COURT FILE NO: SC-24-00001018-00+D1
DATE: 2025-12-30

ONTARIO
SUPERIOR COURT OF JUSTICE
(OSHAWA SMALL CLAIMS COURT)

B E T W E E N:

CENTURY 21 LEADING EDGE REALTY INC.

Plaintiff /
(Defendant by Counterclaim)

- and -

NIDHI KHANNA and AJAY KHANNA

Defendants /
(Plaintiffs by Counterclaim)

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LEGAL REPRESENTATIVES AT TRIAL:
Century 21 Leading Edge Realty Inc.: Liam D'Souza
Nidhi Khanna and Ajay Khanna: Self-represented

TRIAL: OCTOBER 7 AND 8, 2025

JUDGMENT

DEPUTY JUDGE DAVID M. JOSÉ

1) For the reasons that follow:

a) Judgment is granted in favour of Century 21 Leading Edge Realty Inc., as against Nidhi Khanna and Ajay Khanna, jointly and severally, in the sum of **$11,752.50**;

b) No prejudgment interest is awarded;

c) The Defendants' (Counter) Claim is dismissed;

d) No costs are awarded to either party, in either proceeding; and

e) Post-judgment interest will accrue at **3.0%** as prescribed under the *Courts of Justice Act*, R.S.O. 1990, c. C.43., ("**CJA**") for any amount that remains unpaid after thirty (30) days from the date of judgment.

REASONS

Brief Overview of the Case

2) The real estate brokerage firm, Century 21 Leading Edge Realty Inc. (the

"**Brokerage**"), sues their client vendors, Mrs. Nidhi Khanna and Mr. Ajay Khanna (collectively the "**Khannas**") for commission owing after a binding Agreement and Purchase and Sale was aborted by the Khannas at the eleventh-hour. The Khannas counter-sue for damages allegedly flowing from what they describe as breach of fiduciary duties on the part of the Brokerage.

3) Both claims seek to recover $35,000.00. For clarity, the Brokerage seeks $52,827.50 in commission, with the portion above $35,000.00 being waived. If it is concluded that the listing agreement is not enforceable, the Brokerage seeks damages assessed on a *quantum meruit* basis. The Khannas seek $10,000 in damages for direct financial losses incurred (ie: costs thrown away to get home ready for market, loss in property value due to the Brokerage's mismanagement, etc), $10,000.00 for emotional distress, and $15,000 for punitive damages.

Conclusion

4) I find in favour of the Brokerage because they fulfilled their end of the bargain: they found a buyer who was ready, willing, and able to tender on closing. The Khannas, who unilaterally aborted the closing, remain indebted to the Brokerage for the commissions earned, based on the wording of the listing agreement contract. However, the Brokerage breached their fiduciary duty when it came to invoicing for the commission, and that breach warranted a reduction in the commission owed as a deterrent and penalty for such indiscretion.

Evidence

5) The following two witnesses testified:

   a) Ms. Diana Alli, the real estate co-listing agent who had day-to-day dealings with the Khannas, on behalf of the Brokerage (herein the "**Agent**", or "**Agents**" when jointly referring to Ms. Alli and her co-listing agent Mr. Khalid Zuberi); and

   b) Mr. Ajay Khanna on behalf of himself and his wife.

6) Mrs. Khanna did not testify, although she was present throughout the trial. The co-agent, Mr. Zuberi, also did not testify, although he too was present for most, if not all, of the trial as well. Nineteen (19) exhibits were tendered.

7) Generally, I do not take issue with Mr. Zuberi, the co-agent, not testifying. He was not as heavily involved with the key events of this case, and his testimony would likely have been purely redundant and duplicative in nature. I cannot, however, say the

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same for Mrs. Khanna's absence from the witness box. She was more integral to the key communications in this case, and I found it odd that she was sheltered from the witness box. Mr. Khanna insisted that only his evidence was required. He took the position that he was involved throughout, but it seems to me that some of the key dealings were more exclusively with Mrs. Khanna.

The Seminal Facts and Findings

The Initial Meeting Leading to the Listing Agreement

8) The parties became acquainted as a result of a neighbourhood door-knocking campaign by the Agents. The Khannas insist that they were not interested in selling, and felt pressured by the Agents to list their house based on the Agents' promise of achieving a sale price of at least $1.2M, and based on the Agents' "sob story" that they needed the Khannas' business because they were struggling: none of which is simpatico with the evidence tendered by the Agent.

9) I don't accept the Khannas' assertion that they were pressured into selling. They freely invited the Agents back into their home on a later date, and entered into the Listing Agreement on their own free will. Mr. Khanna was clearly very astute about the homes that were selling around his house, and how to compare his house to other houses in the area. I am satisfied that he set the boundaries for the sale price, and he was not in any way bamboozled by the Agents.

10) Indeed, after the first encounter at the door, but before the listing agreement was signed, the Khannas invested time, energy, and money sprucing up their home: painting, buying new rugs, etc, in an effort to stage their home a little better. This was not a rash decision to sign on the dotted-line during a cold-call to their home: the Khannas clearly mulled things over for a long time, and made the decision to sell over the calmness of time.

The Listing Agreement

11) The listing agreement was signed on June 15, 2023, with an asking price of $1.125M. The Agent said that the strategy at the time was to list the property a little above the Khannas' goal of $1.1M, in order to give them a little negotiation wiggle room. Mr. Khanna insisted that he told the Agents he wanted $1.2M at all times, and nothing less.

12) Despite getting professional photos, creating and circulating brochures, putting the house on MLS, and holding open houses, all the offers received fell below $1M. To

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the Agents, this would signal a need to readjust the selling strategy, and with that, they recommended listing the home for $999K, on the hopes that it would attract more interest in the property and perhaps increase the buyer pool.

13) On June 24, 2023, an amendment to the Listing Agreement was duly executed by the parties to reduce the list price to $999K. Mr. Khanna said this was disappointing, and that I should accept this as proof that he and his wife were tricked by the Agents into listing their property for sale against their will because the Agents lulled them into believing that they could get at least $1.2M for their home, and everything pointed in the opposite direction. Mr. Khanna asserts that despite the disappointment, he and his wife agreed to the reduction because they accepted the advice of their professional Agents.

14) The strategy of reducing the listing price worked. During the next bid date, four (4) offers were received, all above $1M: a milestone that they failed to reach in any of the offers to purchase received when the house was listed for $1.125M.

The Sale

15) On July 1, 2023, an Agreement of Purchase and Sale was duly executed by the prospective buyers (herein the "**Buyers**") for $1.1M, with two conditions that were ultimately waived about a week later, and with a closing date of August 31, 2023.

16) From the Agents' perspective, they were very pleased because they achieved a purchase price for exactly what the Khannas were seeking. During the trial, however, Mr. Khanna portrayed that he was severely disappointed because he didn't get his $1.2M. There is no written communication about this alleged disappointment. I doubt very much that Mr. Khanna truly expected $1.2M, or that it was promised to him by the Agents. At its highest, I believe the Khannas were hoping to get $1.2M, consistent with how most home owners hope to push the envelope for the sale price of their property, but I remain confident that the Khannas were happy with the offer: otherwise, they had the option to reject the offer and remarket the property, or alternatively let the listing lapse.

Post-Sale / Pre-Closing Issues

17) On two occasions, the Buyers sought to move the closing date, and both times the Khannas agreed by signing an amendment to that effect: it was first moved to August 29, 2023 through an amendment dated July 8, 2023, and then moved to August 24, 2023 through an amendment dated July 11, 2023.

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18) About nine days before closing, on August 15, 2023, the Khannas asked the Agent to get them an extension of the closing date from August 24, 2023 to August 31, 2023. The Agent was surprised by this late request, and advised that it was unlikely to be granted by the Buyers this late in the day. The Agent testified that she was confused by this late request because she thought, based on prior discussions, that the Khannas were intending to move into the brother's home. When the Agent was told by Mrs. Khanna that this was no longer an option, the Agent suggested looking into a rental, or moving into a hotel on a temporary basis, or renting a storage locker, etc. The Agent was understandably concerned for the Khannas because of the risks involved with an aborted closing.

19) The Khannas conveyed to the Agent that there were no other options, and that they should get the requested extension because they historically gave the Buyers two prior closing date changes. Put another way, the Khannas felt that because they gave the Buyers two closing date changes, they were entitled to at least one closing date change, as of right, in return.

20) The Agent said when she got off the phone with the Khannas who were demanding the closing date extension, she called the Buyers' agent who, as anticipated, conveyed that it was highly unlikely that the Buyers could change the closing date this late in the day, but he would nonetheless ask his clients. The following day, on August 16, 2023, the Agent sent a written amendment for the Buyers to sign, moving the closing date to August 31, 2023, but the Buyers did not sign it, and the Buyers' Agent sent a responding e-mail explaining why the Buyers couldn't sign: essentially a timing issue with the unit the Buyers were renting.

21) For reasons that escape me, during Mr. Khanna's testimony he relentlessly conveyed that he was highly disappointed with his Agents for not getting the extension. According to him, it was the Agents' fault and any decent agent could have obtained the extension: he was convinced that it was an epic failure that his Agents couldn't get his requested closing date extension. Mr. Khanna believes that the Agents' negligence is palpable, in circumstances where the Buyers' agent could get two date changes while his Agents could not even get one. Respectfully, this is an untenable position.

22) The Agents have no special control or power over the Buyers. Despite the feverish pitch for me to find that this was a dereliction of the Agents' duty of care, I find that the Agents handled things perfectly: there was little if anything further that they could have done. Indeed, they gave the Khannas good advice: look for alternatives to avoid the potential fallout.

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The Aborted Closing

23) Needless to say, the Khannas did not follow the Agent's advice to look for ways to complete the sale, nor did they follow their own lawyer's advice to close the deal on August 24, 2023, ultimately leading to a failed closing. When the Khannas decided to abort the sale, they were fully aware from their own lawyer that the Buyers could sue them for damages and/or specific performance: they decided, nonetheless, to abort the closing and take their chances.

24) Another oddity during the trial was Mr. Khanna's reluctance to be open, candid and/or transparent about why he needed the closing date to be extended for an additional six days. He said that he and his wife had their personal reasons, and refused to elaborate when asked. It did not appear to me that they had anything lined up to happen in six days from the date of closing: otherwise, I would have expected Mr. Khanna to tell me when I specifically asked him.

25) Against this backdrop, it is really difficult to feel sympathetic towards the Khannas. It essentially came across as them being upset over not being treated with equal respect when their two consents to amend the closing date were not reciprocated by the Buyers, in-kind. To me it came across like the Khannas simply had a change of heart about selling their home, and they were looking for any excuse not to close, and found it in what they perceived to be inequitable treatment when it came to their request to move the closing date. The Khannas continue to live in the same house.

The Aftermath Following the Aborted Closing

26) Following the aborted closing on August 24, 2023, the Brokerage contacted the Khannas' lawyer for details about the closing so they could process their commission invoice. Not surprisingly, the Khannas' lawyer was not responding: it turns out that he was fired on or about the day of closing. Also, in-and-around this time, the Buyers' lawyer sent a letter directly to the Khannas advising them that the Buyers were reserving their rights to sue the Khannas for damages and/or specific performance.

27) On or about September 7, 2023 there was a telephone call from the Brokerage to the Khannas. As will be more fully explained below, Mr. Khanna relies on this call as further proof that the Brokerage was waiving their commission because at no time during this call did the Brokerage make a demand for them to pay any commission.

28) Although the Agent didn't have reason to doubt that a call was made from the Brokerage to the Khannas on or about September 7, 2023, as asserted by the Khannas, she testified that this call was not made by her, as the Khannas' insist. The

Agent surmises that it was probably a telephone call from someone in their administration office, after being unable to get any feedback from the Khannas' lawyer (since fired).

29) Regrettably, I will never know what exactly was said during this call, because the Agent said it wasn't her, and Mrs. Khanna who was on the other side of this call did not testify.

30) Mr. Khanna testified that based on what his wife told him, the call was short: the person asked for confirmation that the deal closed, with Ms. Khanna replying that it did not, and the other person saying "okay," at which time the call abruptly ended. Hence Mr. Khanna says this closed everything: the Brokerage clearly conveyed that they were "okay" with aborted closing.

31) To me this sounds more like a call that would have come from the person responsible for commission billings at that Brokerage firm, in an effort to get more details on the closing and where to send the commission statement. The Agent testified that she does not get involved in commission billings: the office staff does that.

32) I suspect that if the Agent actually made this call, the discussion would not have been this short nor impersonal because the Agent had a working relationship with the Khannas and she probably would have extended expressions of concern, or of hope, or well wishes, etc. The impersonal nature of this call suggests to me that it was not the Agent who placed this call, consistent with the Agent's evidence in this regard.

33) In addition, I don't give any weight or importance to an office clerk ending a telephone conversation with "okay." This cannot realistically be taken as an express waiver of the commission owing as the Khannas would like me to conclude.

34) Mr. Khanna says that shortly after that call (ie: the same day or perhaps the next day), his wife sent the following email to the Agent, dated September 7, 2023:

> "hello Diana,
> Because buyer did not agree for extension deal stand terminated on Aug-24th 2023, I had tried to save the deal but buyer did not agree."

35) The Agent did not respond to this email. The Agent shared this email with her boss, the broker of record for the Brokerage, and he said he would be taking over from this point forward. Internally, the Brokerage made the decision to hold the Khannas liable for the commissions owing, given that the Khannas alone were responsible for the aborted sale. That is when it was decided that the Agent would step aside, and the

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broker of record would take over to assert their claim for the commission owing. As such, the broker of record responded to Mrs. Khanna's September 7, 2023 email, the same day, as follows:

> "Nidhi Khanna
> I was provide (*sic*) your correspondence dated September 7, 2023 below. I am the Broker of Record of Century 21 Leading Edge, and will handle any communication on this transaction from today forward. The Buyer did not agree to your proposed extension, so the deal would need to close on the original closing date. The breach is with you the Seller. The Buyer could sue for specific performance, or for damages. Please seek advice from your lawyer."

The Mutual Release

36) Fortunately for the Khannas, the Buyers desperately wanted their deposit returned, and they agreed to sign a mutual release to get that done. It was delivered from the Buyers' agent to the Agent on September 15, 2023. The Agent said this came to her as a complete surprise. Although she was disappointed that the deal didn't close, she was pleased that the Buyers were willing to sign a mutual release which would protect her client from any claim at the behest of the Buyers.

37) Just ahead of sending the mutual release to the Khannas for signature, still on September 15, 2023, the Agent called Ms. Khanna (although Mr. Khanna professed to be on the phone as well), to tell her that a mutual release will be sent to them shortly, and that they had to sign in order to have the deposit money returned to the Buyers, which would also release the Khannas from any claims that the Buyers may have against them.

38) During this same call, the Agent was unequivocal in her testimony that she warned Ms. Khanna that her boss, the broker of record, did not, and will not, sign the mutual release because "*he is holding you to your obligations*." I asked the Agent to be very specific about what she told Mrs. Khanna during this phone call, and she said those were her exact words, and nothing more elaborate or explicit was said. As will be more fully explored below, the Khannas deny being told any of this.

39) The mutual release was sent to the Khannas shortly afterwards by email, and minutes later it was returned executed by the Khannas through Digisign, still on September 15, 2023.

The Broker's Commission Invoice

40) About ten (10) days later, on September 26, 2023, the Brokerage delivered an invoice

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to the Khannas, wherein it demanded payment for $52,827.50. The invoice broke the amount down as being the agreed 4.25% on the sale price of $1,100,000.00, for a total of $46,750.00, plus an additional $6,077.50 for H.S.T. (the "**Invoice**").

41) The Khannas were furious when they received the Invoice. They believed that when they signed the mutual release, it released everyone, including all of the agents and brokerages. They assert that they were never told by the Agent that her broker of record was not signing the mutual release, or that he was holding them to their commission obligations.

42) Mr. Khanna was asked why he didn't question the missing signature from the Brokerage on the mutual release (while it was signed by everyone else, including the Buyers and the Buyers' brokerage firm), and he said he didn't question it because he thought it would be signed by the Brokerage later on: in other words, "me first, then the Brokerage next."

Legal Arguments

43) The Brokerage asserts that this is a simple contract case, and that the following terms make it abundantly clear that the Khannas owe them commission:

> "COMMISSION: In consideration of the Listing Brokerage listing the property, the Seller agrees to pay the Listing Brokerage a commission of 4.25% of the sale price of the Property ... for any valid offer to purchase the Property from any source whatsoever obtained during the Listing Period, as may be acceptable to the Seller.
>
> The Seller further agrees to pay such commission as calculated above even if the transaction contemplated by an agreement to purchase agreed to or accepted by the Seller or anyone on the Seller's behalf is not completed. If such non-completion is owing or attributable to the Seller's default or neglect, said commission to be payable on the date set for completion of the purchase of the Property."

44) Mr. Khanna made a compassionate plea that the mutual release "must" be signed by everyone, including both brokerages, to be effective: anything less is fraudulent. He advances this argument because it allows him to posture that if the Brokerage followed the law, or at least abided by the requirements of that mutual release document, and were not fraudulent about it, the Brokerage's signature would be affixed to that mutual release, and he and his wife would be free and clear of any claim for damages as a result of that "properly" executed mutual release.

45) As it pertains to the counterclaim, the Khannas assert that the continual breach of fiduciary duties, from the inception of their dealings with the Agents where they say

they were dupped into signing the listing agreement, all the way to the end when they were subjected to fraud at the hands of their Agents, not only requires the Brokerage to lose their commission, but also to be held liable in damages as a result.

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Analysis

The Contract – Commission Due

46) Contractually, the main Claim is clear-cut. The listing agreement entered into between the parties unequivocally binds the Khannas to pay a commission arising from any binding agreement of purchase and sale entered into during the term of the listing agreement, and that obligation cannot be avoided when the client aborts the sale on their own initiative, as the case here. I believe this case is entirely in line with the reasoning set out in *T. L. Willaert Realty Ltd. v. Fody*, 2013 ONSC 7533.

47) It is my opinion that Mr. Khanna spent a great deal of time, after the fact, to come up with some creative legal arguments to assert against the Brokerage. This followed his research on OREA websites for *dicta* on what mutual releases are about, and studying case law about fiduciary duties, etc. He has convinced himself that he and his wife were victims of fraud. He went so far as lodging a RECO complaint against the Brokerage and the Agents, and he subsequently submitted a fraud incident report with the police, ironically only a few hours after the conclusion of the Settlement Conference in this proceeding.

The Mutual Release – Was the Brokerage Legally Bound to Sign it?

48) I reject the Khannas' assertion that the mutual release, once circulated, cleared them of any commission obligation, on the theory that it was a document that had to be signed by the Brokerage.

49) The mutual release binds those who sign it. The mutual release is a combined document: it is broken into two parts. The first part clearly pertains to the Buyer and Seller releasing one another from any claims, and thereafter directing how the deposit funds will be dispersed. For this section to take effect, the Buyer and Seller must sign it: one signatory alone is insufficient. The first section reads as follows:

> "We, the Buyer and the Seller in the above noted transaction hereby acknowledge that the above described transaction is terminated and release each other and the Brokerage in the proposed transaction, from all liabilities, covenants, obligations, claims and sums of money arising out of !he above Agreement of Purchase and Sale, together with any rights and causes of action that each party may hove had against the other and/or the Brokerage, and we direct the deposit holder to

> disburse the deposit of:……. Canadian Dollars ….. payable to….. (the Buyer, in this case)."

50) The second part of the mutual release pertains to whether the brokerages are releasing the parties. It does not have to be signed by the brokers to give effect to the release negotiated between the Buyer and Seller, inclusive of how the trust deposit funds are to be distributed. The wording of the second part reads as follows:

> "The Brokerage hereby releases all parties from any claim that the Brokerage may have had for commission or other remuneration in the above transaction, except as may be hereinbefore specifically provided."

51) Absent from the mutual release is any wording that requires the brokerage firms to consent to the Seller and Buyer releasing one another or to otherwise approve of the manner in which the Seller and Buyer agreed to disburse the deposit funds. That is not within the purview of the brokerage firms to dictate, and is the reason why their signatures are not required in the first part of the mutual release.

52) For these reasons, I outright reject the argument advanced by Mr. Khanna that the Brokerage was duty bound to sign the Mutual Release, or that they otherwise acted fraudulently when they refused to sign the Mutual Release. Absent some other "agreement," the only takeaway from the absence of the Brokerage's signature on the Mutual Release is that they did not agree to release the Khannas from their commission obligation.

Was there a Separate Agreement Waiving Commissions or a Breach of Fiduciary Duty Disentitling the Brokerage to Commissions?

53) The Khannas are asking me to subvert the result of a clear listing agreement covenant to pay commission because:

a) They were assured that the mutual release protected them from any and all claims, including any commission claims;

b) The Agents/Brokerage breached their fiduciary duties, inclusive of their duty to inform them of their continuing commission obligation.

54) For the reasons that follow, I reject these arguments.

55) Although there is no debate that a real estate agent is in a fiduciary relationship with their clients, I don't see any conduct on the part of the real estate agent that calls into question their loyalty to the client until perhaps at the end of their relationship, when it was becoming apparent that the client was going down a dangerous path of

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aborting the closing. Prior to this point, there was no conflict, and both parties wanted the same things: to get the highest selling price, to get the home to looking its best, to get the most eyes on the property as possible, to generate a lot of interest, to field many offers, etc.

56) The question remains, however, whether there would be a conflict of loyalty when things were going bad in the week or so before closing, when it looked like the Khannas were not going to tender. The Khannas say yes. They assert that the Brokerage wanted their commission, and kept silent about it. The breach of fiduciary duty, they say, occurred because unbeknownst to them, the Agents were brewing a scheme behind their backs to ensure that they could nonetheless still collect their commissions, and this was all orchestrated through a subtle omission of the Brokerage's signature on the mutual release.

57) In the end, the result depends on who I believe: Mr. Khanna who says he was promised a comprehensive release of everyone and that he was kept in the dark about owing commissions, or do I believe the Agent who says she warned the Khannas about her boss' intention to hold them accountable for the commission owing, with her highlighting the absence of her boss' signature on the mutual release.

58) After considering all of the evidence, both oral and documentary, and on a balance of probabilities, I believe that the Agent warned the Khannas when the mutual release was discussed that her boss (the Brokerage) was not going to sign the release because her boss was holding the Khannas to their commission obligations. As a result, I find that there was no side agreement that waived or released the commission owing to the Brokerage.

59) Overall, I found the Agent's candour to be flawless. Her degree of recollection was superb, her testimony never felt contrived, and it always felt genuine. By contrast, Mr. Khanna was often evasive, less than transparent on occasion, and he often took long delays to answer, as if he was trying to think of an answer that fit his narrative.

60) In addition, to accept Mr. Khanna's position, I would have to conclude that the Agent, knowing full well that her boss wanted to collect the commission, went behind his back and defiantly told the Khannas that the mutual release would release them from everything, inclusive of their commission obligations to the Brokerage. The Agent does not strike me as that type of person: not in the least. As such, on a balance of probabilities, I am satisfied that the Agent provided the Khannas with the warning that her boss' signature was missing from the mutual release because he was holding them to their commission obligation.

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61) In addition, there was no evidence that the Agent misled the Khannas with words that suggested they had nothing to worry about. Indeed, it is the exact opposite. When the issue of a potential aborted closing arose, the Agent advised the Khannas to do whatever they could to close as it was not good to abort the closing. The Khannas were aware of this, even from their own lawyer, and yet they still aborted the closing knowing full well that they could be sued by the Buyers.

62) It is also noteworthy that Mr. Khanna has a high comprehension level, as evidenced during this trial where he relied on many OREA publications and legal precedents to advance his case. In my view, Mr. Khanna did not need someone to hold-his-hand to understand the consequences of his actions: if he cared to know more than what his lawyer and his Agent were telling him, he was fully capable of finding the answers.

Even if Breach of Fiduciary Duty Occurred, Was it Causative of Any Losses?

63) Even if some fiduciary duties were breached, the commission is still owed in my view because a breach of a fiduciary duty is only actionable if the breach actually causes the loss (*Canada Trustco v. Barlol & Richards* (1996), 28 O.R. (3d) 768 (C.A.); See also *Rose v. McKee* [1999] O.J. No. 512 (G.D.)).

64) The Khannas aborted the sale knowing full well that the Buyers could sue them for damages and/or specific performance. In this circumstance, I believe, on a balance of probabilities, that adding a commission risk to the mix would not have changed anything: the Khannas would still have aborted the closing.

65) Furthermore, Mr. Khanna conceded that he most likely would have signed the mutual release even if he understood that it did not release him from the commission owing to the Brokerage, because it was important for him and his wife to be released from any Buyers' claim, and understandably so.

66) Mr. Khanna tried to assert, however, that no one really ever knows for sure what they would have done because it is a hypothetical; however, not really knowing for certain what you would have done is not the test for a counterfactual enquiry which is "but for" the negligence/breach, would the party have acted differently on a balance of probabilities. In this case, the answer is no, in my view, based on the evidence before me.

67) Although the Brokerage has succeeded, it was by the narrowest of margins because if it were not for me finding that the Agent was very trustworthy, this case may have been decided very differently. I have previously questioned why real estate agents, with the power of the pen, put themselves in these situations. As I pointed out in

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Jorgensen v Noirot, 2024 CanLII 28333 (ON SCSM) ("**Jorgenson**"), which is another real estate agent commission case dealing with a Buyer's Representation Agreement, agents who put little into writing can turn a slam-dunk case into a losing case for no reason. In Jorgenson I ultimately found in favour of the Agent, but only by the narrowest of margins.

68) In the present case, the same applies. A timely one sentence email, text, or letter making it clear that the Brokerage was holding the Khannas to their commission obligation would have likely avoided this entire lawsuit. Ideally this should have been sent the moment that the Agent got wind that the Khannas were considering aborting the closing, and it would have been equally opportune to reinforce the commission obligation in writing when the mutual release was circulated. The only written correspondence was the email from the broker of record dated September 7, 2023 (reproduced in paragraph 35 above), however this was not a model of clarity because although it warned the Khannas that the Buyer's could sue them, it was completely silent about the commissions owed.

69) If the continuing commission obligation was clearly expressed in writing (just one sentence), it would have prevented, or at least significantly curtailed, the Khannas from asserting that they were told the mutual release protected them from the commission liability. Fortunately for the Brokerage, I have accepted the Agent's testimony that she verbally confirmed with the Khannas that they would not be released from their commission obligations, which effectively defeats the Khannas' assertion to the contrary.

The Impugned Commission Invoice

70) Notwithstanding my favourable finding for the Brokerage in connection with their entitlement to commission, the analysis does not end here.

71) Although the parties were, for the most part, aligned in interest during their relationship, they were not aligned when the commission was being sought: here the parties had different interests. To be clear, it is not a breach of fiduciary duty to enforce the payment of a fee or commission owing under a contract or as governed by a retainer; however, there is a fiduciary duty to enforce the fee or commission contract honestly and even-handedly, and here the Brokerage fell short, in my view.

72) The Brokerage sent an invoice for $52,827.50, which was not only their portion of the commission, but it was also inclusive of the commission the co-operating broker would have received. The problem, of course, being that the co-operating broker released their portion of the commission when they signed the mutual release.

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Hence, it was only open for the Brokerage to invoice for the portion that they agreed to receive if the transaction went through, which was 1.75% of the sale price. The Brokerage owed a duty of loyalty to their client not to bully them into paying 4.25%: an amount that the Brokerage was never entitled to receive. The Brokerage put their own self-interests above that of their client.

73) I may have been prepared to overlook the error in the Invoice as an oversight emanating from an automated billing program; however, to carry this demand through to the Claim, and then through to opening statements, and all the way to closing submissions even after I had the Agent concede during her testimony that the Brokerage probably overstepped with that Invoice, the breach of fiduciary duty is now palpable and inexcusable, and the Brokerage's conduct was outrageous and high-handed, in my view.

74) The difference isn't trivial. At the 4.25% erroneously charged, the commission with H.S.T. comes to $52,827.50. At the appropriate 1.75% (with the cooperating broker to get 2.5% but hence waived), the total comes to $21,752.50 with H.S.T. I am mindful that the Khannas never made this argument at trial, but their mindset all along was that they owed nothing, and not some lesser amount; however, this does not undermine the prevailing Brokerages' duty to protect their client from unscrupulous billing.

75) It goes without saying that I can award compensatory damages, which effectively requires me to fasten a result that puts the Khannas into the same position that they would have been had the breach not occurred. In essence, this would mean a result that makes the Khannas pay only $21,752.50, which is what they would owe if they were billed correctly. If the Khannas had already paid the $52,827.50 Invoice, for example, this would mean having the Brokerage return the difference as part of a restitutionary form of relief.

76) However, to simply undue the error doesn't appear equitable to me, in the sense that there is no encouragement to get things right: it would simply encourage brokerages to overbill, because if they get caught, they have little to worry about if the court simply adjusts the commission to the correct amount. That is not an outcome this court should foster, in my view. There needs to be a penalty, in my view, because compensatory damages alone are not sufficient to achieve the goals of deterrence and denunciation (*Goldentuler Estate v. Crosbie*, 2017 ONCA 591).

77) I fix the award for punitive damages in the sum of $10,000.00, or close to 50% of what the Brokerage was entitled to bill. This will then result in a judgment for

$11,752.50 ($21,752.50 less $10,000.00).

78) The balance of the Khannas' counter-claim is dismissed. The costs incurred to get the home ready for market is not a cost to be borne by the Brokerage, in the circumstances of this case. I was not convinced that the actions of the Agents resulted in a loss of property value. Insufficient evidence was laid to satisfy me that the emotional distress suffered by the Khannas, if any, was serious and prolonged, surpassing the everyday anxieties of life (*Saadati v. Moorhead*, [2017] 1 SCR 543).

Prejudgment and Post Judgment Interest

79) As part of the penalty for the Brokerages' breach of their fiduciary duty to bill the Khannas properly, I decline to award any prejudgment interest to the Brokerage.

80) Moving forward, however, post-judgment interest will be payable on this judgment, as any non-payment would be the result of the Khannas' failure to abide by the ruling. The interest rate will be fixed at 3.0%, payable on any of the awarded amounts that are not paid by the Khannas within 30 days of the date of this Order, in accordance with the CJA.

Costs

81) The parties confirmed that there are no Rule 14 Offers to Settle to consider.

82) The Brokerage seeks substantial indemnity costs of $10,500.00 (15% of the combined $70,000 worth of Claims before me), justifying this demand based on the fact that the Khannas maliciously reported the Brokerage/Agents to RECO, laid a false fraud complaint with the police, and advanced a baseless counterclaim.

83) To secure heightened costs under Rule 19.06 and/or section 29 of the CJA, the court is to consider conduct that unduly complicated, prolonged, or otherwise was unreasonable during, the proceeding. I am not convinced that the Khannas' conduct in this proceeding triggers any of these elements. The Khannas interaction with RECO or the police are irrelevant factors for a cost assessment because those actions are extraneous to the proceeding itself.

84) The Brokerage also advanced several "alternative" lower demands for costs if I didn't subscribe to their position. No disbursements were sought by the Brokerage.

85) The Khannas sought $5,000 for they time they devoted to this matter, and $500 in disbursements. The Khannas' further plead that they are impecunious, such that they

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should not have to pay costs in the event they are unsuccessful. No evidence of impecuniosity was placed before me.

86) I consider the case to be of mixed success. The Brokerage was successful in enforcing some recovery under the listing agreement, but so too were the Khannas successful in establishing a breach of fiduciary duty that effectively cut the Brokerages' recovery in half. Given the balance, both parties shall absorb their own legal costs.

December 30, 2025
Date

"David M. José"
Signature of Judicial Officer

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