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FACTUM

ORDER

COURT OF APPEAL FOR ONTARIO

BETWEEN:

HURST REAL ESTATE SERVICES INC. and DTZ CANADA INC., A UGL COMPANY

Respondents (Plaintiffs)

and

**GREAT LANDS CORPORATION, GREAT LANDS (HALTON HILLS) INDUSTRIAL
PARK CORP. and SAM SADR**

Appellants (Defendants)

FACTUM OF THE APPELLANTS (DEFENDANTS)

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FACTUM OF THE APPELLANTS (DEFENDANTS)

PART I: INTRODUCTION

1. This is an appeal by the Appellants (Defendants) from the Judgment of the Honourable Justice Dietrich of the Ontario Superior Court of Justice at Toronto dated September 5, 2018 finding the Appellants jointly and severally liable to the Respondents (Plaintiffs) Hurst Real Estate Services Inc. and DTZ Canada Inc. a UGL Company, in the amount of \$540,000.00 plus H.S.T. of \$70,200.00, for a total of \$610,200.00 for damages for breach of contract. Costs were also awarded in the amount of \$191,500.00 plus H.S.T. and disbursements of \$6,850.43 on a partial and substantial indemnity basis.

Ref: Judgment and Reasons for Judgment, Appeal Book and Compendium ("Appeal Book"), tab 2(a) and (b) and 3(a) and (b)

PART II: OVERVIEW, PARTIES AND ISSUES

2. The Respondents, Hurst Real Estate Services Inc. and DTZ Canada Inc., had brought this action for payment of commissions with regard to the sale of certain industrial lands owned by the Appellant, Great Land (Halton Hills) Industrial Park Corp.

Ref: Statement of Claim, Amended Statement of Defence and Reply, Appeal Book, tabs 4(a) and (b) respectively and Appeal Book, tabs 4(a), (b) and (c)

3. The parties to the action are:

- a) Sam Sadr ("Mr. Sadr"), a businessman, who is the sole officer, director and shareholder of approximately 20 corporations, each of which has the "Great Land" prefix in their names (the "Great Lands Group of Companies"). Most of these corporations purchase land for development purposes, and in particular, for the construction of high rise residential condominium buildings, as well as for long term investment purposes.

Ref: Sadr transcript, in chief, volume IV, pg. 44, line 20 to pg. 46, line 1; Appeal Book, tab 5(d)

- b) Great Land (Halton Hills) Industrial Park Corp. ("Great Land Halton Hills") at all material times owned 58 acres of undeveloped industrial land in the Township of Halton Hills (the "Property").

Ref: Sadr transcript, in chief, volume IV, pg. 46, line 2 to pg. 49, line 26, Appeal Book, tab 5(d) and tab 1, exhibit 88, Certificate of Incorporation, Appeal Book, tab 6(a)

- c) Great Lands Corporation ("Great Lands Corp.") was at all material times being used to provide financing, by way of interest bearing loans, necessary for the use of the Great Land Group of Companies for purchasing properties, developmental purposes, carrying costs and other expenses for each project.

Ref: Sadr transcript, in chief, volume IV, pg. 49, line 27 to pg. 51, line 25, Appeal Book, tab 5(d) and exhibit 1, tab 88, Certificate of Incorporation, Appeal Book, tab 6(b)

- d) Hurst Real Estate Services Inc. ("Hurst Real Estate") is a real estate brokerage firm whose sole officer, director and shareholder is David Hurst ("Mr. Hurst"), who was a

registered broker with Hurst Real Estate for the periods March 25, 2010 to March 22, 2013 and October 5, 2015 to present.

Ref: Exhibit 1, tab, 87, Letters from RECO, Appeal Book, tab 6(c)

- e) DTZ Canada Inc. (“DTZ”) is a real estate brokerage firm, incorporated July 1, 2013. Mr. Hurst was registered as a broker with DTZ from March 25, 2013 to October 1, 2015.

Ref: Exhibit 1, tab 88, Corporate Profile Report, Appeal Book, tab 6(d)

PART III THE ISSUES

4. The trial judge set out the following three (3) issues at paragraph 6 of her Reasons for Judgment:
 1. Was a binding contract formed by Mr. Sadr’s promise to pay a commission not to exceed 5% if Mr. Hurst introduced a purchaser who would pay a price exceeding \$10.3 million for the commercial property?
 2. Are the plaintiffs barred from bringing their action by the *Real Estate and Business Brokers Act, 2002*?
 3. If a commission is payable to the Respondents/Mr. Hurst on the sale of the commercial property, who is liable for the payment?

PART IV: THE FACTS

5. Using the same time periods as used by the trial judge, in paragraph 9 of her Reasons for Judgment, dated September 5, 2018:

Ref: Reasons for Judgment, Appeal Book, tab 2(b)

A) THE INITIAL CONTACT PERIOD: MARCH 14, 2012 TO NOVEMBER 1, 2012:

6. On March 14, 2012, Mr. Hurst first contacted Ron Stein ("Mr. Stein"), manager of land development for the Great Land Group of Companies, to inform him that he may have a prospective purchaser for the Property. Mr. Stein forwarded to Mr. Hurst an email dated March 14, 2012 advising him that Mr. Sadr (who is the principal of all the Great Land Group of Companies) was looking for \$15M dollars, which included a 3% commission and enclosed an Information Package for the Property. While the cover page of the Information Package contains the logo for "Great Lands Corporation", on page 5 under the heading "Local Context", it sets out that the owner of the Property was Great Land Halton Hills. Mr. Hurst testified that he was aware, once he got the Information Package, that Great Land Halton Hills was the owner of the Property.

Ref: Stein transcript, vol. III, pg. 12, line 17 to pg. 15, line 5, Appeal Book, tab 5(c); exhibit 1, tab 1, information package; Appeal Book, tab 6(e); Hurst transcript, pg. 42, line 2 to line 11; Appeal Book, tab 5(a)

7. Mr. Hurst sought a listing for the Property so as to protect his commission, but was advised by Mr. Stein that Mr. Sadr's policy was not to list any of the properties owned by the Great Land Group of Companies with any particular broker but to instead use an "open listing" format under which any broker that had a prospective purchaser could bring in a short term listing or commission agreement to be signed by Great Land Halton Hills before presenting any offers from a prospective purchaser.

Ref: Stein transcript, vol. III, pg. 15, line 24 to pg. 16, line 24, Appeal Book, tab 5(c); Sadr transcript, vol. IV, pg. 59, line 8 to pg. 61, line 16, Appeal Book, tab 5(c); Hurst transcript, vol. I, pg. 17, lines 13 to 28; Appeal Book tab 5(a); and exhibit 1, tab 3, #25, email dated March 14, 2012, Appeal Book, tab 6(e)

B) THE LISTING PERIOD: NOVEMBER 2, 2012 TO FEBRUARY 28, 2013

8. On November 2, 2012 a listing agreement was entered into between Great Land Halton Hills and Hurst Real Estate. The listing agreement clearly showed that the “seller” is Great Land Halton Hills and is signed by Mr. Sadr as “authorized signing officer” of Great Land Halton Hills. The listing period expired February 28, 2013 with a 180 day over holding period expiring on August 27, 2013. Under the terms of the listing agreement, the seller agreed to pay commission, if any agreement of purchase and sale is entered into during the hold over period to someone introduced during the listing period.

Ref: Exhibit 1, tab 6, listing agreement, Appeal Book, tab 6(f); Hurst transcript, vol. I, pg. 31, lines 9 to 14, Appeal Book, tab 5(a)

9. Mr. Hurst, on cross examination, acknowledged that if he were to arrange the sale of the Property, it would be Great Land Halton Hills who would be responsible to pay commissions to Hurst Real Estate, not Mr. Sadr or Great Lands Corp. or any other of the Great Land Group of Companies.

Ref: Transcript of cross examination of Hurst, vol. II, pg. 28, line 21 to pg. 29, line 10; Appeal Book, tab 5(b)

10. When the listing agreement expired on February 28, 2013, Mr. Hurst provided to Mr. Stein a list of persons that he introduced to the Property during the listing period. No letter of intent or offer to purchase was submitted during the listing period.

Ref: Stein transcript, pg. 26, vol. III, tab 5(b); exhibit 1, tab 19, listing period introductions; Appeal Book, tab 6(g)

11. When the listing agreement expired on February 28, 2013, it was not renewed and a new listing agreement was not entered into despite requests by Mr. Hurst.

Ref: Hurst transcript, vol. I, pg. 40, line 28 to pg. 41, line 1, Appeal Book, tab 5(a)

C) THE OVER HOLD PERIOD: MARCH 1, 2013 TO AUGUST 27, 2013

12. During the over hold period, March 1, 2013 to August 27, 2013, letters of intent and offers to purchase were received from two companies, Verus and First Gulf, both of which were prospective purchasers who were introduced by Mr. Hurst during the listing period and were included on the list of persons introduced to the Property during the listing period. Since Verus and First Gulf were introduced during the listing period and presented offers during the hold over period, if these purchases closed, real estate commissions would be payable pursuant to the listing agreement dated November 2, 2012 and clauses were inserted in their letters of intent and offers to purchase providing for same. Unfortunately, neither of these two prospective purchases closed.

Ref: Verus purchase agreement, exhibit 1, tab 56; Appeal Book, tab 6(h); and First Gulf purchase agreement, exhibit 1, tab 46, Appeal Book, tab 6(i)

13. On April 10, 2013, Mr. Hurst sent an email to Jamie Kitchen of Triovest Realty Advisors advising him of the Property. This email was, however, sent out after the listing agreement had expired. Mr. Hurst further testified that Triovest did not follow up with him with regard to the Property. No evidence was adduced at trial that Mr. Kitchen, or any other Triovest representative, contacted Mr. Hurst until September 30, 2013 with regard to the Property or went out to see the Property as a result of this email.

Ref: Hurst transcript, pg. 56, line 2 to line 32, Appeal Book, tab 5(a); exhibit 1, tab 29, email; Appeal Book, tab 6(j)

14. As of April 30, 2013, Mr. Hurst was still seeking a re-listing or new listing agreement but his requests were rejected. Mr. Hurst had in fact prepared a new listing agreement for Great Land Halton Hills to sign, which was not signed.

Ref: Hurst transcript, vol. I, pg. 60, line 2 to line 26; Appeal Book, tab 5(a); exhibit 1, tab 33, draft listing agreement; Appeal Book, tab 6(j)

15. A meeting was held on April 30, 2013 between Messrs. Hurst, Stein and Sadr and a number of emails were exchanged with regard to bonus or enhanced commissions.

Ref: Infra, para. 30(a) to (g)

D) POST HOLD OVER PERIOD: AUGUST 27, 2013 TO SEPTEMBER 29, 2013

16. By an email dated September 4, 2013, Mr. Stein advised Mr. Hurst that it was unlikely that Mr. Sadr would entertain any offers and that he was going to take the Property off the market for a 2 to 3 year period. At this time First Gulf had indicated that it would not be proceeding with the purchase. In the September 4, 2013 email, Mr. Stein also advised Mr. Hurst that he should remove his signs from the Property, which he did.

Ref: Exhibit 50, #412; Appeal Book, tab 6(l), pg. 18 and 19

E) THE NEW AGREEMENT/TRIOVEST PERIOD: SEPTEMBER 30, 2013 TO JANUARY 20, 2014

17. On September 30, 2013, Mr. Hurst sent an email to Mr. Stein advising him that he had been in contact with someone at First Gulf and that person had received a call from a Richard Mulvale of Triovest asking the status of the Property. Mr. Hurst then sent another email to Mr. Stein advising him that he was only “the messenger” and that Triovest wants to submit an offer. As set out in paragraph 13 of this Factum, Mr. Hurst first notified Triovest of the Property on April 10, 2013, more than 6 months earlier, which was after the listing period had expired. Triovest was not on the list provided by Mr. Hurst of persons he introduced to the Property during the listing period.

Ref: Exhibit 54, #431; Appeal Book, tab 6(l), pg. 17(a)

18. Mr. Hurst, on cross examination, acknowledged that Triovest already knew of the Property from its dealings with First Gulf. Mr. Hurst, in his testimony, indicated that First Gulf had approached Triovest during their due diligence period seeking a joint venture partner with them in purchasing and developing the Property after the listing had already expired.

Ref: Cross examination of Hurst, transcript vol. II, pg. 84, lines 25 to 27; Appeal Book, tab 5(b)

19. Mr. Hurst testified that he could not recall meeting with Mr. Mulvale of Triovest and that he first became aware that Triovest was interested in the Property on or about September 30, 2013.

Ref: Hurst transcript, vol. I, pg. 86, lines 19 to line 29, Appeal Book, tab 5(a)

20. Later that day, Mr. Hurst forwarded an email to Mr. Stein from Mr. Mulvale of Triovest indicating that Triovest was interested in putting the Property under a conditional contract. Triovest confirms in the email that it was introduced to the Property by First Gulf. The email from Triovest is not an offer to purchase but only an email showing interest, since there were essential terms that had to be dealt with, such as deposits, closing date, due diligence period, etc.

Ref: Exhibit 1, tab 56; Appeal Book, tab 6(p)(1), pg. 19

21. On October 1, 2013, Mr. Stein sent an email to Mr. Hurst advising him that he had spoken to Mr. Sadr and that Mr. Sadr was not interested in any conditional offers, that the Property was off the market, that Mr. Hurst shouldn't waste their time with regard to the Property and that he didn't want any further updates from Mr. Hurst.

Ref: Exhibit 1, tab 58; Appeal Book, tab 6(p), pg. 26

22. On October 2, 2013, Mr. Mulvale contacted Mr. Stein directly advising him that, “I personally never understood the word never” and after an exchange of emails, Triovest submitted a letter of intent on October 7, 2013. Mr. Sadr decided to sign back the letter of intent, with changes, on October 16, 2013. Mr. Sadr changed his mind after he satisfied himself that Triovest was a serious buyer.

Ref: Exhibit 1, tab 63; Appeal Book, tab 6(l), pg. 23

23. In Triovest’s letter of intent, directed to Great Land Halton Hills, paragraph 8, Triovest states that it had not engaged any real estate brokerage firm with respect to the transaction. On October 16, 2013, a letter of intent was signed on behalf of Triovest and Mr. Sadr as president of Great Land Halton Hills. The letter of intent was delivered directly from Triovest’s office to Mr. Stein.

Ref: Exhibit 1, tab 68; Appeal Book, tab 6(l), pg. 31

24. Mr. Stein testified that he sent emails thereafter to Mr. Hurst to keep him posted as to the progress of the transaction with Triovest as a courtesy so that Mr. Hurst wouldn’t waste any of his time. Mr. Stein further testified that this is what he always does when there is an “open listing”.

Ref: Ron Stein cross-examination, Appeal Book, tab 5(c), pg. 151, lines 5 to 14

25. Triovest assigned the letter of intent and on November 4, 2013 Great Land Halton Hills entered into an agreement of purchase and sale with 6874525 Canada Inc. The sale was completed by Great Land Halton Hills on January 20, 2014 and was signed by Mr. Sadr as president of Great Land Halton Hills.

Ref: Tab 1, exhibit 73; Appeal Book, tab 6(k)

26. None of the witnesses testified at trial that prior to September 30, 2013, did Mr. Hurst present a commission agreement to Great Land Halton Hills, or anyone else, with regard to the Triovest deal. A commission agreement was not raised by Mr. Hurst until October 30, 2013 after the letter of intent had already been signed.

Ref: Exhibit 1, tab 71; Appeal Book, tab 6(l), pg. 32

27. Mr. Sadr wrote back to Mr. Hurst on November 19, 2013 advising him that Great Land Halton Hills owed no commission as a result of the Triovest transaction because Mr. Hurst had been previously advised, both verbally and by email, that the Property was taken off the market in early September, 2013, after the First Gulf transaction was terminated and Mr. Hurst was asked to remove his signs. The sale with the eventual purchaser had not been negotiated through Mr. Hurst but through direct contact between the purchaser's lawyer and the lawyers for Great Land Halton Hills.

Ref: Exhibit 1, tab 77; Appeal Book, tab 6(l), pg. 35

PART V ISSUES AND ARGUMENTS

ISSUE I: WAS THERE A BINDING CONTRACT FORMED BY MR. SADR PERSONALLY TO PAY ENHANCED COMMISSIONS ON A PURCHASE PRICE OF \$10.3M DOLLARS?

28. On November 2, 2012, a listing agreement had been entered into between Hurst Real Estate and Great Land Halton Hills (Appeal Book, tab 6(f)) wherein the commission would be 3% of the sale price or 4% if another co-operating broker was involved. The listing price was \$10.3M dollars and expired on February 28, 2013 without any agreement of purchase and sale having been submitted.

29. The trial judge found, at paragraphs 17 and 18 of the Reasons (Appeal Book, tab 2(b)) that an agreement as to enhanced commissions (or bonus) was agreed to as a result of a meeting that took place on April 30, 2013 between Messrs. Hurst, Stein and Sadr and through an exchange of emails on or about May 1, 2013. The new agreement was that if the property sold for over \$10.3M dollars, an enhanced commission would be paid on the excess over \$10.3M dollars, by way of a 50/50 split.

30. According to the trial judge, the new agreement arose as follows:

- a) An email dated April 23, 2013 (Appeal Book, tab 6(l)(1)) from Mr. Stein to Mr. Hurst wherein Mr. Hurst was advised that Mr. Sadr was not interested in “re-listing” the property;
- b) A meeting that was held on April 30, 2013 between Messrs. Hurst, Stein and Sadr to discuss a bonus commission if Mr. Hurst brought in a purchaser who paid over \$10.3M dollars;
- c) An April 30, 2013 email from Mr. Hurst to Mr. Stein (Appeal Book, tab 6(l)(12)) sent after the meeting which states, “I really appreciate Sam’s risk/reward offer” and then proceeds to inquire about getting the new listing agreement signed;
- d) The new listing was a listing agreement brought by Mr. Hurst to the meeting of April 30, 2013 (Appeal Book, tab 6(j)). The listing was for \$11.5M dollars with a 3% commission if no co-operating broker was involved. The listing agreement was drafted to be signed by Great Land Halton Hills, but never was.
- e) An email dated May 1, 2013, sent from Mr. Hurst to Mr. Stein again asking for the listing agreement to be signed and further stating, “I am sure you understand I cannot put the commitment into working this deal without the listing”;

- f) An email from Mr. Stein to Mr. Hurst dated May 1, 2013 (Appeal Book, tab 6(1)(14)) confirming discussions held on April 30, 2013 as to enhanced commissions and the requirement for a co-op/commission agreement that Mr. Sadr would have to sign for a specific deal;
- g) An email from Mr. Hurst to Mr. Stein dated May 2, 2013 (Appeal Book, tab 6(1)(15)) in which he still refers to wanting a listing agreement and that a listing agreement is more important to him than any bonus that Sam has generously offered.

31. The response to an offer must be a clear indication that the offer has been accepted, unconditionally, clearly and absolutely. The reply that he finds that offer “agreeable” is not an acceptance.

Ref: The Law of Contract in Canada, 6th edition, G.H.L. Fridman, pgs. 45 to 47 (Carswell), Book of Authorities, Tab 16

University of Alberta v. Nowrouzian, [2005] A.J. No. 767, paras. 11 and 29, Book of Authorities, Tab 12

Pelley v. Morguard Trust Co., [1989] N.J. No. 204, pg. 3, Book of Authorities, Tab 13

Noel v. Paulin, [1987] N.B.J. No. 617, Book of Authorities, pg. 3, Tab 14

32. In the exchange of emails between Mr. Hurst and Mr. Stein, there is no clear indication by Mr. Hurst that he accepts Mr. Stein’s offer. In his email of May 2, 2013, he replied that while he appreciates Sam’s generosity, “the listing is far more important than any bonus”. In addition, Mr. Hurst states that the listing agreement, which had been prepared and left with Mr. Stein and Mr. Sadr on April 30, 2013, was extremely important to him. On the previous date’s email, Mr. Hurst stated that without a listing he cannot commit the work the deal needed.

33. Mr. Hurst’s emails do not amount to clear, unconditional, unequivocal acceptance of the offer made on April 30, 2013 and May 1, 2013.

34. In fact, there is a further email dated May 7, 2013 from Mr. Hurst to Mr. McCaskill of DTZ (Appeal Book, tab 6(j), exhibit 37, item 515) wherein he states, “My listing has expired and the owner has indicated he does not want to re-list”, again showing he has not accepted the May 1, 2013 offer.

35. If there was a contract, which is not admitted, it was conditional on the execution of a co-op/commission agreement as provided for in the May 1, 2013 email prepared by Mr. Stein. The trial judge erred, in paragraph 47 of her Reasons, where she states that there were no pre-conditions in the May 1, 2013 email. Mr. Sadr had always insisted on the signing of a commission agreement for each specific transaction, before the broker brought in a letter of intent or offer to purchase.

Ref: Appeal Book, Sadr Transcript, tab 5(d), pg. 59.

Turney v. Zhilka, [1959] S.C.J. No. 37, pg. 3, Book of Authorities, tab 10

36. In her Reasons, the trial judge makes reference to a number of cases, namely *J.J. Barnicke*, *Century 21 Realty*, *Cash* and *William Allen*. The courts in those cases found that agreements of purchase and sale had been concluded as a direct sequence of events in which the real estate agent was intimately involved and that the agent was an effective and instrumental cause of the ultimate sale. This is not the situation in this case.

37. While Mr. Hurst sent an email to Mr. Kitchen at Triovest on April 10, 2013 (Appeal Book, tab 6(l)(9)) advising him as to the availability of the Property, this was after the listing period had expired. Triovest was not on the list of persons Mr. Hurst advised Mr. Stein that he introduced the Property to (Appeal Book, tab 6(g)). Mr. Hurst also acknowledged on his cross examination that he never showed Mr. Kitchen the Property

(Appeal Book, tab 5(a), pg. 56 and 57, tab 5(b), pg. 57 and 58) and that he never heard back from Mr. Kitchen. Mr. Hurst's evidence was that he did not have contact with anyone from Triovest, including Mr. Kitchen and Mr. Mulvale, until the end of September, 2013.

38. Triovest was introduced to the Property when First Gulf was looking for a joint venture partner in early September, 2013 (Appeal Book, tab 5(b), pg. 77, tab 6(l) #17). Mr. Hurst did not introduce Triovest to the Property. By an email dated September 30, 2013 (Appeal Book, tab 6(l) #18) Mr. Hurst advises Mr. Stein that he is only a "messenger" with regard to Triovest. By an email dated October 1, 2013 Mr. Stein advises Mr. Hurst that Mr. Sadr does not want to deal any longer with the Property for the next few years and that it is off the market (Appeal Book, tab 6(l) #20). The letter of intent and offer to purchase that came from Triovest directly to Great Land Halton Hills was on October 17, 2013 (Appeal Book, tab 6(l) #31, tab 6(i))

39. Therefore, Mr. Hurst did not convey an offer in writing with regard to the Property, show the property to Triovest or introduce Triovest to Great Land Halton Hills. Mr. Hurst was not an effective and instrumental cause leading to the purchase by Triovest or its assignee.

40. The *Bhasin v. Hrynew* case recognizes the duty of honest performance in relation to contractual obligations. The trial judge found that when Mr. Stein advised Mr. Hurst that it was not necessary for him to follow up with Mr. Mulvale, that he was not acting in good faith. However, the trial judge failed to take into account the evidence that Mr. Sadr changed his mind about dealing with Triovest until a few days later when he made

inquiries about Triovest and found that they were a reputable company (Sadr Transcript, Appeal Book, tab 5, pgs. 93 and 94).

41. In addition, Mr. Stein kept Mr. Hurt and Mr. Mulvale in the “loop” with regard to what was transpiring with the Triovest transaction (see *supra* para. 24), even though it was Messrs. Stein and Sadr’s honest belief that since they had no agreement with Mr. Hurst as to commissions, there was no need to keep either Mr. Hurst or Mr. Mulvale advised. As previously set out in paragraphs 30 to 35 of this Factum, the Appellants submit that there was no contract with Mr. Sadr or Great Lands Corp.

42. It can be instead argued that there was a lack of honest performance on the part of Mr. Hurst. For example, there is an email from Mr. Hurst to Mr. Mulvale on October 11, 2013 that they should lay low as to the issue of commissions. A further email dated November 20, 2013 from Mr. Hurst to Mr. McCaskill discusses a recommendation that could be made to Triovest to have them give Great Land Halton Hills a “haircut” by lowering the purchase price by \$800,000.00 with \$500,000.00 going to the realtor and the other \$500,000.00 going to Triovest as a reduction in the purchase price.

ISSUE II: ARE THE RESPONDENTS BARRED FROM BRINGING THEIR ACTION BY REBBA2002?

Real Estate and Business Brokers Act, 2002, Sections 4 and 9

43. Section 4 provides that no person can trade in real estate or perform any of the functions of a real estate agent unless registered under the Act.

44. Section 9 of the Act provides that:

“No action shall be brought for commission or other remuneration for services in connection with a trade in real estate unless at the time of **rendering** the services the person bringing the

action was registered or exempt from registration under this Act and the court may stay any such action upon motion.”

45. The certificate of the Deputy Director under the *Real Estate and Business Brokers Act*, 2002, shows that the Respondent, Hurst Real Estate Services Inc., was not registered for the period from March 23, 2013 to October 4, 2015. Whether David W. Hurst was registered is irrelevant as he is not a Plaintiff in the action.
46. The alleged services rendered by Hurst Real Estate with regard to the Triovest transaction would have occurred between September 30, 2013 and January 20, 2014, when Mr. Hurst Real Estate was not a registered broker.
47. During the material time period of the rendering of services, Mr. Hurst testified that he was with DTZ and he testified that any commissions earned would be split on the basis of 90% to Hurst Real Estate and 10% to DTZ. This is in fact set out in an email dated April 30, 2013 from Mr. Hurst to Mr. Stein (Appeal book, tab I, pg. 10).
48. While Mr. Hurst testified that he was authorized by DTZ’s President to bring this action on behalf of DTZ, the Defendants were not notified until the day of trial that Mr. McCaskill from DTZ would not be called as a witness by the Plaintiffs even though he appeared on the Plaintiffs’ witness list attached to the Trial Management Memo dated Feb.14, 2018. The Plaintiffs did not call any witnesses from DTZ, other than Hurst who was no longer with DTZ.
49. Since Hurst Real Estate and DTZ are separate legal entities, each is only entitled to make a claim for the commission each alleges is owed to them. Therefore the amount of DTZ’s claim is only 10% of what commissions, if any found owing with respect to the

Triovest deal.

Real Estate and Business Brokers Act, 2002, Section 36(3)

50. Section 36(3) of the Act provides:

“No registrant shall request or enter into an arrangement for the payment of a commission or any other remuneration based on the difference between the price at which the real estate is listed for sale or rental and the actual sale price or rental price, as the case may be, of the real estate, nor is a registrant entitled to retain any commission or other remuneration computed upon any such basis.”

51. At the time that the May 1, 2013 email was written, Mr. Hurst had been advised that Great Land Halton Hills wanted to sell the Property for at least \$10.3M dollars. While the listing agreement for \$10.M dollars that had been sent the day before was not signed, there was an open listing for this price. Therefore, the bonus commission was based on the difference between the list price, being \$10.3M dollars and the actual sale price, if it was greater than \$10.3M dollars, which is contrary to Section 36(3). Hurst Real Estate and DTZ were both experienced real estate brokers and therefore should have knowledge of Section 36(3) of the Act.

REBBA 2002, Reg 567/05, section 23

52. Section 23(1)(a) of Regulation 567/05 under REBBA 2002 requires a written agreement the is signed by or on behalf of the person required to pay the commission. None of the emails exchanged around March 1, 2013 contains the signature of any party or on behalf of any part as required by Section 23(1)(a) of the Regulations, Messrs. Stein and Sadr. Even if their names are printed on an email, they do not qualify as signatures as provided for in the *Electronic Commerce Act, 2000*.

Personal Liability of Sadr: Inducing Breach of Contract

53. While the judgment imposes liability on the Appellants for damages for breach of contract, in her reference to the *Century 21 Coastal Realty* case at paragraph 70 of her Reasons, she makes reference to the tort of inducing breach of contract. While no damages have been awarded for inducing breach of contract, which were pleaded by the Respondents, I will deal with this issue. Better safe than sorry.

54. Great Land Halton Hills is not a nominal owner. It owned the Property for approximately 14 years and filed tax returns. The company is still in existence. Great Land Halton Hills is not a subsidiary of Great Lands Corporation since the shares of Great Land Halton Hills are not owned by Great Lands Corporation, they are owned by Mr. Sadr.

55. Mr. Sadr testified that from the time Great Land Halton Hills purchased the Property in 2000 until it sold the Property in January, 2014, it borrowed money from Great Lands Corp. in order to provide the funds required for the down payment for the purchase of the Property in 2000, to subsequently discharge the mortgage that had been arranged when the Property was purchased, to pay interest on monies borrowed, to finance development costs such as studies and reports for draft plan approval and to pay realty taxes and other carrying costs, and other expenses (such as salaries). When the Property was sold in 2014, the sale proceeds were used to pay back the Great Lands Corp. the monies borrowed.

Ref: Sadr in chief, Vol. IV, tab 5(d), pg. 51, lines 1-29

56. In the Ontario Court of Appeal Decision of *Ariston Realty Corp.*, at paragraph 33, the court stated that there was no basis for holding the sole officer, director and shareholder

of the selling company personally liable. While the shareholder was no doubt the directing mind of the selling company, the evidence fell far short for establishing that the shareholder had acted in pursuit of some interest separate from that of the corporation, as required for the shareholder to be found personally liable. Therefore, only the corporate seller was liable for the compensation owed to the broker.

57. In the case of *Nucorp Realty Ltd. v. Bakas Investments Inc.* [2007] O.J. No. 1502 (SCO), in a decision of Perell, J., the plaintiff was claiming commission with regard to the sale of a certain property and sued two corporations for breach of contract and the two individuals who were the directing minds of the corporation on the basis of unjust enrichment and inducing breach of contract. On a motion for summary judgment the claim against the two individuals was dismissed. Firstly, the court held that because the plaintiff failed to plead that the corporate defendants were sham corporations and that the corporate veil should be pierced, the court should not pursue this point (see paragraph 4 of the Decision). In this case the Respondents also did not plead that Great Land Halton Hills was a sham corporation and that the corporate veil should be pierced.
58. As to the claim of inducing breach of contract, Perell, J. relied upon the principals set out in the case of *Said v. Butt* [1920] 3 KB 497 and *ADGA Systems International Ltd. v. Valcom Ltd.*, [1999] O.J. No. 27 (CA). A person dealing with a corporation cannot have available to him both the claims of breach of contract against the corporation and a claim in tort for inducing breach of contract against the directing minds of the corporation. Since no independent tort was pleaded against the individual other than inducing breach of contract, the plaintiff's claim as against the two individuals was dismissed (see paragraph 40 of *Nucorp Decision*).

59. With regard to the claim for unjust enrichment, the court set out the three elements to the claim:

- i. The defendant has been enriched;
- ii. The plaintiff has suffered corresponding deprivation; and
- iii. There is an absence of juristic reason.

Since there was no evidence the any profits that Great Land Halton Hills earned went to either Mr. Sadr or Great Lands Corp., the claim of unjust enrichment cannot succeed as against them (see paragraph 36 of the Decision). There was no evidence of the absence of a juristic reason.

60. The Decision was appealed to the Court of Appeal and the Court of Appeal dismissed the appeal. The Court of Appeal rejected the claims for unjust enrichment and inducing breach of contract for the reasons given by the motion's judge.

61. Therefore, pursuant to the aforesaid judgment, any claims against Mr. Sadr for inducing breach of contract should be dismissed.

62. In the case cited by the trial judge, *Century 21 Coastal Realty*, the court found that the corporate veil should not be pierced and secondly, that only one of the individual defendants acted in his own personal, economic self-interest and he testified that he believed that he would derive a personal benefit (see paragraph 50 of the Decision). There was no evidence adduced at trial that Mr. Sadr had obtained a personal benefit as a result of the non-payment of commission. The evidence was that only Great Land Halton Hills may have benefitted.

63. The fact that corporations act through officers and directors does not change the nature of the contractual relationship they enter into. There was no pleading that Mr. Sadr, the corporate principal, was the real party to a commission agreement, if one existed, or that Great Land Halton Hills was incorporated as a sham and being used for fraudulent and improper conduct. When suing officers and directors, there is a need to plead the particulars of the tortious conduct of the individual separate from that of the company pleading, that at all material times, the director and officer was the controlling mind of a corporation, is insufficient for finding an officer and director personally liable.

Ref: Pita Royale Inc. (c.o.b. Aroma Taste of the Middle East) v. Buckingham Properties Inc., [2019] O.J. No. 2717 Book of Authorities Tab 15

PART V: COSTS

64. The trial judge made an order as to costs taking into account an offer to settle and thereby awarded costs on a partial indemnity basis for part of the proceedings and costs on a substantial indemnity basis for the balance of the proceedings. Depending on the results of this appeal, costs may have to be re-adjusted.

PART VI: NATURE OF ORDER REQUESTED

65. The Appellants ask that the appeal be allowed and that the Judgment of the Honourable Justice Dietrich of the Ontario Superior Court of Justice dated September 5, 2018 and the Order as to Costs dated October 31, 2018, Court File No. CV-14-00512903-0000, both be set aside, with costs of this appeal and of the trial to the Appellants.

66. In the alternative, if a contract has been entered into, which is not admitted, in paragraph 44 of her Reasons, the trial judge finds that the terms of commission arrangements that

had been agreed to were that if Mr. Hurst brought in a purchaser who is willing to purchase the Halton Hills Property for more than \$10.3M dollars, the commission would be 3% for the first \$10.3M dollars, and on any amount paid of \$10.3M dollars, the difference would be split equally between Mr. Hurst and Great Lands Halton Hills. At paragraph 44 of the Reasons, the trial judge erred in stating that an apportioning of the enhanced commissions would be between "Mr. Hurst and Great Lands Corporation (and not Great Land Halton Hills)". Therefore, if that was the case, which is denied, Great Land Halton Hills would pay a 3% commission on \$10.3M dollars, being \$309,000.00, and Great Lands Corporation (should be Great Land Halton Hills) would pay the enhanced commission to a maximum cap of 5% of the sale price, being \$231,000.00 (See Schedule attached).

Ref: Ron Stein cross-examination, Pg. 138, line 15 and pg. 139, line 10

CERTIFICATE

1. An Order under Rule 61.09(2) is not required; and
2. The Appellants' lawyer estimates that he will require 90 minutes for his oral argument.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 25th DAY OF JUNE,
2019.



DAVID A. WEISMAN, Lawyer for the Appellants

SCHEDULE

Paragraphs 44 and 49 of Reasons

If Property sells at \$10.8M dollars:

3% commission on \$10.3M dollars	\$309,000.00
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50/50 slip on .5	<u>250,000.00</u>
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\$559,000.00

Capped amount

5% x \$10.8M dollars	\$540,000.00
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Therefore	\$19,000.00 deduction from \$250,000.00 = \$231,000.00
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Total commission payable:

Great Lands (Halton Hills)	\$309,000.00
----------------------------	--------------

Great Lands	<u>\$231,000.00</u>
-------------	---------------------

\$540,000.00

E. & O. E.

SCHEDULE "A"
LIST OF AUTHORITIES

1. *JJ Barnicke Limited v. 1471422 Ontario Limited*, [2007] O.J. No. 3740 (ONSC)
2. *Century 21 Realty Ltd. v Trickett*, [1986] A.J. 808 (Alta. C.A.)
3. *Cash v. George Dundas Realty Ltd.*, [1073] 40 D.L.R. (3d) (ONCA)
4. *William Allen Real Estate Co. v. Robichaud*, [1990] O.J. No. 41
5. *William Allen Real Estate Company Limited v. Joseph Yvon Robichaud et al.*, [1993] O.J. No. 75 (C.A.)
6. *Bhasin v. Hrynew*, 2014 SCC 71
7. *Century 21 Coastal Realty Ltd. v. 0863486 BC Ltd.*, 2017 BCWLD 5557 (BCSC)
8. *Nucorp Realty Ltd. v. Bakas Investments Inc.* [2007] O.J. No. 1502 (SCO)
9. *Nucorp Realty Ltd.v. Bakas Investments* [2007} OJ 4667 (CA)
10. *Said v. Butt* [1920] 3 KB 497
11. *ADGA Systems International Ltd. v. Valcom Ltd.*, [1999] O.J. No. 27 (CA)
12. *University of Alberta v. Nowrouzian*, [2005] A.J. No. 767
13. *Pelley v. Morguard Trust Co.*, [1989] N.J. No. 204
14. *Noel v. Paulin*, [1987] N.B.J. No. 617
15. *Pita Royale Inc. (c.o.b. Aroma Taste of the Middle East) v. Buckingham Properties Inc.*, [2019] O.J. No. 2717
16. *The Law of Contract in Canada*, 6th edition, G.H.L. Fridman (Carswell)

SCHEDULE "B"
LIST OF STATUTES

1. *Real Estate and Business Brokers Act, 2002*
2. *Real Estate and Business Brokers Act, 2002 Regulation 567/05 section 23*
3. *Electronic Commerce Act 20000*

**HURST REAL ESTATE SERVICES INC. et al
DTZ CANADA INC., A UGL COMPANY
and SAM SADR**

Respondents (Plaintiffs)

-and-

**GREAT LANDS CORPORATION, GREAT
LANDS (HALTON HILLS) INDUSTRIAL PARK CORP.**

Appellants (Defendants)

Court of Appeal File No. C65935

SCOJ Court File No. CV-14-00512903-0000

COURT OF APPEAL FOR ONTARIO
Proceeding commenced at
TORONTO

FACTUM

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LSUC #16203S

DOCUMENT TITLE:

Factum of the Respondents (Plaintiffs)

DOCUMENT CATEGORY (Circle One):

PLEADINGS

MOTIONS

FACTA/BRIEFS – MOTIONS

FACTA/BRIEFS – APPLICATIONS

FACTA/BRIEFS - APPEALS

DOCUMENT TYPE (Circle One):

PLEADING

MOTION

FACTUM

ORDER

COURT OF APPEAL FOR ONTARIO

B E T W E E N :

**HURST REAL ESTATE SERVICE INC.
and DTZ CANADA INC., A UGL COMPANY**

Respondents
(Plaintiffs)

– and –

**GREAT LANDS CORPORATION, GREAT LANDS (HALTON HILLS)
INDUSTRIAL PARK CORP. and SAM SADR**

Appellants
(Defendants)

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Lawyers for the Respondents (Plaintiffs)

PART I - OVERVIEW STATEMENT

1. This is an appeal from a judgment granted in favour of the plaintiffs following a trial concerning the plaintiffs' entitlement to a real estate commission arising from the sale of a parcel of land in the Town of Halton Hills. As will be outlined in this factum, the trial judge, Madam Justice Dietrich, made numerous findings of fact, all of which were fully supported by the documentary evidence that formed the trial exhibits, and the *viva voce* evidence of the trial witnesses. Having made those findings of fact, the trial judge correctly applied the relevant judicial and statutory authorities, which led inexorably to a judgment in favour of the plaintiffs against all three of the defendants.

2. The plaintiffs brought this action for the payment of commissions owed pursuant to the purchase and sale of a large industrial property known as Part of Lots [redacted] and [redacted] Concession [redacted] formerly in the Township of Esquesing, now in the Town of Halton Hills (the "Property").

3. The nominal owner of the Property was the defendant, Great Land (Halton Hills) Industrial Park Corp. ("Great Land HH"). The defendant, Sam Sadr, is the sole officer, sole director and sole shareholder of Great Land HH. Mr. Sadr is also the sole officer, sole director and sole shareholder of the defendant, Great Lands Corporation. Ron Stein was Manager of Land Development for Great Lands Corporation.

4. The plaintiff, Hurst Real Estate Services Inc. ("Hurst Real Estate") was a registered real estate brokerage from May 2, 2002 - March 22, 2013. During this time, David Hurst worked as a real estate agent for Hurst Real Estate (he was also the sole owner). In March 2013, Mr. Hurst joined the plaintiff, DTZ Canada Inc., a UGL Company ("DTZ"), a registered real estate brokerage.

5. From March 2012 to November 2013, during his time at Hurst Real Estate and at DTZ, Mr. Hurst made extensive efforts to sell the Property for the defendants in exchange for a commission. For most of that time, Mr. Hurst worked without a listing agreement. A listing agreement was entered into between the parties covering the period from November 2, 2012 to February 28 2012. Thereafter, Mr. Sadr refused Mr. Hurst's repeated requests for a new listing agreement. The Property was not listed for sale, and Mr. Sadr preferred to maintain what he described as an open listing policy. However, Mr. Hurst was repeatedly assured by the defendants that if he brought a prospective purchaser to the defendants who made an offer to purchase the Property that was acceptable to Mr. Sadr, the plaintiffs would be paid a commission on the closing of the transaction.

6. In addition, on April 30, 2013, Mr. Sadr personally offered Mr. Hurst an enhanced commission opportunity capped at 5% if he was able to sell the Property for more than \$10.3 Million. This agreement between the parties was set out in an e-mail from Mr. Stein to Mr. Hurst on May 1, 2013.

7. For the relevant time from March 2012 to November 2013, Mr. Hurst introduced a number of prospective purchasers to the Property and to the defendants, including Triovest Realty Advisors Inc. ("Triovest"). On September 30, 2013 Triovest wrote to Mr. Hurst with an offer to purchase the Property for \$10.8 Million, on an all cash basis with a 45 day due diligence period. Later that day, Mr. Hurst forwarded the offer to purchase from Triovest to Mr. Stein, who was Mr. Hurst's main point of contact on behalf of the defendants.

8. Mr. Hurst also urged Triovest to contact Mr. Stein directly for more details concerning the Property, and to tout Triovest's record of successfully closing property transactions on which it had made offers to purchase.

9. Triovest contacted Mr. Stein directly on October 1, 2013. From then on, the defendants generally ceased communication with Mr. Hurst and dealt with Triovest directly. At Mr. Stein's request, on October 7, 2013 Triovest sent the defendants a letter of intent concerning its wish to purchase the Property on terms that were identical to those in its offer to purchase which Mr. Hurst had sent to the defendants on September 30, 2013.

10. On October 16, 2013, Mr. Sadr on behalf of the defendants, signed back the Triovest letter of intent, agreeing to all of Triovest's proposed terms of purchase with no amendments. On November 4, 2013 Triovest and the defendants signed an agreement of purchase and sale for the Property, on terms identical to those set out in Triovest's initial offer to purchase sent to the defendants by Mr. Hurst. Triovest ultimately purchased the Property for \$10.8 Million. The sale closed on January 20, 2014, but the defendants refused to pay a commission to the plaintiffs.

11. At trial, both of the defendants' witnesses (Mr. Sadr and Mr. Stein) testified that the April 30, 2013 personal offer from Mr. Sadr to Mr. Hurst of an enhanced commission (memorialized in an e-mail from Mr. Stein to Mr. Hurst on May 1, 2013) constituted a new agreement between the parties. They also testified that this agreement was never revoked or taken off the table at any time prior to the successful sale of the Property by the defendants to Triovest.

12. As indicated above, the learned trial judge made numerous findings of fact, all of which were fully supported by the evidence before her, which led inexorably to her decision in favour of the plaintiffs. The appellants, in their factum, do not contend that the learned trial judge made any palpable and overriding errors in her factual findings or otherwise. When one reads the reasons of the learned trial judge and ties them into the evidence before her, it is apparent that the decision appealed from is a careful, considered and thorough analysis of the evidence and the applicable law. This appeal must be dismissed.

PART II - RESPONDENTS' STATEMENT OF FACTS

13. The respondents accept as materially correct the facts set out in paragraphs 5, 6 (although the appellants' citations are inaccurate), 7, 8, 10, 11, 13-16, 18, 19, 21, 23 and 25 in the appellants' factum.

14. The respondents disagree with the "facts" as alleged in paragraphs 9, 12, 17, 20, 22, 24, 26 and 27 in the appellants' factum.

15. There was an extensive record of contemporaneous written communication between the parties on the issues raised at trial. Counsel provided the trial judge with a three volume Joint Documents Brief which was marked as Exhibit 1 at trial. Counsel agreed that there were no issues of document authenticity. However, the document that is contained at Exhibit Book Volume II, Tab 61 is erroneous as to its stated date. Tab 61 contains the Triovest Letter of Intent concerning the Property which is dated July 10, 2013 on its face. The parties agreed that this date is incorrect, the day and month in the letter were accidentally transposed, and the correct date should in fact be October 7, 2013.¹

16. The plaintiffs called Mr. Hurst as their sole witness. Mr. Hurst testified that he has been a licenced real estate broker for over 40 years and has a particular expertise in industrial real estate.² He has generally acted equally for vendors and purchasers and has been involved in over 300 transactions through the course of his career.³

17. The defendants called two witnesses: Ron Stein and Sam Sadr. Mr. Sadr is the sole officer, sole director and 100% shareholder of Great Lands Corporation and Great Land HH.⁴ He holds

¹ Document Compendium of the Respondent ("DCR"), Tab 58.

² DCR, Tab 2, lines 20-21.

³ DCR, Tab 3, lines 19-21.

⁴ DCR, Tab 4, page 49, lines 27-32; page 50, lines 1-27.

the same complete ownership and sole responsibility for the 20 or more Great Lands corporations currently in existence, one of which is Mr. Sadr's real estate brokerage, Great Lands Realty Ltd.⁵ Mr. Sadr is the sole directing mind and decision-maker for the defendant companies. In addition, he became directly personally involved in the contractual agreement with the plaintiffs and the promise of an enhanced commission on the sale of the Property if certain conditions were met. Mr. Stein is the Manager of Land Development for Great Lands Corporation and is essentially Mr. Sadr's right hand.⁶ Mr. Stein has never been formally employed or paid by Great Land HH.⁷

18. As was noted by the trial judge at paragraph nine of her Reasons for Judgment, the relationship between Mr. Hurst as real estate broker/agent on behalf of the plaintiffs, and Mr. Sadr and the Great Lands corporations, as vendors, developed over many months. The four relevant time periods, as identified by the trial judge, are: the initial contact period (March 2012- November 2012); the listing agreement period (November 2, 2012 – February 28, 2013); the holdover period (March 1, 2013 – August 27, 2013); and the new agreement/Triovest period (May 1, 2013- January 2014).

The Initial Contact Period

19. In March 2012, Mr. Hurst, on behalf of a potential purchaser, approached Great Lands Corporation to make inquiries about the Property.⁸ Mr. Stein advised that the Property was not listed for sale. However, if the right offer was made, Mr. Sadr was prepared to sell.⁹

⁵ DCR, Tab 5, lines 8-31; DCR, Tab 59.

⁶ DCR, Tab 6 page 8, line 31-32, page 9, lines 1-20; and DCR, Tab 7, lines 10-20.

⁷ DCR, Tab 8, page 82, line 11 to page 83, line 5.

⁸ DCR, Tab 9, page 9, lines 23-32, page 10, lines 1-32, page 11, lines 1-7.

⁹ DCR, Tab 10, lines 30-33; DCR, Tab 60.

20. On March 14, 2012, Mr. Stein provided Mr. Hurst with an information package produced by Great Lands Corporation and printed on Great Lands Corporation letterhead concerning the Property.¹⁰ The information package disclosed the Property was owned by Great Land HH.¹¹ In the covering email accompanying the information package, Mr. Stein advised Mr. Hurst that “Sam is looking for \$15 million which includes a 3% commission for your company”.¹² There was no mention of a listing agreement or a commission agreement being required. Mr. Hurst testified that more than 70% of the transactions with which he had been involved did not require a listing agreement or a commission agreement prior to the closing of the transaction or as a prerequisite for receiving a commission.

21. From March 2012 to October 2012 Mr. Hurst introduced prospective purchasers to the Property.¹³ Mr. Hurst testified that he had encouraged his contacts to also contact Mr. Stein directly to discuss the Property.¹⁴ Mr. Hurst testified that such direct contact between the potential purchaser and the vendor was not uncommon in the trade of industrial real estate, as it is an efficient means for the purchaser to get information and direct answers to questions about the property for sale.¹⁵ During this initial contact period, no letters of intent or agreements of purchase and sale were exchanged.

The Listing Agreement Period

22. On November 2, 2012, Mr. Sadr on behalf of Great Land HH and Mr. Hurst on behalf of Hurst Real Estate entered into a listing agreement with an expiry date of February 28, 2013, and a

¹⁰ DCR, Tab 60.

¹¹ *Ibid.*

¹² *Supra note 10.*

¹³ DCR, Tab 11.

¹⁴ DCR, Tab 12, lines 9-33.

¹⁵ *Ibid.*

180 day holdover period (expiring August 27, 2013).¹⁶ The listing agreement provided for a commission of 3% of the sale price to the listing broker, or a commission of 4% if there was a co-operative broker. Mr. Sadr was then looking for \$15 million for the Property.

23. Once the listing agreement was signed, Mr. Hurst proceeded to actively market the Property through advertising, an information brochure and the erection of signs on the Property.¹⁷ By March 2013, he had introduced 42 prospective purchasers to the Property.¹⁸

24. In the latter part of February 2013, shortly before the expiration of the listing agreement, Mr. Hurst introduced another prospective purchaser to the Property, First Gulf.¹⁹ Subsequently, First Gulf made an offer to purchase the Property which was accepted by the defendants.

The Holdover Period

25. After the listing agreement had expired, Mr. Hurst made several requests to have the listing agreement renewed.²⁰ Mr. Sadr always declined such requests from Mr. Hurst.²¹ However, Mr. Hurst continued making efforts to find a purchaser despite the absence of a listing agreement, with regular assurances from the defendants that if he brought a purchaser to the Property, he would be paid a commission upon the successful closing of the transaction.²²

26. On April 10, 2013, Mr. Hurst introduced Triovest to the Property.²³ Mr. Hurst sent an email to Jamie Kitchen of Triovest concerning the Property and its features. He subsequently had a

¹⁶ DCR, Tab 61.

¹⁷ DCR, Tab 13, page 26, lines 24-33, page 27, lines 1-11.

¹⁸ DCR, Tab 14, lines 24-33; Tab 62.

¹⁹ DCR, Tab 66.

²⁰ DCR, Tab 19, page 55, lines 20-31, page 57, lines 10-12, page 59, lines 29-33; Tab 20, lines 11-22 Tab 69.

²¹ DCR, Tab 21.

²² DCR, Tab 22, lines 16-28; Tab 67.

²³ DCR, Tab 23; Tab 68.

telephone conversation with Mr. Kitchen, providing him with more details concerning the Property. Mr. Kitchen advised Mr. Hurst that he would alert Triovest's downtown Toronto personnel to the possibility of purchasing the Property. Triovest ultimately did purchase the Property.²⁴

27. On April 30, 2013 Mr. Hurst had a meeting with Mr. Sadr and Mr. Stein during which Mr. Sadr specifically offered Mr. Hurst/DTZ what Mr. Sadr agreed at trial was a "special offer" made only to Mr. Hurst/DTZ.²⁵ The offer made by Mr. Sadr to Mr. Hurst/DTZ was that if he brought in a purchaser who offered to purchase the Property for a price greater than \$10.3M and the offer was accepted by Mr. Sadr, then DTZ would receive a 3% commission on \$10.3M of the sale price, and DTZ and Great Lands Corporation/Mr. Sadr would split any amounts in excess of \$10.3M on a 50/50 basis. Subsequent to the meeting, Mr. Hurst sent an email to Mr. Stein on April 30, 2013, expressing his gratitude and appreciation for Mr. Sadr's enhanced commission offer.²⁶

28. On May 1, 2013, Mr. Stein sent an email to Mr. Hurst memorializing the offer made by Mr. Sadr and Great Lands Corporation to DTZ, and advising that the commission amount would be capped at 5% on any purchase greater than \$10.3M.²⁷ In cross-examination, Mr. Stein agreed that the offer made by Mr. Sadr was a personal promise from Mr. Sadr to Mr. Hurst/DTZ, which constituted a new agreement between the defendants and Mr. Hurst/DTZ.²⁸ He also agreed that the email was sent on his letterhead as Manager of Land Development for Great Lands Corporation (and not Great Land HH), that the offer of an enhanced commission was made specifically by Mr. Sadr to Mr. Hurst/DTZ, and that the May 1, 2013 new agreement stated that any apportioning of

²⁴ *Ibid.*

²⁵ DCR, Tab 24, lines 3-16.

²⁶ DCR, Tab 69.

²⁷ DCR, Tab 67.

²⁸ DCR, Tab 25, page 140, lines 28-32, page 141, lines 1-9 and 25-28; Tab 67.

the enhanced commission would be between Mr. Hurst/DTZ and Great Lands (and not Great Land HH).²⁹

29. On May 17, 2013 First Gulf provided a letter of intent, through Mr. Hurst, to the defendants proposing to purchase the Property for \$10.7M.³⁰ Subsequently, First Gulf and Mr. Sadr agreed that First Gulf could purchase the Property for \$10.8M, subject to a \$7.2M vendor take back mortgage, and a due diligence period of 75 days.³¹ The Agreement of Purchase and Sale was signed on June 21, 2013.³² Clause 9.19 of the Agreement stated that the purchaser (First Gulf) had not utilized an agent, that the defendants had utilized the services of DTZ and would be responsible for paying any commissions owing to DTZ on the closing of the transaction.³³

30. In August 2013, First Gulf requested an extension of the 75 day due diligence period. Mr. Sadr agreed to an extension on terms involving payment of interest which First Gulf would not accept. As a result, the proposed purchase of the Property by First Gulf collapsed in late August 2013.³⁴

The New Agreement/Triovest Period

31. On September 4, 2013, Mr. Stein advised Mr. Hurst by email that the Property was no longer available for purchase and that Mr. Hurst should remove his signs from the Property.³⁵ Mr. Hurst did remove his signs, but he continued in his efforts to find a purchaser to make an offer to

²⁹ DCR, Tab 26.

³⁰ DCR, Tab 27, lines 22-31; Tab 70.

³¹ DCR, Tab 71.

³² DCR, Tab 72.

³³ *Ibid.*

³⁴ DCR, Tabs 73, 74, 75 and 76.

³⁵ DCR, Tab 77.

purchase the Property at a price that Mr. Sadr would accept. He also kept Mr. Stein and Mr. Sadr apprised of his efforts.³⁶

32. On September 30, 2013, Mr. Hurst advised Mr. Stein by email that he knew a pension fund advisor, Triovest was still very interested in the Property.³⁷ Mr. Hurst confirmed to Mr. Stein that he had advised Triovest that Mr. Sadr would not consider anything other than an all cash offer at a price of \$10.8M with a 30 day closing. Mr. Hurst also advised Mr. Stein that Triovest might contact Mr. Stein directly and that Mr. Hurst would appreciate it if Mr. Stein would remind Triovest that it must deal through Mr. Hurst.³⁸

33. Later that same day, after Mr. Hurst discussed details of the Property with Richard Mulvale of Triovest, he wrote again to Mr. Stein to advise that Triovest wished to submit an offer to purchase the property for \$10.8M on an all cash basis. However, the offer could not be made without a due diligence period. Mr. Hurst was concerned about the request for a due diligence period, and asked Mr. Stein if Mr. Sadr would consider a very short period of due diligence.³⁹

34. Still later in the day on September 30, 2013, Mr. Hurst forwarded to Mr. Stein a written offer to purchase made by Mr. Mulvale on behalf of Triovest. Triovest offered to purchase the Property for \$10.8M, all cash, but it wanted a 45-day due diligence period. In addition, at the urging of Mr. Hurst, in the offer from Triovest, Mr. Mulvale promoted Triovest's track record (100%) for closing on land acquisitions and included a list of closed transactions. Mr. Hurst had

³⁶ DCR, Tab 28.

³⁷ DCR, Tab 78.

³⁸ *Ibid.*

³⁹ DCR, Tab 79.

urged Mr. Mulvale to include such a promotion in the offer in order to persuade Mr. Sadr that Triovest was a serious purchaser despite its request for a period of due diligence.⁴⁰

35. Mr. Stein replied to Mr. Hurst later on September 30, 2013 to advise that he would show Mr. Mulvale's offer to Mr. Sadr the next day.⁴¹ On October 1, 2013, Mr. Stein again wrote to Mr. Hurst to advise him of his discussions with Mr. Sadr following Mr. Sadr's review of the offer from Triovest.⁴² Mr. Stein advised that Mr. Sadr "is very unhappy" about being contacted by Mr. Hurst with time wasting messages and conditional offers, and wanted "the discussion to end now". Mr. Stein's email went on to state that Mr. Hurst was free to deal with potential buyers through an unofficial due diligence period, and that "obviously, it is worth the investment and risk to you if there is a 3% commission involved, but [Mr. Sadr] doesn't want to hear about it. He feels that Triovest is just playing a game The only contact he expects is the forwarding of an unconditional clean offer for \$10.8M and closing in 45 days". There is no mention of any required commission agreement in Mr. Stein's note.⁴³

36. Mr. Hurst testified that he had encouraged Mr. Mulvale to speak with Mr. Stein directly in order to help persuade Mr. Stein of Triovest's *bona fides* as a purchaser.⁴⁴ He provided Mr. Mulvale with Mr. Stein's contact information. Later in the day on October 1, 2013, Mr. Mulvale telephoned Mr. Stein's office and left a voice message. Mr. Stein and Mr. Mulvale spoke directly on October 2, 2013 and Mr. Stein sent Mr. Mulvale an email that same day telling Mr. Mulvale to

⁴⁰ DCR, Tab 29; Tab 80.

⁴¹ *Ibid.*

⁴² DCR, Tab 81.

⁴³ *Ibid.*

⁴⁴ DCR, Tab 30, lines 14-21.

send him Triovest's letter of intent directly.⁴⁵ At that point, or shortly thereafter, the defendants decided to cut Mr. Hurst and DTZ out of the transaction so as to avoid paying a commission.

37. On October 7, 2013, Mr. Mulvale sent a letter of intent on behalf of Triovest to Mr. Stein directly.⁴⁶ The terms in Triovest's letter of intent were identical to those set out in the September 30, 2013 offer to purchase that Mr. Hurst had sent to Mr. Stein. Triovest offered to purchase the Property for \$10.8M, all cash, with a 45 day due diligence period. The letter of intent also stated that "the Purchaser warrants that it has not engaged any real estate brokerage firm in respect of this transaction. The Vendor shall be solely responsible for the payment of any brokerage commissions associated with the sale of the Property".⁴⁷

38. On October 16, 2013, Mr. Sadr signed back the letter of intent with no amendments to Triovest's proposed terms of sale.⁴⁸ Mr. Stein sent an email to Mr. Mulvale the same day attaching the letter of intent signed back by Mr. Sadr. He also wrote to Mr. Hurst on October 16th, advising him that Mr. Sadr had signed back the letter of intent, that he had had a number of discussions with Mr. Mulvale in the previous few weeks and that he would keep Mr. Hurst posted.⁴⁹

39. On October 18, 2013, Mr. Hurst replied to Mr. Stein's email and specifically reminded Mr. Stein that Mr. Hurst had recommended that Mr. Mulvale contact Mr. Stein directly, and that he had provided Mr. Mulvale with Mr. Stein's contact details, so that the two of them could discuss Triovest's offer in greater detail.⁵⁰ In the same email, Mr. Hurst inquired about the purchase price and offered to negotiate with Triovest if its offer was less than \$10.8M, "in order to cover our

⁴⁵ DCR, Tab 82.

⁴⁶ DCR, Tab 84.

⁴⁷ *Ibid.*

⁴⁸ DCR, Tab 84.

⁴⁹ *Ibid.*

⁵⁰ DCR, Tab 86.

commission". Mr. Stein responded the same day to advise Mr. Hurst that there was no need to follow up with Triovest. Again, he advised that he would keep Mr. Hurst posted.⁵¹

40. On October 30, 2013 Mr. Hurst wrote to Mr. Stein.⁵² He reminded Mr. Stein that it had been agreed that a separate commission agreement would be executed since Mr. Hurst did not get the renewal of the listing agreement he had been seeking.⁵³ Mr. Hurst received no reply to his October 30th email.⁵⁴ Mr. Stein testified that he was instructed by Mr. Sadr not to reply to Mr. Hurst's correspondence.⁵⁵

41. The agreement of purchase and sale was entered into on November 4, 2013.⁵⁶ The stated purchase price was \$10.8 M, all cash, with a 45 day period of due diligence, terms which were identical to those set out in the September 30, 2013 offer to purchase by Triovest that Mr. Hurst had sent to Mr. Stein. Clause 12.2 of the agreement of purchase and sale, concerning commissions, stated that neither the vendor or the purchaser had utilized the services of any real estate broker or agent. The clause reflected a change in the commission provision from that set out in the letter of intent, which had provided that the Purchaser alone had not engaged in agent and that the Vendor would be responsible for the payment of brokerage commissions.

42. On November 18, 2013, Mr. Hurst emailed Mr. Stein and asked him to forward the Triovest letter of intent and the agreement of purchase and sale to him, so that he could prepare the commission agreement for Mr. Sadr to sign.⁵⁷ The defendants ignored Mr. Hurst's request.⁵⁸

⁵¹ *Ibid.*

⁵² DCR, Tab 87.

⁵³ *Ibid.*

⁵⁴ DCR, Tab 32, lines 15-16.

⁵⁵ DCR, Tab 33.

⁵⁶ DCR, Tab 88.

⁵⁷ DCR, Tab 90.

⁵⁸ DCR, Tab 34, lines 23-24; Tab 35.

43. On November 19, 2013, Mr. Sadr responded to Mr. Hurst with an emailed letter which was stated to be “without prejudice”.⁵⁹ The letter stated, in part, as follows:

“Further to your email to Ron Stein of this office, we confirm Great Land (Halton Hills) Industrial Park Corp. entered into an Agreement of Purchase and Sale with a numbered company and one of the conditions of the Agreement of Purchase and Sale is that all terms and conditions of the agreement are to remain strictly confidential between the Purchaser and the Vendor. Therefore, notwithstanding that we have no reason to do so anyway, we are unable to provide this information to you, or your company.

As was advised previously, both verbally and by email, the property was taken off the market for sale in early September, immediately after the First Gulf Agreement of Purchase and Sale was terminated by them. You recall that you were asked to remove your signs at that time, which were installed as per the expired Listing Agreement signed November 2, 2012, with your previous company.

The sale with the numbered company was negotiated through direct contact between our lawyers and the Purchaser’s lawyer, with no real estate involvement. The fact that you do not have a copy of the Letter of Intent or the Agreement of Purchase and Sale confirms the fact that your firm did not represent the Purchaser or Vendor in this Agreement.”

44. The Triovest/Great Lands transaction closed on January 20, 2014 at a purchase price of \$10.8M on an all cash basis.⁶⁰ Given the purchase price, and based upon the agreement between Mr. Sadr and Mr. Hurst/DTZ, the commission payable was \$540,000.00.⁶¹ No commission was paid to the plaintiffs or to anyone else on the transaction.

PART III - THE ISSUES

45. As set out by the trial judge in her reasons for judgment at paragraph six, and as set out by the appellants in their factum, the issues for consideration by this Court are as follows:

⁵⁹ DCR, Tab 91.

⁶⁰ DCR, Tab 36, lines 9-12.

⁶¹ DCR, Tab 36, lines 13-16.

- (a) whether there was a binding contract formed by Mr. Sadr's promise to pay a commission not to exceed 5% if Mr. Hurst introduced a purchaser who would pay a price exceeding \$10.3 million for the Property;
- (b) whether the plaintiffs barred from bringing their action by the Real Estate and Business Brokers Act, 2002; and,
- (c) whether a commission is payable to the respondents/Mr. Hurst on the sale of the Property, who is liable for the payment?

PART IV – ARGUMENT AND THE APPLICABLE LAW

Was A Binding Contract Formed?

46. All of the witnesses at trial (Mr. Hurst, Mr. Stein and Mr. Sadr) testified that the personal offer from Mr. Sadr of an enhanced commission to Mr. Hurst/DTZ if he brought in a purchaser who purchased the Property for more than \$10.3M, constituted a new agreement between the parties.⁶² Mr. Sadr testified that the offer of an enhanced commission, memorialized by Mr. Stein's email on Great Lands Corporation letterhead to Mr. Hurst of May 1, 2013, was a special offer made by Mr. Sadr only to Mr. Hurst.⁶³ The apportioning of any enhanced commission is stated to have been between Mr. Hurst/DTZ and Great Lands Corporation. Great Land HH is nowhere mentioned in the new agreement between the parties.

47. Mr. Hurst wrote repeatedly to Mr. Stein expressing his gratitude for the special offer of an enhanced commission made to him by Mr. Sadr, and the additional incentive such an offer provided to him.⁶⁴

48. Mr. Stein testified that the new agreement was not dependent upon the terms of the expired listing agreement, or the holdover period, and that the offer was never revoked by the defendants. Mr. Stein also admitted that if the First Gulf transaction had closed, Mr. Hurst/DTZ would have

⁶² DCR, Tab 25, lines 1-9; Tab 37, page 148, lines 3-16; Tab 69.

⁶³ *Ibid.*

⁶⁴ DCR, Tab 59; Tab 69; DCR, Tab 67.

been entitled to a 5% commission on the sale. Mr. Sadr agreed with these admissions in his cross-examination.⁶⁵

49. Mr. Stein testified that neither he nor Mr. Sadr had ever heard of Triovest or Mr. Mulvale until Mr. Hurst connected them.⁶⁶ Mr. Sadr and Mr. Stein both agreed that they expected Mr. Hurst to rely upon their word, and they sought to be honest in all their dealings with others.⁶⁷ In cross examination, Mr. Stein admitted that Mr. Sadr was attempting to renege on his May 1, 2013 agreement with Mr. Hurst/DTZ in his letter to Mr. Hurst of November 19, 2013.⁶⁸

50. Given the admissions of all the witnesses at trial that a new agreement was entered into by the parties on April 30, 2013, coupled with the statements of Mr. Stein and Mr. Hurst in the contemporaneous emails sent to each other at the time the new agreement was entered into, the evidence was overwhelming that a binding contract was formed by Mr. Sadr's offer to pay an enhanced commission not to exceed 5% to Mr. Hurst/DTZ if Mr. Hurst introduced a purchaser who would pay a price exceeding \$10.3M for the Property, and Mr. Hurst's/DTZ's grateful acceptance of that offer.

51. The issue of whether or not a contract has been formed by the parties is a question of fact. The trier of fact is to apply an objective test in order to determine whether a contract has been formed, based upon the words (in this instance, written) and conduct of the parties.

UBS Securities Canada Inc. v. Sands Brothers Canada Ltd., 2007 ONCA 405, Respondents' Brief of Authorities ("RBOA") at Tab 7, at para 2

Exchange Corporation Canada Inc. v. Swytch Delivery Solutions Inc., 2009 ONCA 143, RBOA at Tab 5, at para 1

⁶⁵ DCR, Tabs 25, page 140, lines 28-32, page 141, lines 1-9; Tab 26, line 15 to page 139, line 25; Tab 67.

⁶⁶ DCR, Tab 38, lines 19-30.

⁶⁷ DCR, Tabs 42-43.

⁶⁸ DCR, Tab 45, lines 12-17.

52. The trial judge correctly found as fact that Mr. Sadr's promise of an enhanced commission to Mr. Hurst/DTZ, and Mr. Hurst's acceptance of it, constituted a binding agreement between the parties. In their factum, the appellants do not contend that the trial judge made palpable and overriding errors of fact in her reasons. Therefore, it is submitted that this Court must defer to the trial judge's findings in this regard.

53. Accepting that a binding contract was formed between the parties, the issue becomes whether or not Mr. Hurst/DTZ satisfied Mr. Sadr's conditions for receiving the enhanced commission. Again, the evidence was clear that Mr. Hurst/DTZ introduced the purchaser Triovest to the defendants when he forwarded Triovest's September 30, 2013 written offer to purchase the Property for \$10.8M, on an all cash basis, to Mr. Stein. Triovest's letter of intent, sent to the defendants on October 7, 2013, at Mr. Stein's request contained terms of purchase identical to those set out in the September 30, 2013 offer to purchase.⁶⁹ Mr. Sadr signed back the letter of intent on October 16, 2013 and accepted all of Triovest's proposed terms.⁷⁰ The purchase closed on January 20, 2014 on the same terms as initially proposed by Triovest in its offer to purchase.⁷¹ The trial judge correctly found as fact that Mr. Hurst/DTZ had satisfied all of the conditions in the agreement in order to receive the enhanced commission promised by Mr. Sadr.

54. The determination of legal rights and obligations of parties to a contract is no longer considered to be a question of law alone. Contractual interpretation involves issues of mixed fact and law. While it may be possible to identify an extricable question of law from within what is characterized as a question of mixed fact and law, the circumstances in which a question of law can be extricated from the interpretation process will be rare. The goal of contractual interpretation,

⁶⁹ DCR, Tab 84.

⁷⁰ *Ibid.*

⁷¹ DCR, Tab 36, lines 9-12.

to ascertain the objective intentions of the parties, is inherently fact specific. As such, the standard of review in matters of contractual interpretation is that of palpable and overriding error.

[Sattva Capital Corporation v. Creston Moly Corporation](#) [2014] 2 S.C.R. 633, RBOA at Tab 6, at pp 658-660

55. Based on the admissions of the defendants' witnesses at trial, and the contemporaneous emails between and among Mr. Hurst, Mr. Stein and Mr. Mulvale which were exhibits a trial, the evidence overwhelmingly supported the factual findings of the trial judge that the defendants had breached the agreement by refusing to pay a commission at a rate of 5% to Mr. Hurst/DTZ once the transaction closed.

56. In the case of *Cash v. George Dundas Realty Ltd.*, the Court of Appeal allowed an appeal by the plaintiff real estate agent against the defendant vendor. At trial, the agent's claim was dismissed on the basis that after the agent had presented the purchaser's initial offer to purchase, the purchaser and vendor involved their solicitors in drafting various agreements of purchase and sale which ultimately led to a closing. In allowing the appeal, the Court noted that the vendor had promised to pay a commission of 5% to the plaintiff if the plaintiff obtained a purchaser. Thereafter, the plaintiff did bring the vendor and purchaser together and an agreement of purchase and sale was ultimately executed, based essentially on terms agreed to in a meeting arranged by the plaintiff agent. The defendant's position was that, as the vendor and purchaser dealt directly, and through their solicitors, the agent was not entitled to a commission. The Court, per Justice Estey, noted as follows:

“in modern day conveyancing practices the role of the agent, being neither that of an owner nor a purchaser, we cannot expect him to earn his entitlement by reaching decisions of policy in the negotiation of offers and counter offers. Not being a solicitor, his role may not always be required, or perhaps even tolerated, particularly in any complex commercial real estate transactions. In the inevitable give-and-take negotiation and exchange of ideas in preparation for the sale of a property....The real estate agent can, at most, be a conduit and a

catalyst and, after the initial launching of negotiations, may only perform these limited roles, if requested or permitted by the principals”

Cash v. George Dundas Realty Ltd. (1973), 40 D.L.R. (3d) 31 (ONCA), RBOA at Tab 2, at paras 22 & 24

57. As the trial judge found, the situation at hand is analogous to that in the *Cash* decision. Mr. Hurst introduced a purchaser to the defendants and to the Property and forwarded to the defendants the Triovest offer to purchase. The defendants contended that, as they had subsequently dealt with the purchaser directly, there was no commission payable. The plaintiffs could expect to have no role in the preparation of the agreement of purchase and sale. As Mr. Sadr’s November 19, 2013 letter stated, Triovest and the defendants negotiated matters through their lawyers and Mr. Hurst’s involvement in the negotiation process was not necessary.⁷² As was noted by the court in *Cash*, the agent in a complex commercial transaction is not expected to play an active role in the negotiation process. However, it was clear that Mr. Hurst had a very direct role in bringing a purchaser to the defendants who made an offer to purchase that the defendants accepted on terms identical to the offer. As such, the trial judge correctly found that the plaintiffs acted as a conduit or a catalyst for the transaction and were entitled to their commission in the circumstances.

Are the Plaintiffs Barred From Bringing Their Action by the *Real Estate and Business Brokers Act*, 2002

58. Mr. Hurst testified that he has been licensed real estate agent/broker continuously since 1973.⁷³ He has worked as a real estate salesperson for a number of real estate brokerages, including for various periods of time, his own real estate brokerage, Hurst Real Estate.⁷⁴ During the time that Mr. Hurst worked under the auspices of Hurst Real Estate, the corporation was required to be

⁷² DCR, Tab 91.

⁷³ DCR, Tab 2, lines 19-23.

⁷⁴ DCR, Tab 2, lines 23-32; Tab 50.

registered as a real estate brokerage pursuant to the provisions of the *Real Estate and Business Brokers Act*, 2002 (the “Act”).⁷⁵ However, during times when Mr. Hurst worked for a brokerage other than Hurst Real Estate, the Act required that Hurst Real Estate be deregistered as a real estate brokerage.⁷⁶

59. Mr. Hurst’s initial contact with the defendants was in March 2012. At that time, he was working with Hurst Real Estate. Mr. Hurst made efforts to find a purchaser for the Property from March 2012 until October 2013, when Triovest’s offer to purchase the Property was accepted by Mr. Sadr. The transaction closed in January 2014.⁷⁷

60. In March 2013, Mr. Hurst joined DTZ as a salesperson. As required under the Act, Mr. Hurst deregistered Hurst Real Estate as a real estate brokerage. In October 2015 Mr. Hurst left the DTZ brokerage, and resumed working under the auspices of Hurst Real Estate. Accordingly, at that time he re-registered Hurst Real Estate as a brokerage in order to comply with the provisions of the Act.

61. Tab 87 of the appellants’ exhibit book contains three Director’s Certificates issued by the Real Estate Council of Ontario (“RECO”).⁷⁸ The certificates, concerning each of David Hurst, Hurst Real Estate and DTZ, make it clear that Mr. Hurst was a properly registered real estate agent/broker throughout the period of his dealings with the defendants. Hurst Real Estate was a registered brokerage during Mr. Hurst’s time working there. However, it was de-registered as a brokerage in March 2013 when Mr. Hurst jointed DTZ. DTZ was a properly registered brokerage at all material times.

⁷⁵ *Real Estate and Business Brokers Act*, 2002, S.O., 2002, c.30, Sched. C.

⁷⁶ DCR, Tab 51.

⁷⁷ DCR, Tab 51; Tab 60.

⁷⁸ DCR, Tab 92.

62. Accordingly, it is clear that Mr. Hurst was a properly registered real estate agent/broker throughout the period of his dealings with the defendants from March 2012 to January 2014. Throughout the period of his dealings with the defendants, Mr. Hurst worked under the auspices of a properly registered real estate brokerage under the Act, be it Hurst Real Estate or DTZ. As such, section 9 of the Act is of no assistance to the appellants in the circumstances.

63. The plaintiffs' made a claim of *quantum meruit* in their statement of claim. In the event that the trial judge had decided against the plaintiffs concerning their entitlement to a commission from the defendants, the plaintiffs alleged an entitlement to compensation from the defendants pursuant to the doctrine of *quantum meruit*. An entitlement to *quantum meruit*, if awarded, could have been awarded to both Hurst Real Estate and DTZ for the work done by Mr. Hurst throughout the time of his involvement with the defendants.

64. However, given the decision of the trial judge that the defendants are liable to pay a commission, the entitlement to the commission is held by DTZ, as Mr. Hurst was working with DTZ at the time he introduced Triovest to the defendants, and the purchase transaction concerning the Property closed.

65. Mr. Hurst testified that he had the authority of the President of DTZ to pursue the legal proceeding on behalf of both plaintiffs.⁷⁹ He also testified that he had an agreement with DTZ as to how the commission was to be apportioned between him personally and DTZ. Mr. Hurst advised Mr. Stein of his commission apportionment agreement with DTZ.⁸⁰ Any internal agreement between Mr. Hurst and DTZ as to how a commission payment is to be apportioned is irrelevant to a determination of the amount of commission payable.

⁷⁹ DCR, Tab 52, page 115, lines 8-15.

⁸⁰ DCR, Tab 52, page 114, lines 15-31; Tab 59.

66. With respect to the appellants' purported reliance on section 36 (3) of the Act, again, that section is inapplicable to the circumstances at hand. Section 36 (3) of the Act provides:

“No registrant shall request or enter into an arrangement for the payment of a commission or any other remuneration based on the difference between the price at which real estate is listed for sale or rental, and the actual sale price or rental price, as the case may be, of the real estate, nor is the registrant entitled to retain any commission or other remuneration computed upon any such basis”⁸¹

67. The appellants contend that the May 1, 2013 agreement entered into between Great Lands Corporation, Mr. Sadr and Mr. Hurst/DTZ constituted a violation of section 36 (3) of the Act. However, the Property was not listed for sale as of May 1, 2013. There was no listing agreement in place concerning the Property, and there was no list price for the Property.⁸² As such, there was no difference between the price at which real estate was listed for sale, and the actual sale price of the Property because the Property was not listed for sale at any price.

68. Moreover, this is not a situation where the real estate agent was in a position of influence over the vendor, as might be the situation where the vendor is selling his or her home for the first time. Rather, the parties were in a position of equal bargaining power. Both Mr. Sadr and Mr. Stein were very experienced and knowledgeable in real estate matters and Mr. Sadr owned his own real estate brokerage.⁸³ Mr. Sadr specifically decided to offer Mr. Hurst/DTZ an enhanced commission if the conditions set out in the May 1, 2013 agreement were met. However, the Property was not listed for sale at any price. Accordingly, it is submitted that section 36 (3) of the Act is inapplicable in the circumstances.

⁸¹ *Supra* note 107.

⁸² DCR, Tab 62.

⁸³ DCR, Tab 54.

If a Commission is Payable to the Respondents on the Sale of the Property, who is Liable for the Payment?

69. The correspondence of May 1, 2013 memorializing the “new agreement” between the parties was sent to Mr. Hurst by Mr. Stein on Great Lands Corporation letterhead,⁸⁴ as was the case with every single document Mr. Stein ever sent to Mr. Hurst or to Mr. Mulvale of Triovest. The May 1, 2013 agreement expressly states that it is a specific offer from Mr. Sadr offering to split all proceeds of sale over and above \$10.3M on a 50/50 basis between Mr. Hurst/DTZ and Great Lands Corporation. Great Land HH, the nominal owner of the Property, is nowhere mentioned in the agreement.⁸⁵

70. Mr. Sadr testified that Great Land HH is a single-purpose corporation. Its sole purpose was to be the nominal owner of the Property. Its purpose ended when the Property was sold on January 20, 2014. Great Land HH has not conducted any business activity of any kind since January 20, 2014.⁸⁶ However, the proceeds of sale from Triovest were immediately distributed to other corporations in Mr. Sadr’s Great Lands conglomerate, depending upon where Mr. Sadr, in consultation with Great Lands accountants, decided those funds should be directed.⁸⁷

71. The parties to the May 1, 2013 agreement are Mr. Sadr, Great Lands Corporation and DTZ. Great Land HH is not a party to this agreement.⁸⁸

72. In *D. Holdings Ltd. v. Crawford Realty (1990) Ltd.*, the Saskatchewan Court of Appeal dismissed an appeal by the defendant after the plaintiff real estate agent was awarded his commission on a summary judgement motion. The Court noted that the nominal owner of the

⁸⁴ DCR, Tab 67.

⁸⁵ DCR, Tab 67.

⁸⁶ DCR, Tab 55.

⁸⁷ DCR, Tab 56.

⁸⁸ DCR, Tab 67.

property which was sold was not a party to the contract with the agent. The contract stated which parties had agreed to pay the agent's commission and it was those parties who were liable to do so. In the situation at hand, the contracting parties for the May 1, 2013 agreement are Great Lands Corporation, Mr. Sadr and DTZ. As such, Mr. Sadr and Great Lands Corporation breached their contract with Mr. Hurst/DTZ and are responsible for payment of the commission, as was correctly found by the trial judge.

D. Holdings Ltd. v. Crawford Realty (1990) Ltd., 2014 SKCA 28, RBOA at Tab 4, at para 7

73. Mr. Sadr is the sole owner of all of the Great Lands corporations.⁸⁹ He agreed at trial that every decision of consequence concerning all of the Great Lands corporations is his decision alone to make.⁹⁰ Only Mr. Sadr could decide on an acceptable purchase price for the Property, and on what terms it would be acceptable. Only Mr. Sadr could decide what became of the proceeds of sale once the Property was sold. He testified that following the sale of the Property, the money from the sale was immediately taken from the nominal landowner and reallocated to other Great Lands corporations, and allocated to "management fees", all in the absolute discretion of Mr. Sadr.⁹¹ As was found by the trial judge, it is clear that the Great Lands corporations do not operate at arm's length. They are the alter egos of Mr. Sadr.

74. Mr. Sadr testified that certain of the proceeds of sale of the Property were used to pay "management fees" provided to the nominal owner of the Property.⁹² Management fees are inevitably paid to a corporation's management. The Great Lands corporations have only one person responsible for all management, being Mr. Sadr. Unavoidably, the corporations'

⁸⁹ DCR, Tab 57, page 45, lines 17-25, page 129, lines 6-32.

⁹⁰ *Ibid.*

⁹¹ DCR, Tab 56, page 130, lines 20-31, page 131, lines 13-27.

⁹² *Ibid.*, page 131, lines 13-27.

management was enriched by the proceeds of sale. The trial judge concluded that Mr. Sadr would have received a share of the sale proceeds as management fees.

75. It was Mr. Sadr alone who determined that the defendants would not pay a commission to DTZ, despite knowing that Mr. Hurst/DTZ had introduced Triovest to the Property and to the defendants and had provided the defendants with Triovest's offer to purchase on September 30, 2013, which offer was accepted by the defendants with no amendments. In being the sole decision-maker for Great Lands Corporation and the nominal owner of the Property, and in determining in his sole discretion to deny Mr. Hurst/DTZ a commission for their role in bringing about the sale of the Property, Mr. Sadr breached his personal agreement with Mr. Hurst/DTZ. By deliberately excluding Mr. Hurst from the transaction, Mr. Sadr also acted in bad faith and failed to carry out his duty of honest performance in his contract with Mr. Hurst/DTZ. The trial judge was correct in finding as fact that Mr. Sadr breached his contract with Mr. Hurst/DTZ and acted in bad faith in so doing.

Bhasin v. Hrynew, 2014 SCC 71, RBOA at Tab 1, at para 93

76. In addition to his own breach of contract, Mr. Sadr induced Great Lands Corporation to breach its agreement with Mr. Hurst/DTZ as well. In the case of *Century 21 Coastal Realty Ltd. v. 0863486 B.C. Ltd.*, dealing with the payment of real estate commissions, the court found a director of the defendant corporation liable for inducing a breach of contract. To establish liability the court held that there are five constituent elements to the tort of inducing breach of contract and each must be proved to establish liability. The elements are as follows:

- (a) a contract between the plaintiff and a third party and a breach of it by the third-party;
- (b) the defendant had knowledge of the existence of the contract;
- (c) the defendant's conduct was intended to cause the third party to breach the contract;
- (d) the defendant's conduct caused the third-party to breach the contract; and

(e) the plaintiff suffered damages as a result.

Century 21 Coastal Realty Ltd. v. 0863486 B.C. Ltd., 2017 BCWLD 5557 (BCSC), RBOA at Tab 3, at para 48

77. In the situation at hand, the third party is Great Lands Corporation. Mr. Sadr knew of the existence of the contract between Great Lands Corporation and Mr. Hurst/DTZ because Mr. Sadr was the author of that contract. It was Mr. Sadr's decision alone to deny Mr. Hurst/DTZ the commission, which was intended to cause Great Lands Corporation to also breach its agreement with Mr. Hurst/DTZ, and did in fact cause Great Lands Corporation to also breach the agreement. Mr. Hurst/DTZ was denied the rightful commission earned on the sale of the Property as a result. Accordingly, as was found by the trial judge, Mr. Sadr breached his contract with Mr. Hurst/DTZ, and is also liable for inducing Great Lands Corporation to breach its contract with Mr. Hurst/DTZ as well.

PART IV - ORDER REQUESTED

78. The decision of the trial judge was correct, both in fact and in law, in all respects. There is no reason for the decision to be revisited by this Court. For the foregoing reasons, the respondents submit that the appeal is to be dismissed in its entirety, with costs of the appeal payable to the respondents, to be fixed by the Court following the submissions of counsel, or as agreed upon between the parties, as well as HST thereon.

All of which is respectfully submitted this 14th day of November, 2019.

Peter Manderville
Lawyer for the Respondents (Plaintiffs)

SCHEDULE “A”

1. *Bhasin v. Hrynew*, 2014 SCC 71
2. *Cash v. George Dundas Realty Ltd.* (1973), 40 D.L.R. (3d) 31 (ONCA)
3. *Century 21 Coastal Realty Ltd. v. 0863486 B.C. Ltd.*, 2017 BCWLD 5557 (BCSC)
4. *D. Holdings Ltd. v. Crawford Realty (1990) Ltd.*, 2014 SKCA 28
5. *Exchange Corporation Canada Inc. v Swytch Delivery Solutions Inc.*, 2009 ONCA 143
6. *Sattva Capital Corporation v. Creston Moly Corporation* [2014] 2 S.C.R. 633
7. *UBS Securities Canada Inc. v. Sands Brothers Canada Ltd.*, 2007 ONCA 405

SCHEDULE “B”

1. *Real Estate and Business Brokers Act, 2002, S.O., 2002, c.30, Sched. C*

DAVID W. HURST ET AL
– Respondents (Plaintiffs) –

V.

GREAT LANDS CORPORATION ET AL
– Appellants (Defendants) –

COURT OF APPEAL FOR ONTARIO

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