted very negatively. In the late summer of 1989, Mr. Frank McKechnie, the local councillor for the City of Mississauga, met with Mrs. Rae to attempt to get her agreement to the designation of the Property. Mrs. Rae advised him that she was not interested in having the Property designated.

6 On October 11, 1989, Warrack had a telephone conversation with Robb in which they discussed the heritage designation process. It is Warrack's evidence, which is not contradicted, that he advised Robb that the City would start the designation process soon, probably within a month. Robb asked Warrack to forward to him copies of notices of all meetings where the heritage designation of the Property would be discussed. On October 24, 1989, a meeting of the Local Architectural Conservation Advisory Committee ("LACAC") of the City of Mississauga was held and it was recommended that the Property be designated under the Ontario Heritage Act, R.S.O. 1990, c. O. 18 ("the Act"). This recommendation was approved by the Planning and Development Committee of the City on November 6, 1989 and adopted by City Council on November 13, 1989. It was Warrack's evidence that it is the practice of the City to give notice of all such meetings to the owners of properties proposed to be designated under the Act.

7 On November 15, 1989, a copy of the Notice of Intention to Designate was forwarded with a covering letter to Rae with a copy to Robb and others. Sometime in mid-October 1989, Goldstein drove by the Property, noticed the "For Sale" sign and contacted Budd for further information about the Property. Budd advised him of the size of the Property, the list price, that the Property was zoned agricultural and that Rae would not accept an offer conditional on rezoning. After discussions with prospective fellow investors, Goldstein instructed Budd to submit an offer at \$750,000 with a vendor takeback mortgage of \$475,000. The offer was submitted on October 23, 1989 containing the provision:

"The said mortgage shall further provide that the mortgagor shall have the right to remove or demolish all existing structures on the said lands and carry out grading, excavating or other operations thereon as may be incidental to the construction of said lands, without such activity constituting waste under the terms of said mortgage."

The offer was signed back by Rae at \$800,000 with a vendor takeback mortgage of \$500,000 and was accepted by Goldstein on October 24, 1989. At some point the closing date in the offer was changed from November 15, 1989 to November 14, 1989. Prior to submitting the offer, Goldstein attended at the City Planning Department to enquire about rezoning and received the impression that the rezoning for commercial purposes would not be a significant problem and would probably take six to eight months. Goldstein discussed with Budd at this time the possibility of renting the Property for some period of time. The transaction closed on November 14, 1989 and Rae took back a mortgage for \$500,000 containing a demolition clause similar to the one contained in the offer. Goldstein established a budget of \$500,000 for the acquisition and development of the Property exclusive of construction costs which he expected to finance through bank financing. The \$500,000 was based upon the \$300,000 down payment for the Property and \$200,000 for all expenses in connection with zoning approvals, site plan, permits, design costs, professional fees and other expenses to be incurred to get the Property to the construction stage.

8 Goldstein returned to Toronto from vacation on December 10 or 11, 1989 and found a letter from his lawyer, Marie Davison ("Davison") advising him of the proposed heritage designation by the City and enclosing a copy of the Notice of Intention to Designate. Davison advised Goldstein that she would seek rescission of the transaction and subsequently reported to Goldstein that Robb had advised her that Rae would not agree to rescission. Davison advised Goldstein that he would either have to live with it or litigate. Goldstein eventually retained Allan Dick of the Macaulay, Chusid firm to advise him with respect to the heritage designation process under the Act and an objection to the designation was filed in December, 1989 within the time period provided for in the Act.

9 From January 1990 to November or December of 1991, Goldstein retained lawyers, architects and planners to assist him with negotiations with the City to develop a design and site plan which would provide for a commercial use of the property but satisfy the City's heritage designation concerns. Eventually in November, 1991, the City agreed that only the main house need be designated and a final site plan application was submitted in June, 1992. During this period, Goldstein also had discussions with various fast food franchisors including, in particular, detailed discussions with Tim Horton Donuts Limited with respect to the construction of a Tim Horton Donut shop on the Property and acquiring a franchise for himself and his co-investors. Also during this time, Goldstein had discussions with the Region of Peel with respect to the possible acquisition of lands owned by the Region immediately adjoining the Property to the east. In April, 1992, the Region advised Goldstein that the price of the Region's lands would be \$141,000. In July, 1992, the Region advised Goldstein that they would not approve the proposed rezoning of the Property because of their concern about inadequate parking spaces for the restaurant and unless he agreed to purchase the Region's lands to the east of the Property, the price of which the Region had reduced to \$85,200.

10 Goldstein did not proceed with his redevelopment plans and the Property remains zoned agricultural and rented as a residence.

11 When payments ceased on the mortgage, an action was commenced by Rae on the mortgage. By order of this court, the actions were consolidated and accordingly I must deal with the relief sought in both actions.

Submissions

12 It is the submission of counsel for the plaintiffs that the failure by defendant Rae to disclose to the plaintiffs what was known to her with respect to the intention of the City to designate the Property as a heritage property constituted the failure to disclose a material fact, that the lack of knowledge on Goldstein's part of any intention of the City to designate the property was one of the factors which induced Goldstein to enter into a contract and Goldstein has sustained damage as a result of such failure to disclose. Accordingly, plaintiffs' counsel submits that the failure to disclose constitutes a fraudulent misrepresentation and that the plaintiffs are entitled to rescission and, alternatively or in addition, to damages. It is his position that the knowledge of Robb must be attributed to Rae in that he acted as her personal solicitor and therefore as her agent throughout the transaction and that Robb either knew, or was reckless in not finding out, what the effect of the heritage designation would be on the ability to deal with the buildings on the Property.

13 With respect to the defendants Budd Real Estate and Budd, counsel for the plaintiffs maintains that, in acting on behalf of both the vendor and the purchaser, there was a duty on the part of Budd Real Estate and Budd to disclose all material information to both parties and that to determine whether information is material, one should consider whether knowledge of the information would have affected the decision of the party to proceed with the transaction. He further submits that the position of the real estate agent creates a special relationship between the agent and his principals and that accordingly, even if the misrepresentation was innocent as opposed to fraudulent, the failure to determine the exact impact of the heritage designation and to disclose to Goldstein that the City was proceeding with the designation process constituted negligence on the part of the agent and the plaintiffs are entitled to rescission as well as to damages against the defendant Budd and Budd Real Estate. With respect to Budd's assertion that he thought the heritage designation process was voluntary and for that reason did not raise it with Goldstein, counsel for the plaintiffs submits that I should not accept this assertion on the part of Budd. He points out that at no point during the history of this action nor in the pleadings was there ever an assertion that the defendants thought that the process was voluntary and that, for Budd to have held this belief after his discussions with Warrack with respect to the time periods involved in the designation process, is not credible and is inconsistent with the evidence given by Warrack and with the fact that Budd was aware that other prospective purchasers of the Property were concerned about designation of the buildings as historic buildings and about the right to demolish the buildings. It is also inconsistent with Budd's stated version of the manner in which he carries on his business, i.e. that if there is any question in his mind as to whether something ought to be disclosed to a client, he will disclose it.

14 Counsel for the plaintiffs further submits that, if the court should find that the actions of the defendants constituted an innocent misrepresentation rather than fraudulent misrepresentation, the court may still order rescission on the basis that the result of the misrepresentation was that the plaintiffs acquired something totally different from that for which they had bargained and accordingly there has been an error in substantialibus, i.e. a virtual failure of consideration. He submits that, in any event, if there has been

misrepresentation, all of the defendants are liable to the plaintiffs in damages and in addition Budd and Budd Real Estate are liable to the plaintiffs in damages for breach of fiduciary duty and for negligence. It is his submission that it is no answer, in an action for fraudulent or innocent misrepresentation, to say that the plaintiff was careless or could have discovered the misrepresentation with due diligence.

15 With respect to damages, counsel for the plaintiff submits that the first head of damages is the difference between the purchase price paid for the Property, i.e. \$800,000, and the value of the Property at the date of purchase with the Notice of Intention to Designate in place. He notes that the only evidence before the court is that two other prospective purchasers were prepared to make an initial offer of \$650,000 for the Property with no heritage designation problem and that the one appraisal submitted to the court appraises the value of the Property as at November 14, 1989 at \$525,000 based upon comparables, three of which had no heritage designation feature and the other two of which were situations where the heritage designation was possibly a positive rather than a negative component in that the properties were historic homes occupied as residences in the Village of Meadowvale.

16 The second head of damages referred to by counsel for the plaintiffs is the cost which would be incurred in integrating the main house into the commercial development if the development should proceed. Two estimates of this cost put in evidence were approximately \$103,000 and \$81,000.

17 The third head of damages is the loss of chance of profits. Counsel for the plaintiff concedes that the calculation of loss of profit would have to be discounted based upon the probabilities of the plaintiffs being successful in obtaining a Tim Horton Donuts Ltd. franchise or similar franchise. Counsel for the plaintiff submits that the court ought to accept that the period of delay in proceeding with the development attributable to the heritage designation problem was a period of 18 months and that the only evidence before the court as to estimated profits from the development was the evidence of Mr. Hugh Spriggs, the Ontario Real Estate Development Manager for Tim Horton Donuts Ltd., who estimated that a Tim Horton Donuts franchise operation on the Property would yield an annual net profit of \$130,500 before depreciation, personal salary, income taxes and debt financing. It is conceded that the debt financing planned by Goldstein was a financing of \$500,000. It is also conceded that the cost of a franchise for a Tim Horton Donuts operation would have been \$50,000.

18 The fourth head of damages referred to by counsel for the plaintiff is additional professional fees incurred by Goldstein as a result of the heritage designation problem which he calculates as follows:

Fees of Macaulay, Chusid firm	\$8,874.16
50% of fees of Andrew Adamson, planner	\$7,234.74
25% of the fees of Charles Vernon Black, architect	\$2,593.75
50% of the fees of Zippen and Barrett, architects	\$1,131.85

	\$19,834.50

19 Counsel for the plaintiff submits that if damages are awarded they should be set off against the amount owing on the mortgage to Rae.

20 With respect to the personal liability of Budd, counsel for the plaintiff submits that both the individual agent Budd and the employer, Budd Real Estate should be found liable. The reliance by the client is on the individual sales agent and not on the corporation and that, on a tort analysis, where the claim is for breach of fiduciary duty, the sales agent should not be permitted to hide behind the corporate veil. He notes that under s. 31 of the Real Estate and Business Brokers Act, R.S.O. 1990, c. R. 4, there are obligations imposed on both the broker and the sales agent with respect to disclosure of interests in properties and submits that, by analogy, there is an obligation on both the broker and the sales agent to disclose any material information with respect to properties to the vendor and to the purchaser when they are representing both the vendor and the purchaser.

21 It is the submission of counsel for the defendants that I should find no liability on the part of any of the defendants in that they were under the impression that the heritage designation was strictly voluntary and would not proceed if the owner was not agreeable and, accordingly, it was not necessary to disclose to the plaintiffs the City's interest in designating the Property. He further submits that the defendants were either actively or passively misled by the City in that they were not apprised of the progress of the heritage designation process prior to closing and were not advised of the effect of a heritage designation by the City. It is the further submission of counsel for the defendants that Goldstein could have substantially shortened the period of delay and could have reduced the additional costs incurred by him as a result of the proposed heritage designation by taking active steps under the Heritage Act to apply for a demolition permit and to force the City into action. He submits that there is no evidence of a notice of any of the committee or council meetings going to Rae, Robb or Budd. He submits that no adverse inference should be drawn from Robb's failure to testify in that Robb acted more as a friend to Rae than as her lawyer and that the only evidence before this court is that he had an imperfect knowledge of the Heritage Act process and in fact thought that the total delay possible was seven months.

22 With respect to Budd, the only evidence before the court as to his knowledge of the Heritage Act process was that he was at one point asked whether he wished to have an old house which he owned in Brampton designated and, when he advised the City representative that he did not want the designation, nothing further happened. He further submits that Goldstein's evidence as to the reasons why he abandoned the development of the Property should not be accepted. He points out that the only evidence before the court is that the purchaser had to the date of abandonment incurred a net expenditure of about \$425,000 on the Property being \$75,000 less than the budgeted figure for the down payment on the Property and the costs to be incurred in proceeding with the development of the Property to the stage of construction. He submits that the real reasons for Goldstein abandoning the project were the problems with the Region and the fact that he had determined that the proposed commercial development was not viable because the purchase price which he had paid for the Property was excessive.

23 With respect to liability, counsel for the defendants submits that a failure to disclose cannot constitute a misrepresentation unless there is a duty to disclose and that no such duty existed here. The limited information which Rae and Budd had available to them with respect to the heritage designation process would not have caused them to disclose this information to Goldstein because they thought that the process was voluntary and would not interfere with Goldstein's use of the Property. With respect to the claim for negligence or breach of duty, counsel for the defendants submits that the plaintiff must establish a duty to disclose and that it was foreseeable that the other party would rely upon the misstatement resulting from the failure to disclose. He submits that neither of these elements has been established in this case with respect to Budd or Budd Real Estate. Counsel for the defendants further submits that there should be no personal liability on Budd. He submits that the only liability could be in tort and that Budd was acting throughout as an employee of Budd Real Estate within the scope of his employment and accordingly should incur no personal liability.

24 As to the calculation of damages, counsel for the defendants submits that to be compensable in damages, losses must be reasonably foreseeable and unavoidable, which has not been established in this case. He further submits that the plaintiffs have failed to mitigate their damages in that no concerted effort was made to resell the Property or to proceed with the commercial development proposal and resell the Property with the commercial development potential in place. Counsel for the defendants further submits that one cannot claim damages for innocent misrepresentation if the transaction has closed as in our case.

25 With respect to the various heads of damages, counsel for the defendants' submits that the evidence does not establish the value of the Property as at the closing date with the Notice of Intention to Designate in place. He submits that the effect of a heritage designation depends entirely upon the intended use of the property by the purchaser and notes that Mr. Spencer Higgins, the architect called by the plaintiffs, gave evidence that the buildings on the Property had an historic value of \$750,000. He submits that there may well have been a market for the property with a heritage designation and notes that there was at least one enquiry from a party who wished to use the Property as it existed, converting the main house into a restaurant.

26 With respect to the cost to integrate the main house into the commercial development, counsel for the defendants submits that such cost was neither foreseeable nor unavoidable. He submits that Goldstein could have obtained a demolition permit by taking a more active and aggressive stance with the City to force the issuance of a demolition permit. This would also have shortened the period of delay in respect of which the plaintiffs are seeking damages for lost profits.

27 With respect to lost profits, counsel for the defendants submits that the evidence is insufficient to establish whether there would in fact have been any net profit from the operation of a Tim Horton Donuts franchise or similar franchise on the Property. He submits that the total cost of the development would have been \$1,350,000 comprised of the \$800,000 purchase price, the \$200,000 budgeted pre-construction costs, the estimated \$300,000 construction costs and the \$50,000 for the franchise and that the only evidence before this court with respect to estimated profits would not seem to justify an expenditure of that amount on the Property.

28 With respect to additional professional fees, he submits that some part of the fees of the Macaulay, Chusid firm should be deleted in that they comprised advice to the plaintiffs with respect to the commencement of various actions including this action.

29 Finally, counsel for the defendants submits that the plaintiffs' action should be dismissed and judgment entered for the defendant Rae in the mortgage action.

Issues

30 The following issues arise in this action.

1. Did the failure of Rae, Budd Real Estate and Budd to disclose to Goldstein the City's interest in designating the Property as a heritage property amount to a misrepresentation?

2. If the conduct did constitute misrepresentation, was it a fraudulent or an innocent misrepresentation?

3. In the case of either a fraudulent or innocent misrepresentation, what are the remedies available to the plaintiffs?

4. If damages are to be awarded, under which heads of damage do they fall and how are the damages calculated?

5. May the damages be set off against the amount owing to Rae under the vendor takeback mortgage?

6. Is there an additional cause of action against Budd and Budd Real Estate based on negligence and breach of fiduciary duty?

7. Are Budd and Budd Real Estate jointly liable for damages for either misrepresentation or negligence and breach of fiduciary duty?

8. Should punitive damages be ordered in this action?

Findings of Fact

31 It should be noted that counsel have advised that Rae is not competent to testify in this matter and is represented in this matter by her litigation guardian. Counsel have agreed that I should draw no adverse inference from the fact that Rae was not called to testify.

32 Robb also did not testify and, in view of the fact that he acted for Rae throughout the transaction and was involved in the negotiation of the various offers on the Property and in discussions with the City with respect to the designation of the Property, counsel for the plaintiffs has submitted that I must draw the adverse inference that his testimony would not have been helpful to the defendants.

33 Counsel for the defendants has submitted that I ought not to draw such an adverse inference on the basis that Mr. Robb was equally available to both parties and could have been called by the plaintiffs. I do not believe this to be the state of the law. A witness may be available in the sense that the witness can easily be subpoenaed to come to court and

testify by either party but that is not the test of availability. If, because of the witness' relationship to one party, that witness could reasonably be expected to testify in favour of that party and against the other party, then that witness is not equally available and an inference may be drawn from the fact that the witness was not called by the first mentioned party. See: *Murray v. Saskatoon* (1952) 2 D.L.R. 499 (Sask. C.A.); *Pointer v. Pointer* 251 S.W. 2d 334 (Mo. App., 1952). In this case, Mr. Robb was Mrs. Rae's solicitor throughout, was present at the discussion of at least two of the offers to purchase and had discussions with the City of Mississauga with respect to the heritage designation. Accordingly, I must draw an adverse inference from the fact that Mr. Robb was not called to testify by the defendants. See: *Claiborne Industries Ltd. et al. v. National Bank of Canada et al.* (1989), O.R. (2d) 65 (C.A.).

34 On the basis of all the evidence presented, I find on the balance of probabilities, the following facts to be established.

1. Rae was aware at all relevant times of the City's interest in designating the Property but was not aware that, through the designation process, the City could restrict or prohibit the demolition, alteration or addition to the buildings on the Property without the consent of the owner.

2. That as of October 24, 1989 and November 14, 1989, Robb knew of the interest of the City in designating the Property and knew that the City had accelerated the process of designation and intended to start the process within a month and knew or ought to have known that the result of designation would be that the City could restrict or prohibit demolition of, and alterations or additions to, the buildings.

3. As of October 24, 1989 and November 14, 1989, Budd knew of the City's interest in designating the Property and was at least aware that the designation process could result in problems and delays in proceeding with any demolition of the buildings on the Property.

4. That Robb and Budd were both aware that Goldstein was interested in purchasing the Property for the purposes of a commercial development and intended to demolish the buildings on the Property.

5. That none of the defendants advised Goldstein as to the interest of the City in designating the Property or the intention of the City to commence the designation process, either before October 24, 1989 or before November 14, 1989.

6. That, prior to November 1991, the City was not prepared to budge from its original position that the whole Property was to be designated and would not have issued a demolition permit and would have resisted any steps taken by Goldstein to force the City to issue a demolition permit pursuant to the provisions of the Act.

7. That, on the advice of his professional advisors, Goldstein attempted to negotiate a compromise with the City rather than take a confrontational approach by proceeding under the provisions of the Act to force the City to act and that, in all the circumstances of this case, it was reasonable for Goldstein to proceed in this manner.

8. That there were no inordinate delays on the part of Goldstein in proceeding with the design and site plan and negotiations with the City during 1990 and 1991.

9. That it did not make sense for Goldstein to proceed with site plan approval or any other approvals or permits required until the heritage designation problem was resolved.

10. That by the summer of 1992, Goldstein had expended approximately \$400,000 on the acquisition of the Property, on the development of an acceptable design and site plan for a commercial development on the Property incorporating the main house and on the professional fees in connection therewith. The evidence of Goldstein is that \$506,000 has been expended to date on the Property and the proposed development although only \$425,000 had been expended up to May 1993. Presumably the difference relates to expenses in connection with the litigation as the project was abandoned by Goldstein in the summer of 1992.

11. That the Region could not have refused approval based on the number of parking spaces in the development if Goldstein had reached an accommodation with the City on the number of parking spaces and that the Region would have been unable to enforce its condition that Goldstein had to buy the Region's lands to the east of the Property in order to obtain the Region's approval of the site plan.

12. That the value of the Property as of November 14, 1989 with the heritage designation in process was less than \$800,000 but that the evidence at this trial is not conclusive as to what the value was on that date.

13. That, once the Notice of Intention to Designate was issued by the City, Goldstein would not have been successful in obtaining a demolition permit from the City without either successfully pursuing his objection at City Council or at a hearing of the Conservation Review Board.

14. That the City did not intentionally mislead any of the defendants or Robb with respect to its intentions as to the heritage designation of the Property.

15. That, whereas there may have been some lack of knowledge by the defendants as to the details of the heritage designation process, neither Budd nor Robb believed that it was entirely voluntary on the part of the property owner.

16. That the real reason for the plaintiffs abandoning the development of the Property was that the development was not economically viable. The evidence indicates that two other developers were prepared to pay \$650,000 for the property as opposed to the \$800,000 paid by the plaintiffs and that the total cost for the property, for construction and for the franchise would have been \$1,350,000 about \$850,000 of which was to be financed. Aside from the difficulty of comprehending some of the projections submitted to the court by the plaintiffs, it would appear that the type of development contemplated by the plaintiffs on the property might well have yielded no net profit.

35 In arriving at the above findings of fact, I have, where there was a conflict in evidence on a material matter between the evidence of Goldstein and the evidence of Budd, preferred the evidence of Goldstein. In my view, the evidence of Goldstein was more credible, was more consistent with the evidence of other witnesses and with the documentary evidence submitted to this court. I found Budd, on a number of occasions, to be evasive, defensive and argumentative in his evidence and taking positions which did not seem to be credible when viewed in all the circumstances of the case. In addition,

Budd seemed to be attempting to deflect all blame to the City and to establish that the parties to this action had been deliberately misled by the City. No explanation was given as to why the City would attempt to mislead any of the parties nor can I determine any possible motive on the part of the City to do so.

Reasons

Failure to disclose constituting misrepresentation

36 Having found that Rae was at least aware of the interest of the municipality in designating the Property as a heritage property and that Robb and Budd were aware that the heritage designation process was underway at the time of the sale and that no mention of this was made to Goldstein, I find that the failure to make such disclosure constitutes a misrepresentation. On the facts of this case, the knowledge of Robb that the heritage designation process was underway may be attributed to Rae. In *Kirilenko et al. v. Lavoie et al.* (1981), 127 D.L.R. (3d) 15 (Sask. Q.B.), Sirois J. stated at p. 28:

Mr. McCann [the co-defendant's counsel] at all relevant times was fully aware of the earlier agreement and he was fully aware of the fact that the entire purchase price had been paid into Mr. Busse's office... While the defendant Lavoie said nothing or very little when the agreement between himself and his co-defendant was typed out by Mr. Busse in the latter's office, he is presumed to have full knowledge of what was known to his lawyer: vide *Bradley v. Riches* (1878), 9 Ch.D. 189; *Bank of British North America v. St. John & Quebec R. Co.* (1920), 52 D.L.R. 557, 47 N.B.R. 367 [affirmed 67 D.L.R. 650, 62 S.C.R. 346]. Notice to a solicitor is actual notice to his client: vide *Espin v. Pemberton* (1859), 3 De G. & J. 547 at p. 554, 44 E.R. 1380.

The court also commented unfavourably on the failure of the defendant's counsel, present at the proceedings, to testify and inferred that his testimony would not have supported his client's case in any way.

37 Particularly in the case of transactions involving the sale of real estate, the failure to disclose defects of title, as well as latent defects in the condition of the property, will warrant the court's intervention. In *Carlish v. Salt*, [1906] 1 Ch. 335, the vendors did not tell the plaintiff purchasers that a party wall in the house was subject to a dangerous structure notice and that the owners would be obliged to pay for a share of the cost of reconstruction. The court held that this liability was a latent defect in the title, which was material to the value of the property and which the purchasers could not be expected to discover for themselves with the care ordinarily used in such transactions. Fraudulent misrepresentation was not claimed, and the court ordered the return of the purchasers' deposit and the costs of investigating title.

38 The principle is set out in 34 Halsbury, 3d ed., p. 214 as follows:

Disclosure by vendor. Under special circumstances, however, it may be the duty of the vendor to disclose matters which are known to himself, but which the purchaser has no means of discovering; such as a defect which will render the property useless to the purchase for the purpose for which, to the vendor's knowledge, he wishes to acquire it; or a notice served in respect of the property, knowledge of which is essential to enable a purchaser to estimate the value; and, if the vendor fails to make disclosure, he cannot obtain specific performance and may be ordered to return the deposit.

(Emphasis added)

39 The notice of the potential heritage designation, in my view, clearly falls within the above principle, particularly in view of the fact that the mortgage clause in the Goldstein offer contained a provision regarding "the right to remove or demolish all existing structures on the said lands". Accordingly, I find that the failure on the part of the defendants to disclose the impending heritage designation constituted a misrepresentation.

Fraudulent and innocent misrepresentation

40 The elements of fraudulent misrepresentation are stated by Perell, "Remedies and The Sale of Land" at p. 88 as follows:

As a civil law matter, fraud is the act of making dishonest and false representations. Fraud is proven when it is clearly and distinctly shown that a false representation has been made knowingly or without belief in its truth or recklessly without caring whether the representation be true or false. The dishonest intent is significant and distinguishes fraudulent misrepresentation from innocent misrepresentation, a related doctrine. If the person who makes the false statement proves that he or she had an actual and honest belief in the truth of the statement, then fraud is not established, even if the statement was made negligently or carelessly.

41 In *United Shoe Machinery v. Brunet* (1909), A.C. 330 (P.C.), the Court held that to establish fraudulent misrepresentation, the plaintiff must prove (1) that the representations complained of were made by the defendant, (2) that they were false in fact, (3) that they were known, when made, to be false or recklessly made, i.e. without knowing whether they were true or false, (4) that the representation induced the plaintiff to enter into the contract to his prejudice and (5) that, within a reasonable time after the discovery of the falsity of the representation, the plaintiff elected to avoid the contract and accordingly repudiated it. To constitute fraudulent misrepresentation there must be an intention to deceive, based upon some evidence that a statement was made which was known to the party making it to be false or was made recklessly as to its truth or falsity. See: *Derry v. Peek* (1889), 14 App. Cas. 337 (H.L.); *Redican v. Nesbitt*, [1924] S.C.R. 135; *Hjort v. Wilson*, [1954] 2 D.L.R. 705 (B.C.C.A.). In *Derry v. Peek*, supra, Lord Herschell stated at p. 359:

Where rescission is claimed, it is only necessary to prove that there was misrepresentation; then, however honestly it may have been made, however free from blame the person who made it, the contract, having been obtained by misrepresentation, cannot stand. In an action for deceit, on the contrary, it is not enough to establish misrepresentation alone, it is conceded on all hands that something more must be proved to cast liability upon the defendant, though it has been a matter of controversy what additional elements are requisite.

42 In the case at bar, I am not satisfied that the necessary elements have been established so as to constitute the actions of the defendants in failing to disclose the existence of the potential heritage designation as fraudulent misrepresentation.

Remedies - rescission or damages

43 An innocent misrepresentation as to material fact may give rise to a right of rescission; however, to grant rescission of a contract after the transaction has closed, the court must find a virtual failure of consideration, an error in substantialibus, e.g. that a purchaser has acquired something completely different from that for which he bargained: *Redican v. Nesbitt*, [1924] S.C.R. 135 at 144 per Duff J. In *Fitzgerald v. Dennis* (1981), 35 N.B.R. (2d) 60 (N.B.Q.B.), rescission was granted when the vendor failed to disclose that an Order-in-Council prohibited most types of access to the Property. The property became worthless because access was withdrawn and the vendor was aware that this was imminent as of the date of closing.

44 Obviously, in our case, the impending heritage designation did not render the property completely worthless nor did it ultimately result in the plaintiffs acquiring something completely different from that for which they had bargained. The negotiations with the municipality and the development of the site plan incorporating the original house into the development meant that the property was developable, more or less in the way in which Goldstein had envisaged, although clearly at the cost of some additional expense and inconvenience and perhaps with not as many potential uses as Goldstein had anticipated. Accordingly, in this case I do not find that there was an error in substantialibus making this an appropriate case for rescission to be granted.

45 In general, damages are not recoverable for innocent misrepresentation. Where justice calls for it, however, the rule can be modified under principles that the fusion of the common law and equity have engendered. *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534, concerned a breach of solicitors' fiduciary duty through non-disclosure of a secret profit in the sale of a joint venture property. The majority reasons given by La Forest J. discussed the principles of recovery for loss from a breach of fiduciary obligation. At p. 587, he fully concurred with the statements of Somers J. in *Day v. Mead*, [1987] 2 N.Z.L.R. 443 that equitable and common law obligations as to disclosure, use of confidential information and want of care owed by reason of the relationship between the parties ought to afford the same remedies in cases of breach, whether the remedies have developed from equitable or common law principles. He then said, at p. 588:

It would be wholly inappropriate to interpret equitable doctrines so technically as to displace common law rules that achieve substantial justice in areas of common concern, thereby leading to harsh and inequitable results...Both the common law and equity sufficiently support the fiduciary position by compensating the victim of the of breach of confidence. Damages equivalent to those for deceit would seem sufficient to meet both these ends.

46 Misrepresentation or non-disclosure in situations where the court does not find fraudulent misrepresentation but does find the existence of a duty of care due to the relationship between the parties accordingly entitles the plaintiff to damages for negligent misrepresentation.

47 A vendor's duty of care toward the purchaser has been expressed in various ways. In *Chapman v. HLS York Development Ltd.* (1988), 64 O.R. (2d) 498 (H.C.J.), the court found that the corporate vendor's representative had failed to disclose the risk of error in

an architect's measurement of a condominium. The court found that since the price per square foot is the basis for comparison between condominiums, that the plaintiff purchaser accepted and relied upon the square footage representation, that the defendant was in a position to know and had foreknowledge of the seriousness of the misrepresentation, that the misrepresentation as to the size of the unit was incorporated into the sales agreement, and that the vendor was liable for damages in the amount of the overpayment for the misrepresented floor area.

48 The purchasers in *Jung v. Ip* (1988), 47 R.P.R. 113 (Ont. Dist. Ct.) claimed fraudulent or negligent misrepresentation when they discovered, after closing, that the house was infested with termites. In discussing the liability of the vendors in fraud, the court said, at p. 123:

The vendors are also responsible for any fraudulent or negligent misrepresentation made on their behalf by either Mr. Leung or Miss Wong, both of those persons being agents for the vendors. Even if the vendors themselves had committed no wrong, they would be vicariously liable for the wrongs of the two agents.

49 Various liability was also found in *Betker v. Williams*, [1992] 2 W.W.R. 534 (B.C.C.A.), where the purchasers were sold a lot which the agent had told them was suitable for a solar home when it was too small for any home because no sewer could be installed. After finding the agent liable for negligent misstatement, the court said at p. 540:

Notwithstanding her counsel's argument to the contrary, I find nothing fundamentally unjust in a vendor being required to reimburse a purchaser to the extent that the price which the vendor has received from the purchaser exceeds the value of the property as a result of misrepresentations made by the vendor's agent.

50 Accordingly I find in our situation both the vendor and the agent liable in damages to the plaintiffs for the negligent misrepresentation of the agent in failing to disclose the potential heritage designation.

Heads of Damage' and Calculation of Damages

51 The first head of damage claimed by the plaintiffs is the difference between the purchase price of the property and the value of the property with the heritage designation process in place. I think it is beyond dispute that the plaintiffs are entitled to damages under this head.

52 In *Parna v. G. & S. Properties Ltd.*, [1968] 1 O.R. 626, varied as to damages 5 D.L.R. (3d) 315, appeal dismissed [1971] S.C.R. 306, the expenditures needed to operate an apartment building, designed to induce the purchasers to buy, were fraudulently misrepresented. The trial judge awarded damages against the vendor company amounting to "the value which the property would have fetched as between reasonable and honest sellers and purchasers, if the whole truth of the facts which the representators had perverted or concealed had been within the knowledge of those fixing the price" (p. 631-32). The Court of Appeal said that this was loss of bargain damages, and disagreed with the award. Evans J.A. said:

The plaintiffs are entitled to be put in the same position they would have been in if the representations had not been made, but not to be put in the position they would have been if the representations had been true. I am of the opinion that the proper measure of damages is the difference between the purchase price paid for the property and the actual value of the property at the time of sale.

(emphasis added)

53 In *Bitton v. Jakovljevic* (1990), 75 O.R. (2d) 143 (H.C.J.), where there had been fraudulent misrepresentation as to the income of an industrial rental property, the court discussed the availability of consequential damages at length. At p. 156, Van Camp J. distinguished the restricted award in the Parna case from the principle that consequential damages may be awarded for fraud adopted in the numerous cases which followed *Doyle v. Olby (Ironmongers) Ltd.*, [1969] 2 All E.R. 119 (C.A.):

In my opinion, Parna can be distinguished from *Doyle* as follows: in *Doyle*, the court made a clear finding that the plaintiff had been tricked into buying a business which he would otherwise not have bought at all if there had been no fraud. In Parna, there was no finding on the facts off case that if the representations had not been made, i.e., if the plaintiffs knew of the true circumstances, they would not have entered into the bargain at all.

54 The court also pointed out that the decision in Parna was reversed on appeal to the Supreme Court of Canada, which found no liability for deceit, but did not refer to the proper measure of damages. In *Bitton*, the court found the plaintiff was entitled to recover all losses directly flowing from the fraudulent inducement, including consequential loss.

55 I find therefore that the measure of damages should be the difference between the purchase price of the Property and the value of the Property on the closing date with the potential heritage designation in place, together with consequential damages flowing from the non-disclosure of the potential heritage designation.

56 As outlined above, there is no conclusive evidence before this court as to the value of the property at the date of purchase with the potential heritage designation in place and a reference to the Master will be required on this question.

57 The second head of damages claimed by the plaintiffs is the costs incurred to integrate the main house into development and I find that these costs, if incurred, would be consequential damages incurred as a result of the misrepresentation as to the potential heritage designation. These costs are estimated by the plaintiffs at approximately \$103,000 and by the defendant at approximately \$81,000. In the event that the development proceeds and the parties are unable to agree on this amount, a reference to the Master will be required on this question as well.

58 The third head under which the plaintiffs claim damages is with respect to the carrying costs of the property during the 18 month period while the heritage designation problem was being dealt with. These costs include mortgage payments, taxes and insurance. It appears to me that these costs would have been incurred in any event even if there had been no heritage designation problem and the plaintiffs had proceeded with the development of the property in the normal course. Accordingly, I find that the plaintiffs are not entitled to damages under this head.

59 The fourth head of damages claimed by the plaintiffs relates to additional professional fees incurred in negotiations with the municipality and in the preparation of various drawings and site plans to include buildings designated as heritage properties in the development. I find that these costs were consequential damages incurred as a result of the non-disclosure with respect to the potential heritage designation and I find that the plaintiffs are entitled to damages in the amount of these costs.

60 The fifth head of damages asserted by the plaintiffs is based upon the loss of expected revenue from the business to be carried on the property for a period of 18 months, being the period which the plaintiffs maintain was the period of delay as a result of the heritage designation process. I have some difficulty with the evidence presented to this court as to the calculation of anticipated net profit from the development contemplated for the property. In any event, based on the evidence before me, I have concluded that the real reason for the plaintiffs' abandoning the development of the property was that the development was not economically viable. Accordingly, I am not prepared to award the plaintiffs any damages based on loss of anticipated profit.

Liability for Damages

61 As indicated above, it is settled law that notice to a solicitor and the knowledge of the solicitor with respect to the transaction in which he or she is retained is attributed to the solicitor's client. Accordingly, although Rae may only have been aware that the municipality had some interest in designating the property as a heritage property, the knowledge of Robb that the designation process was about to commence and the effect of that process must be attributed to Rae. The failure to disclose this information accordingly constitutes a breach of the duty of care owed by a vendor to a purchaser of real property.

62 With respect to Budd and Budd Real Estate, it is clear from the documentation that, in law, the agent retained by Rae was Budd Real Estate and that the agent subsequently contacted by Goldstein and retained by him to prepare and submit the offer was also Budd Real Estate. I therefore find that Budd Real Estate was acting in the capacity of agent for both parties in this transaction. In *Raso v. Dionigi* (1993), 12 O.R. (3d) 580, the Ontario Court of Appeal set out the obligations of an agent acting for both vendor and purchaser as being an obligation to make full and fair disclosure of all material circumstances and of everything known to the agent respecting the subject matter of a contract which would be likely to influence the conduct of the agent's principal. At p. 587, Dubin C.J.O. stated:

As Wallace J.A. stated in *Ocean City Realty Ltd. v. A & M Holdings Ltd.* (1987), 36 D.L.R. (4th) 94, 44 R.P.R. 12 (B.C.C.A.), at p. 98 D.L.R., p. 318 R.P.R.:

In my opinion, the trial judge's interpretation of the obligation owed to a principal by its agent is too restrictive. The duty of disclosure is not confined to those instances where the agent has gained an advantage in the transaction or where the information might affect the value of the property, or where a conflict of interest exists. The agent certainly has a duty of full disclosure in such circumstances; they are commonly occurring circumstances which require full disclosure by the agent. However, they are not exhaustive.

The obligation of the agent to make full disclosure extends beyond these three categories and 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) or, as expressed in 1 Hals., 3rd ed., p. 191, para. 443, everything which "... would be likely to operate upon the principal's judgment". In such cases the agent's failure to inform the principal would be material nondisclosure.

63 I find that, throughout, Budd was acting within the scope of his employment as an officer and employee of Budd Real Estate and, as a result of his non-disclosure, Budd Real Estate was in breach of its fiduciary duty owed to the plaintiffs and is liable in damages for breach of fiduciary duty.

Personal Liability of Budd

64 From the documentation and evidence presented to this court, I have concluded that, although technically the principal/agent relationship established by both the vendor and the purchaser was with the corporation, Budd Real Estate, the person with whom both Rae and Goldstein communicated and who had the knowledge with respect to the impending heritage designation was Budd and it was Budd who directly breached fiduciary duty by failing to disclose this information to Goldstein and I find Budd personally liable in damages for breach of fiduciary duty.

65 The measure of damages is in my view the same as that against the vendor, that is the difference in value between the purchase price paid by the plaintiffs for the Property and the value of the Property as of the date of purchase with the heritage designation pending, together with consequential damages, being the costs incurred by the plaintiffs in integrating the main house into the development, should they decide to do so, and the additional professional fees paid by the plaintiffs to deal with the heritage designation problem.

66 In Canson, supra, the Supreme Court of Canada affirmed the appropriateness of damages in equity, or compensation, for breach of fiduciary duty. At p. 586, LaForest J. said:

...in this particular area law and equity have for long been on the same course and whether one follows the way of equity through a flexible use of the relatively undeveloped remedy of compensation, or the common law's more developed approach to damages is of no great moment. Where "the measure of duty is the same", the same rule should apply: see Somers J. in Day v. Mead, supra, at p. 457.

67 The court in Sedgemore v. Block Bros. Realty Ltd. (1985), 39 R.P.R. 38 (B.C.S.C.), after having found the vendor liable for fraud and the agents liable for negligent misrepresentation, awarded damages against the realtor for the amount of commission and against the real estate agents jointly and severally, following C.R.F. Holdings Ltd. v. Fundy Chemical Int. Ltd., [1982] 2 W.W.R. 385 (B.C.C.A), on the principle that damages may be awarded for consequential loss. In Sedgemore, Lysyk J. relied on Jarvis v. Maguire (1961), 28 D.L.R. (2d) 666 (B.C.C.A.), and at p. 52, quoted from that case as follows:

While equity does not award damages as such, it has its own peculiar remedies, such as restitution, compensation, indemnity and accounting, by which it can order the payment of money which in some cases might be awarded by common law courts as damages...I see no reason why equity should not apply its conventional remedies to compel the agent and salesman, as well as the vendor, to restore to the purchasers the money they were induced to pay out by actionable wrong in which the defendants were jointly implicated.

68 Accordingly, I find that Budd and Budd Real Estate are jointly liable in damages to the plaintiffs to the same extent as the vendor.

Punitive Damages

69 Exemplary or punitive damages may be awarded in cases where the defendant deliberately or recklessly exposes the plaintiff to a risk without justification. However, they are not awarded in an ordinary action or breach of a commercial contract: *A.G. Ont. v. Tiberius Productions Inc.* (1984), 46 O.R. (2d) 152 (H.C.). The circumstances of this case coincide more closely with the "ordinary commercial dishonesty" found in the sale of land case, *C.R.F. Holdings Ltd. v. Fundy Chemical Int. Ltd.*, supra:

It is, I think, clear that the claim for punitive or exemplary damages cannot succeed; this is not a case in which there has been intentional injury, abuse of authority, or any other factor which would characterize the conduct of the defendants otherwise than as ordinary commercial dishonesty.

70 In the case at bar, I do not find that the elements exist to find the defendants liable in punitive damages to the plaintiffs.

Judgment

71 Judgment accordingly against the defendants Rae, Budd Real Estate and Budd, the damages to be payable by them jointly and severally. A reference is directed to the Master to determine the value of the Property as of the date of the purchase with the heritage designation pending and, if necessary, to determine the additional professional fees paid by the plaintiffs in dealing with the heritage designation problem. If the plaintiffs file with this court, on or before June 30, 1994, an undertaking that they will proceed with the development of the Property on the basis of the final site plan filed with the City of Mississauga in June, 1992, they shall be entitled upon completion of such development to damages, payable jointly and severally by Rae, Budd Real Estate and Budd, in an amount equal to the additional costs incurred in incorporating the main house in the development project and a reference to the Master is directed to determine such amount.

72 The action brought by Rae on the mortgage is stayed pending the determination of the amount of damages in the action commenced by Goldstein.

73 Costs to the plaintiffs. Counsel may speak to me or forward written submissions as to the scale and quantum of costs.

GROUND J.

DRS/DRS

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