

## BUYER AGENCY, ITS ADVENT AND IMPLICATIONS

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Purchasing a house can be a daunting task at the best of times. It is the single largest purchase that most individuals make in their lifetimes. The task is made more difficult by the combination of two factors. The first is the application of the principle of caveat emptor - "let the buyer beware"<sup>2</sup>. The second is that typically no real estate agent acts for the buyer. The result is that individuals embarking on the largest purchase of their lives find themselves in a situation in which the law makes little attempt to imply any protections in their favour<sup>3</sup> and in which everyone with whom they deal in structuring the transaction is working for the owner of the property. The combination of these two factors placed the bulk of the transaction risk squarely on the shoulders of the purchaser.

Notwithstanding these principles, the odds have not been entirely stacked against the purchaser. Over time, courts have created various devices to limit the principle of caveat emptor. The case books are replete with examples of litigation concerning this topic. This issue is beyond the scope of this paper. Similar concerns which led to legal challenges to the principle of caveat emptor have also led to litigation concerning the role of real estate agents in transactions. Courts have

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<sup>2</sup> This maximum essentially summarizes the rule that a purchaser is responsible for examining, judging and testing before making a purchase. As Dickson J., in *Fraser-Reid v. Droumsekas* (1979), 9 R.P.R. 121 (S.C.C.) at p. 129 points out this approach was based upon "the laissez-faire attitudes of the 18th and 19th centuries and a notion that a purchaser must fend for himself, seeking protection by express warranty or by independent examination of the premises. If he fails to do either, he is without remedy, either at law or in equity, in the absence of fraud or fundamental difference between that which was bargained for and that obtained."

<sup>3</sup> Such as for example the traditional position that there is no implied covenant that an existing house is suitable for occupation, even where it is clear that it is being sold as a place of habitation.

responded both by imposing standards of conduct and disclosure on real estate agents, and also, in certain circumstances, recognizing a dual agency relationship.

It is beyond the scope of this paper to consider all of the factors which initially led to the allocation to the purchaser of the bulk of the transaction risk. Rather we will briefly review the court's imposition of duties on real estate agents in an effort to level the playing field, the recent real estate industry decision to adopt a presumed buyer agency model and finally we will speculate briefly on the potential impact of this recent decision.

## **AGENCY AND THE COURTS**

Before examining how the courts have regulated real estate agents, it is useful to briefly consider the nature of an agency relationship.

### **Creation of Agency**

An agency relationship may arise as a result of a written, oral or express agreement, or it may be implied from the conduct of the parties and other circumstances of the case, or by ratification, in which case all parties are put in exactly the same position they would have been had the brokers been authorized to begin with, by estoppel, and occasionally by operation of law.

Most typically, the agency relationship in a real estate transaction is created by the express terms of the listing agreement. The listing agreement provides expressly for the primary agency

relationship between the seller and the listing agent and also provides that the listing agent may use subagents to assist in the sale of the property.

The agent owes the principal a duty of good faith. The agent must perform the terms of its contract, carry out the instructions of the principal, employ reasonable care and skill in doing what they have undertaken, and display the qualities which are generally associated with those involved in the real estate brokerage business. The agent also owes the principal a duty of confidentiality.

### **Duties of Real Estate Agents to Purchasers**

While agents work for the vendors (and therefore owe their primary loyalty to the vendors), the courts have imposed standards of conduct on real estate agents which make it clear that they nonetheless owe certain duties to prospective purchasers. Real estate agents have a duty to prospective purchasers to act with honesty and integrity. A prospective purchaser is generally entitled to rely upon representations of a vendor's agent. Further, the courts will not sanction the misleading of a prospective purchaser on matters which are material to the contract, either by direct misrepresentation or omission.<sup>4</sup> While there are numerous examples of these principles in the case books, the following will highlight the issues.

In *Jakubke v. Sussex Group - SRC Realty Corp.* (1993), 31 R.P.R. (2d) 193 (B.C.S.C.), the vendor added a new west wing to his house before selling it. As a result of a municipal inspection,

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<sup>4</sup> *Lambert v. Gillis* (1993), 122 N.S.R. (2d) 296 (N.S.S.C.)

a stop-work order was issued, and the vendor amended his plans to comply with the municipal requirements. After the final inspection, the vendor proceeded to complete a bedroom and bathroom without a permit and contrary to the municipal requirements. The unlawful status of the renovations were never disclosed to the purchasers.

The real estate agents were aware that the wing likely did not comply with the current building code. They thought the wing was old or original construction and that the municipality would not attempt to enforce the current code if the original work had been completed to code requirements. In showing the home, the agents described it as having a bedroom and bathroom in this wing. The court found that the fact that the work had been done by the vendor without a permit and in contravention of the municipality's directives was a latent defect, whose non-disclosure by the vendor constituted a fraudulent misrepresentation.

The court also found that although there was no express representation by the agents that the bedroom and bathroom could be lawfully used, that was how the rooms were described, marketed and displayed. The fraudulent misrepresentation was, therefore, passed on to the purchasers by the agents. At p. 206, the court reviews the duty of care of a realtor to a purchaser:<sup>5</sup>

*In some circumstances, a real estate agent is entitled to rely on representations of fact made by the vendor...In Foster, Real Estate Agency Law (1984), the duty to exercise care and skill is described in the following terms (at p. 243):*

*"It is now well established that real estate brokers who elect to provide information and advice to the third parties with whom they may have dealings must exercise*

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Citing Lysk J. in *Sedgemoor v. Block Bros. Realty Ltd.* (1985), 39 R.P.R. 38, where he quotes with approval W.F. Foster, *Real Estate Agency Law* (Toronto: Carswell, 1984), at p. 49.

*reasonable care and skill in the performance of their undertaking in ensuring the completeness and accuracy of such information and advice."*...

*"That the misinformation conveyed by a broker to a third party originates with the broker's principal, or with the listing broker in a multiple listing situation, will not necessarily relieve the broker from personal liability to the third party. A broker must at least check the completeness and accuracy, both of all information which is usual or customary for brokers to verify, and of all other information as to the completeness and accuracy of which he is in doubt. However, authority exists to support the contention that the obligation of, at least, a listing broker is somewhat broader in that he must ascertain and verify all pertinent facts concerning the property placed in his hands for disposal."*

In the present case, there were circumstances which ought to have caused the realtors to doubt the completeness and accuracy of the representations. The court acknowledges at p. 207, that:

*great care must be taken not to impose standards on these realtors that are more properly those to be imposed upon architects, builders, engineers or solicitors. I do not think, at least on the evidence before me, that there is a duty on a realtor to ensure that a building complies in every respect to the building codes either present or past. A consideration of the duty and standard of care of realtors must also be viewed in light of what might be a conflicting duty to their principals.*

However, the court does find that the realtors did not meet their duty and standard of care. They were aware extensive renovations had occurred. It was apparent to them that the west wing work was not in compliance with the building code. An inquiry as to the status of the bedroom and bathroom would have revealed the true state of affairs.

In *Fletcher v. Hand* (1994), 40 R.P.R. (2d) 52 (Alberta Q.B.), the purchasers bought a farm property on the basis of a representation with respect to the farm well's capacity. The vendor was the originator and only source of misrepresentation that was made fraudulently or recklessly. The real estate agents were found to be in breach of their duties to the purchasers. The information

representing the capacity of the well was a material fact that the listing agent was required to verify so that the purchasers would know to what extent they could rely on the information. The listing agent's failure to ascertain the accuracy of the representations constituted a failure to meet the standard of care normally required of a listing agent. In addition, the selling agent was also under a duty to make inquiries and to validate any material representations. The selling agent could not simply rely on the listing agent to discharge the duty of providing complete and accurate information. The real estate companies were also vicariously liable for their agent's negligence.

The result is that real estate agents are in an odd middle ground. Duties are owed not only to their principal but also to the purchaser, one with whom their principal has a direct conflict of interest. This conflict creates additional strain because in many cases an agent who is contacted by a potential purchaser to help locate a house has little if any contact with the vendor. Nonetheless, the agent is acting as a sub-agent for the vendor by virtue of the standard listing agreement. The legal requirement that this sub-agent owes primary loyalty to the vendor does not conform easily to the standard practice. Recently there have been cases where courts have recognized the conflict inherent in this situation and have found the real estate agent to also be the agent for the purchaser.

In *Wypych v. McDowell* (1990), 11 R.P.R. (2d) 89 (Ont. Dist. Ct.), the vendors listed their residence with a MLS. The vendors accepted an offer from the purchasers conditional on the purchasers obtaining a new first mortgage. However, the new first mortgage was conditional on the

purchasers selling two other properties, but this was not disclosed. The transaction fell through and the vendor sold the property at a lower price. In addition, to suing the purchaser, the vendor sued the original selling agent for a failure to make proper disclosure of the true nature of the contingency.

In this case, the judge reviews the nature of the duties arising in an agency relationship, and at pp. 94 -95 states:

*The McDowells [the purchaser] retained Mrs. Simpson to help them find a home and to represent them in negotiating its purchase. They settled on the vendors' home. If Simpson then becomes the agent of the vendors, who then represents the McDowells' interest? No one. What we would then have are two agents working against the McDowells in the interests of the vendors; and they must so work because, as agents of the vendors, they owe the utmost loyalty to the vendors. The McDowells are thus left to hang in the breeze. Surely this is not the law. It must be the case that since the McDowells retained Simpson to act on their behalf, she is their agent and no one else's. She cannot at the same time be the agent of the Wypychs. It would defy both law and logic if she were.*

After reviewing the case law which has found the selling agent to be an agent of the vendor, at p. 96, the judge states:

*These cases do not decide that a member of a multiple listing service is always an agent of the vendor. At best, they say that such a member may be an agent of the vendor. Otherwise, it would mean that no member of a multiple listing service could ever act for any purchaser buying a listing through that service.*

In *Knoch Estate v. Picken (Jon) Ltd. et al.* (1991), 49 O.A.C. 321, the selling agent had not had any direct contact with the vendor and did not advise the vendor with respect to the real estate transaction. The main issue of appeal was what duties did the selling agent owe to the vendor. The court agrees with the findings in *Wypych*, and at p. 331 states:

*the selling agent, may be the agent of the vendor for limited purposes, which include authorization to present an offer to purchase and to receive notices to the vendor, as well as to make representations binding on the vendor. I would also agree that the selling agent is obliged not to deceive or mislead the vendor. But, in the absence of the characteristics of a true fiduciary relationship between the vendor and the selling agent, I do not think the law requires more of a selling agent than indicated above.*

It is obvious that in recent years the conflict between the legal effect of the vendor subagency arrangement and the way in which people behaved in practice were throwing into question the legal effect of the contractual arrangements among the owner, the agents and the purchaser. One attempt to address this matter was to provide for greater disclosure on the exact nature of the agency relationship to all parties to the transaction. This disclosure at least will at least address the misunderstanding which is wide spread in the industry. For example William F. Foster<sup>6</sup> refers to a survey of three major Canadian cities which found 40% of purchasers felt that the agent with whom they dealt represented them and that another 40% felt that the agent represented both them and the vendor.

The problem remains however that the dynamics of the sales relationship do not correspond to the sub-agency model. The only way to truly address this problem is re-examine the nature of the agency relationships involved in the transaction. This is precisely what has been done in Nova Scotia where the real estate industry has decided to abandon the presumed subagency relationship in favour of a presumed buyer agency relationship.

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<sup>6</sup> Meridith Memorial Lectures (1989), p. 84,



## **BUYER AGENCY**

The Halifax-Dartmouth Real Estate Board, together with the other boards in the province, have recently adopted buyer agency as the standard agency relationship. This means that except for the listing agent all agents working in other firms are presumed to act for the buyer not the seller. This arrangement is thought to be more in accordance with the understanding of the members of the public and to also conform more closely with the manner in which real estate agents were expected to act in the industry. The Board has established policies to require members to provide a disclosure statement as soon as they begin working with the client, advising them how agency relationships work. The pamphlet *Working With a Real Estate Agent* for use by members of the Nova Scotia Real Estate Association, is intended to provide an explanation of the relationship between vendors, purchasers and real estate agents (attached). The pamphlet explains some of the basic principles of agency, potential agency options, and provides an acknowledgment by the salesperson and vendor or purchaser which reads as follows:

*I acknowledge having received and read the brochure "Working With a Real Estate Agent. I understand the various types of relationships that may occur between myself and a REALTOR. I further understand that I will be signing additional documentation acknowledging the type of agency that I receive.*

The standard Agreement of Purchase and Sale has also been amended to reflect the requirement for agency disclosure. Item 15 of the Agreement of Purchase and Sale includes acknowledgment by the vendor and purchaser that they have received, read and understood the brochure. It then requires an indication of who the buyer or seller has an agency relationship with, both brokers and salespersons or, in the case of dual agency, an indication that both the purchaser and vendor have consented to a limited dual agency relationship. If the purchaser or vendor do not

indicate with whom they have an agency relationship, the form indicates that this signifies no agency relationship for that particular party. The payment of commission does not appear to have changed under this new form. The Listing Agreement also recognizes the need for disclosure. Paragraph 15 states:

*15. You agree to act only as my Agent except where I have consented to Limited Dual Agency (see #17 below); to provide information about the property to both Buyers, Agents and Sub-Agents acting with my consent; to exercise duties of good faith, competence, honesty, confidentiality and accountability to me; and not to accept remuneration from the Buyer without my knowledge and consent.*

*16. I hereby acknowledge and agree that it is not a breach of your duties to me if the publication of authorized information relating to the property by the MLS results in information becoming known to members of the public, including perspective buyers and agents of a buyer; it is not a conflict or breach of your duties to me if you list or show property of, or have agency relationships with, other sellers; it is not a conflict or a breach of duty to me if you have agency relationships with other buyers; you will not be required to disclose to me confidential information obtained through any other agency relationship; an agent acting only for a buyer does not owe any agency duties to me; ...*

*17. If you are also the agent of a buyer who becomes interested in my property, you will seek my written consent and that of the buyer to continue to act as a Limited Dual Agent to facilitate a sale of the property. Where the buyer and I have consented to you acting as our Limited Dual Agent your duties will be modified by the limitations described in the brochure published by the Halifax-Dartmouth Real Estate Board entitled "Working With a Real Estate Agent".*

The seller, when signing a Listing Agreement, also explicitly acknowledges that they have received and read the brochure "*Working With a Real Estate Agent*".

The Halifax-Dartmouth Real Estate Board has also introduced a new form for members of the Nova Scotia Real Estate Agent which acts as a consent to the agent acting for both the buyer and

seller and to limiting the scope of the agency relationship. The text of this agreement reads as follows:

*Now therefore in order to facilitate the purchase and sale of the Property the Buyer, the Seller, and the Agent hereby acknowledge and agree each with the other as follows:*

1. *The Buyer and Seller acknowledge and agree that it is not a breach of duty to either of them for the Agent to act as agent for both the Buyer and the Seller and they hereby authorize and consent to the Agent acting for both the Buyer and the Seller as a limited dual agent with respect to the purchase and sale of the Property.*
2. *Any previous agreements entered into between the Agent and either the Buyer or the Seller and the agency duties created by such agreements are hereby modified by this Agreement and shall continue in full force and effect except as modified herein. In the event of conflict the provisions of this Agreement will apply.*
3. *The Buyer and the Seller acknowledge and agree that with respect to the purchase and sale of the Property the Agent and its salespersons will be the agent for both the Buyer and the Seller and will represent both parties as a limited dual agent with the following changes and limitations to its duties as agent:*
  - a) *the Agent will deal with the Buyer and the Seller impartially;*
  - b) *the Agent will have a duty of disclosure to both the Buyer and the Seller except that:*
    - i) *the Agent will not disclose that the Buyer is willing to pay a price or agree to terms other than those contained in the Offer, or that the Seller is willing to accept a price or terms other than those contained in the Listing;*
    - ii) *the Agent will not disclose the motivation of the Buyer to buy or the Seller to sell unless authorized by the Buyer or the Seller;*
    - iii) *the Agent will not disclose personal information about either the Buyer or the Seller unless authorized in writing;*

- c) *without limiting 3 (b) the Agent will disclose to the Buyer defects about the physical condition of the Property known to the Agent;*
  - d) *the Agent may disclose all comparable property information to the Seller and the Buyer at any time.*
4. *The Buyer and Seller have both received and read the Brochure "Working With a Real Estate Agent" published by the Halifax-Dartmouth Real Estate Board.*

The above actions by the Halifax-Dartmouth Real Estate Board are a step in right direction.

It is submitted, that following potential benefits may arise through the use of the new disclosure forms:

- (a) Consumer education - Purchaser's are likely to benefit from the new disclosure rules, which should help them understand the agency relationships in a real estate transaction. Since purchaser's traditionally have been the one's most likely to suffer the greatest damage if they were not aware of the agent's loyalty, they are also the one's most likely to benefit from disclosure. Vendors may also benefit, but certainly not to the same degree;
- (b) Clearer Choice - while a purchaser could always choose to retain their own agent, in the past, this choice was not generally made clear. The disclosure statement will help purchasers and vendor's in dual agency situations to make an informed choice with respect to their representative;
- (c) If no agent is chosen the disclosure statement should not limit the potential remedies still available under the common law;

- (d) As vendors and purchasers become more aware of the agency relationship, the amount of litigations surrounding agency relationships may be reduced;
- (e) The disclosure statement will help provide a written record of what the purchaser and vendor knew with respect to the agency relationship;
- (f) By changing the standard agreement of purchase and sale and listing agreement, the use of the disclosure forms is essentially mandatory; Prior to this, agents were no doubt hesitant about disclosing the agency relationships which favoured vendors; and
- (g) Public confidence in the real estate profession may rise.

### **IMPLICATIONS OF BUYER AGENCY**

The two unresolved issues as a result of the recent changes are (i) what, if any, impact will the new agency relationship have on the standard of care owed by the agent; and (ii) how will limited dual agency work in practice.

Typically the agreement of purchase and sale is prepared by the real estate agents. The agent preparing the offer may now be the exclusive agent of the buyer. Therefore the agreement must be drafted solely to reflect the interests of the purchaser. Previously the subagent owed some duty to the vendor in preparing the offer. It is also important to note that regardless of ultimate qualifications, if an agent holds him or herself out as having expertise in preparing agreements he or she will be held to a high standard.<sup>7</sup> In most agreements there are a range of options in stipulating

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<sup>7</sup> Foster in Real Estate Agency Law (1984) says, at p. 195-6,:

*This obligation assumes the existence in all brokers of some expertise in legal matters because, as a*

conditions or extracting covenants which range from neutral, to vendor oriented or buyer oriented. A buyer agent will owe all of his or her professional obligations to the buyer. Therefore, in structuring the agreement, it will be the buyer's agent responsibility to ensure that the agreement provides to the buyer the appropriate legal protections. If the agreement contains a neutral or vendor oriented clause the buyer agent may well find his or herself subject to a higher degree of scrutiny.

For example, I recently reviewed an offer prepared by a buyer agent which contained a vendor oriented inspection clause which limited the inspection rights to structural defects or major defects in the heating, plumbing, and electrical systems. It was evident in speaking with the purchaser that he did not understand the alternatives available to him in structuring this clause. This clause was not appropriate in that case because the purchaser was not experienced enough to have taken responsibility for the items which were excluded from the clause and further because the purchaser only wanted to complete the transaction if the cost of planned renovations did not exceed his budget. Fortunately matter resolved themselves without difficulty. Otherwise though the purchaser could easily have had an action against the agent for negligence in drafting the offer.

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*minimum, they must be able to identify those situations in which a principal should be warned to seek independent legal advice. Such an assumption is not unreasonable because in Canada, unlike some other jurisdictions, lawyers do not often become involved in real estate transactions until principal and third party have entered into contractual relations. The contract is prepared either by the broker or by the parties themselves, and in the latter situation the broker will commonly advise his principal as to the import of its terms or its effectiveness. Thus, whether or not brokers in fact possess any legal expertise, they profess to do so and should accordingly be held accountable for their negligence in this area.' (Emphasis added)."*

The question of limited dual agency is perhaps more even more problematic. Lawyers have debated and wrestled with the issue of representing more than one client in the closing of a commercial transaction in which the essential business terms have already been settled by the parties. Our rules of ethics provide certain limited ability to perform in that capacity, although the increasingly preferred practice is simply to avoid acting on both sides of a transaction wherever possible. The scope of conflicts which can potentially confront a lawyer in attempting to act for both the vendor and a purchaser in a real estate transaction would generally be much smaller than those issues which would confront a real estate agent attempting to put in place the actual purchase agreement between the parties.

The scope for conflict of interest make it difficult for lawyers to see how real estate agents can avoid the problems inherent in occupying a position between the vendor and the buyer. The nature of the problem is well summarized by William F. Foster, Meredith Memorial Lectures (1989), at p. 78:

*Real estate agents, unlike some other categories of professional agents, represent parties whose interests are diametrically opposed in the negotiation of transactions in which few, if any, terms and conditions (from price to date of vacant possession) are pre-determined and unalterable. Vendors look to their agents to obtain the highest possible price and the terms which best accommodate their interests; whereas purchasers look to agents to negotiate the lowest possible price and the terms which best accommodate their interests; neither looks to the agent merely to mediate what the agent personally believes to be a 'fair' or acceptable deal between the parties.*

Then at p. 80 he states:

*Whether the fiduciary duty of disclosure, even if complied with by real estate agents, affords adequate protection to vendors and purchasers in dual agency situations, for it must be asked:*

*How in these circumstances, can one be the agent of both simultaneously at the same time act faithfully toward each?...[i] It seems like a difficult task, for what the agent does in the interests of one will almost certainly be against the interests of the other.*

I suspect that the issue is one which has yet to be completely resolved by the real estate industry. The current changes represent a step forward because they are an attempt to deal directly with a problem which previously was only dealt with by implication or omission. By focussing on the issue however agents must be prepared to measure up to the standard which they have expressly agreed to measure themselves against. What remains to be seen is how willing members of the public will be to accept the concept of dual agency. If any significant reluctance emerges we may well find an evolution to real estate agencies which specialize in representing only vendors or only purchasers, time will tell.