

# Duties of Real Estate Agents



**A** number of years ago, the real estate industry in BC recognized that Realtors®—who at that time were often both listing agents and selling agents (technically sub-agents, but with the role of bringing buyers to listed properties)—frequently found themselves in a difficult position in certain transactions because they owed a *fiduciary* duty to both a buyer and a seller.

Having certain information, obtained from one party but withheld from the other, placed them in an impossible conflict of interest.

Now we have a much better system: a buyer's agent, with a duty to the buyer, and a seller's agent, with a duty to the seller. (There is also, of course, limited dual agency, but that is for another time.)

Does this mean, then, that a seller's agent no longer has a duty to a buyer where the buyer has his or her own agent? No, it does not.

The duty of a seller's agent to a buyer, even one with a separate agent, is well illustrated in the BC Supreme Court case of *Johnstone v. Dame*, 49 R. P. R. (2d) 1996.

The facts can be summarized as follows. Mr. Dame was the seller. His house was originally a 40-year-old army hut that a previous owner had moved onto the site and that Mr. Dame proceeded to renovate, without any permits or inspections.

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These do-it-yourself renovations were to lead to major structural deficiencies that would require replacement of the entire roof and some of the foundation. There were many other problems (when the buyer took his first shower, for example, water started pouring down the outside wall). The total cost of renovations was \$88,000. But the house *looked* new.

Mr. Dame listed this renovated house for sale with a Realtor® whom we will call Larry Lister. In the listing, Larry described the house as three years old because at that time, the renovations were three years old. During the course of the listing, Larry became aware that the house was in fact based on a 40-year-old army hut shell. But he did not revise the listing information.

Then Mr. Johnstone, through his agent Mr. Thompson, made an offer to buy this house as his wife's "dream" home—this "new" rancher. After some negotiations on price, a contract was signed. Then Mr. Thompson searched the municipal records for the property and discovered that according to these records, permits had not been obtained nor inspections carried out.

The response of the buyer to this discovery is interesting. Did he arrange for an inspection of his own? No. His wife loved the house and in these circumstances, he didn't really want to find any problems. Instead he resorted to magic! He consulted his agent—who drew up and presented to Larry Lister for signature by the seller—an addendum warranty stating that the house met 1992 Building Code standards. And guess what? The seller signed it! Problem solved!

This is what the judge at the subsequent trial of the Johnstone's action for damages for misrepresentation and breach of warranty had to say about the conduct of the seller:

...he warranted the work was up to the 1992 Building Code standard. That was patently untrue. Accordingly, I have no difficulty in finding that the [sellers] are liable in damages to the plaintiff both in tort and in contract. There is no doubt that the [sellers] were fraudulent in

their whole approach to the sale of this renovated structure. Clearly, they dressed up this old army barracks to look in all respects like a contemporary three-bedroom rancher, and then set out to try and pass it on to a prospective purchaser.

The result of the claim against the seller could not be clearer. But the buyers also sued not their own agent, Mr. Thompson—who after all had initiated the due diligence that revealed the misrepresentation—but the *seller's* agent, Larry Lister, on the basis that he owed a duty of care to the buyers and was negligent in the performance of that duty.

The judge found that Larry knew the house was not three years old, because someone had specifically told him. Then the judge said:

Why [Mr. Lister] with that knowledge would not totally revise the listing information... is difficult to understand, particularly when, as he testified on discovery, the proper practice upon discovering material errors is to revise the listing. This he did not do. From all of this I can only conclude that...[Mr. Lister] did not want to refer to this home as a 40-year-old renovation for fear that it would not sell. After all, [Mr. Lister] had a vested interest; he wanted to earn a commission.

With respect to Mr. Lister getting the subsequent warranty addendum signed by the seller, the judge commented:

A reasonably prudent Realtor®, in my view, ought to have been suspicious of a representation that there had been a final inspection for an unfinished home. [Mr. Lister] appears to have suspended his credibility for the sake of getting this sale to completion. [Mr Lister] had no reasonable basis to believe that the home met the requirements of the 1992 Building Code. On the other hand, he had every reason to suspect that it might not, an even better reason to doubt the accuracy of the information he was getting from [the seller]... [Mr. Lister]

was the listing agent... He was the professional who had both the ability and the duty to check the facts he communicated... I have no doubt that [Mr. Lister] was negligent in the performance of his obligations as a licensed Realtor® under the standards imposed by the code of ethics. While there was no direct communication between [Mr. Lister] and the [buyers]...he communicated with their agent. The question that then arises is whether there is some duty of care by the listing agent [to the buyers] in these circumstances.

The judge went on to observe that there is little difference between communicating directly with a party or with that party's agent. The judge concluded:

That warranty was made falsely, and was intended to mislead the [buyers]. I am satisfied...that [Mr. Lister] was a party to that misrepresentation, and is jointly and severally responsible for the damages suffered by the [buyers], notwithstanding that [Mr. Lister] had no direct contact with the [buyers]. He did have contact with [them] through [their] agent. It is my opinion that a Realtor® is negligent when that Realtor® passes on representations that something is true, when he should have known that those representations may not be true. That, in my opinion, is a reasonable standard of care.

As a real estate lawyer, I wholeheartedly agree with this judge; I appreciate it when a judge makes clear decisions in this often muddy field. In practical terms, the judge has affirmed that one party's agent, in seeking information from the other party's agent, should be able to rely upon that agent's reasonable efforts, as a professional, to take care that the information is true. ▲

**Anthony DuMoulin** is a senior partner in the law firm DuMoulin & Boskovich, Barristers & Solicitors.

Voice: 604 669-5500  
Fax: 604 688-8491  
tony@dubo.com