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Court finds agent must be paid for doing job

Real estate commission due when seller is made a full listing price offer

A seller must pay commission to the real estate agent if a full-price offer is presented, whether or not the offer is accepted, according to a ruling of the Ontario Superior Court of Justice last month.

Back in September, 2008, Richard Fody signed a listing agreement with T. L. Willaert Realty Ltd. for a vacant parcel of vacant land near Tillsonburg. The $229,000 listing price was later reduced to $199,900.

In the standard form listing agreement, Fody agreed to pay Willaert a commission of five per cent of the sale price.

The agreement stated that commission was due and payable upon delivery of any "valid offer" on the terms set out in the listing agreement, or any other terms acceptable to the seller. Even if the transaction failed to close, commission was payable if the non-completion of the transaction was owing to the seller's "default or neglect."

A vacant land data input form signed at the same time as the listing agreement showed that the property was a "desirable treed building site just minutes from Tillsonburg," and that the buyer would be responsible for installing a well and septic system.

Willaert found a buyer who submitted an offer for $150,000 in March, 2009. When Fody refused to meet with the agent, the offering price was increased to $170,000, then $184,000, and finally $186,272.50. Fody signed the offer back at $195,000, but ultimately refused to accept it.

At the end of April, the purchaser submitted an offer at the full asking price of $199,900. The offer was faxed to Fody's lawyer, and a copy was dropped off the same evening in Fody's mailbox. Fody and the agent also exchanged text messages over the next four days. Fody did not respond to the offer.

Terry Willaert then sent a text message to Fody advising him that the offer would expire at midnight on that day, and should he decide not to sign the offer, "the commission will still be payable" under the terms of the listing agreement. Ultimately, Fody did not accept the offer.

Willaert sued Fody in Small Claims Court for the commission of $8,995.50 plus HST and costs. Deputy judge James Searle ruled in favour of the real estate agent, and found that the listing agreement was sufficient to make the seller liable to pay the stated commission on the basis of an offer which met all the terms of the listing agreement.

In his decision, the deputy judge wrote, "The court has no doubt Fody was avoiding and otherwise frustrating Willaert because he decided not to sell unless he was able to purchase a farm. When the prospect of purchasing a farm evaporated late in April of 2009 he became inaccessible and nasty and refused to act in good faith when Willaert was obtaining and communicating offers that were near, then at, the listing price, something Willaert was obligated and entitled to do."

Fody appealed the Small Claims Court decision to the Superior Court of Justice. Justice Marc Garson ruled that the price offered by the buyer was both the full listing price and the best available price at the time.

In dismissing the appeal and holding that the full commission was payable, the court ruled that a valid offer was submitted to the seller during the listing period, and that the seller acted "in bad faith and attempted to frustrate the efforts" of the agent.

"Acceptance of the offer is not required. The listing agreement clearly contemplated payment of the commission upon presentation of an offer at the full asking price."

Sellers should think twice before refusing to pay their real estate agents for doing what they were hired to do.

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Court of Appeal for Ontario > 1989 CanLII 4344 (ON CA)

Rolling v. Willann Investments Ltd. (Ont. C.A.), 1989 CanLII 4344 (ON CA)

Date:	1989-11-01
Parallel citations:	70 OR (2d) 578; 63 DLR (4th) 760; OJ No 1886

Re Rolling et al. and Willann Investments Ltd. et al.
Indexed as: Rolling v. Willann Investments Ltd.
(Ont. C.A.)

70 O.R. (2d) 578

[1989] O.J. No. 1886

Action No. 649/89

ONTARIO

Court of Appeal

Zuber, Robins and McKinlay JJ.A.

November 1, 1989.

* A notice of discontinuance on an application for leave to appeal to the Supreme Court of Canada was filed February 8, 1990. S.C.C. File No.: 21695. S.C.C. Bulletin, 1990, p. 298.

Contracts -- Interpretation -- Option to purchase land -- Right of first refusal -- Option holder allowed 72 hours from date offer "delivered" -- Transmittal of offer by fax machine amounts to delivery.

By the terms of an agreement in 1974 R. gave to W. "the first right to meet any offer to purchase that [R] may receive ... [W] shall have 72 hours from the date such offer is delivered to it by [R] within which to exercise this option by submitting ... an offer on terms identical to those contained in the first mentioned offer. Failing which this option shall terminate and [R] may accept such first mentioned offer." R. received an offer from S. to purchase property, and on May 19, 1989, sent a copy to W. by fax machine. Over 100 hours later W. submitted an identical offer. In proceedings to determine W.'s rights, an order was made in favour of W.

On appeal by S. to the Ontario Court of Appeal, held, the appeal should be allowed.

It was not necessary for R. to deliver the signed original offer, and transmission of a copy by fax, though not specifically contemplated in 1974, was sufficient. Accordingly, the fax transmission amounted to delivery of the offer, and W.' s response was out of time.

Civil procedure -- Costs -- Party and party -- Entitlement -- Counsel for one party not appearing at first instance -- That party successful on appeal -- Costs awarded to respondent.

APPEAL from an order of Chadwick J. determining the rights of the grantee of an option to purchase land.

J.B. Berkow and R.L. Youd, for appellant.

J.S. McNeil, Q.C., for respondent, Willann Investments Limited.

W.A. McLauchlin, for respondents, William Nelson Rolling and Vera Mae Rolling.

The judgment of the court was delivered orally by

ROBINS J.A.:-- The point in issue in this appeal is whether the telephone transmission of a facsimile of an offer to purchase constitutes "delivery" pursuant to the provisions of an option agreement between the respondents in this appeal.

In 1974, as part of a real estate transaction between the respondents, William Nelson Rolling and Vera Mae Rolling (the Rollings), as vendors, and the respondent, Willann Investments Limited (Willann), as purchaser, the Rollings gave Willann the first right to meet any offer to purchase that the Rollings might obtain for certain property owned by them in the Town of Collingwood. This first right of refusal was engrossed in an option agreement and registered on title. It provided as follows:

> The vendors [the Rollings] agree to give to the purchasers [Willann] the first right to meet any offer to purchase that the vendors may receive or give with respect to the said property. The purchaser shall have 72 hours from the date such offer is delivered to it by the vendors within which to exercise this option by submitting to the vendors an offer on term identical to those contained in the first mentioned offer. Failing which this option shall terminate and vendors may accept such first mentioned offer.

On May 15, 1989, the Rollings received an offer to purchase the propert from the appellant, Sam Spokek (Spodek), which they accepted on May 17, 1989. The outstanding option in favour of Willann had been disclosed to Spodek. He acknowledged in his offer that he was aware of the option under which Willann had 72 hours to submit an identical offer and agreed that, should that right of first refusal be exercised, his agreement would become null and void.

For the purpose of satisfying the requirements of the option agreement, the solicitors for the Rollings took the following steps on May 19, 1989:

(1) They faxed a message to Willann stating "we have documents for your attention -- could you fax back we correctly have your fax number". Willann replied: "fax # correct, please send documents through".

(2) Following the confirmation of the fax number, the solicitors, at about 2:12 p.m., transmitted a facsimile of the Spodek offer to Willann together with a covering letter which made reference to the terms of the first right of refusal and put Willann on notice that if the Rollings did not receive an offer to purchase on terms identical to those contained in the Spodek offer within 72 hours the Spodek offer would be accepted unconditionally and Willann's rights under the option agreement would terminate and be of no further force or effect.

It is common ground that the 72-hour time period within which Willann might exercise its first right of refusal would begin running upon delivery of the Spodek offer. Assuming the transmission of the facsimile constituted delivery, time would then run from 2:12 p.m. on May 19, 1989.

On May 23, 1989, Willann submitted an offer to Rollings in terms identical to the Spodek offer. At the same time, Willann asserted, in essence, that Rollings had not acted properly in compliance with the option agreement and that it remained open to it, notwithstanding the expiration of the 72-hour period, to submit an offer at that time. The Willann's offer was submitted at 7:00 p.m. on May 23rd, some 101 hours after the company had been put in receipt of the Spodek offer. Again, assuming that delivery had properly been effected, this offer was obviously tendered beyond the time allowed for the exercise of the first right of refusal.

Confronted with adverse claims to purchase the property, the Rollings brought these proceedings for a determination of the rights of Spodek and Willann in the property. In both weekly court and this court, the Rollings simply submitted their rights to the court and sought only a declaration as to which of Spodek or Willann had a binding agreement of purchase and sale. For reasons which have not been adequately explained, counsel for Spodek, who was not counsel on this appeal, did not appear on the application in weekly court. An order was made without argument in favour of Willann. Spodek now appeals that order.

As indicated, under the terms of the option agreement, Willann was given 72 hours from the date the Spodek offer to purchase was delivered to it within which to exercise its option. In Spodek's submission, the Rollings fulfilled their obligations under the option agreement; Willann did not exercise its option in time and, therefore, has no right to purchase the property. Willann, on the other hand, takes the position that the Rollings did not satisfy the requirements of the option agreement. It advances two grounds in support of that position.

First, Willann contends that it was entitled to receive a signed original copy of the Spodek offer and not merely a photocopy or facsimile thereof. We do not agree. We see no reason, practical or commercial, why the option agreement should be construed so as to require the Rollings to deliver their original signed copy and, indeed, none has been suggested. The copy received by Willann was clearly a true copy of the offer and, we think it manifest, is in a form that satisfies the provisions of the option agreement.

Willann next contends that the facsimile transmission of the offer could not constitute "delivery" under the terms of the option agreement. Given that the agreement was entered into in 1974, the parties could not have intended or contemplated that delivery would be made in this manner and, it is argued, this form of delivery is not in compliance with the contract. In Willann's submission, delivery to it could be effected only by personal service or by mail.

While it is true that the parties to the option agreement could not have anticipated delivery of a facsimile of the offer by means of a telephone transmission at the time the agreement was executed, they did not limit or restrict or, indeed, specify the way in which delivery was to be made for the purposes of their agreement. The purport of the agreement is that Willann is to be placed in receipt of a copy of the offer and is to exercise his option within a specified time following receipt. The manner in which delivery is to be made in order to place Willann in receipt of the document is of no real importance. What is important is whether and when Willann was in fact put in receipt of the offer or, put another way, whether and when the document was in fact delivered to him.

Where technological advances have been made which facilitate communications and expedite the transmission of documents we see no reason why they should not be utilized. Indeed, they should be encouraged and approved. Nothing is to be gained in the circumstances of this case in requiring an attendance at Willann's offices to deliver the documents, and Willann suffered no prejudice by reason of the procedure followed. In our opinion, the transmission of a facsimile of the offer for the purpose of effecting delivery is not in violation of the option agreement. It follows that Willann properly received delivery of the offer. For whatever reason, the company failed to exercise its option within the strict time period granted by the option agreement and, consequently, has no existing rights under that agreement.

In the result, the appeal will be allowed. The order of Chadwick J. will be set aside and in place thereof a declaration will issue that Willann has no agreement of purchase and sale with the Rollings with respect to the property and on the closing of the sale of the property to Spodek its right of first refusal shall be of no further force and effect. The closing date of the agreement of purchase and sale between the Rollings and Spodek shall be December 13, 1989, and adjustments, including the adjustment of interest, shall be made as of October 13, 1989. There will be no costs of the application in the court below. With respect to the costs in this court, we are of the view that had the appellant appeared and the case been argued in the court below, this appeal may not have been necessary. Accordingly, notwithstanding the appellant's success, it shall pay the respondents their costs of the appeal.

Appeal alllowed.

Legislation cited (available on CanLII)

- Courts of Justice Act, RSO 1990, c C.43 — 27(2)

Decisions cited

- H.W. Liebig Co. v. Leading Investments Ltd., 1986 CanLII 45 (SCC)
- Housen v. Nikolaisen, 2002 SCC 33 (CanLII)
- Team Realty Inc. v. Kanata 1075 March Road Project Inc., 2012 ONSC 1255 (CanLII)

CITATION: T. L. Willaert Realty Ltd. v. Fody, 2013 ONSC 7533

COURT FILE NO.: CV-11-178

DATE: 2013/12/12

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
T. L. Willaert Realty Ltd.	)	James Battin, for the Plaintiff (Respondent)
	)	
	)	
	)	
Plaintiff (Respondent)	)	
	)	
- and -	)	
	)	
	)	
Richard Mark Fody	)	Jamie Pereira for the Defendant (Appellant)
	)	
	)	
Defendant (Appellant)	)	
	)	
	)	**HEARD:** November 22, 2013

On Appeal from the Judgment of Deputy Judge J. D. Searle dated October 4, 2011

M. A. GARSON J.:

Introduction

[1] This is an appeal from the judgment of Deputy Judge Searle, dated October 4, 2011, in Small Claims Court, Woodstock, Ontario, awarding the respondent damages in the amount of $8995.50 plus GST, plus costs of $1225.00.

[2] The appellant submits the trial judge made various fact findings that were not supported by the evidence, misinterpreted various contractual provisions and misapplied a statutory provision.

Background

[3] On September 16, 2008, the appellant, Richard Fody, executed a listing agreement with the respondent, T. L. Willaert Realty Ltd., to list his property for sale, legally described as Mid Concession 2 NTR, Part Lot 21 being Part 2 on Reference Plan 37R-1195, Norfolk County ("the property") at an initial asking price of $229,000.

[4] The listing agreement took the form of a standard Form 200 Ontario Real Estate Association Listing Agreement.

[5] Section 2 of the listing agreement describes the terms upon which a commission is payable to the respondent listing agent and provides in part:

> **COMMISSION:** In consideration of the Listing Brokerage listing the Property, the Seller agrees to pay the Listing Brokerage a commission of 5.0% of the sale price of the Property or 4 1\2% if sold by Terry Willaert personally for any valid offer to purchase the Property from any source whatsoever obtained during the Listing Period and on the terms and conditions set out in this Agreement OR such other terms and conditions as the Seller may accept… The Seller further agrees to pay such commission as calculated above even if the transaction contemplated by an agreement to purchase agreed to or accepted by the Seller or anyone on the Seller's behalf is not completed, if such non-completion is owing or attributable to the Seller's default or neglect, said commission to be payable on the date set for completion of the purchase of the Property.

[6] A separate document entitled Vacant Land Data Input Form ("VLDIF") was also executed at the time of the listing agreement and page 2 of that form in a box entitled "Realtor Remarks" reads as follows:

> Desirable Treed Building site just minutes from Tillsonburg.
>
> Special Condition: The Seller Reserves the right to a hydro box for signage for Fody Auto Wreckers Ltd. to be register [sic] on title and Located on the north
>
> west corner of the property.
>
> Robert Fuller: Seller's Lawyer
>
> Buyer to install well & septic system.
>
> Note: No Pesticides on property for 4 years + 1- [sic]

[7] On page 1 of the VLDIF at line 7 next to the heading "Possession" is the phrase "15 days".

[8] The listing agreement expired at 11:59 p.m. on April 30, 2009.

[9] The respondent presented the appellant with a number of offers including:

DATE	RESULT
February 26, 2009	Offer for $125,000, closing date of March 20, 2009
February 27, 2009	Fody counters offer back at $199,900 and accepts closing date of longer than 15 days
February 28, 2009	Purchaser counters at $150,000. Fody does not agree to sign back the offer.
March 11, 2009	New purchaser signs Agreement of Purchase and Sale offering to purchase for $150,000. Fody refuses to meet with Willaert Realty.
March 12, 2009	New purchaser increases offer to $170,000. Fody refuses to meet with Terry Willaert to discuss offer.
March 20, 2009	Fody counters back at $195,000 and accepts later closing date.
March 30, 2009	Fody meet with Willaert Realty to scrutinize offer, potential purchaser agrees to extend offer for one day.

March 31, 2009	Fody informs Willaert Realty that he is holding out for the closing date of	$190,000 but is content with June 30, 2009.
March 31, 2009	Potential purchaser increases offer to $184,000, the agreement.	Fody refuses to accept
April 1 to April 7, 2009	Potential purchaser makes three additional offers $186,272.50 which Fody	ranging from $181,022.50 to does not accept.
April 30, 2009	Potential purchaser offers $199,900 with a closing emailed to Fody who does	date of June 30, 2009; Offer not respond.

[10] The April 30, 2009 offer from Benjamin Vink, who has made earlier offers, is a full asking price offer at $199,900.00.

[11] The offer was emailed on that same day to the appellant's spouse, Sara, and was also sent to the appellant's lawyer.

[12] A series of text messages were exchanged between the parties on April 30, 2009, with the first being from the respondent to the appellant at 2:53 p.m. stating in part: "Rich, I have emailed full price cash offer to Sara's email. I have also faxed copy to your lawyer. Please give me a call at my office to discuss."

[13] Five minutes later, at 2:58 p.m., the appellant replied "Full price listing or the $186?"

[14] One minute later at 2:59 p.m., the respondent replied: "Full price listing price."

[15] Having heard nothing further all day from the appellant, the respondent sends a further text at 8:58 p.m., some six hours later, stating: "Will put a copy of the offer in your mailbox to review."

[16] The respondent hears nothing from the appellant later that day, nor the following three days and some four days later sends a text at 9:12 a.m. to the appellant asking: "Where can we meet?"

[17] Having no reply to this text, some four hours later on the same day at 1:14 p.m., the respondent sends the following text: "Rich, as you know the offer on your property expires this evening at 11:59 p.m. Should you decide not to sign the offer, the commission will still be payable per the terms of your listing agreement. Please inform me as to how you wish to proceed."

[18] The reply from the appellant at 2:22 p.m. reads: "I'm on course all day do not continue to harass or threaten me or Sara I will deal with you at the end of my course."

[19] The respondent replied "perfect" some eight minutes later and that evening at 7:04 p.m. the appellant texts: "Be at your office at 8:15 p.m."

[20] The offer was not accepted by the appellant.

Position of the Parties

[21] There are three essential arguments put forth by the appellant:

(i) The offer was never presented to him on the April 30, 2009 date;

(ii) Even if presented on a timely basis, the appellant submits the offer failed to include all of the conditions set forth in the VLDIF dealing with well and septic installation, possession, and the right of the appellant to a hydro box for signage;

(iii) There was a breach of a fiduciary duty owed to the appellant by not obtaining the appellant's written consent to multiple representation.

[22] The respondent simply takes the position that Searle D.J. was correct in law and made no errors, and that his decision should be upheld on appeal.

[23] In a detailed and well reasoned decision, Searle J. found that the listing agreement was sufficient to hold the appellant vendor liable to pay the stated commission to the realtor on the basis of a qualifying offer to purchase that was presented on April 30, 2009.

Analysis and the Law

[24] As mentioned, the appellant argues that the offer was not presented during the listing period.

[25] It is difficult to appreciate any other way that Mr. Willaert could have presented this offer. The steps he took were:

(a) he notified Sara Jacob who was the appellant's common-law spouse and had been an active contact person for the appellant in this matter on April 30, 2009;

(b) he faxed a copy of the offer to the appellant's lawyer;

(c) he texted the appellant that he had an offer and later clarified that the offer was for the full listing price after the appellant sought clarification; and

d) he dropped off a copy of the offer to the appellant's mailbox that evening.

[26] The appellant was unresponsive to all of these efforts and when the respondent sought a response in a polite and respectful manner, knowing the offer would expire, he was met with a terse, impolite and disrespectful reply alleging that he was somehow harassing or

threatening the appellant. Nothing could be further from the truth.

[27] As Searle D.J. aptly points out at para. 11 of his decision:

> The court has no doubt Fody was avoiding and otherwise frustrating Willaert because he decided not to sell unless he was able to purchase a farm. When the prospect of purchasing a farm evaporated late in April of 2009 he became inaccessible and nasty and refused to act in good faith when Willaert was obtaining and communicating offers that were near, then at, the listing price, something Willaert was obligated and entitled to do.

[28] This court is satisfied that the offer was presented to the appellant within the prescribed timelines required by the listing agreement.

[29] The appellant further argues that the terms specified in the VLDIF were not part of the April 30 offer and, therefore, did not make it capable of triggering the payout of the full commission. Searle D.J. addressed each item in paragraphs 30-34 as follows:

> 30. The defendant raises three ways in which the final offer by Vink did not comply with some of the terms of the agreement. Firstly, the closing date proposed by Vink was more than the 15 days in the agreement. Secondly, Vink did not agree to install a well and septic system. Thirdly, although Vink agreed to granting a right to have a commercial sign on the property his offer put the expense of registering that right on title on Fody.
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> 31. As to the time for closing the court notes Fody made counter offers to both Coderre and Vink and in each case the closing date was more than 15 days after the date of the offer. Vink's email of April 25, 2009 essentially offered to change the closing date if it was a problem. There was no response. The court finds Willaert earlier assured Fody the proposed closing date was flexible.
>
> 32. The subject land was bare land with an agricultural history and no residence and Fody's house was not for sale so the risk of finding himself temporarily without a residence was not a risk. The property had been on the market for six months. At trial Fody gave no evidence to indicate this term was important other than as a defence to Willaert's claim. The evidence gives no indication the closing date was objected to by Fody at the meeting late on May 04 or any other time before this proceeding was commenced.
>
> 33. As to Wink not offering to install a well and septic system Fody told the court he put that term in the agreement to avoid the risk of a purchaser closing then suing him over the absence of a well and septic system. Given the subject land was bare land with a solely agricultural history the court puts that risk at zero and the value of this term also at zero. Furthermore, in an atmosphere of good faith the realtor or lawyers for the parties could have resolved that simply. The evidence does not indicate the absence of this term was objected to by Fody at the May 04 meeting or any other time before this proceeding was commenced.
>
> 34. The listing agreement required any buyer to grant Fody the right to have a sign but was silent as to the cost of registration of the sign on title. Vink's offer complied but sought to put the cost of such registration on the seller. Counsel assured the court the cost of registration would be approximately $70.00. Subsection 27(2) of the Courts of Justice Act R.S.O. 1990, c. C.43 as amended permits this court to accept that assurance as evidence and this court does so. It is an amazingly miniscule item in such a large transaction. When it came time for lawyers to close the transaction it would probably be an expense charged to Fody if he chose to register the grant. When asked why it was an important matter Fody testified it was important only because it would be an expense to him. As with the alleged non-compliance with terms this was never the subject of an objection by Fody until the pleadings were exchanged.

[30] I agree with the trial judge's analysis. The phrase "15 days" alongside the heading "Possession" was not intended to be a required closing date but an indication that, as evidenced by the history of dealings during the listing period on many earlier occasions, the appellant was prepared to, and in fact did, acquiesce to a longer closing date. The period of 15 days was a minimum closing period.

[31] The VLDIF contained the words "Buyer to install well & septic system." The fact the offer did not contain those words was of no consequence. The offer did not impose any obligation on the appellant to install those items. The property is bare agricultural land. It does not have a well or septic system. Silence meant that installation would have been the responsibility of the buyer. The appellant's objective was achieved by the offer as presented.

[32] The April 30, 2009 offer expressly included the right of the appellant to a hydro box for signage. The VLDIF was silent as to who was to pay the cost of registration. The appellant cannot complain that the offer did not address that issue. In any event, a $70 registration fee represents a small and minute fraction of the transaction. This was not a precondition to the presentation of a valid or qualifying offer.

[33] The appellant further argues that the failure to obtain the appellant's written consent to provide multiple representation to the buyer and the appellant seller, nullified the offer.

[34] As was pointed out at trial, this matter was brought before the Real Estate Council of Ontario on this point and there was no finding of fault on the part of the respondent relating to multiple representation. Further, the intent of this section is to protect a vulnerable buyer who is sharing information with the realtor that may expose them to price reductions if the potential purchaser became aware of same. By way of example, a fiscal crisis, a family crisis or a binding obligation to acquire another property may all make a seller vulnerable to price reductions.

[35] In this case, it is difficult to imagine how someone can breach a fiduciary duty to a seller yet bring them an offer for the full asking price. This court is asked by the appellant to speculate that the "best possible price" may have been greater than the asking price. There is no evidence on the record to support this claim. The evidence available to the court shows that the property was listed on September 6, 2008, was subject to a $30,000.00 price reduction on November 14, 2008 and the offer in question for the full listing price was presented some six and a half months later. That sort of history satisfies this court that the price offered was both the full listing price and the best possible price available to the appellant at the time.

[36] The appellant relies on the cases of *Leading Investments Ltd. v. New Forest Investments Ltd.* 1986 CanLII 45 (SCC), [1986] 1

S.C.R. 70 and *Bird v. Ireland*, 2005 CarswellOnt 6945 (Div. Ct.) Searle D.J. speaks to both of these cases at paragraphs 44-57. This court agrees with how both of those cases were distinguished below:

> 44. The court turns first to the law submitted by the parties for the court's consideration, beginning with *Leading Investments Ltd. v. New Forest Investments Ltd.; H.W. Liebig & Co. Ltd. v. Leading Investments Ltd.* 1986 CanLII 45 (SCC), (1986) CarswellOnt 671, 38 R.P.R. 201, (1986) 1 S.C.R. 70, 64 N.R. 209, 14 O.A.C. 159, 25 D.L.R. (4th) 161, J.E. 86-300 (S.C.C.). It is not a case concerned with the "terms and conditions" in an offer.
>
> 45. In 1974 Leading owned development land in the Toronto area and listed it with Liebig who was a real estate broker. Liebig obtained an offer from *New Forest* and *Leading* accepted that offer with a $15,000 deposit. *New Forest*, the intended purchaser, refused to close. Leading sued *New Forest* for damages and Liebig for the deposit held by Liebig in trust. Liebig counterclaimed for the deposit or a commission of $22,650. Leading settled the suit against New Forest, one of the terms of which involved New Forest abandoning the deposit. The case went to trial on the issues between Leading and Liebig. The trial judge found for Liebig. The Ontario Court of Appeal reversed the trial judge and the case went to the Supreme Court of Canada on the issue of whether Liebig was entitled to a commission from Leading.
>
> 46. In its result the court divided 4-3 in finding Liebig was not entitled to a commission. Majority reasons were delivered by La Forest J. (Dickson C.J.C. and Lamer J. concurring). Le Dain J. delivered his own reasons for finding Liebig was not entitled. Estey J. (McIntyre J. and Chouinard J. concurring) delivered the dissenting reasons in finding Liebig was entitled to a commission.
>
> 47. In attempting to apply the lessons in the Leading case to the case now before the court it must be noted that in Leading it was the intended purchaser that defaulted. That is not so in the case at bar where it is the intended seller, Fody, who is alleged to be at fault. A distinction is drawn even by the majority in Leading where, at paragraph 30, Mr. Justice La Forest said:
>
> > Counsel for Liebig argued that it was sufficient for the broker to establish that he had procured a person who was ready, able and willing to purchase. That is certainly true where it is the vendor who reneges. In that case, the broker could recover either on a quantum meruit …or in contract.
>
> 48. At paragraph 47 Mr. Justice Le Dain said:
>
> > There is in my opinion an obvious difference, in respect of the equities and allocation of risk, between the case where the sale is not completed through the fault of the vendor and the case where it is not completed through the fault of the purchaser.
>
> 49. Another difference is in the wording of the respective agreement terms. A third difference is in the factual circumstances: in Leading there was an accepted offer and a 'commission slip'. In the case at bar there is an offer but not acceptance and hence no 'commission slip'.
>
> 50. Counsel for Fody urges this court to find the possibility of Fody owing a commission under the listing agreement even if no sale is completed is something that must be specifically brought home to Fody before he can be held liable in the absence of a sale. This court understands counsel to be urging this court to adopt a statement by Lord Denning in *Dennis Reed, Ltd. v. Goody*, [1950] 2 K.B. 277, reiterated by Lord Denning, about "the common understanding of men'. In *Leading,* Le Forest J. and those who concurred with him said it was good law despite having been subsequently disapproved but the other four members of the court, the majority on this point, dismissed it, as did the English Court of Appeal, as going too far as a matter of contract.
>
> 51. *Bird v. Ireland* 2005 CarswellOnt 6945 is a decision of Clark J. sitting as the Divisional Court on an appeal from the result in a Small Claims Court trial. Bradley Bird was a realtor and Sheila Ireland was the owner of a rural house. They entered into a listing agreement in February of 2002 with a listing price of $123,900. During the currency of the listing agreement Bird presented Ireland with an offer at the listing price. The offer also required warranties with respect to water quality and flow and the working order of the septic system.
>
> 52. Ireland refused to accept the offer. In the following year Ireland sold the residence for the same price she had declined in April of 2002 with water and septic system warranties. Bird sued.
>
> 53. The trial judge found for Bird, Ireland appealed and a new trial was ordered. The second trial judge also found for Bird but Ireland appealed again. The reasons before us are those of the second appeal in which Clark J. found for Ireland. Perhaps trying to avoid yet a third trial Clark J. made several findings of fact contrary to the facts found by the trial judge.
>
> 54. In *Bird* the trial judge found the offer was presented. The appeal judge found it was not and explained his finding. In the case now at bar counsel for Fody argued Willaert did not present the offer. This court rejects that argument: Fody was avoiding Willaert and not responding to him, Willaert emailed it to Ms. Jacob who, the evidence is abundant, was a contract for Fody, faxed it to Fody's lawyer, hand delivered a copy to Fody's residence and tried to speak with Fody.
>
> 55. The appeal reasons do not set out the listing agreement paragraph on which the Willaert case falls to be decided. That is clear because the appeal judge was deciding the appeal on a different paragraph of the commission agreement, one which contained the phrase 'owing to or attributable [sic] my fault or neglect'. It might well be that the OREA standard listing agreement was different in 2002, when the Ireland property was listed, from what it was in 2008 when the Fody property was listed.
>
> 56. On the issue of whether Bird went far enough in explaining the commission term to Ireland the appeal judge applied the oft-reviewed test by Lord Denning reiterated by him in *Jacques v. Lloyd D. George & Partners Ltd.* [1968] 1 W.L.R. 628 (Eng. C.A.). That is the test subsequently repudiated by that same English court in 1974 and by four of seven justices in Leading, *supra.*

> 57. In both the *Ireland* and *Fody* cases the offer contained conditions that were not part of the listing agreement. In Ireland the conditions involved warranties of the well and septic systems, warranties that had the potential to be extremely expensive.

Test on Appeal

[37] The appellant sets out the test on this appeal as set out by the Supreme Court of Canada in *Housen v. Nikolaisen,* 2002 SCC 33 (CanLII), [2002] 2 S.C.R. 235. If the issues relates to the interpretation of the evidence as a whole, the test is "palpable and overriding error." The standard of review on findings of law is correctness.

[38] The appellant relies on the case of *ReMax Northland Realty v. Turcotte*, 1992 CarswellOnt 3369 (Gen. Div.) for the proposition that the agent can only be entitled to the Commission if he satisfies all of the terms of the listing agreement. This case deals with an overholding clause which is not at issue here. Ultimately, Karam J. found in that case that the plaintiff was entitled to its commission and that it had fulfilled the terms of the listing agreement.

[39] Simply put, courts have recognized that listing agreements are binding contracts and as such, the general law relating to contracts and agency applies: *Martel Commercial Realty Inc. v. Hamilton-Burlington and District Real Estate Board*, [2005] O.J. No. 3016 (S.C.J.) and *Team Realty Inc. v. Kanata* 1075 March Road Project Inc., 2012 ONSC 1255 (CanLII), 2012 ONSC 1255 (S.C.J.).

[40] The law further provides that the vendor may still be liable for the commission even though the transaction does not close, provided the vendor knows or can be taken to know what the agent has undertaken to do to get the commission. See *H. W. Kiebig & Co. v. Leading Investments Ltd.,* 1986 CanLII 45 (SCC), [1986] 1 S.C.R. 70 and *Kellner v. Strickland*, [1997] B.C.J. No. 3265 (B.C.S.C.).

[41] The appellant further relies on the case of *D.E.M. Corp. v. Skinner* 2004 CarswellPEI 105 (S.C.) for the proposition that the respondent owed the appellant a duty of loyalty and he breached that duty with multiple representation. The facts in that case involve two competing offers, one for $137,000.00 and a reduced commission of 2.5% of the sale price, and the other for $145,000.00 with a 5% commission. The property was sold one month after the listing agreement expired.

[42] The court in *D.E.M. Corp., supra*, found at para. 31 that "In the case before the court, the evidence shoes that the plaintiff's listing agent failed to communicate verbal offers made by Morrissey to the defendant or to put those verbal offers into written offers."

[43] At paragraph 33, Campbell J. goes on further to find:

> 33. In the case before the court, the listing agent seems to have gone to great lengths to promote or advance the Vos offer. Although Moase disclosed that this offer was from another of the Plaintiff's agents, I agree with the Defendants that there is a perception that the listing agent's loyalty was divided creating a conflict of interest. This perception is heightened by the listing agent's failure to communicate verbal offers from Morrissey to the vendors or to translate these offers into written offers to be submitted to the vendors for their consideration and by Moase's refusal to give effect to the information from Raymond Skinner that Marilyn Skinner would not consent to the agreement.

[44] Further, at paragraph 35, Campbell J. states:

> While it is an established fact that the listing agent disclosed to the vendor that the offer he put forward at 2.5% commission was from a co-worker, it does not in my mind satisfy the duty of loyalty that is inherent in a fiduciary relationship in that it does not address the issue as to why the Morrissey offers were not put forward.

[45] Although this court agrees that the relationship between a real estate agent and a vendor pursuant to a standard listing agreement creates a fiduciary duty, the facts in the case before this court disclose no indication whatsoever of any impropriety or breaching of that duty. As such, the *D.E.M. Corp.* case is clearly distinguishable and not relied upon by the court.

[46] Accordingly, this court is satisfied that:

i) a valid offer was presented to the appellant within the listing period. The appellant acted in bad faith and attempted to frustrate the efforts of the respondent in presenting the final order;

ii) the items set for in the VLDIF were either contained in the offer or not required;

iii) acceptance of the offer is not required. The listing agreement clearly contemplated payment of the commission upon presentation of an offer at the full listing price; and

iv) the terms of the listing agreement were clear and unambiguous. The underlying facts as found by the trial judge were based in the evidence and no error has been identified.

[47] For these reasons, the appeal is dismissed.

[48] The appellant shall pay costs to the respondent in the all-inclusive amount of $900 within 30 days.

"Justice M. A. Garson"
Justice M. A. Garson

Released: December 12, 2013

CITATION: T. L. Willaert Realty Ltd. v. Fody, 2013 ONSC 7533

COURT FILE NO.: CV-11-178

DATE: 2013/12/12

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

T. L. Willaert Realty Ltd.

Plaintiff (Respondent)

– and –

Richard Mark Fody

Defendant (Appellant)

Reasons for Judgment

on Appeal

GARSON J.

Date: December 12, 2013

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