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ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
James A. Hendry and Sandra D. Hendry	Robert A. Haas, counsel for the Plaintiffs
Plaintiffs	
- and -	
Ronald R.M. Strike, Edward Snoyer, Allan Frank and Steven Sylvester	John S. McNeil, counsel for the Defendant, Ronald Strike
Defendants	
	HEARD: October 12, 13, 14, 15, 18, 19, 20, 21, 22, December 13, 14, 15, 16, and 22, 2004

J. E. Ferguson J.

INTRODUCTION

[1] The plaintiffs, James and Sandra Hendry, were owners of a 95.7-acre residence and farmland property located in what was formerly the Town of Newcastle, now the Municipality of Clarington, located about one mile east of the Newcastle harbour and about one-quarter mile north of the Lake Ontario shoreline.

[2] This litigation was the end result of a speculative business venture entered into by the parties, which ultimately failed. In 1985 Mr. Hendry acquired a property that in 1989 he sold to a partnership, for an amount of $700,000 and a 50% interest in its development. The property was never developed and the partnership was dissolved, following which the Hendry's initiated various lawsuits against both their former partners and the managing partner, Ronald Strike. These lawsuits were complicated and fraught with allegations of fraud and conspiracy. By the time of this trial many of the causes of action had been withdrawn and many of the original defendants were no longer a party to the proceedings. The only remaining defendant at trial was Mr. Strike.

[3] On consent and made Exhibit #1 was a Document titled Admitted Facts, containing 87 paragraphs and various documents. Those facts and documents were the result of a Request to Admit and represent formal admissions. They were not withdrawn. As a result, the truth of these facts and documents is not in dispute. *(Patterson v. Scherloski [1971] 3 O.R. 753).* Where possible the facts set out below have been taken from Exhibit #1, with the paragraph or document identified. If there is no reference to a paragraph or document, that finding represents one made by me, based on the evidence presented at trial.

BACKGROUND AND THE PARTNERSHIP

[4] Mr. Hendry purchased the property on May 15, 1985 for $135,000, of which $75,000 was financed by way of a mortgage. (Paragraph 6)

[5] On April 22, 1987, the property was transferred from Mr. Hendry to Mr. and Mrs. Hendry as joint-tenants. (Paragraph 7)

[6] On December 22, 1987, W.H. Clipperton appraised the property as future development property, at a value of $1,250,000. (Paragraph 11)

[7] In 1988, the Hendrys were not successful with their application for an official plan amendment and a re-zoning for 29 estate-residential lots. By letter dated August 2, 1988, Newcastle advised the Hendrys that their application was denied without prejudice. Mr. Strike was not their lawyer for that application.

[8] The Hendrys learned about Mr. Strike from the then mayor, Marie Hubard and were in touch with Mr. Strike towards the final stages of their initial application. Mrs. Hendry testified that Mr. Strike failed to tell them of the difficulties with their application. She claimed that she did not know why their application was denied. Their application problems were, however, discovered by their consultants in 1987. Eventually, in cross-examination, Mrs. Hendry admitted that she knew of these problems and that they received a letter from Newcastle, dated April 5, 1988, which set out the following problems with their proposed plan:

(i) water supply;
(ii) drainage;
(iii) private septic systems (needed a plan for sewage removal);
(iv) road design; and
(v) issues involving the Ministry of Agriculture and Food.

[9] At trial, the Hendrys abandoned their attempt to amend their pleadings to allege that Mr. Strike failed to tell them of these problems when advised that, if the amendment were granted, there would be further production obligations, possibly further discoveries and an adjournment granted to Mr. Strike, on terms. Considering that Mrs. Hendry is intelligent and previously worked in real estate, I am surprised that she attempted to convince me that she was not aware of the problems with their application. The only explanation I can reach is that she was attempting to include Mr. Strike in as many problems as early as possible, in order to cast the net of his potential obligations as widely as possible.

[10] On June 15, 1988, a 12.25% mortgage in the amount of $325,000 was placed on the property with Security Trust, repayable in monthly payments of $3,410.64. Those mortgage proceeds were used to pay off the existing mortgage and a loan. After payment of other miscellaneous fees, the Hendrys received $105,600. (Paragraphs 8, 9 and 10)

[11] The terms of the partnership agreement were agreed upon between the Hendrys and the other partners on March 23, 1989. The business and purpose of the partnership was to own, develop, operate and maintain the property. (Paragraph 13 and Tab 1)

[12] David Thomas acted for the Hendrys with respect to the negotiation of the partnership agreement and the terms of the offer and purchase. He provided independent legal advice to the Hendrys. Although Mrs Hendry tried to convince me that Mr. Strike was their lawyer for this transaction she eventually agreed that Mr. Thomas was involved on their behalf and was there to "protect their interests". Mr. Strike performed the conveyancing and invoiced the Hendrys for the services of transferring clear title. Under the agreement, Mr. Strike, in trust, entered into an offer to purchase a one-half interest in the property from the Hendrys for the amount of $700,000. The Hendrys were paid 50% of the 1989 full market value and they had a right to participate in the development of the other 50%. (Tab 1)

[13] The parties signed the agreement over the spring and summer, the last person signing on August 2, 1989. The initial managing partner was Mr. Strike and he was to be paid as a lawyer at a rate of $150 per hour. (Paragraph 14 and Tab 1)

[14] As managing partner, Mr. Strike was immediately authorized to pursue discussions with the staff and elected officials of Newcastle, the Region of Durham and other individuals as deemed necessary by him with respect to the re-zoning and development of the property. The agreement set out what actions required notice to and a majority decision by the partners. (Tab 1)

[15] The Hendrys accepted promissory notes from Mr. Strike ($100,000) and from two other partners ($100,000). (Tab 1)

[16] The Hendrys were permitted to reside on the property at no cost on certain terms. They were able to mortgage the property up to $300,000. (Tab 1)

[17] On the advice of their accountant, the Hendrys' partnership interest was rolled into a numbered company (159952). Mr. Thomas provided the legal services for that transaction.

[18] Entering into the partnership was the first step taken by the Hendrys to start making money from real estate and to become land developers. They sold their farm equipment after entering into the partnership and started living what I believe is best referred to as a "semi-retired" type of existence.

[19] It was never the plan of the partners to spend money to develop the property themselves. They wanted to place the property in a favourable spot to attract a joint-venturer or a purchaser. They hoped to develop an attractive land use that would be acceptable to the region, town, and local residents.

[20] Although it made financial sense to include as much residential development as possible, the problems experienced by the Hendrys with their earlier application still existed. The appeal of the property to a developer/purchaser was directly proportional to the ability of the property to support residential development. (Paragraph 80)

[21] There is an issue as to what, if anything, Mr. Strike told the partners about the timing of the completion of the development. Mr. Strike testified that there was no representation made by him about timing. The Hendrys did not tell him that it needed to be done in a certain time frame. He was obviously very positive about the project or he would not have brought in friends and family. Mr. Allen Frank, a real estate broker and one of the partners who invested $100,000, testified that the partnership was purely a speculative venture, with no guarantee of success or time horizon for completion and with no specific plan. They thought that the property would increase in value. Mr. Edward Snoyer, another partner, testified that the partners hoped to make money quickly but that when the market dropped, the partnership became a long -term venture. He testified that there was never an application at municipal or regional levels because the partnership was not prepared to put more money into it once the market declined and that they had to wait for the market to change direction. Mr. Strike, however, needed to keep the plan alive and in the sights of the town and region.

[22] Mrs. Hendry's evidence was not consistent as to what they were told about the time frame for realizing a profit. Sometimes she said two to three years and at other times she said two to five years. She appeared to be desperate to have me find an early promise so that she could more easily establish a causal connection between the partnership and their other personal real estate transactions. Her husband testified at their combined examination for discovery that Mr. Strike told them five years. She was present and did not correct his evidence. Mr. Strike testified that he did not guarantee a definite period of time and did not tell them two to three years. I accept his evidence. Unfortunately, I do not have the benefit of Mr. Hendry's trial testimony. If he had testified and been consistent with his discovery evidence he may have confirmed his understanding of the 5 year time horizon during which period of time, the Hendrys were already insolvent by virtue of the Bowmanville purchase with its financing and refinancing, which had nothing to do with Mr. Strike (dealt with below).

[23] Based on the evidence, the five-year horizon makes sense, for the following reasons:

(i) The Hendrys introduced Mr. Strike to the Niklaus' more than two years after the inception of the partnership. When the Niklaus' joined the partnership, the addition of their land allowed for an 18-hole golf course. When the Niklaus' came aboard, Mrs. Hendry knew that the concept was not yet developed or was about to change by the addition of more land. She also knew that development of a golf course alone was a possibility, as it had been discussed with Mr. Strike;

(ii) Mr. Frank, Mr. Snoyer, and Mr. Strike, all testified that Mrs. Hendry's evidence of the two to three year promise was not true;

(iii) Mrs. Hendry testified that she took the statements made by Mr. Strike regarding the partnership as a promise. She had no explanation as to why the promise did not get built into the agreement;

(iv) The Hendrys' Florida $58,000 property purchase took place approximately two-and-a-half years after the partnership inception. It makes no sense that they would go into further debt if Mr. Strike was in breach of a timing promise;

(v) On May 24, 1993, Mrs. Hendry answered a newspaper ad inquiring whether the author of the ad would be interested in becoming an owner/partner or included in a joint-venture of a golf/housing development in the early stages of development;

(vi) The Hendry's took out a mortgage with Avco and annually renewed it at a carrying cost of over $5000 per month. They would not have done this if they were upset with Mr. Strike;

(vii) They were living at the partnership property at no cost and therefore did not need Bowmanville, which could have been sold.

[24] Mrs. Hendry testified as to an offer of $1,200,000 received from a purchaser named Babovic before entering into the agreement, which incredibly she could not produce. But for Mr. Strike's offer, she testified that they would have sold to Babovic. In cross-examination she eventually conceded that the offer was not acceptable as it was conditional, did not give them any money and tied up the property without any guarantees. There was no credible evidence adduced that there was a buyer who would unconditionally pay a better price or participate in a reasonable prospect for the development of the property. I find that Mrs. Hendry's evidence about this offer was an attempt to try and persuade me that her damages against Mr. Strike should translate into the difference between the Babovic offer of $1,200,000 and their one-half of the original value used for the partnership of $1,400,000 an amount of $500,000. Mr. Strike testified that the partnership used a value of $1,400,000, because there was excitement about the development that was viewed by the politicians as being located in a hot area. There was also discussion by the politicians about the extension of the urban boundary in that direction.

[25] Mrs. Hendry's evidence that she did not know it would be very costly to proceed with a full scale re-zoning/official plan amendment is unbelievable in view of her evidence that they spent about $25,000 going only part way with their re-zoning project. Her evidence about what the partnership was willing and authorized to spend was not consistent throughout trial. It is clear that the partnership was never willing to spend that much money. They only wanted to position the property in the market in order to attract a joint-venturer or a purchaser.

[26] Mrs. Hendry testified that they entered into the partnership on the basis of Mr. Strike's representations that there would exclusively be residential development. This makes no sense in view of their lack of success with 29 estate-residential lots. It was reasonable to believe that it would not be possible to accomplish any re-zoning or an official plan amendment that would permit extensive residential development unless the property was to be serviced by a municipal sewage system. She finally admitted in cross-examination that such development required sanitary sewer services that were not available for the property. At one point they learned that the province might approve a communal septic system and Mr. Strike followed-up in that regard. (Paragraph 81) Further Mrs. Hendry confirmed that they knew and supported golf course, alone which would not include any residential.

[27] Various partnership meetings were held, including one on November 25, 1989, at which time it was discussed that re-zoning was dependant to a large extent on the marina re-zoning and that the lakeshore-freeze was an unknown issue. Information had been received from real- estate agents that $30,000 per acre was not an unreasonable sale price. Obviously this information would have had a positive impact on the partners, who would have realized that a tidy profit would be made if sold at that price.

[28] The partnership retained a planning consultant, Cole Sherman, to assist in developing a portrayal of the property in order to curry support with local planners and politicians for an amendment to the official plan. (Paragraph 82)

[29] The partnership agreed to and listed the property for sale on March 31, 1990, at a list price in excess of $7,000,000. There were no offers in response to that listing. (Paragraph 73)

[30] Mr. Gowdie, a real estate appraiser, testified as to the unforeseen collapse in the real estate market, beginning around June of 1990 (about one year after the inception of the partnership) and existing at the time of the dissolution of the partnership in October of 1995. One result of the recession was that there was no point in submitting an application to amend the official plan and for a re-zoning because there was no market for the property. To move forward with those applications would involve considerable expense and that was no one's plan. I find that all of the partners were victims of the collapse.

[31] One consequence of the collapse was that the partners who paid $700,000 to the Hendry's would not be able to recover their basic investment unless the property was sold for at least $1,400,000. A sale at that price never occurred and the project waited out the recession with Mr. Strike trying to keep the development in the sight of planners and politicians.

[32] Mrs. Hendry would not acknowledge these consequences to the cash-investing partners as of the spring of 1993, had a buyer even been interested. Mr. Gowdie appraised the property in 1993 at $430,000. (I note that the highest valuation was done in 1987 by W.H. Clipperton at $1,250,000.) A sale at that price would mean that the other partners would receive 50%, or $215,000, a net loss of $485,000 (they paid the Hendrys $700,000 for the one-half interest). This made no sense.

[33] Mrs. Hendry initially testified that she had not given much thought about the recession. In cross-examination she testified that she knew about it in 1995. Only when confronted with her statement of defence in the Avco action, in which they pleaded that it lasted from August of 1990 until May of 1995, did she agree that she knew about the recession. Mrs. Hendry seems to ignore the fact that all of the partners were affected by the market decline. Her unwillingness to answer about her knowledge of the recession shows that she was not able to concede that, apart from Mr. Strike, there were other were factors at play, which I find existed and which negatively affected the development.

[34] The property was subject to land-use controls imposed by Durham and Clarington- a Newcastle zoning by-law, which zoned it agricultural, and the Durham Regional Official Plan ("D.R.O.P."), which designated it, major open space ("M.O.S."). Residential development was not permitted. (Paragraphs 19 and 20)

[35] On January 27, 1992, Newcastle instructed its Planning and Development Committee to begin a review of its official plan. (Paragraph 23)

[36] The partnership report authored by Mr. Strike and sent to the partners, including the Hendrys, dated April 8, 1992 confirmed the following:

(i) The property had been designated by regional council as a special study area ("S.S.A.") for golf/recreational/residential uses in the final amendments to the D.R.O.P. since 1991 and required provincial approval. (I find that the parties, including the Hendrys, learned of the concept of golf/residential use at a March 31, 1990 meeting and were happy with the concept.);

(ii) He was tracking the S.S.A. amendment with the provincial government in an effort to ensure that the designation was not changed;

(iii) The S.S.A. designation was a very important step as it recognized the planning concept behind their general intent and established a precedent which could be put to great use in future re-zoning applications and consequent discussions with local, regional and provincial land use representatives and politicians;

(iv) The S.S.A. designation did not guarantee use but passed on the message of the preferred use. A very good reason was needed to disallow development of this nature. (Incredibly, Mrs. Hendry would not agree that this indicated that their intended land use might not be obtained.);

(v) There had been a change of the local government in November of 1991 and Mr. Strike was continuing with his efforts to ensure that the rapport, which he had established with the old government, continued with the new government. The new mayor (Diane Hamre) continued to be a powerful ally, continued to support their project and was instrumental in gaining approval of the S.S.A. at the regional level. From discussions with local and regional planning staff and other politicians, there continued to be considerable support for their general concept;

(vi) There was a benefit of the Bramalea proposal of 1650 units, which development would help in many ways. Bramalea officials were telling Newcastle that they hoped to begin construction in the next 1½ to 2 years. Although Bramalea was experiencing financial woes, they appeared to have financial backing. The Bramalea development in the Newcastle area was a positive one for the partnership because it would serve as a bellwether for any developer interested in the property and, it would bring development closer to the property. (Paragraph 21);

(vii) The golf/residential use was the only alternative given the environmental dictatorship imposed by the Crombie Commission and the resulting vague freeze placed by Clarington on their entire waterfront. Golf/residential was a way to reconcile the Crombie Commission requirements of green space and public access to the waterfront, which were also requirements of the provincial, regional and local government levels. (Crombie Commission dealt with in more detail below.);

(viii) The plan and direction of the partnership continued to be to enhance the value of the property through re-zoning, to make it most attractive to a purchaser;

(ix) Following discussions with golf-course architects, builders, planners and politicians it appeared that more land to accommodate a larger golf course would be beneficial. There was potential involvement of the Niklaus' who owned adjacent property and who likely would agree to a joint venture of the re-zoning of the combined properties, allowing for a larger golf course. (Paragraphs 74 and 75) I find the Hendrys' introduction of Mr. Strike to the Niklaus' indicative that they were satisfied with the direction of the partnership and were well aware of the timing (they were already 2 and ½ years into the partnership).

(x) Mr. Niklaus had reported that in 1990 he had been offered $30,000 per acre but that the current reasonable price was $10,000 to $15,000 per acre, confirming the effect of the recession on real-estate prices;

(xi) In order to proceed with the re-zoning process they needed advice from a golf-course architect (Robert Heaslip) and a planning/engineering firm (Cole Sherman), both of whom were highly recommended by planners and politicians;

(xii) Bird and Hale had been hired by Newcastle to conduct a waterfront study and to make a proposal for waterfront use. They supported the partnership's proposal of golf/residential use. (Tab 10)

[37] The Crombie Commission had been established to review waterfront areas and to address environmental issues. Following the Commission's final report in June of 1992, the provincial government legislatively established the Waterfront Regeneration Trust and David Crombie was made the Chairman to implement the Commission's recommendations (Paragraph 24). The Hendrys submitted that Mr. Strike did not disclose the practical effect of the Crombie Commission's waterfront studies on the subject lands (i.e. a freeze in development). I do not agree. Mrs. Hendry confirmed that during the March 31, 1990 meeting, when they first learned about the golf course/residential development, Mr. Strike advised them of the effects and that they would not get away with a purely residential development and that some allocation would require recreational, public or greenbelt use. I find that Mr. Strike explained the practical effects of the Crombie Commission and the resultant waterfront studies to the partners.

[38] In September of 1992, Durham launched a public waterfront planning study in furtherance of its role under the trust, which affected the property. (Paragraphs 25 & 26)

[39] Thereafter, and up to June 29, 1993, the Durham Region Planning Committee ("the D.R.P.C.") intended to recommend to Council that the 1976 agricultural designation be restored on the property. (Paragraph 27) Such a designation would be fatal to residential development.

[40] In the partnership report of September 25, 1992, Mr. Strike confirmed the following:

i) The Niklaus' had entered into an agreement to joint-venture their property with the partnership;

ii) The development plan prepared by Cole Sherman and Robert Heaslip was completed (and enclosed with the letter);

iii) He had promptly advised Newcastle and Durham planning authorities and waterfront consultants about their plans, to ensure that they were given consideration in the town's waterfront and lifestyle community concept plan;

iv) From discussions with planners the best way to pursue development was to require municipal servicing. 250 units were proposed, comprised of a mix of single residential lots, town home units and medium density condominium units;

v) His next two immediate tasks were attendance at a public meeting on the town's draft waterfront study (October 5, 1992) and at a meeting with the Bond Head Community Association. (I find that the Hendrys were well aware of the opposition of the Bond Head Community Association to development as they experienced such opposition with their application.);

vi) One of the next main steps would be to file local and regional re-zoning applications which would be discussed at the next meeting, set for October 31, 1992;

vii) The proposal had been reviewed by planners and politicians at local and regional levels and had been received with varying degrees of interest and enthusiasm. He had yet to receive a negative response but had not yet really received enough of a response from any of the relevant sources to provide a well-informed opinion as to the next step. (Tab 10)

[41] At a partnership meeting on October 31, 1991, it was discussed that, no matter what they did, they were going to end up before the Ontario Municipal Board. The problems with private septic and municipal sewers and participation in the town and regional waterfront studies were also discussed.

[42] On March 25, 1993, the Ministry of Municipal Affairs advised Durham that the province would not consent to the S.S.A. designation. (Paragraph 29) Up until this point Sue Cummings and Mayor Hamre were optimistic about the project.

[43] On June 29, 1993, Ms. Cummings made strong recommendations to the D.R.P.C. concerning the planning designation that should be applied to the property, arguing against an agricultural designation. (Paragraph 28)

[44] The same day the D.R.P.C. passed a resolution recommending to Council that the property be designated waterfront open space (W.O.S.), which was ultimately accepted by Council. (Paragraph 30)

[45] With amendments to the official plan that designation would have permitted golf course and limited residential use, as being contemplated by the partnership. (Paragraph 31)

[46] The D.R.O.P. affected the partnership property and designated it as Waterfront Greenway. The uses permitted by the D.R.O.P. and Clarington's draft official plan were compatible. Both permitted uses of conservation, reforestation, agricultural and recreational uses for the property.

Golf courses were permissible by amendment to the plans. Golf courses, with associated modest residential use, were also permissible by amendment, provided that there was a potential scheme of sewage disposal. (Paragraphs 32, 33 and 34)

[47] One of the Hendrys' main complaints was that Mr. Strike did not clearly explain the meaning of the S.S.A. Frank Wu, of the Clarington planning department, confirmed that it only meant that the lands may be the subject of further study and, until completed, Clarington would not do anything with respect to land designation. The Town also needed the results of the ongoing Crombie waterfront study.

[48] Another of the Hendry's complaints was that they were not told that the planners were opposed to the S.S.A. designation. Mr. Wu testified that the S.S.A. designation was not necessary because the property was already part of the town's comprehensive waterfront study. The planner's recommendation of the elimination of the S.S.A. in the General Purpose and Administration Committee report was, however, followed by a comment that Mr. Strike's proposal could be reviewed within the context of the town's waterfront planning exercise. I do not find that the planners' belief about the S.S.A. meant that they did not support the partnership concept.

[49] In any event, although the planners did not support the S.S.A. designation, the politicians did, and the property was included in the official plan as a S.S.A. This was a result of a decision made by Council.

[50] David Crome, also with the Clarington planning department under Mr. Wu, felt that the golf aspect of the plan had merit and he had an open mind about the residential aspect of the plan. He confirmed that the politicians on Council had the final say and that the designation of S.S.A. occurred, despite the planners' view. Ms. Cummings testified that it was a positive sign that the development plan and the S.S.A. designation were looked on favourably by the politicians, as they had the ability to amend the official plan. She also testified that she did not know why the partnership's municipal and regional applications were not filed but also confirmed that in retrospect, those filings may have turned into denials pretty quickly.

[51] The evidence confirmed that, although planners are important to land development, at the end of the day town and regional councils make the planning changes and they supported Mr. Strike's plan.

[52] The Hendrys were also critical that Mr. Strike did not specifically advise that the planners were against residential development outside of the urban boundaries. Both mayors with whom Mr. Strike had contact, were however supportive of some form of residential development, outside of the urban boundary.

[53] Mrs. Hendry did not explain why having more specific information from the planners about the S.S.A. and development of residential development outside of the urban boundaries would have been material to their decisions. Mr. Hendry never testified so we do not have his evidence on this point. As a result, there is no evidence that they would have done anything differently if they had received this information. In any event as set out above, it is the voices of the politicians, which matter.

[54] The Hendrys also submitted that Mr. Strike was not specific enough in explaining the significance of a S.S.A. and that the picture he painted was too rosy. I have read the partnership reports and agree that Mr. Strike is to be criticized for not being more specific. The Hendrys are, however, educated and intelligent people. Mr. Strike did say that the designation of the S.S.A. did not guarantee success of golf course/residential use. Even if Mr. Strike had been more specific in explaining the details of a S.S.A., that information would have had no effect on steps taken by the Hendrys, who did nothing differently when told that the S.S.A. did not guarantee success.

[55] The Hendry's mortgaged the partnership property for $110,000, by a one year 11% mortgage dated April 21, 1993, repayable in monthly instalments of $1,008.33 ("the Press mortgage", Mr. Press being the solicitor who acted for the mortgagee.) After payment of brokerage, placement, administration and legal fees as well as taxes, the Hendrys received $101,262.62. (Paragraphs 50 and 51) Mrs. Hendry eventually agreed in cross-examination that the Press money was needed to pay off the Avco arrears on the Bowmanville property (dealt with below).

[56] Mr. Strike testified that he only learned of the Press mortgage after it was arranged and that he arranged for the Hendry's independent legal advice that was required by Mr. Press. Mrs. Hendry reluctantly confirmed that they did not consult with Mr. Strike, Mr. Thomas or their accountant, until after they had submitted the mortgage application. Mr. Strike needed to know about the transaction because he owned the land in trust for the partnership and had to sign the documents. The Hendrys told Mr. Strike that the Press mortgage was for farming purposes. Mrs. Henry testified that they were not out of money and that was not the reason, however, when confronted with their discovery evidence and their pleadings in which it was stated that the Press money was required for Bowmanville mortgage arrears and for payments on Newcastle, she agreed. The bottom line is that the Hendrys were in a financial mess as a result of their own actions. What started out to be an opportunity to make a lot of money from real estate turned out to be a disaster, not because of Mr. Strike, but because of many other factors.

[57] Although Mr. Strike was involved in the Press renewal negotiations for an additional six-month term, the decision to renew was that of the Hendrys. Mrs. Hendry attempted to convince me that Mr. Strike had taken on the role of their financial adviser and thereby owed them even greater obligations. I find that Mr. Strike's involvement was only to help the Hendry's obtain better renewal terms and in no way did it elevate him to their financial advisor.

[58] In 1994, the Hendrys undertook several of their own initiatives to find a buyer or joint-venturer. These initiatives involved contact with the Landford Group, the Heron Group, Coscan Developments, River Oakes Homes, Quorum Development, Monarch Construction and Fern Brook Homes. (Paragraphs 77 and 78)

[59] Mr. Strike confirmed the following in his March 15, 1994 partnership report:

i) The favourable planning status of being a S.S.A. in the D.R.O.P. for golf/residential did not have provincial government support. As a result it had been deleted from the proposed regional official plan. (This was a unilateral decision made by then Premier Bob Rae and his bureaucrats, which occurred when the region's official plan had been submitted for final approval.) The province had cut out all S.S.A. outside of urban boundaries as they were seen as an encroachment on agricultural lands by residential plans.

ii) Initially, following this decision the region planned to zone the property as permanent agricultural, which would make it very difficult to develop in any residential manner for the next 20 to 30 years. As a result of efforts by Mr. Strike, Mayor Hamre and Ms. Cummings, who made a presentation before the D.R.P.C. in June of 2003, the region agreed to designate the properties M.O.S. That designation permitted for golf courses and possible future residential use, although requiring re-zoning.

iii) To some extent this re-zoning was more beneficial than the S.S.A. as they at least had a definite zoning that would allow golf and a reasonable prospect of residential use.

iv) Once the region had made this decision it had been returned to the province for ratification, who in the meantime had decided that golf courses were permitted uses but only after the filing of a re-zoning application, which needed to meet certain environmental requirements.

v) The picture was still more complicated. Regional and local municipal waterfront zoning plans were currently being drafted to correspond with the new D.R.O.P. It appeared that there would be additional restrictions on residential development on waterfront M.O.S. (Much of this flowed from the Commission's recommendations for the preservation and greening of the waterfront.)

vi) It continued to be the partnership's goal to spend as little money as possible but to preserve and enhance the ability to develop the property. He recommended that they must take some part in the drafting of the regional and local waterfront plans to protect their interests, which included reviewing the developing legislation and meeting with local planners to address the resulting issues.

vii) In order to best position the partnership in the development of the waterfront studies, it would be a good time to submit re-zoning applications at regional and local levels. They continued to have good political support from Mayor Hamre for golf/residential but she had confirmed support of an initial proposal for 50 units (not 250 units). He recommended an initial proposal of 50 units, leaving significant open space for future residential development.

viii) The issue was further complicated by the provincial government's new procedural requirements for re-zoning applications. Neither Clarington nor Durham knew exactly what was entailed and, as a result, they would be at the cutting-edge of the new re-zoning application form. He believed that the province required greater upfront re-zoning information and thereby greater upfront expense.

ix) The budget to proceed from their planner was about $12,000 and he would seek instructions at the partnership meeting with respect to this expense. He realized that the partners were reluctant to spend money but advised that these efforts were required to protect the property because there was no buyer or joint-venturer on the immediate horizon.

x) Although it would take from approximately $75,000 to $200,000 to fully re-zone the property, he was aware that no one was prepared to expend these funds. His plan was to position the property as best as possible for the purpose of future development.

xi) A local newspaper article dated December 14, 1992, confirmed Clarington's approval of the building of homes on golf course properties.

xii) He had been involved in extensive discussions with Bramalea since July of 1993, who had been interested in their property since it was zoned M.O.S. By November of 1993, he learned that they would not commit funds to a joint venture but that Bramalea would present their property as a potential part of their development, for which they were seeking a joint-venture partner from national and international markets. (Mr. Strike testified that he had a meeting with Bramalea on October 25, 1993, following which he anticipated a proposal from Bramalea.)

xiii) Bramalea suggested that, given the devastated real estate industry, particularly with raw development lands, the lands were worth $5,000 to $10,000 per acre. Mr. Strike felt that no one would pay near $10,000 per acre and that an offer of interest to them over the next few years was that of a joint venture.

xiv) Both Bramalea and local planning officials advised that the Bramalea property would end up at about 1100 units and would be selling in approximately 2-years time.

xv) He had been in contact with Mr. Barry Racippo, of Sales Facts Realty Inc., regarding the marketing of the joint venture. Mr. Racippo had been actively involved in the raising of venture capital for and development of several golf course/residential developments around the world.

xvi) He confirmed a meeting of April 16, 1994 to discuss what monetary limits should be placed on the re-zoning applications. (Tab 10)

[60] While I am critical of Mr. Strike's lapses in written reporting, I find that, in addition to the three partnership reports, other meetings took place and that he kept the partners informed.

[61] The Bramalea development went bankrupt before any decision was made in respect of its application in the Newcastle harbour. (Paragraph 22)

[62] On August 30, 1994, the Hendrys arranged an additional 14.75% mortgage in the amount of $25,000 from the Keys, repayable in monthly interest- only payments of $307.29. After the payment of brokerage fees, lenders fees, tax arrears, hydro arrears and legal fees, the Hendrys received $19,092.86 from the proceeds. (Paragraphs 56 and 57)

[63] Although the Niklaus' stood to benefit from any positive partnership development plans without any participation, on September 26, 1994, they sent Mr. Strike a letter declaring void their agreement dated June 23, 1992. (Paragraphs 79 and 83)

[64] On September 23, 1994, the Hendrys, through Mr. Thomas, advised that they intended to sell their partnership interest. (Paragraph 61)

[65] In October of 1994, the Hendrys obtained a mortgage commitment, without notice to the partners, on the security of the property for the sum of $235,000. On October 17, 1994, they asked for permission to mortgage the partnership property. (Paragraphs 62 and 63)

[66] The request to mortgage caused Mr. Strike to obtain an opinion concerning the property value, due to his fear that the other partners' equity would be encumbered because of the drop in real estate values. Mr. Humphrey of Re-Max provided a current market value of $265,000.

[67] The agreement was amended on November 21, 1994, to allow the Hendrys to place a mortgage(s) not in excess of $200,000. (Paragraph 15). The partners were told that the Hendrys needed the money for a trailer park deposit. Even though they obtained the mortgage, the trailer park purchase did not transpire. Mrs. Hendry testified that they changed their mind and decided not to follow through with the purchase even though they likely could have revived their offer (further discussion of the trailer park issue is set out below). They needed the money because the carrying charges on the mortgages totalled about $7,000 per month.

[68] Mrs. Hendry made a big issue out of the fact that they were not allowed to attend at the meeting, at which their ability to mortgage the property was discussed. I do not believe that this was inappropriate. There may, however, have been a lack of communication with the Hendry's as to why they could not attend. The other partner's equity in the property was affected by their rights to mortgage and this needed to be discussed in the absence of the Hendry's.

[69] On November 22, 1994, the Hendrys placed a one-year 11% mortgage on the property with Mr. Press in the amount of $200,000, requiring monthly interest only payments in the amount of $1,833.33, which mortgage went into default on maturity. (Paragraphs 64 & 65)

[70] The amended agreement contained an acknowledgement by the Hendrys that Mr. Strike, in his capacity of managing partner, had complied with all his obligations under the original agreement and that the Hendrys had no complaint or claim against Mr. Strike in any capacity or the other partners for conduct with respect to the partnership to the date of the amended agreement. (Paragraph 67)

[71] Immediately upon concluding the amending agreement, the Hendrys wrote to the Law Society of Upper Canada complaining about Mr. Strike's conduct, alleging he was their lawyer and asserting misconduct with respect to the partnership. (Paragraph 68)

[72] On May 12, 1995, the Hendrys listed their half of the partnership property for sale at a listing price of $700,000. (Paragraph 69)

[73] On October 20, 1995, the Hendrys delivered a Notice of Dissolution of the partnership. (Paragraph 16)

[74] On October 20, 1995, the Hendrys served a Notice of Application to wind up the partnership and for an accounting. (Paragraph 17)

[75] In an affidavit sworn by the Hendrys, they deposed that the purpose of the partnership was to re-zone the property for sale as golf/residential. They also acknowledged the decline in the real estate market.

[76] On May 29, 1996, Mr. Strike and the other respondents delivered a Notice of Counter-Application for dissolution of the partnership; the taking of accounts; acquisition of the Hendrys' interest in the partnership; sale of the property with the right to bid; an order requiring the Hendrys to vacate the property; and an order requiring the Hendrys to bring the mortgage on the property into good standing. (Paragraph 18)

[77] On March 28, 1996, the mortgagee under the Press mortgage as a result of the Hendrys default served the partnership with a Notice of Sale to the mortgagee in the amount of $204,707.83. (Paragraphs 85 and 86)

[78] After default the mortgagee took possession in accordance with its rights on default and was engaged in efforts to sell the property. (Paragraph 87)

[79] The Hendrys were unable to repay the $200,000 mortgage and the other partners discharged that liability to avoid foreclosure.

[80] The Hendrys had also failed to pay municipal taxes for the years 1994 through 1996. (Paragraph 84)

[81] On September 11, 1997, the court ordered the transfer of the Hendrys' interest to the other parties and no accounting.

[82] During the course of the partnership and up until the Hendrys delivered their Notice of Dissolution, Mr. Strike sent correspondence to Newcastle/Clarington and Durham on May 5, 1990; March 1, 1991; April 11, 1991; January 31, 1992; July 29, 1992; March 17, 1994; September 26, 1994; and September 13, 1995. Mr. Strike also distributed, for payment by the partners, various accounts from Cole Sherman. (Paragraphs 70 and 72)

THE HENDRYS OTHER TRANSACTIONS

[83] On August 6, 1989, Mr. Hendry inherited a one-half interest in a 17-acre house and farm property owned by his mother in Bowmanville. His brother inherited the other half. (Paragraph 35)

[84] Mr. Hendry purchased his brother's interest through his limited company for the sum of $235,000. They rented out this property. (Paragraphs 36, 37 and 46)

[85] Mrs. Hendry testified that her husband had discussions with Mr. Strike about this transaction. Mr. Hendry's discovery evidence was put to Mrs. Hendry in which he confirmed that he had not had a discussion with Mr. Strike about buying his brother's interest. I accept Mr. Strike's evidence that he had no advance notice of this purchase and that he had no opportunity to consider the Hendry's financial circumstances and their ability to carry the costs. Mrs. Hendry was reluctant to agree that Mr. Strike did not know that they were relying on him for financial advice, as he did not even know about the Bowmanville purchase in advance. She eventually agreed that they did not have a strong income source to cope with the monthly payments on Bowmanville, even when they first bought it.

[86] Mr. Strike's law firm acted for the vendor on this transaction and Mr. Thomas acted for Mr. Hendry and 759952. (Paragraph 38)

[87] The purchase money came from a one-year 15% mortgage arranged by Mr. Hendry with Security Trust in the amount of $250,000, with monthly interest only payments of $3,125. Of the proceeds, $235,000 was paid to Mr. Hendry's brother and $15,000 was paid to the Hendrys. (Paragraphs 39, 40 and 41)

[88] Although Mrs. Henry tried her best to convince me that they bought Bowmanville because Mr. Strike told them that development of Newcastle was imminent and they needed a place to live, she eventually agreed in cross-examination that the reason for the purchase was that it might later generate a profit. I find that the purpose was to make money and had nothing to do with anything said to them by Mr. Strike.

[89] On April 30, 1990, the Hendrys borrowed $60,000 from Kellum Investments Ltd., secured by a 17%, one-year mortgage, with monthly interest only payments of $850. ("the Kellum mortgage") (Paragraph 42)

[90] On August 30, 1990, the Hendrys borrowed $450,000 from Avco, secured by a 14.5% one-year mortgage repayable in monthly payments of $5,444.64. The mortgagor was 759952 and the Hendrys were the guarantors. (Paragraph 43) This transaction was only one year after the inception of the partnership and I find it to be the cause of the Hendrys' financial downfall. Mr. Strike certainly was not in breach of any timing promises at the one-year mark.

[91] The mortgage proceeds were used to discharge the Security Trust mortgage ($253,064.14), the Kellum mortgage ($60,810.41) and to pay brokerage and legal fees. The balance of $116,989.57 was paid to 759952. (Paragraph 44) I find that these funds were required by the Hendry's to support their semi-retired lifestyle. Although they were farming, that work did not generate much annual income.

[92] Although Mrs. Hendry testified that Mr. Strike knew about these financing deals, I accept Mr. Strike's evidence that he did not and that he only learned of them after they were arranged. In any event, the Hendry's could have put Bowmanville on the market to avoid the mortgage obligations before they reached financial disaster.

[93] Mrs. Hendry's evidence on the reasoning behind the Avco mortgage was incredible. The original mortgage in November of 1989 was for $250,000. Not quite one year later, they increased the mortgage by $200,000. At one point she tried to convince me that the additional funds were needed for the development of the partnership property. Eventually, she agreed that the funds were a cushion for future expenses. I find that the Hendrys were living well beyond their means, hoping for a change in the market so that they could sell their properties. Why would anyone borrow an additional large amount of money at a hefty interest rate if the partnership did not need that money, particularly when that amount of money was never contemplated as being spent by the partnership? Mrs. Hendry would not agree that they were spending more money than they were generating. Mr. Hendry's discovery evidence that he was not going to deny that situation was put to her. Even then, she was reluctant to accept this reality.

[94] Mrs. Hendry's tax returns confirmed insufficient income to carry the monthly debt. Mr. Hendry did not testify and his tax returns were not provided. The drawing of an adverse inference applies to documents as well as to the failure of a witness to testify and is dealt with below. I find

that Mr. Hendry's returns would have confirmed this situation. When they borrowed the Avco money, the Hendrys discovery evidence was put to Mrs. Hendry that they knew that within a year the property would have to be sold or Newcastle was going to have to be taking shape. Even after the discovery evidence was put to her (and which was never changed), she seemed unwilling to accept that this was the situation. I conclude that Mr. Hendry did not testify because his evidence would not have been helpful to their case.

[95] In June of 1991 the Hendrys borrowed $15,000 from the C.I.B.C. for which they told the bank the funds were needed to buy farm equipment. (Paragraph 47)

[96] On September 19, 1991, the Hendrys entered into a one-year renewal agreement with Avco at 15.25%, for the new principal balance of $447,893.83, with monthly payments of $5,687.20. It is interesting that they had a chance to list Bowmanville but chose not to. They knew Bowmanville had increased in value and knew that they were now 2 years into the partnership, which had not realized a profit. She testified that they were pleased with the Bowmanville purchase, which gave them a fair degree of financial comfort. In my view had they sold Bowmanville at that time, it is likely that they could have avoided their financial ruin. They were living at no cost at the partnership property and the hefty monthly payments on Bowmanville were killing them. At renewal, the Avco mortgage was extended until November 28, 1994, at which time it was recapitalized for a further year, with the outstanding principal and interest amounts treated as principal of $440,770.04, bearing interest of 11%. (Paragraphs 48 and 49)

[97] Mrs. Hendry testified as to an appraisal on Bowmanville in the amount of $1,200,000.00 - another document that she could not produce, but which she says was done within months after the purchase. Mr. Gowdie testified as to the unlikeliness of such an escalation in value in a matter of six months or so. I accept Mr. Gowdie's evidence. If such an offer ever existed it only makes sense that the Hendry's would have sold the property and generated a handsome profit.

[98] The Hendrys bought property in Florida in November of 1991 for approximately $58,000. They spent winters in Florida, also indicative of their semi-retired life style. Mrs. Hendry unsuccessfully tried to blame Mr. Strike for this purchase. Mrs. Hendry did confirm that Mr. Strike did not have advance notice of the Florida purchase.

[99] On August 15, 1994, the Hendrys entered into an agreement for the purchase of a trailer park for the purchase price of $695,000, to close no later than October 25, 1994, conditional on arranging financing by August 25, 1994. They required a loan of $25,000 for the deposit. (Paragraphs 53, 54 and 55)

[100] The trailer park agreement became null and void on August 25, 1994, due to the Hendrys inability to arrange financing. Although the Hendrys did not proceed with the purchase, they did however proceed with the loan (The Keys loan described above). Mr. Thomas acted for them on the transaction. It is bizarre that they went to the vendors on September 3, 1994, did not seek an extension of the deal but kept the loan. They then renegotiated the partnership agreement and obtained the $200,000 Press mortgage (set out above). (Paragraphs 56, 58 and 59)

[101] On November 4, 1994, the Hendrys entered into an exclusive listing agreement for the sale of their Florida property. Contrary to the terms of the partnership amending agreement the Hendrys did not keep the partners advised about the disposition of this property. (Paragraph 66)

[102] On May 12, 1995, the Hendrys listed Bowmanville for sale at the listing price of $699,000. (Paragraph 69)

CREDIBILITY OF MRS. HENDRY

[103] Mrs. Hendry was often evasive in answering questions. Time after time she would not directly answer simple questions, and repeated that "she [they] trusted Mr. Strike" or "they did not think about the matter".

[104] The clearest example of her demeanour was when she was asked when they lost trust in Mr. Strike. This is an important issue because from the date that such trust was lost, the Hendrys would no longer have relied on anything told to them by Mr. Strike and would have taken steps to get out of their financial mess. At discovery she put the date in 1993. At one point at trial she testified it was the fall of 1994 but at another point said it was with their partnership wind-up application in October of 1995. She got caught in these inconsistencies. Mrs. Hendry wanted to lengthen the period of time over which she claims that Mr. Strike owed them duties and to minimize their responsibilities for their own decisions made because they viewed themselves as wealthy, semi-retired property-developers. Mr. Strike may be criticized for infrequent written reporting but the Hendrys are responsible for their own mess. They bought Bowmanville. They bought Florida. They stopped working full time. They did not proceed with the trailer park purchase. They got into the financing transactions. Mr. Strike is not responsible for these steps taken by the Hendry's.

VARIOUS LEGAL ISSUES

ISSUE #1 – *Res Judicata*

[105] The issues that need determination are as follows:

(1) Does the March 10, 1999, order of Mr. Justice Haines bar Mr. Strike from arguing *res judicata* at trial?

(2) Does the September 11, 1997, order of Mr. Justice Ferguson, in the *Partnership Act* application, constitute a bar to the plaintiffs' claims?

[106] In dealing with the issue of whether Mr. Strike is barred from making a *res judicata* argument before me, it is necessary to turn to the Notice of Motion before Mr. Justice Haines which only cited rule 56.01 (1)(d)(e) of the *Rules of Civil Procedure*, as it pertained to the motion for security for costs. The Hendrys submit that it was a motion under rule 21.01 (3) that ended in a final order, which cannot be re-argued at this trial. In my view, it is not clear from the Notice of Motion or from the decision of Mr. Justice Haines that this issue cannot be argued at this trial.

[107] Mr. Justice Haines considered the case law on the issue of *res judicata* and stated the following:

> Certain issues were resolved in the proceedings under the *Partnership Act* and it may be that the plaintiffs could have raised other issues in that proceeding but the whole issue of damages remains unresolved and I do not see, on the material before me, that the plaintiff should be deprived of the opportunity to have their case on damages heard.

[108] In my view, Mr. Justice Haines' intention was that the matter proceed to trial, including the issue of *res judicata*. The Ontario Court of Appeal confirmed that an earlier ruling with respect to *res judicata*, argued unsuccessfully on a summary judgment motion, only represented adjudication that there is a genuine issue for trial and did not preclude the matter from being considered after a full trial. (*See V.K. Mason v. Canadian General* (1998), 42 O.R. (3d) 618)

[109] I do not find that Mr. Strike is estopped from defending the Hendrys' claim on the basis of *res judicata.*

[110] In turning to the order of Mr. Justice Ferguson, the application under the *Partnership Act* was commenced on October 24, 1995, in which the Hendrys sought a dissolution of the partnership; an accounting; the sale of the lands and the right to submit a bid to purchase the lands. The responding partners, including Mr. Strike, issued a counter-application on May 29, 1996, seeking dissolution of the partnership; acquisition of the Hendrys' interest; the sale of the land; an accounting and damages for the Hendrys' breach of the partnership agreement.

[111] An action was commenced against Mr. Strike on April 19, 1996, for negligence and breach of fiduciary duty.

[112] Another action was commenced on August 24, 1998, alleging a conspiracy amongst Messrs. Strike, Snoyer, Frank and Sylvester in addition to repeating the earlier allegations against Mr. Strike. (Note that it was eventually consolidated with the action as described in paragraph 111.)

[113] The common thread in all the proceedings is that the Hendrys were dissatisfied with Mr. Strike arising from the attempted development of the property sold by the Hendrys to the partnership.

[114] Mr. Strike submits that pursuant to the *Partnership Act* the Hendrys' claims had to be, and must be considered to have been dealt with in the final orders in that application. Mr. Strike takes the position that all of the issues, excepting the claim for damages for mental distress, could and should have been raised in the proceedings under the *Partnership Act*. Since there has been a final disposition of that application, he submits that the issues in the subsequent actions are *res judicata*. In that application, Mr. Justice Ferguson ordered that the Hendrys sell their partnership interest to the other partners for the sum of $1.00 and further ordered that no accounting would be held with respect to the partnership. Mr. Strike submits that those orders preclude the Hendrys from relitigating the same issues, or ancillary issues that could have/should have been raised by them at that time. (*Thornton v. Tittley* (1985) 51 O.R. (2d) 315)

[115] Mr. Strike submits that Mr. Justice Ferguson had jurisdiction to require an accounting by Mr. Strike for the allegations made by the Hendrys, if they came to be established (specifically the

allegations of misrepresentation). He submits that, whatever the appropriate standard of care between partners, this was an issued raised in that application and that in making an order for no accounting; Mr. Justice Ferguson made findings with respect to the allegations of negligence and misrepresentations.

[116] I was directed to R.C.I. Banks, "Lindley and Banks on Partnership" 17th ed., (London: Sweet & Maxwell 1995) which provides an analysis of the law prior to the *Partnership Act* of 1890 and further states that:

> The *Partnership Act* did not alter the law in this respect...although it is not entirely clear what degree of misconduct or negligence is required to invoke this principle...something more than mere negligence must normally be shown...and as might be expected, questions of the above type will usually be raised in the course of taking accounts between the partners. (pg. 571)

[117] While this passage supports Mr. Strike's position that applications under *The Partnership Act* may encompass these issues, it is not possible to know what was argued before Mr. Justice Ferguson, and on what facts, if any, he was asked to base his ruling and made his ruling.

[118] It has been held that the doctrine of *res judicata* has "not so wide an application as the broadness of the language might lead one to infer. It is limited to such matters as arise within one cause of action... if there are facts which are common to several causes of action, an inquiry into these facts in one cause of action does not prevent an examination of the same facts where another cause of action is set up, provided that this cause of action is separate and distinct." (See *Hall v Hall* (1958) 15 D.L.R. (2a) 638 (Alta.CA))

[119] In my view, although certain facts regarding the partnership may have been placed before Mr. Justice Ferguson, that alone does not prevent me from considering them in relation to the separate claims now before the court. I do not find that the order of Mr. Justice Ferguson constitutes a bar to the plaintiffs' claim. As a result, the plaintiffs are not precluded from taking this matter to trial on the basis of his order.

ISSUE #2 - CLAUSE IN THE PARTNERSHIP AMENDMENT AGREEMENT OF NOVEMBER 21, 1994

[120] The partnership amendment agreement of November 21, 1994, contains the following provision:

> The Hendrys acknowledged that Ron, in his capacity of managing partner, has complied with all his obligations under the original partnership agreement and they further acknowledge that they have no complaint or claim against Ron in any capacity or the other partners for the conduct with respect to the partnership to this date.

[121] Mr. Strike submits that this clause is a release and therefore a bar to the plaintiffs' action. The Hendrys submit that it is not a release, which is the giving up, discharge or renunciation of all rights and claims against another. The Hendry's rely on the definition of release in Black's

Dictionary which states "the relinquishment, or concession, or giving up of a right, claim, or privilege". I do not see this clause as going quite so far to meet the definition of release.

[122] The Hendrys' submit that they did not have full knowledge and disclosure of the true story of the partnership at the date of the amending agreement. Accordingly, they argue they could not make an informed decision with respect to the acknowledgment and further argue that they executed the amending agreement under economic duress. I note, however, that the Hendrys were represented by counsel and had already drafted a letter to the Law Society of Upper Canada before they signed this agreement, which contained the basic outlines of their claims advanced in this action.

[123] The partnership agreement gave the Hendrys the right to mortgage the property to the sum of $300,000 and the amendment limited it to $200,000. The Hendrys had the option of not signing the amendment agreement and instead taking the other partners to court to enforce the terms of the original agreement.

[124] I agree with Mr. Strike that the reality was that the Hendrys appreciated the argument of their co-partners that the value of the property had so diminished by virtue of the recession that there was a possibility that the equity of the partners would be affected by the Hendry's desire to mortgage the property. They agreed to a resolution of this issue, including this acknowledgement. It was the only way they could get money and stay afloat for a further period of time. I do not find any evidence of duress.

ISSUE #3 – FAILURE TO CALL A PARTY (MR. HENDRY)

[125] Although the Hendry's were present at trial, Mr. Hendry did not testify and no explanation was given for his failure to testify.

[126] Where a party fails to call a witness and an explanation is not provided, the court may but not must draw an adverse inference. (See *Kaytor v. Lion's Driving Range*, (1962), 40 W.W.R. 173 (B.C.S.C.))

[127] "Where a party has an evidentiary burden of establishing an issue, his failure, in certain circumstances, to call necessary evidence to support his case justifies a court in drawing the inference that the evidence of the witness who might have been called would have been unfavourable to him. The non-production of evidence that would naturally have been produced by an honest and therefore fearless claimant permits the inference that its tenor is unfavorable to the party's case." (*Bernardi v. Guardian Royal Insurance Co.* [1979] I.L.R. Ontario Ct. of Appeal)

[128] The failure to call a witness does not itself give rise to an adverse inference. One factor in exercising discretion is whether the evidence has been adduced in an equally reliable way. (See *McMaster v. York* 42 M.P.L.R. (2d) 90 [1997]). Although we have Mrs. Hendry's evidence, of significance would have been Mr. Hendry's evidence of what they were told by Mr. Strike (only he was present at some meetings with Mr. Strike); how any omitted information was material to him; what his tax returns showed; his understanding of timing; and his reasoning of their transactions - Florida, Bowmanville, financing and the trailer park.

[129] Counsel for the Hendrys submits that Mr. Hendry was available and could have been called by the defence. As a result, he argues that it is not open to draw an adverse inference. I am not surprised that no case law was provided supporting this position as I cannot imagine a situation whereby the opposing party would be forced to call the other side as part of their case in order to argue that an adverse inference ought to be drawn. Once that party has testified, the issue would no longer be relevant.

[130] In this case Mr. Hendry, who is supposed to have been the victim of misrepresentations - a recipient of misinformations that he says were both material to him and relied upon by him- did not testify. I agree with Mr. Strike that it is "fatal" to the Hendrys' case that no evidence was offered as to why the matters alleged by them to not have been disclosed were important to their decisions.

[131] There is a further problem with respect to some of Mrs. Hendry's evidence. Mr. Strike cannot be blamed for not anticipating that Mr. Hendry would not testify and therefore cannot be blamed for not objecting each time to Mrs. Hendry's hearsay evidence. I too, believed that Mr. Hendry would be testifying. During the course of Mrs. Hendry's testimony, Mr. Hendry spoke from the courtroom, at which point he was told by his counsel that it was not his time to give his story. I am not suggesting that counsel for the Hendrys misled the court, rather that trial strategies change and for reasons that were not explained to the court, Mr. Hendry did not take the witness stand.

[132] Any such hearsay evidence at this point given by Mrs. Hendry would have been excluded at trial. In my view all hearsay evidence, whether objected to or not, must be given no weight. It also does not satisfy the test of necessity on account of Mr. Hendry's obvious availability, nor is it reliable. This is a case wherein Mr. Strike's liability depends on words uttered by him, how the Hendrys understood those words, and how that understanding was material to their thinking. To keep Mr. Hendry out of the witness box deprived this court of his version of events. The inference I draw is that his evidence would not have helped their case and that he did not take the stand through fear that his evidence would "wreck their case".

ISSUE #4 – The Pleaded Causes of Action

[133] The Hendry's main submission was that Mr. Strike made negligent misrepresentations (also omissions) and thereby breached his fiduciary duty. They argued that Mr. Strike was their lawyer throughout, was the partnership's managing partner and as a result holds a general fiduciary duty. In my view generalized statements were submitted to this court, blurring the pleaded causes of action. It was difficult to analyze them separately. I have the sense that Mrs. Hendry wanted to convince me that Mr. Strike was a "bad guy", without giving much thought as to the evidence required for each pleaded cause of action. In any event, I will break down the pleaded causes of action as was done in the statement of claim, which divided the action into two categories i) negligence, breach of contract and breach of fiduciary duty and ii) fraudulent and negligent misrepresentations.

[134] An essential initial point for determination is the nature of the relationship, as it existed between Mr. Strike and the Hendrys. The Hendrys submitted that a solicitor-client relationship existed and continued at all times. They attempted to paint Mr. Strike as their long-standing, personal lawyer and financial advisor. Mrs. Hendry kept stating that with every transaction in which they were involved, "he was our lawyer, we trusted him".

[135] It is not disputed that Mr. Strike is a lawyer and that he was the managing partner of the partnership. In that capacity, he was paid based on his hourly billing rate as a lawyer. The Hendrys want me to find that, because he is a lawyer, he owes additional duties, which have enhanced his standard of care as managing partner of the partnership. They argued that, as managing partner, he had to disclose all matters and had a duty to warn about Bowmanville and Florida. It is not disputed that he acted as a lawyer for the Hendrys in certain transactions. His involvement in those transactions is, however, not in question. In my view, the Hendrys are trying to stockpile Mr. Strike's legal involvements with them in order to argue that he held a general retainer, which he somehow breached or that, as managing partner, he assumed greater duties. The partnership agreement was clear as to what he had to obtain approval from the partners and I find that he complied with this obligation as managing partner. I do not see his role as managing partner giving rise to a duty to warn about purchasing other properties. In any event, Mr. Strike did not have prior knowledge of these transactions.

[136] I agree with Mr. Strike that the law does not recognize a general retainer. It is essential to define the scope of the retainer when the complaint is that the solicitor failed to warn of a risk. (See *Fasken Campbell Godfrey v. Seven-Up* (1997) 142 D.L.R. (4th). Further, "a law firm does not incur liability for not communicating something within its knowledge and which would be quite advantageous to that client, if that element is outside the agreed retainer." (See *Baranick v. Counsel Trust Co.* (1993) O.J. No. 2186)

[137] I agree with Mr. Strike that it is not enough to say that because he was paid as a lawyer, that in turn makes him the partnership's lawyer, from which additional duties of care flow. Mr. Strike's

[140] In applying the criteria to this case I make the following findings:

(i) Mr. Strike did not have the scope for the exercise of discretion or power. There was nothing he could do on his own which materially would affect the partnership. (Section 5.5 (b) sets out what required notice to the parties and a majority decision of the partners.)

(ii) Mr. Strike could not unilaterally exercise his power or discretion so as to affect the beneficiary's interests. This was a commercial transaction whereby he could not do anything unless authorized by the partners.

(iii) The Hendry's were not vulnerable to or at the mercy of Mr. Strike. The Hendry's had other lawyers acting for them. They had their own lawyer's advice before entering into the agreement. Mr. Strike could not act unilaterally to the detriment of the Hendrys.

[141] Further, I find that Mr. Strike made full, open and complete disclosure and acted in good faith, loyalty and honesty. He conducted the partnership affairs in no way adverse to the Hendrys. No one could have anticipated the recession, the Crombie Commission or the change in provincial government. All the partners unfortunately sustained a significant financial loss.

[142] I find that there are no extended fiduciary obligations as submitted by the Hendrys and no breach of fiduciary duty by Mr. Strike.

[143] No expert evidence was tendered by the Hendrys setting out the expected standard of care. When specifically asked about the effect of not tendering any expert opinion, counsel for the Hendrys directed me back to the Rules of Professional Conduct (which he used in his breach of fiduciary obligation argument) and which he stated represent the standard expected of professionals. He directed me to *Central Trust v. Rafuse* [1986] 2 S.C.R. 147, whereby it is stated that a solicitor is required to perform the professional services which he has undertaken with reasonable care, skill and knowledge. He must have sufficient knowledge of the fundamental issues or principles of law applicable to the undertaken work to be able to ascertain the relevant law. I agree that this is the expected standard of care. This case however involves a commercial land speculation deal and I agree with Mr. Strike that it was essential for me to have evidence of a standard of care expected as a lawyer acting as a managing partner in such a deal. The matter at hand is not commonly within the experience of a lawyer and I am unable to determine whether or not Mr. Strike fell below the standard of care because the standard is neither obvious nor apparent to me. (*Gauvreau v. Paci* O.C.A. [1996] O.J. 2390). I do not believe that relying on the Rules of the Profession is sufficient. As a result, the Hendrys have not established a cause of action framed in negligence on a balance of probabilities/preponderance of the evidence.

ISSUE #6 –MISREPRESENTATION

[144] The Hendrys allege that Mr. Strike made fraudulent or negligent misrepresentations, which induced them to enter into the partnership. They further allege that he fraudulently or negligently made representations or failed to disclose material information to them after they entered into the partnership. They allege that they sustained damages due to the misrepresentations or nondisclosures.

[145] Although the Hendrys in the end did not argue the case in fraud, they did not withdraw that pleading.

[146] It is helpful to review the standard of proof required in any civil case. In *Bernstein and College of Physicians and Surgeons of Ontario*, 15 O.R. (2d) 447, the court stated:

> ...in civil cases there is no precise formula as to the standard of proof required to establish a fact. In all cases, before reaching a conclusion of fact, the tribunal must be reasonably satisfied that the fact occurred, and whether the tribunal is so satisfied will depend on the totality of the circumstances including the nature and consequences of the fact or facts to be proved, the seriousness of an allegation made, and the gravity of the consequences that will flow from a particular finding...
>
> While the standard of proof is the simple standard, which is variously described as proof by preponderance of evidence or on the balance of probabilities, the standard has never been precisely formulated. Nevertheless, before a tribunal can find a fact proved it must be reasonably satisfied that it occurred and a mere mechanical comparison of probabilities independent of the belief in the reality of the factual occurrence of the alleged event is not sufficient. Moreover, the proof must be clear and convincing and based on cogent evidence.

[147] When dealing with allegations of fraud it is even more essential that the proof must be clear, convincing and based on cogent evidence. In this case the Hendry's have not adduced such evidence. In any event, Mr. Strike did not acquire their property and in fact, had he been involved in a scheme to swindle the Hendrys of their property, it would have involved the other partners, against whom the Hendrys dropped their action and at the start of this trial withdrew the allegations of conspiracy. To use counsel for Mr. Strike's words, "there was not one scrap of evidence introduced by the plaintiffs that could remotely establish fraud on the part of the defendant". I agree.

[148] The elements of an action for negligent misrepresentation (also nondisclosure) are set out by the Supreme Court of Canada in *Queen v. Cognos Inc.*, (1993) 99 D.L.R. (4th) 626 and require:

(i) A duty of care based on a "special relationship" between the representor and the representee;
(ii) The representation in question must be untrue, inaccurate or misleading;
(iii) The representor must have acted negligently in making said representation;
(iv) The representee must have relied in a reasonable manner on said negligent misrepresentation; and
(v) The reliance must have been detrimental to the representee, in the sense that damages resulted.

[149] Turning to the misrepresentations allegedly made to induce the Hendry's to enter into the partnership, the Hendry's allege that Mr. Strike promised a time frame of when the partnership would turn a profit and further that he guaranteed success. My findings on this issue have been set out above. The reality is that in 1985, Mr. Hendry acquired the property for $135,000. In 1989 the Hendrys were paid $700,000 for the property (netting $565,000) and held a further 50% interest in its development plan. No misrepresentation was required to induce them to enter into the

partnership. They were paid a handsome amount of money upfront and had a chance to make money from their partnership interest.

[150] Besides proving that the representations were made (which I do not find), the Hendrys must prove that their reliance was reasonable. The evidence clearly showed that they knew at all times that the venture was speculative, and as a result cannot establish reasonable reliance upon Mr. Strike.

[151] Turning to the allegations that Mr. Strike negligently made representations or failed to disclose material information after they entered into the agreement, my findings are set out above. I also agree with Mr. Strike that, in considering these allegations, it is essential that the Avco mortgage, the root cause of the Hendrys' financial difficulties, was taken out in August of 1990, after buying Bowmanville. Nothing Mr. Strike said or did not say is in any way related to the Hendrys' decision to borrow this money. They increased their debt by $200,000 in 1990 and the carrying costs were extremely high. This was only one year after the start of the partnership. I accept Mr. Gowdie's evidence as to the unforeseen collapse in the real estate market beginning around June of 1990, eventually leading to a total collapse. Another helpful piece of evidence as to value is that by April of 1992, Mr. Niklaus thought his property was worth $10,000 to $15,000 per acre, a drastic decline from its value in 1989 of $30,000 per acre. The Hendrys knew this information and they too were victims of the market decline- nothing at all to do with Mr. Strike.

[152] A failure to disclose knowledge can only constitute a misrepresentation if there is a duty on a party to give the information. Although Mr. Strike was the partnership's general manager, it was obviously contemplated that he would conduct the partnership business without the need for consultation with the partners on every aspect of the partnership. I agree that the allegations of specific materials not disclosed in paragraph 40 of the statement of claim generally relate to routine partnership matters, which did not require reporting to the other partners. (See *Scotsburn Cooperative Services Ltd. v. Goodwin Ltd.*, [1985] 1 S.C.R. 54)

[153] Most importantly with respect to this cause of action, the Hendrys did not offer any evidence as to why the matters alleged by them to not have been disclosed were important to their decisions. The Hendrys must establish that any non-disclosures were material to them and that there was reasonable reliance. Mrs. Hendry did not explain this, and Mr. Hendry's failure to testify is of great significance. They have not met their required onus of proof with the allegations of misrepresentation.

[154] It is also a key fact that the partnership report set out that a S.S.A. designation did not guarantee success. Mrs. Hendry's evidence on not understanding the significance of this statement is just nonsense. If Mr. Hendry had testified, it is possible that he might have confirmed that he understood that the project was always subject to uncertainty and that the development concept might not be approved. If so, any alleged failure of Mr. Strike to communicate information to the Hendrys could not possibly be material because all their decisions would then have been undertaken with the knowledge that the development concept might not proceed.

[155] The Hendrys have not made out a case in fraudulent or negligent misrepresentation.

DAMAGES

[156] The court must assess damages regardless of any finding on liability.

[157] The Hendrys may recover damages caused by Mr. Strike's wrong. The Hendrys bear the onus of proof of this causal connection. The test remains the "but for" test – that their losses would not have occurred but for Mr. Strike's breach of duty. The Hendrys must establish this on a balance of probabilities – that it is more probable than not that Mr. Strike's breach of duty caused the loss.

[158] In addition to proving that Mr. Strike caused the loss, which the Hendrys have not established, the Hendrys must establish the extent or quantum of the loss.

[159] As a contract case, the damages are measured by the economic benefit to the Hendrys had the contract not been breached. The Hendrys must prove not only what they directly lost as a result of the breach but also what benefits might have been obtained had Mr. Strike not breached. This involves the construction of hypothetical scenarios about what would have happened, but for the breach. As a case in tort, damages are again assessed by determining what would have happened but for the tort. Specifically, with respect to the fraudulent and negligent misrepresentations, if a misrepresentation can be found, the courts typically award to the plaintiff the entire loss suffered on a transaction entered into by the plaintiff as a result of the misrepresentation. In this case, the purpose of these damages would be to place the Hendrys in the position they would have been in had they not entered into the losing transaction. Sepcifically, they would be put back to the position of owning the property in full before the partnership, and in that case would not have received the $700,000. Even if I had found that Mr. Strike had made misrepresentations, I only heard Mrs. Hendry's sweeping statements about the effect – no proof of such damages was presented. The Hendrys have not proven damages on a reasonable preponderance of credible evidence.

[160] All that the Hendrys have said about damages is that although they received $700,000 and a 50% partnership interest, they lost the opportunity to make a profit. Mrs. Hendry unsuccessfully tried to link their damages to the "mysterious" Babovic offer, which she eventually agreed was no real offer because it was accompanied with conditions. She had no other evidence of damages. Mrs. Hendry also unsuccessfully tried to link the Bowmanville purchase and it's financing to Mr. Strike as well as the Florida purchase. As set out above there is no evidence of any causal connection with these properties and therefore no damages flow. There was also a submission that Mr. Strike had a duty to advise against the Press mortgage. If however he had provided such advice they would have lost the property in that event. The bottom line is that the Hendry's adduced no evidence as to how they were misled or how they might have acted differently. As a result, they have not shown how they have been aggrieved. The purpose of such damages are to put the aggrieved party back in the position where they would have been if the duty had not been breached or the representation made. I am unable to value any such damages without any such evidence having been led.

[161] The Hendrys' also seek damages for mental distress, as compensation for their vexation, anxiety and distress. They submit that these damages were the direct and foreseeable consequence of Mr. Strike's actions/omissions.

[162] Mr. Strike submits that generally, such damages are not awarded in a commercial setting as a certain amount of distress, rage and frustration are expected to occur and be endured with a degree of fortitude. In *Barbour v. G.H. Heating and Air Conditioning* [(1981), 15 C.C.L.T. 168. High Court of Justice] the court stated that not every breach of contract that results in mental distress (even if foreseeable) entitles the plaintiff for damages for such distress. It is only in the proper case that such can be recovered in contract when "the defendant had agreed specifically or by implication to provide the plaintiff with certain mental, social or emotional benefits or satisfaction and the

defendant failed to fulfill its promise in that regard. It can further be said that as a general rule damages for mental distress have only been awarded in contracts involving social, family or personal relationships as opposed to contracts involving commercial relationships." In my view, this clearly is a commercial relationship not involving social, family or personal relationships and the Hendrys, as a result, are not entitled to such damages.

[163] Mr. Hendry did not testify, and we only heard his wife's evidence as to the particulars of his claim, specifically that he was depressed and contemplated suicide. No medical evidence was tendered. I would have thought that if Mr. Hendry wanted to argue entitlement to such damages his counsel would have put him in the box. Mr. Hendry is not entitled to these damages, which in my view are not even possible to assess.

[164] Mrs. Hendry testified that her panic attacks, problems with sleep and depression pre-date the creation of the partnership. She was unclear as to whether they commenced again in 1994 and 1995. Her medical records note problems with her psychological health dating back to approximately 1990. Mrs. Hendry has not adduced evidence from any treating doctor or expert that her health difficulties were caused by the struggle with partnership matters. While in some cases it is appropriate to infer causation, it is not appropriate in this case where there is a pre-existing history, from which it could equally be inferred that her health issues are a continuation of some existing problem. Mrs. Hendry has not proven that such damages were caused by any action relating to Mr. Strike. Although difficult to quantity, if proven, such damages would have been assessed at $25,000.

[165] The Hendrys' also claim punitive damages, which they submit are awarded to punish and deter conduct of a fiduciary and for the court to express its disapproval of the defendants conduct. In *Norberg v. Wynrib* [1992] 2 S.C.R. 224 the court stated that "Where the actions of the fiduciary are purposefully repugnant to the beneficiary's best interests, punitive damages are a logical award to be made by the Court. This award will be particularly applicable where the impugned activity is motivated by the fiduciary's self-interest."

[166] For reasons set out above I did not find that there has been any breach of fiduciary duty. There is no reason in awarding punitive damages. Mr. Strike had invested his own money as well as that of family and friends. It makes no sense that he was not acting with the best of intentions. Even if I had found a breach of fiduciary duty, I am not convinced that the conduct was of such a nature as to merit punitive damages.

CONCLUSION

[167] The Hendrys' claims are dismissed.

[168] If the parties are unable to agree on costs, they may speak to me.

J. E. Ferguson J.

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