Court File No. 756/99

SUPERIOR COURT OF JUSTICE

B E T W E E N :

DONALD WAYNE SMITH

Plaintiff

- and -

CENTURY 21 TITEN REALTY INC
JOHN D'ANDREA
DON MACKAY
NORMAN PARENT
GEORGE, MURRAY & SHIPLEY

Defendants

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R E A S O N S F O R J U D G M E N T

BEFORE THE HONOURABLE JUSTICE ABBEY
on March 23, 2005, at SARNIA, Ontario

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APPEARANCES:

E. Corrigan	Counsel for W. Smith
J. D'Andrea	Agent for Century 21 Titan Realty Inc.
J. D'Andrea	Self-represented
D. MacKay	Self-represented
L. Curran	Counsel for N. Parent
J. Leber	Counsel for George, Murray & Shipley

WEDNESDAY, MARCH 23, 2005

R E A S O N S F O R J U D G M E N T

ABBEY, J. (Orally):

Between, May 1993 and May 1994, the plaintiff became involved in a number of real estate transactions. Those transactions are the focus of this action.

At the relevant times, the defendant McKay was a real estate agent with the defendant Century 21. The defendant D'Andrea was a real estate broker and the principle owner of Century 21. The defendant Parent was a vendor to the plaintiff in one of the subject transactions and a purchaser in another. The defendant George, Murray & Shipley, was a law firm, which represented the plaintiff in the closing of the transactions.

In the action the plaintiff has claimed damages generally founded upon allegations of negligence, breach of contract, and breach of fiduciary duty. The action includes a claim for punitive or exemplary damages against all defendants.

The real estate transactions, with which the actions is primarily concerned are three. On February 25, 1994, the plaintiff sold to the defendant Parent, 1284 Cathcart Boulevard

(Cathcart), and purchased from Parent, 20 Vimy Crescent (20 Vimy). On May 26th, 1994, the plaintiff purchased from the estate of James McPherson the condominium unit located at 155 Front Street (Front Street).

A significant underpinning of the plaintiff's case against all defendants relates to the mental health of the plaintiff at the time of these transactions.

The central factual issue in relation to each defendant has to do with whether the plaintiff's mental condition was known or ought to have been known. The position of the plaintiff is that each of the defendants conducted themselves negligently or in breach of their fiduciary obligation, either knowing of the plaintiff's condition or failing to make enquiry about his condition.

Apart from that core issue, even after 16 days of trial evidence, and the presentation of both oral and written submissions by counsel for the plaintiff, I have found it difficult to identify the issues which the plaintiff presents. Some not previously identified have appeared during the trial. Others have been raised in argument without any evidentiary foundation. While, I

intend as best I can to address these issues, I begin with the central issue.

The plaintiff's mental health problems began in the late 1980's. He was then a shop teacher at a local high school. He was politically active with the Ontario Secondary School Teachers Federation. At about that time, a fellow teacher launched a human rights complaint against the school, other teachers and representatives of the Teachers Federation. According to the plaintiff he found himself caught in the middle, in that there existed a perception that the plaintiff may have encouraged the making of the human rights complaint.

Beginning in approximately 1998, and continuing throughout the relevant period until approximately May 1994, the plaintiff received medical care from his family physician, Dr. Cynthia Arnold and from psychiatrists associated with the St. Thomas Psychiatric Hospital. From time to time during this period, the plaintiff was admitted to psychiatric facilities for brief periods.

The evidence of the medical history of the plaintiff must be gathered from a number of medical reports, authored by some of the psychiatrists who had contact with the plaintiff,

the testimony of Dr. Cernovsky, a psychologist who had some dealings with the plaintiff between, 1992 and 1995 on a non-professional basis, and the oral testimony of Dr. Arnold.

I found the testimony of Dr. Arnold to be a useful summary of the plaintiff's mental condition during the relevant time. She was qualified to provide opinion evidence concerning the condition of the plaintiff, including his mental health and competency.

It is clear that throughout Dr. Arnold's dealings with the plaintiff, she considered it to be her responsibility to continue to assess the plaintiff's condition for signs of mental health issues and in particular for signs of incapacity. In that respect, she cast a broad net. At times, when she was concerned about the plaintiff's mental capacity, she referred the plaintiff for diagnosis and follow-up. According to Dr. Arnold, the plaintiff's problems began in the late 1980's when in consultation with a psychiatrist, Dr. Scholz, he withdrew from anti-psychotic medication. After that, Dr. Arnold noted that the plaintiff began to show signs of paranoia, particularly in relation to issues connected with his employment as a teacher.

By April 1999, however, the plaintiff had returned to anti-psychotic medication and according to Dr. Arnold his condition then improved. In consultation with Dr. Scholz, it was agreed that the plaintiff would take a temporary absence from work, and he did so in approximately June 1989. Dr. Arnold noted in a visit with the plaintiff May 26th, 1989, that he seemed to be in control of his anger and doing well.

The plaintiff continued to visit Dr. Arnold, and in the fall of 1991, she began to notice a lack of control in the plaintiff and a lessening of his ability to cope with stress at work. She spoke with Dr. Scholz about the possibility of long-term disability. Dr. Scholz however, according to Dr. Arnold, felt that the plaintiff was a candidate to return to work.

Dr. Arnold specifically recalled a meeting with the plaintiff in her office in November 1991, when she said the plaintiff spoke about what she assessed as a conspiracy against him related to the school. She questioned then the mental competence of the plaintiff, and she arranged for a hospital admission.

According to the testimony of Dr. Arnold, when she saw the plaintiff approximately six months

later in July 1992, the plaintiff was still angry at the world. By then he was seeing, as an outpatient, a psychiatrist, Dr. Smith, at the St. Thomas Psychiatric Facility.

The next occasion when Dr. Arnold had concern in respect to the competency of the plaintiff, was at an office visit in October 1992. Again, the plaintiff spoke to her about people that he had thought were after him. Dr. Arnold then contacted a Dr. White, a psychiatrist with the St. Thomas facility who by then had taken over the plaintiff's outpatient care.

When Dr. Arnold saw the plaintiff again in January 1993, the plaintiff she said was in generally the same condition as he had been in October. After that January 1993 visit however, it was the testimony of Dr. Arnold that the plaintiff's condition settled. From that time on, although the plaintiff continued to see her in office visits, those visits concerned only complaints about the plaintiff's physical condition. January 1993, therefore, was the last time according to Dr. Arnold, that she had any concerns about the plaintiff's competence or his capacity to make decisions.

The medical reports, which have been marked as exhibits, are reports from Dr. Maureen Pennington

dated November 1999, Dr. Sadek dated March 1994, January 1998, January 2004 and April 2004, and a report of Dr. Swamy dated May 2004.

In his report of May 11, 2004, Dr. Swamy as requested, commented upon the financial competence of the plaintiff at the time of the plaintiff's hospital admission in January 1993. According to Dr. Swamy's report, although at that time the plaintiff lacked insight and evidenced poor judgment, he was financially competent in respect to his sense of money and his knowledge and understanding of his real estate.

The plaintiff was once again admitted to care between February 27 and March 12, 1993. It was Dr. Swamy's assessment at that time that the plaintiff had become increasingly more paranoid and delusional, and required immediate treatment. Nevertheless, according to the report of Dr. Swamy, the plaintiff was not viewed as financially incompetent. He was discharged for follow-up by another psychiatrist, Dr. Smith.

In the concluding paragraph of his May 2004 report, Dr. Swamy wrote in reference to the admission in February 1994:

> "I did not feel in any way that this patient was financially incompetent nor

was he certified in terms of his mental competence to consent to treatment."

Dr. Satek first saw the plaintiff as an outpatient in March 2, 1994. According to his report of January 22, 1998, at that time the plaintiff was diagnosed as having psychotic illness and was stabilized on medication. In his report of April 5, 2004, Dr. Satek made the point of writing that since he saw the plaintiff first on March 2, 1994, he was not in a position to comment upon the psychiatric condition and mental status of the plaintiff at any earlier time. He did write however, that although he diagnosed the plaintiff as likely suffering from chronic paranoid schizophrenia, that disorder does not per say, render a patient legally or functionally incompetent.

As an aside, I note the comment in the text medical disability in the Law in Canada, second edition by Gerald B. Robinson at page 197.

"Finally it should be noted that the mere fact one party is suffering from insane delusions at the date of the contract, will not necessary sustain the defense of mentally incapacity. Even where the delusion is shown to have been related to the subject matter of the transaction, it

must still be determined whether it prevented the party from understanding the nature and effect of the contract."

According to Dr. Sadek's report, therefore, the plaintiff's mental status and vulnerability in respect of financial decisions is required to be assessed separately from the diagnosis.

As far as I can tell, from the medical records, Dr. Pennington saw the plaintiff briefly in February 1994. In her report of November 22, 1999, however, she referred to various historical records obtained from the St. Thomas Psychiatric Hospital. Dr. Pennington noted that although the records documented a history of alcohol and cannabis misuse, together with depressive symptomatology, the plaintiff was judged by Dr. Swamy in January 1993, while lacking in insight and judgment, to be financially competent. She further noted that according to the notes of Dr. Smith, by June 1993, the plaintiff was getting better with medication, and by July 1993 was judged to be well to the degree that plans were being made for his return to work.

Dr. Pennington further noted that although, in the fall of 1993, the plaintiff complained about a decrease in his mental acuity, by December 1993, Dr. Smith noted improvement and felt that

the plaintiff was ready to begin the process of rehabilitation leading to a return to work.

In her report, Dr. Pennington recalled meeting with the plaintiff February 3, 1994, when she said the plaintiff was appropriately behaved, attended without difficulty to their conversation and denied paranoid thoughts although complaining of some slowing in his mental processes.

In the comments concluding her report of November 19, 1999, Dr. Pennington wrote:

> "From the notes reviewed, and from my recollection of my brief meeting with Mr. Smith, it seems that Mr. Smith was free of obvious psychotic symptoms during the winter of 1993 and 1994. However, he was complaining of a decrease in his mental acuity and then slowing of his mental processes. No objective cognitive testing was performed, so it is difficult to estimate the extent to which Mr. Smith was suffering."

In a progress note written by Dr. Pennington in early February 1994, she noted that at that time the plaintiff was doing quite well with recovery, although continuing to need considerable support around reintegration into his formal lifestyle.

Dr. Cernovsky, a psychologist between 1992 and 1995, a number of times, spoke to the plaintiff informally in the hallways of the St. Thomas Psychiatric facility. The meetings were social and not professional. Dr. Cernovsky was not qualified to express expert opinion evidence. This witness recalled that, from time to time, in his casual conversations with the plaintiff, the plaintiff spoke to him about a mafia plot and going to Central or South America as an escape. At times, the plaintiff, he said, referred to his real estate transactions, but Dr. Cernovsky found the explanations difficult to follow.

All of this medical evidence suggests to me a particular history.

The plaintiff began to show signs of paranoia in the late 1980's, connected with his withdrawal from anti-psychotic medication. By mid 1989, however, he had returned to the medication and his condition improved. His condition again deteriorated in the fall of 1991 and from time to time, from then until January 1993, he continued to evidence symptoms, which caused Dr. Arnold to refer him for psychiatric assessment. From that point on, while he continued treatment, medication and even short hospital admissions, his mental condition was episodic. For example, during the winter of 1993 and 1994, he was free

of any apparent psychotic symptoms. The diagnosis of chronic paranoid schizophrenia was made in March 1994.

There are other noteworthy observations, which are apparent from this medical history.

Dr. Arnold, in her dealings with the plaintiff, was looking for signs of incapacity. After January 1993, she had no concern about the plaintiff's competence or capacity to make decisions, despite the fact that she continued to see the plaintiff for physical complaints.

The plaintiff was admitted to hospital for short stays in January and February 1993, and again in April 1995.

Section 54 of the Mental Health Act, requires that on a patient's admission to a psychiatric facility, the patient is to be examined to determine capacity to manage property.

Apart from the fact that the plaintiff was not judged to be lacking incapacity to manage property, there is reference in some of the psychiatric reports to the plaintiff having been judged competent. For example, Dr. Swamy's assessment of the plaintiff, at the time of his admission in late February 1993, was that he did

not view the plaintiff as financially incompetent.

There were times, even after 1991, when the plaintiff was considered by doctors and other professionals to be a candidate for possible return to work. According to Dr. Arnold, Dr. Scholz was of that view in the fall of 1991. In February 1994, a vocational rehabilitation consultant wrote to the superintendent of the Lambton County Board of Education, concerning the prospect of the plaintiff returning to employment.

Certainly, there is evidence, including evidence from the plaintiff himself, that, at times, he behaved strangely and evidenced paranoia. He spoke about mafia plots and people who were out to get him. In November 1992, he went to Costa Rica believing that his life was threatened and that he was being followed because of the circumstances connected with the human rights case.

In February 1994, he suddenly went to South America to search for a prospective wife.

Still, there is other evidence suggesting that, at times, the plaintiff evidenced relative stability in his mental condition.

Judy Reid was married to the plaintiff from approximately 1985. She and the plaintiff separated for the first time in November 1998. Thereafter, at times they reconciled and lived together, while at times they remained separate. She described the plaintiff, at times, as acting strangely, while at other times, sometimes for months at a time, appearing to be stable.

Kenneth Kirkman rented a room from the plaintiff at Cathcart from August 1993, until the spring of 1994. He said simply that the plaintiff appeared to be lethargic, meaning not motivated to do things, that he smoked a great deal and that occasionally he drank to excess. The plaintiff's condition he said, however, did not alarm him.

When this evidence is combined with the medical evidence, the irresistible conclusion, in my opinion, is that despite the fact that the plaintiff was under psychiatric care, despite the diagnoses that were made and despite the fact that at times he evidenced, psychiatric symptoms such as paranoia, he was, at other times controlled, stable, and without any outward sign of incapacity in respect to the making of decisions or dealing with his financial affairs.

With this background, I now move more specifically to the issue as to whether the

defendants knew or ought to have known that the plaintiff was lacking in his capacity to understand the subject real estate transactions. Edward Litrenta became a partner in the defendant firm in June 1990. He represented the plaintiff on the sale of Cathcart, the purchase of 20 Vimy and the purchase of Front Street. Mr. Litrenta's practice has always been in the areas of corporate, commercial and real estate. In 1988, Litrenta had acted for the plaintiff in the purchase of another property on Lakeshore Road in Sarnia. In 1990, he acted for the plaintiff at the time of the purchase of Cathcart. In 1992, he gave advice to the plaintiff in respect to a possible business venture concerning the sale of tobacco. On that occasion, he saw the plaintiff initially for about 15 minutes and his total time involved in the matter, including research and an opinion letter, was approximately one and one half hours.

Following the separation of the plaintiff and his wife in November 1998, a separation agreement was prepared and executed January 31, 1989. The plaintiff reconciled in December 1989 and thereafter further agreements were entered into between the plaintiff and his wife, generally pertaining to their respective interest in real estate.

While there is evidence that Litrenta had some involvement with certain of these agreements, his involvement was always in relation to property issues, including the purchase or sale of property, the refinancing of property or the adjustment of the interests of the plaintiff and his wife in property.

There is no issue in this case concerning the conduct of the defendant firm in its dealings with the plaintiff in connection with these various agreements.

It was suggested, however, that Litrenta, as a result of his peripheral involvement with certain of these agreements, received information concerning the mental condition of the plaintiff.

It was the testimony of Litrenta that over the years before he received, in December 1993, the first of the subject agreements of purchase in sale, he obtained no information whatever concerning the mental condition of the plaintiff. Still, it has been suggested that Litrenta received information concerning the health of the plaintiff from his partner, Darcy Bell.

Mr. Bell was a commercial and real estate lawyer with the defendant firm. Following the separation of the plaintiff and his wife in

November 1998, they reconciled in December 1989 and, following that reconciliation, agreements were prepared generally pertaining to their respective interests in real property, including Cathcart. One of those agreements was dated October 15, 1990. The purpose of the agreement was to adjust the interest of the plaintiff's wife in the ownership of Cathcart. Mr. Bell prepared the agreement and represented the interest of the plaintiff's wife.

It was the testimony of Bell, that he received no information from the plaintiff's wife concerning the mental health of the plaintiff. Indeed, there is nothing in the testimony of the plaintiff's wife herself to suggest that she provided to Bell any information of that kind.

There is no evidentiary foundation in any of this evidence for the position that Litrenta received information concerning the mental health of the plaintiff before December 1993.

The fact that Litrenta, in February 1992, received a letter from a solicitor then representing the plaintiff's wife which contained reference to the possibility of future hospitalization of the plaintiff, certainly does not dissuade me from that conclusion.

It was, on the other hand, the testimony of the plaintiff that he shared with Litrenta the full detail of his mental and emotional problems, his issues with his wife, and with the Board of Education, and the diagnoses which he received. Indeed, he said that Litrenta received a microcosm of his life.

Having regard to the infrequent and relatively brief points of contact between Litrenta and the plaintiff, I do not accept this testimony of the plaintiff as reasonable. I prefer to accept the testimony of Litrenta that the plaintiff had not spoken to him about his emotional or mental issues. After all, after January 1993, the plaintiff did not complain even to his family doctor about symptoms related to mental incapacity.

I now come to Litrenta's conducts specifically in relation to the real estate transactions.

Of course, the relationship between Litrenta and the plaintiff was a fiduciary one.

By letter, from Century 21, December 21, 1993, Litrenta received the completed agreement of purchase in sale in respect to Vimy with advice that the plaintiff, as purchaser, had requested that he act. The vendor, Parent, had chosen to

represent him in connection with the transaction, Mr. Fazio, also a partner in the defendant firm.

By letter dated January 31, 1994, also from Century 21, Litrenta received the completed agreement of purchase and sale for Cathcart with advice that the plaintiff had requested that he represent his interest as vendor. Once again, Fazio was to represent the interest of the purchaser, Parent.

Eventually, Litrenta received verification that the conditions to the offers had been removed, and then prepared the transactions for closing, including conducting the requisite searches and preparing the necessary documentation.

The closing date for each of the Cathcart and 20 Vimy transactions was February 25, 1994.

Litrenta's office attempted to contact the plaintiff to arrange a meeting before closing. The plaintiff could not be reached. We know from the plaintiff's evidence that he went to Colombia, South America to find a wife. Finally, it was arranged that the plaintiff attend at Litrenta's office on the day of closing, February 25, 1994.

It was the testimony of Litrenta that he reviewed with the plaintiff, before signing, each of the documents pertaining to both the sale and the purchase and that, in respect to each transaction, the first document which he reviewed was an acknowledgement to be signed by the plaintiff that he had been informed that Fazio, in the same firm, represented the other party to the transaction and that he consented that Litrenta and Fazio continue to represent the interest of the two parties. After explanation, the plaintiff signed the acknowledgements.

It was Litrenta's testimony that he was with the plaintiff between 45 and 60 minutes going over the documentation for both transactions.

In the course of going through the statement of adjustments for the purchase of 20 Vimy, the plaintiff spotted the fact that one of the rental units was vacant whereas, according to the plaintiff, it had been represented by Parent as occupied with rental income.
This issue was resolved when, after discussion between Litrenta and Fazio, Fazio, with the instruction of Parent, proposed that the plaintiff be allowed to stay in Cathcart an additional two months after closing at a reduced rent charged by Parent who, in turn, would find a tenant for the vacant unit. This proposal was

discussed with the plaintiff and he accepted it. It became the subject of an undertaking signed by Parent.

The fact that the plaintiff raised the issue concerning the vacant unit, engaged in rational discussion of the subject and was able to consider and accept the accommodation proposed by Parent, would suggest to Litrenta that the plaintiff had the capacity to understand the transaction which was the subject of the meeting and the documents.

It was the testimony of Litrenta that, before this meeting in February 1994, he had no contact with the plaintiff since advising him on the business matter in 1992. It was further his testimony that in the meeting in February 1994, he observed nothing unusual on the part of the plaintiff who, he said, in fact, particularly in respect to the issue concerning the vacant apartment, appeared aware and with a complete understanding.

Litrenta heard no complaint from the plaintiff in respect to his handling of the Cathcart and 20 Vimy transactions until receiving the statement of claim in 1999.

In fact, in April 1994, Litrenta received the completed agreement of purchase and sale for the purchase by the plaintiff of Front Street, with a request that he represent the plaintiff. Wayne Shipley, also a partner in the defendant firm was to act for the vendor.

Litrenta completed the purchase of Front Street in the usual manner. In anticipation of the closing of the transaction on May 31, 1994, he met with the plaintiff May 26th. Once again, he reviewed each of the closing documents with the plaintiff before signing and once again the plaintiff signed an acknowledgement as he had in respect to the Cathcart and 20 Vimy transactions.

It was the testimony of Litrenta that in his meeting with the plaintiff for approximately 30 minutes he observed nothing out of the ordinary in respect to the plaintiff's condition. Once again, Litrenta received no complaint regarding the Front Street transaction until served with the statement of claim.

On May 15, 1995 the plaintiff signed an agreement to sell Vimy at a price of $155,000 to close June 1, 1995. Once again, on the face of the agreement, the plaintiff selected Litrenta to represent his interest as vendor. The purchaser, Peter Epps, selected as his solicitor, John

Ruffilli, at the time, also a partner with the defendant firm.

In this agreement, a warranty was given by the plaintiff as vendor that the property met fire codes. As the necessary inspection had not taken place by closing, a direction was given on closing signed by the plaintiff, to hold back $500 from the sale proceeds pending the inspection, to be used to remedy any deficiencies.

After closing and following the inspection, as deficiencies were found, an agreement was reached that the purchaser would retain the $500 sum and, additionally, a refrigerator and stove which had been left in the property by the plaintiff.

Litrenta discussed with the plaintiff this issue together with the documents which were required to be signed and received the plaintiff's agreement. Once again, the plaintiff's participation in the resolution of this issue in appropriate fashion according to Litrenta, suggested capacity and not incapacity.

The sale of Vimy took place in the usual manner. Litrenta met with the plaintiff before closing to review the closing documents and, once again, the

plaintiff executed an acknowledgement as he had for each of the previous transactions.

Again, it was the testimony of Litrenta that throughout his dealings with the plaintiff in connection with the sale of Vimy he had no concern about the ability of the plaintiff to understand and once again he heard no complaint from the plaintiff until he received the statement of claim.

There is nothing in this evidence which I have reviewed to suggest that Litrenta was aware or that he ought to have been aware of any incapacity on the part of the plaintiff in understanding the nature and effect of these real estate transactions or any of the documentation connected with them.

Counsel for the defendant George, Murray, Shipley has provided, as a useful summary of the law pertaining to contractual capacity, excerpts from the text to which I earlier referred, Mental Disability and The Law in Canada. At page 194 of the text, it is pointed out that mental capacity in respect to a document is relative to the particular transaction to which the document pertains and can be conveniently described as the capacity to understand the nature of the transaction when it is explained. The relevant

issue is not whether the person in fact understood, but whether the person was capable of understanding. In summarizing the present position of The Law in Canada, the author at page 201 concluded as follows:

> "A contract is voidable if one party is mentally incapable of understanding its nature and effect, and either the incapacity is known to the other party or the contract is unfair."

Section 2(1) of the Substitute Decisions Act, 1992 creates a presumption that a person is capable of entering into a contract. The section reads:

> "A person who is 18 years of age or more is presumed to be capable of entering into a contract."

Subsection three of that section, provides:

> "A person is entitled to rely upon the presumption of capacity with respect to another person, unless he or she has reasonable grounds to believe that the other person is incapable of entering into the contract, or of giving or refusing consent as the case may be."

Justice Quinn in Koch (Re), (1997), 33 O.R. (3d) page 485, discussed the meaning and significance of this presumption. In summarizing his findings and at page 513, in part, he said:

> "There is a distinction to be drawn between the appellant failing to understand and appreciate risks and consequences, and being able to understand and appreciate risks and consequences. It is only the latter that can lead to a finding of incapacity."

And further:

> "Compelling evidence is required to override presumption of capacity found in Section 2(2) of the S.D.A., and Section 4(1) of the H.C.C.A. The nature and degree of the alleged incapacity must be demonstrated to be sufficient to warrant depriving the appellant of her right to live as she chooses. Not withstanding the presence of some degree of impairment, the question to be asked is whether the appellant had retained sufficient capacity to satisfy the statutes."

Justice Quinn revisited the same subject in Children's Aid Society of Niagara Region v. W.D.,

(2003) O.J. No. 3244 and, in that case, had reference to his earlier decision.

These statutory provisions, therefore, assist in providing some guidance as to the standard expected of Litrenta in his dealings with the plaintiff.

At the time that Litrenta received the executed agreements of purchase and sale for Cathcart and 20 Vimy, each of the agreements was subject to conditions which had not yet been satisfied.

Nevertheless, there existed no reasonable ground in my opinion, for a belief that the plaintiff was incapable in respect to the transactions. Litrenta was entitled to rely upon the presumption of capacity.

Once the conditions to these agreements were fulfilled, the contracts both were voidable only if the plaintiff were found to be mentally incapable of understanding the nature and effect of the transaction and, additionally, either that incapacity was known to the other party, Parent, or the contract was unfair.

I have not been provided with any expert evidence against which the conduct of Litrenta may be judged.

Nevertheless, it seems quite clear that a reasonably prudent solicitor in the position of Litrenta would not have undertaken a consideration as to whether these transactions were voidable. There was nothing to suggest incapacity on the part of the plaintiff which, if it existed, would be the trigger to a consideration as to whether circumstances otherwise existed, which might render the transaction voidable.

I will have something to say later on the subject of the $175,000 purchase price of 20 Vimy and its fairness.

Counsel for the plaintiff has argued that Litrenta ought not to have represented the plaintiff in any of these transactions because he was in a conflict of interest arising from the fact that his partners acted for the opposite party.

I accept, of course, that the fiduciary relationship between Litrenta and the plaintiff included the obligation to act solely in the best interest of the plaintiff and incorporated a duty of loyalty to the plaintiff.

Marked as an exhibit at the trial was a copy of a portion of the rules of professional conduct of

the Canadian Bar Association in force at the time. The relevant rule provided:

> "The lawyer shall not advise or represent both sides of a dispute and save after adequate disclosure to and with the consent of the clients or perspective clients concerned, shall not act or continue to act in a manner when there is or is likely to be a conflict of interest."

In none of the transactions in which Litrenta represented the plaintiff was there a dispute which would have required Litrenta to withdraw. In each case, the plaintiff signed an acknowledgment as required by the rule in which he confirmed his understanding that the other side of the transaction was also represented by the firm and consented that Litrenta continue to represent his interest. The standard of conduct required by the rule was not breached.

At times, plaintiff's counsel has also presented an argument that Litrenta was in a conflict of interest because, prior to these transactions, another partner in the firm, Bell, had represented the plaintiff's then wife.

As I have said, Bell previously represented the plaintiff's wife in respect to an agreement to adjust her interest in the ownership of Cathcart.

I can understand no basis upon which it can be suggested that Litrenta was in a conflict of interest in representing the plaintiff in any of these real estate transactions because, years before, his partner prepared an agreement between the plaintiff and his wife related to the ownership of real property. These transactions are completely unrelated.

While I am not certain, it may be that counsel for the plaintiff has advanced a position that the defendant law firm had an obligation to advise the plaintiff in respect to the purchase price of 20 Vimy.

In case there is such an issue, it is answered by the judgments of the Ontario Court of Appeal in *Vazoxlade v. Volkenstein* (2000) O.J. No. 2694, and *Wong v. 407527 Ontario Ltd.* (1999) O.J. No. 3377. There is no duty upon a solicitor who is presented with a signed offer to purchase to improve a client's bargain by for example attempting to negotiate a price adjustment.

At times, I believe it has been suggested by counsel for the plaintiff that Litrenta had an

obligation to advise the plaintiff that an increase in his down payment for the purchase price of 20 Vimy would relieve him of the responsibility of paying for C.M.H.C. mortgage insurance.

As will appear in these reasons later, there is no evidentiary foundation for a conclusion that an increase in the down payment would have avoided C.M.H.C. insurance. Apart from that, once again this was a signed agreement of purchase and sale. There is no responsibility on a solicitor to attempt to renegotiate the amount of the down payment.

The plaintiff has alleged in this action negligence, breach of contract, and breach of fiduciary obligations on the part of the defendant law firm.

In my opinion, the evidence does not support any of these allegations.

The obligations of a lawyer arising both in tort and by virtue of the contractual relationship, have been explained in a number of decisions. See for example, *Central Trust Company against Rafuse*, (1986) 2, S.C.R. 147. *Couglin v. Comery*, (1996) O.J. 822 at paragraph 21, and *Victoria & Grey Trust Co. v. Apple*, (1984) 32 RPR, 230.

Madam Justice McKinley, in Victoria and Grey, in part said this:

> "A solicitor's retainer whether it be written or oral, or partly written and partly oral, imposes a twofold duty upon the solicitor: first, to exercise the care and skill of a reasonably competent solicitor in accordance with the standards of the profession, and secondly when the matter for which he has been retained is the carrying out of a contract between his client and another party, to see that the precise terms of that contract for which a solicitor would normally be responsible are carried out in accordance with the terms of the contract, unless he has received instructions to the contrary."

In my opinion, Litrenta in all that he did, carried out his responsibilities carefully and absolutely in accordance with his obligations as a solicitor. There is no basis upon which Litrenta can be found to have behaved negligently or in a manner contrary to his fiduciary obligations.

This action against the defendant law firm is dismissed.

R E C E S S

U P O N R E S U M I N G:

I turn now to the case which has been presented particularly in relation to the defendant MacKay. MacKay was certainly in a fiduciary relationship and continued to be despite the fact that he entered into a listing agreement with Parent when Parent agreed to accept the plaintiff's offer to purchase 20 Vimy.

Before turning to the particular issues relevant to the case against the defendant MacKay, something is required to be said on the subject of the absence of expert evidence.

No expert evidence has been provided to supply a standard of care against which the conduct of the defendant MacKay is to be measured.

While reference has been made to the Code of Ethics of the Canadian Real Estate Association, for the most part, those provisions do not specifically address the conduct which is called into question in this action.

A plaintiff who hopes to establish lack of competency on the part of a professional,

proceeds at his peril without evidence of an established standard.

In the case of the defendant Litrenta, the absence of expert evidence did not prove to be of real significance. In addition to the reference to certain provisions of the code of professional conduct, counsel for the defendant firm provided the statutory references to which I have referred and which provided a context against which to measure the conduct of the defendant Litrenta.

Additionally, in the case of a defendant solicitor, a trial judge, in the determination of the standard of care, may take into account his own experience. See, *Morris v. Jackson*, (1984) O.J. No. 1341, paragraph 110, and, *Milhot v. Savoie*, (2004) NBJ No. 98, a decision of the New Brunswick Court of Appeal.

In some cases the conduct complained about is sufficiently egregious that expert evidence is not required in order to settle upon a standard. In other cases, however, the absence of expert evidence may leave the court without a standard against which to judge the conduct of the defendant and therefore without a basis upon which negligence can be found. See *Walls v. Ross*, (2001) BCJ No. 1641, *Haag et al v. Marshall*, 61 DLR 4th series 37 and, in particular

the judgment of Justice Loch and *Nicholson v. Forster*, (1994) SJ No. 655, a decision of the Saskatchewan Court of Queens Bench, at paragraph 16.

These principles form a backdrop for a consideration of the conduct of MacKay, which has been called into question.

Once again, of course, in looking at the conduct of MacKay I have in mind the evidence which I have already reviewed, pertaining to the mental condition of the plaintiff. I also have in mind the presumption of capacity found in Section 2 of the Substitute Decisions Act.

The plaintiff contacted MacKay in approximately May, 1993. MacKay was an experienced real estate agent with over 20 years in the business.

The plaintiff asked MacKay to assist him in locating a property, which would be a home for him, while also producing rental income. The plaintiff himself testified that he was interested in finding a property, which would provide financial security in the event that he were to lose his long term disability entitlement. He was looking for a property in which he could live, and which also provided rental income. It was the plaintiff therefore,

who defined the purpose for the acquisition of the property.

MacKay's only previous contact with the plaintiff had been years before when he saw the plaintiff briefly at an open house, at the time that the plaintiff and his then wife were in the process of selling a jointly owned property on Indian Road. That property was a multi-unit rental building, leaving MacKay with the impression that the plaintiff, who was also living in the property at the time, had experience with the management of a small residential multi-unit dwelling.

The plaintiff, over the years, had owned various properties. He originally owned a home in St. Thomas with his first wife. After that he purchased a home on Bedford Crescent in Sarnia, which he owned for about five years before purchasing the Indian Road six-plex. He sold Indian Road at a profit, and purchased a property on Lakeshore Road in Sarnia, which he also sold approximately two years later again for a profit. Following that, he purchased a property on Grandview, which he sold in less than one year. After Grandview, came the purchase of Cathcart.

On May 13th, 1993, the plaintiff listed Cathcart with MacKay at a listing price of $127,900.

At about the same time MacKay introduced the plaintiff to a 12 unit property on Alice Street. The plaintiff made a conditional offer. He then made the decision not to proceed with that transaction and the agreement was allowed to lapse through non-fulfillment of the conditions. The plaintiff requested that MacKay investigate another property, a duplex on Penrose Street. On October 26, 1993, the plaintiff offered to purchase that property at a price of $95,000, also subject to conditions. The offer was accepted. Again, the plaintiff decided against the property and on December 16, 1993, a mutual release was signed.

Meanwhile, Cathcart not having sold, on October 26, 1993, the plaintiff agreed in writing on the advise of MacKay to reduce the listing price of Cathcart to $119,900. On November 11th, the plaintiff signed a document by which he offered a $1000 bonus for the sale of Cathcart and on November 18th he signed a further document deleting the bonus, and changing the listing price to $116,900.

Throughout the period from May 1993 when Cathcart was listed, only one offer was received by the plaintiff prior to the subject offer and that was in the amount of $100,000. It was rejected.

The offer by the plaintiff to purchase 20 Vimy was made December 16, 1993.

Next door to 20 Vimy was 14 Vimy, a building which, from the outside appeared identical. 14 Vimy was also listed for sale in December 1993. The evidence discloses important differences between 14 Vimy and 20 Vimy.

It was the uncontradicted evidence of the defendant Parent, that his property 20 Vimy had a new roof in September 1991. Exhibit 125, introduced through Parent, contains a list of numerous further upgrades to 20 Vimy. Parent looked at 14 Vimy as a comparison when he listed 20 Vimy. His evidence was generally that 14 Vimy was, in numerous respects, both inside and outside, in a substandard condition of repair.

Lea Kridiotis, in June 1992, appraised 20 Vimy for the Royal Bank. At the time, Parent was negotiating a loan. She inspected the property both inside and outside. She noted, as Parent confirmed, that 20 Vimy had new aluminum soffits, fascia and eaves troughing in March 1992, as well as a new roof installed in 1991. 20 Vimy, was occupied by long term and reliable tenants.

It was the testimony of MacKay that, before the offer was made on 20 Vimy, he provided the plaintiff with information concerning 14 Vimy.

MacKay recalled telling the plaintiff that 14 Vimy could be purchased for approximately $145,000. He also provided to the plaintiff, he said, information that the building was in need of a new roof and perhaps new windows. MacKay recalled putting together and sharing with the plaintiff a rough workup of the cost of a new roof and windows at 14 Vimy which, he recalled, resulted in a possible acquisition of 14 Vimy still at about $160,000.

It was the testimony of MacKay that the plaintiff, presented with this information, was nevertheless not interested in the purchase of 14 Vimy, because he was concerned about the prospect of future repair and maintenance.

MacKay then, he explained, turned his attention to 20 Vimy. He contacted Parent, the owner. On December 16, the plaintiff submitted an offer, conditional upon the sale of Cathcart and upon the obtaining of first mortgage financing, in the amount of $170,000. The offer was accepted by Parent December 17th.

On January 26th, 1994, the plaintiff and Parent signed an agreement of purchase and sale by which Parent agreed to purchase Cathcart at a price of $110,000.

The Cathcart sale to Parent and the 20 Vimy sale from Parent to the plaintiff, closed as I have said, February 25, 1994.

On April 26, 1994 an agreement of purchase and sale was completed between the plaintiff and the estate of James McPherson for the sale to the plaintiff of Front Street at a price of $95,000. Century 21 represented by the defendant MacKay submitted the offer for the plaintiff.

Although Front Street was subsequently sold, no issue is raised in this action pertaining to the conduct of MacKay in relation to that purchase.

The evidence provided only brief explanation as to the circumstances which brought about the plaintiff's purchase of Front Street.

According to the plaintiff's testimony, he found the apartments at 20 Vimy too small for himself. Rather than moving in, he decided to keep 20 Vimy as an income property and look for another home. Through an advertisement, he found Front Street.

MacKay's testimony was that the plaintiff approached him, telling him he was interested in Front Street, had been in touch with the listing agent and had made arrangements to see it. MacKay recalled that he attempted to talk the plaintiff out of the purchase, because he felt it would destroy the economics connected with the purchase of 20 Vimy. As I said, the Front Street purchase was completed May 31, 1994.
On May 16, 1995, the plaintiff signed an agreement of purchase and sale for the sale of Vimy at a price of $155,000. Over time, he said, he had reached the conclusion that 20 Vimy was a bad deal.

There are two particularly important differences between, on the one hand, the testimony of MacKay and, on the other hand, the testimony of the plaintiff.

The first is that whereas MacKay testified that he told the plaintiff about 14 Vimy, before the plaintiff signed the agreement to purchase 20 Vimy, it was the evidence of the plaintiff that 14 Vimy was never mentioned to him at all. The second important difference has to do with the degree of knowledge on the part of MacKay as to the mental condition of the plaintiff.

In addressing these important differences and in particular assessing the evidence of MacKay, I have been mindful of certain features of his testimony.

There were some differences between the trial testimony of MacKay and the evidence he provided on his examination for discovery in February 2001. In most cases, the discrepancies were relatively insignificant. In other cases, MacKay provided what appeared to me to be satisfactory explanation. For example, whereas his trial evidence was that when he looked at 14 Vimy, he did not see the inside, his evidence on discovery was that he did go through 14 Vimy. He explained at trial, firstly, that the examination for discovery was some eight years after the event, and secondly, that if he did go inside the building, he was only in the hallways.

Perfect recollection on the part of any witness concerning events which have taken place so many years before is not expected and the absence of perfect recollection should not affect the reliability of the evidence. MacKay does not have perfect recollection, but in my opinion, his recollection of these events is what would reasonably be expected.

MacKay's testimony did not always accord with the testimony of other witnesses. For example, whereas it was the evidence of MacKay, as it was also the evidence of the plaintiff, that the plaintiff's offer to purchase 20 Vimy from Parent was originally part of a package including the purchase of another property on Vidal Street, because Parent wanted to sell both, it was the testimony of Parent that he did not link the sale of Vidal with 20 Vimy.

There are documents marked as exhibits in which the handwriting of MacKay can be seen linking Vidal and 20 Vimy.

In my opinion, these aspects of the testimony of MacKay, do not however, in any significant way affect the credibility or reliability of his evidence.

I now come to the testimony of MacKay, in respect to the two important differences which I have identified when compared to the testimony of the plaintiff.

It was the testimony of MacKay, that shortly after the listing of Cathcart and in the course of further explaining to him his purpose and looking for a rental income property, the plaintiff told him that he was on a temporary

leave of absence from school and that, although he hoped to return to work, he expected that he might be placed on a disability pension. He said, MacKay recalled, that he had experienced problems at school. According to MacKay, the plaintiff might have used the word anxiety in relation to those problems.

MacKay said that he saw nothing unusual about the information with which he was provided and that there was nothing in the information which suggested to him that the plaintiff had diminished capacity in respect to carrying out his purpose of acquiring a rental income property. At no time, he said, did the plaintiff tell him of a diagnosis such as schizophrenia. MacKay testified that he had no idea that the plaintiff had made a trip to Colombia, South America, prior to the closing of Cathcart and 20 Vimy although, he said, at some later time the plaintiff told him that he had gone somewhere looking for a bride.

The plaintiff, according to MacKay at all times during their dealings, acted reasonably. He did not question nor, he said, that he have any reason to question the plaintiff's intellectual ability or his level of understanding of the transactions. He noticed only that, at times,

the plaintiff appeared slow in his physical movements.

The plaintiff approached MacKay with the purpose of finding an income property in which he could also live. Over the course of a period of approximately one year during which he dealt with MacKay, with the advice of MacKay one way or the other, he made decisions about the acquisition of property, and in some cases, not to proceed with conditional agreements which he had signed. He discussed with MacKay the reduction in the listing price of Cathcart. In connection with the purchase of 20 Vimy, he followed through on arrangements made by MacKay to speak with a lending institution, Investors Group, where he negotiated a mortgage loan.

The essence of MacKay's evidence is that, throughout all of these dealings, he noticed nothing which caused him to question the mental capacity of the plaintiff to understand the nature and effect of the various transactions and the agreements of purchase and sale.

The relationship between MacKay and the plaintiff, which is under scrutiny, took place over a period of approximately one year following May, 1993.

Once again, note should be made of the testimony of Dr. Arnold to the effect that in the plaintiff's visits to her office after January 1993, she saw nothing to cause her concern pertaining to the plaintiff's competence or capacity to make decisions.

I will later have something more to say about the testimony of Parent.

It is worthy of note that Parent also spoke about his dealings with the plaintiff surrounding the sale of 20 Vimy.

Sometime between the signing of the agreement of purchase and sale in December 1993, and the closing in February 1994, Parent met the plaintiff at the property and had a discussion with him about matters, which included improvements, which Parent explained to the plaintiff he intended to make had he continued his ownership. The plaintiff, he said, asked questions during the discussion. Parent found him to be straightforward and he said he had no concern at that time in respect to his competence.

Following the closing, Parent had occasion, a number of times, to speak to the plaintiff when he, Parent, met the plaintiff at Cathcart to

receive the plaintiff's rental cheques. Once again, it was the testimony of Parent that he observed nothing unusual in the condition of the plaintiff.

This evidence, as well, I have taken into account in my determination of whether MacKay, as he dealt with the plaintiff, recognized or ought to have recognized signs of mental incompetency.

In some respects the testimony of the plaintiff is not significantly different from that of MacKay.

According to the plaintiff, he told MacKay that he was on a leave of absence from his employment, about the problems which he had encountered at school and about the prospect of a disability pension.

The plaintiff's evidence, however, went further. He said that, from time to time, he told MacKay that he had been hospitalized receiving psychiatric care. In fact, he said, from the very start of their relationship of May 1993, he told MacKay that he was mentally ill.

Arthur Grant was and is a personal friend of the plaintiff. He recalled the plaintiff explaining to him his concern about his level of income from

a disability pension and his intention to acquire income property. The concern, according to Grant, appeared to him to be realistic and the plan, at the time, to sell Cathcart and to acquire property with rental units, appeared to him to make sense.

Grant recalled that on one of the two or three occasions when he saw MacKay at the plaintiff's residence on Cathcart, the plaintiff told MacKay that he was ill, on medication and provided some description of his conditions such as paranoia or schizophrenia. Of course, Mr. Grant's ability to recall the precise language used by the plaintiff is to be judged in the context of these few discussions having taken place on an informal occasion over 10 years ago.

Certainly MacKay did receive some information from the plaintiff related to his mental condition. He was told that he had encountered problems at school, which were causing anxiety. He may well also have been told that the plaintiff was receiving treatment and medication in connection with those matters.

All of that information received by MacKay, however, must be taken in the context of his dealings with the plaintiff. The plaintiff's proposal to sell Cathcart and acquire income

property for the purpose explained by the plaintiff, appeared rational and reasonable. Over the course of MacKay's dealings with the plaintiff, the plaintiff made what appeared to be rational decisions and engage in rational discussion in respect to the various transactions. There were times when the plaintiff initiated decisions.

On this evidence as a whole, I am unable to find that MacKay had reasonable grounds to believe that the plaintiff was incapable of engaging in the various transactions or understanding the nature and affect of the subject agreements of purchase and sale. MacKay, I believe, was entitled to continue to rely upon the presumption of capacity.

MacKay, in my opinion, did not know that the plaintiff was incapable of understanding the nature and effect of the real estate transactions or the agreements which he signed. Nor were there circumstances which would have presented reasonable grounds for such a belief.

To that conclusion, this should be added. The issue in this case was not simply whether MacKay failed to notice and to respond to an established conditional of mental incompetency. On the evidence, which I have reviewed, including the

medical evidence, I believe it probable that the plaintiff, at the time of his dealings with MacKay, was not incapable of understanding the nature and effect of the various transactions.

Had MacKay, therefore, been confronted with reasonable grounds to believe that the plaintiff lacked capacity, it seems to me that, in any event, the result of any inquiry on his part would not have been that the plaintiff lacked capacity.

In summary, therefore, I am unable to find that MacKay was either negligent or in breach of his fiduciary obligation or a contractual obligation in pursuing, in the way in which he did, and at the request of the plaintiff, the plaintiff's purpose to sell Cathcart and to acquire income property.

Apart from the issue pertaining to MacKay's knowledge of the mental capacity of the plaintiff, it is alleged that MacKay was negligent and in breach of his fiduciary obligation, firstly, in not advising the plaintiff that 14 Vimy was for sale, and, secondly, in not advising the plaintiff, after the agreement of purchase and sale for 20 Vimy was signed, that 14 Vimy had been sold at a price of $140,000.

The court does not require expert evidence to accept the obligation of a real estate agent to provide to a client information which is reasonably available and relevant to a purchase under consideration. It is not surprising that the code of ethics of the Canadian Real Estate Association contains a provision, found in article four, as follows:

> "A realtor has an obligation to discover facts pertaining to every property for which the realtor accepts an agency, which a reasonably prudent realtor would discover in order to fulfill the obligation to avoid error, misrepresentation or concealment of pertinent facts."

I believe that MacKay did provide information to the plaintiff pertaining to 14 Vimy, before the plaintiff signed the agreement to purchase 20 Vimy. 14 Vimy was the next door property, it was listed and it was one of only very few properties which met the plaintiff's criteria. It would be highly unlikely that MacKay, an experienced real estate broker, would not have drawn the plaintiff's attention to this property.

Additionally, MacKay's recollection of his visit to 14 Vimy was detailed. He recalled noting the condition of the roof, the windows and other

aspects of the building. He recalled specifically, the plaintiff's reaction upon receiving the information pertaining to 14 Vimy, that being, that he was not interested, because of a concern about future repair. MacKay specifically then recalled turning his attention to 20 Vimy and contacting Parent.

I prefer to accept this testimony of MacKay rather than the broad denial by the plaintiff that he was not told even that 14 Vimy was for sale.

14 Vimy sold on January 25, 1994. At that time, the conditions applicable to the plaintiff's agreement to purchase 20 Vimy had not been satisfied.

MacKay did not tell the plaintiff that 14 Vimy had sold, because he did not know that the property had sold.

A number of witnesses, including MacKay, were asked about the availability, in 1993, of information pertaining to listings and sales. On an assessment of all of that evidence, I have concluded that whereas MacKay had available to him on a daily basis information that properties, such as 14 Vimy, had sold, he did not have

immediate assess to information concerning the sale price.

Accepting, as I do, the testimony of MacKay that the plaintiff had turned down any thought of the purchase of 14 Vimy, after being told that it could be bought for approximately $145,000, I accept the explanation of MacKay that there would have been no point, even if MacKay had known about the sale and sale price of 14 Vimy, in once again presenting 14 Vimy to the plaintiff approximately one month after the plaintiff had agreed to purchase 20 Vimy.

As to the obligation of MacKay to disclose the sale of another property which the plaintiff had rejected after execution of the agreement of purchase and sale, I do believe that the absence of expert evidence establishing a standard is of some importance.

In conclusion on this point, I cannot find that the defendant MacKay, was negligent, in breach of contract or his fiduciary obligation in failing to advise the plaintiff, in these circumstances, of the sale of 14 Vimy.

Argument has been advanced by counsel for the plaintiff, that the defendant MacKay, was negligent and in breach of his fiduciary

obligation in advising the plaintiff to purchase 20 Vimy at a price of $170,000.

The foundation of this argument is that 20 Vimy was not worth $170,000.

This foundation in turn, appears to rest primarily on two pieces of evidence. The first is that 20 Vimy sold, in May, 1995 at $155,000. The second is the appraisal testimony of Andrew Egerton.

There is no question but that Sarnia, in the period between December 1993 and May 1995, was experiencing a declining real estate market.

Paul Ashdown, an appraiser who testified on behalf of the defendant law firm, provided his opinion that the market peaked between 1991 and 1993, then reducing until approximately 1998 affected by increased interest rates and a downturn in the local economy. That market trend, he said, affected all residential properties, including single family, multi-unit and condominium.

Brenda Grant, a real estate agent called by the plaintiff, recalled her experience that the market was in decline from the early 1990's.

I have already mentioned the appraisal of Lea Kridiotis. It was her recollection, as well, that the market in Sarnia declined from the early 1990's until the late 1990's.

For reasons which are not well explained by the plaintiff, in a declining market in 1995, he decided to sell 20 Vimy. The fact that he lost money is a reflection of the market. The $155,000 sale price provides no indication of the value of the property in December 1993.

It was the opinion of Mr. Egerton, that the value of 20 Vimy, in December 1993 was $140,000. There are however, a number of weaknesses to Mr. Egerton's opinion.

Mr. Egerton's office is and always has been in London. Predominantly his experience has been with commercial real estate. Only about 10 percent of his appraisal work is done in Sarnia and most of that 10 percent is commercial. He estimated that, overall, approximately 10 to 20 percent of his work is concerned with residential properties including multi-unit buildings.

Egerton considered 14 Vimy to be the perfect comparable. He described the use of 14 Vimy as a comparable as a "no brainer". It was clearly the most significant factor in his appraisal.

In looking at the sales histories of 20 Vimy and 14 Vimy, he assumed that the properties were identical, outside and inside even though he was not inside the building. He assumed that the tenancies were of equal value.

I have already referred to evidence from which the conclusion is to be taken that 14 Vimy was a building of lesser quality.

Egerton was not aware that, at the same time as the plaintiff purchased 20 Vimy from Parent, he also sold Cathcart to Parent. When told that, Egerton agreed that, in those circumstances, the important number is the difference between the purchase price and the sale price as opposed to the $170,000 purchase price. In other words, as I understood his evidence, the $170,000 purchase price which the plaintiff paid for 20 Vimy must be viewed in the context of the plaintiff having received $110,000 for the sale of Cathcart.

Egerton agreed that, in those circumstances, he was unable to say that $170,000 was too much for the plaintiff to have paid.

Incredibly, Mr. Egerton, until his error was pointed out to him near the end of his oral testimony, was of the belief that 20 Vimy and 14 Vimy were semi-detached buildings. Nevertheless,

he went on to say that whether the buildings were semi-detached or detached would not affect the value. He followed that statement by reversing himself, agreeing that detached buildings would probably have more value.

The weight of Mr. Egerton's opinion of $170,000 is the market value of 20 Vimy is seriously weakened by these circumstances.

Paul Ashdown, as I have said, was a real estate appraiser called by the defendant law firm, and provided opinion evidence particularly pertaining to market trends. It was Mr. Ashdown's opinion that the difference in the purchase price of $170,000 and the sale price of $155,000 for 20 Vimy is consistent with market trends at the time.

As I have already said, Lea Kridiotis appraised 20 Vimy for financing purposes in 1992 at $172,000.

In a declining market it would not be reasonable to believe, as would be the suggestion from the testimony of Egerton, that 20 Vimy was worth $140,000 in 1993 and then increased to $155,000 by 1995.

In addition to all of this, it must be remembered that the plaintiff had a particular purpose in acquiring 20 Vimy. He was not just looking for income property, but he was looking for a home to replace Cathcart, which he managed to sell at the same time.

On a consideration of all of this evidence, I can find no merit in the position that 20 Vimy, in December 1993, did not have a value of $170,000.

Consequently, I reject the position that the defendant MacKay behaved negligently or in breach of a fiduciary obligation in his advice to the plaintiff in relation to the offer of $170,000 for 20 Vimy.

While it was not raised in argument, at the outset of this trial, counsel for the plaintiff identified as a trial issue the failure of MacKay to have taken the plaintiff through 20 Vimy before the plaintiff made his offer.

MacKay, in his testimony, explained that, in the case of a purchase of income property, it was common practice to view the inside of the property after completion of the agreement of purchase and sale, and to insert into the agreement conditions which would allow the purchaser an escape. That is what was done in

this case. There is no other evidence suggesting any different standard from that advanced by MacKay. This argument, therefore, also fails.

It has been argued that MacKay and Century 21 were not entitled to commission on the sale of Cathcart.

The theory advanced by counsel for the plaintiff is that Cathcart was a trade in on the purchase of 20 Vimy and that, therefore, no commission should be payable.

The plaintiff signed a listing agreement for Cathcart and subsequently, negotiated reductions in the commission.

MacKay and other witnesses as well, explained in their testimony that there is a difference between, on the one hand, property which is listed and then sold in combination with the sale of other property to the vendor and, on the other hand, property which is not listed, but where the equity is offered as part of the purchase price for another property. In the former, commission is payable whereas, in the latter, no commission is payable on the trade in.

Despite this explanation in the evidence, counsel for the plaintiff during trial, advanced Section

22 of the Real Estate and Business Brokers Act, offering it as a statutory provision that commission is not payable on a "trade-in".

Section 22 reads:

> "No action shall be brought for commission or for remuneration for services in connection with a trade in real estate unless at the time of the rendering of the service the person bringing the action was registered or exempt from registration and the court may stay such action at anytime upon motion."

This section, of course, is totally unconnected with the proposition for which it is cited. Apparently, counsel read this section as pertaining to a trade in as opposed to a transaction.

It has been argued that MacKay misrepresented to the plaintiff the net income obtainable from 20 Vimy.

I accept, without the need of expert evidence, that an agent has an obligation to accurately advise a purchaser in respect to rental income connected with the proposed purchase of an income property.

There are documents, which contain the writing of MacKay, providing to the plaintiff some estimates of the net rental which the property might generate. Before closing, acknowledgments were provided to the plaintiff from each of the tenants containing information as to the rental paid.

There is, however, no evidence as to the net rental, which the property actually generated after the sale and consequently there is no basis in the evidence for an argument that MacKay misrepresented the net income.

Counsel for the plaintiff has advanced the position that MacKay was negligent in failing to insert into the agreement to purchase 20 Vimy a warranty similar to that contained in the agreement upon the sale of 20 Vimy, pertaining to compliance with the fire code.

As a consequence of this alleged negligence, the plaintiff claims to recover from MacKay the $500 sum which was held back on sale of the property together with the unknown value of the refrigerator and stove left with the purchaser.

It was the testimony of MacKay that such a clause is not inserted in all agreements for the purchase of property and in the case of 20 Vimy

there being no indication of non-compliance, he saw no reason to include such a warranty. On this point, having no expert evidence as to a standard, I have no evidence contrary to the evidence of MacKay.

Consequently, I see no merit in this particular allegation of negligence.

The plaintiff has maintained a position throughout this trial that MacKay was negligent in failing to advise the plaintiff that an additional down payment on the purchase of 20 Vimy of approximately $1000, would save the plaintiff approximately $3500 in C.M.H.C. mortgage insurance.

A number of witnesses including the defendant MacKay and D'Andrea testified on this subject.

The conclusion which I take from this evidence is that it is the lender which makes the decision as to whether C.M.H.C. insurance will be required as a condition to the loan. The lender to the plaintiff, in the case of the purchase of 20 Vimy, was Investor's Group and no evidence was called from that financial institution.

In any event, the evidence does not support the proposition that, in the case of a multi-unit

residential property, mortgage insurance is not required if the down payment is at least 25 percent of the purchase price.

Once again, the evidence does not support the position advanced by the plaintiff.

R E C E S S

U P O N R E S U M I N G:

It has been argued that MacKay was in breach of his fiduciary obligation in placing himself in what is alleged to be a conflict of interest, by entering into a listing agreement with Parent December 17, 1993, while representing the plaintiff, as purchaser.

I accept, without the necessity of evidence on the point that an agent such as MacKay, in a fiduciary relationship with the plaintiff, would be considered to be in breach of his obligations if he were to place himself in a situation in which he had an interest conflicting or which might conflict with his duty to his principal.

The plaintiff signed the agreement to purchase 20 Vimy December 16. Parent, at the same time as excepting the plaintiff's offer in December 17, executed the listing agreement.

The only evidence provided on the subject of the standards of the real estate industry at the time was the testimony of the defendant, D'Andrea. His evidence was to the effect that, at that time it was commonplace for agents to represent both vendor and purchaser. Presently, he explained, agents are expected to have the clients sign an acknowledgment, similar in form to that used by solicitors when acting for both vendor and purchaser.

The evidence does not permit a conclusion that MacKay, in entering into the listing agreement with Parent, was in conflict with accepted standards at the time. Nor does the evidence lead to the conclusion that MacKay breached his fiduciary obligation to the plaintiff by allowing a competing interest to interfere with his duty.

In summary, in respect to the defendant, MacKay, I can find no basis in the evidence for a conclusion that he acted negligently in breach of his contractual obligations or in breach of his fiduciary obligations.

Consequently, this action that is against the defendant MacKay is dismissed.

With one exception, the action, as against the defendant, Century 21, is entirely based upon its position as the employer broker.

The exception is an issue raised by counsel for the plaintiff for the first time in argument.

The proposition was advanced on the basis of some evidence from the defendant D'Andrea that he believed that Century 21, at the time, had an air miles program, that the plaintiff was entitled to damages in consequence of his receiving no air miles points.

Counsel argued, with absolutely no supporting evidence, that the plaintiff should have received 750 air miles, which according to counsel would have a value of $200.

There is no evidence to support this position, either as to entitlement or damages.
Having regard to the conclusion which I have reached in respect to the liability of the defendant MacKay, it follows that this action as against the defendant Century 21 based upon the principle of vicarious liability, must likewise be dismissed.

The defendant D'Andrea, had absolutely no dealings with the plaintiff before this trial.

He had never met the plaintiff. His only involvement in the subject transactions was the preparation of commission statements. The plaintiff himself acknowledged, that he had never met D'Andrea.

I was told in argument that the case against D'Andrea was based upon the supposition that Century 21 did not have insurance which would have responded to the negligence of it's employee, MacKay.

Setting aside any consideration as to whether the failure of Century 21 to have insurance would create liability to the plaintiff on the part of D'Andrea, there is, in any event, no evidence of an absence of insurance.

This action is dismissed as against the defendant D'Andrea.

I come now to the plaintiff's case against the defendant, Parent.

The allegations of the plaintiff directed to this defendant have, through the trial, represented an elusive target.

It is apparently alleged that Parent failed to disclose to the plaintiff the need for a drain to

be installed in a corner of the parking lot for 20 Vimy.

Parent specifically recalled meeting the plaintiff at the building in 1994, before the closing and having a discussion with the plaintiff at that time. In that discussion, he said, he told the plaintiff that water gathered in a corner of the parking lot and that, if he had kept the building, he intended to install a drain. I accept that evidence.

No evidence has been presented pertaining to the cost associated with the installation of a drain or any other remedial work related to the water problem on the corner of the parking lot.

There is no basis upon which the plaintiff may recover from Parent damages consequent upon this alleged failure to disclose.

There has been a suggestion in argument that Parent may have misrepresented the value of 20 Vimy at $170,000. I have already spoken about the evidence concerning the value of the property at the time. There is no suggestion in the evidence of any representation by Parent concerning value apart from his accepting the plaintiff's offer.

Plaintiff's counsel has advanced in argument the position that Parent misrepresented the condition of the apartments of 20 Vimy, and, as a consequence of that, is responsible to the plaintiff for damages in the amount of approximately $300.

It was Parent's evidence that the plaintiff saw each of the apartments before closing. The plaintiff's own evidence was that he saw three of the four apartments.

There is a total absence of any evidence of a representation made by Parent in respect to the condition of the apartments in relation to paint.

It was, in fact the testimony of Parent, that the apartments and the interior of the building generally had been recently painted.

Once again, there is no evidentiary basis for the allegation.

As to all of these allegations pertaining to representations by Parent, the agreement of purchase and sale contained the usual provision to the effect that the written agreement was to constitute the entire agreement and that no representations or warranties were given apart from those expressed in the agreement.

It was the uncontradicted testimony of Parent, that in August 1996, the plaintiff called him looking for receipts for the rental, which he had paid to Parent for his stay in Cathcart after the closing. Parent prepared a duplicate receipt and met the plaintiff. At that time, the plaintiff made no complaint whatever concerning any of the matters which are now the subject of this action.

In the statement of claim and in the plaintiff's evidence at trial the allegation was made that Parent had made promises to tenants at 20 Vimy concerning repairs, and that he did not carry out the repairs with the consequence that the plaintiff became under an obligation to pay for repairs.

Suffice it to say that this allegation has no support either in logic or in the evidence. The specific allegations directed to the defendant, Parent are set out in paragraphs 21 to 25 of the statement of claim. The trial evidence does not support any of these claims.

Consequently, the actions against the defendant Parent is dismissed.

I have endorsed the trial record, that in accordance with these oral reasons, the action, in its entirety, is dismissed.

FORM 2

Certificate of Transcript

***Evidence Act*, Subsection 5(2)**

I, Jacquie Milligan, certify that this document is a true and accurate transcription of the recording of Smith v. Century 21 Titen Realty Inc., John D'Andrea, Don MacKay, Norman Parent and George, Murray & Shipley in the Superior Court of Justice held at 700 N. Christina St., Sarnia, taken from Recording No. 1711-01-CIV-059/2005 which has been certified in Form 1.

June 20, 2005 J Milligan