CASE STUDY PREPARED FROM ORIGINAL PUBLISHED OPINION

ERNEST A. LONG
Alternative Dispute Resolution
❖ Resolution Arts Building ❖
2630 J Street, Sacramento, CA 95816
ph: (916) 442-6739 • fx: (916) 442-4107
elong@ernestalongadr.com • www.ernestalongadr.com

<u>Horike v Coldwell Banker Residential Brokerage Co.</u> 11/21/16

Real Estate Law; Dual Agency; Agent's Fiduciary Duties of Disclosure

This case arises from the sale of a luxury residence in Malibu by a family trust. The trust engaged Chris Cortazzo, a salesperson in Coldwell Banker's Malibu West office, to sell the property. As Cortazzo prepared to list the property, he obtained public record information from the tax assessor's office, which stated that the property's living area was 9,434 square feet, and a copy of the residence's building permit, which described a single-family residence of 9,224 square feet, a guest house of 746 square feet, a garage of 1,080 square feet, and a basement of unspecified area. When Cortazzo listed the property on the MLS in September 2006, however, the listing stated that the property "offers approximately 15,000 square feet of living areas." Cortazzo also prepared and distributed a flyer making the same representation about the property's square footage.

In early 2007, a couple working with another Coldwell Banker salesperson made an offer to purchase the property. By a handwritten note in the disclosures he prepared, Cortazzo informed the couple that Coldwell Banker did not "guarantee or warrant" the square footage of the residence, and he advised them "to hire a qualified specialist to verify the square footage." When the couple requested documentation of the square footage, Cortazzo gave them, through the

salesperson, a letter from the architect of the residence stating that "the size of the house, as defined by the current Malibu building department ordinance is approximately 15,000 square feet." In a cover note, however, Cortazzo again cautioned them that they should "hire a qualified specialist to verify the square footage." The couple requested an extension of time to inspect the property, which the trust refused to grant. In March, the couple canceled the transaction.

Meanwhile, plaintiff Hiroshi Horiike, a resident of Hong Kong, had been working for several years with Chizuko Namba, a salesperson in Coldwell Banker's Beverly Hills office, to find a residential property to buy. In November 2007, Namba arranged for Cortazzo to show the Malibu property to Horiike and accompanied Horiike to the showing. At the showing, Cortazzo gave Horiike the marketing flyer stating the property offered "approximately 15,000 sq. ft. of living areas," and an MLS listing printout that did not specify the square footage and contained a small-print advisement that "Broker/Agent does not guarantee the accuracy of the square footage." After viewing the property, Horiike decided to make an offer to purchase it. Namba sent Horiike's offer to Cortazzo. Horiike and the trust eventually agreed on a sale price.

Seller: Family Trust   Agent: Cortazzo
Buyer: Hiroshi Horiike   Agent: Namba
Broker for both agents: Coldwell Banker

Before completing the purchase, Horiike signed the two agency disclosure forms required by California law. (See Civ. Code, §§ 2079.14, 2079.16, 2079.17.) The first form, entitled "Confirmation Real Estate Agency Relationships," specified that Coldwell Banker was both the "listing agent" and the "selling agent," and indicated that Coldwell Banker was "the agent of. . . both the Buyer

and Seller." The second form, entitled "Disclosure Regarding Real Estate Agency Relationships," contained the statutorily required explanation that "a real estate agent, either acting directly or through one or more associate licensees, can legally be the agent of both the Seller and the Buyer in a transaction," in which case, the agent owes "a fiduciary duty of utmost care, integrity, honesty and loyalty in the dealings with either the Seller or the Buyer." Cortazzo signed both forms on behalf of Coldwell Banker. Namba also signed the confirmation form on behalf of Coldwell Banker as the selling agent, and she provided Horiike a separate agency relationship disclosure form, which she signed as an associate licensee of Coldwell Banker.

Horiike also signed a third disclosure form, entitled "Disclosure and Consent for Representation of More Than One Buyer or Seller." That form explained: "A real estate broker, whether a corporation, partnership or sole proprietorship, ('Broker') may represent more than one buyer or seller provided the Broker has made a disclosure and the principals have given their consent. This multiple representation can occur through an individual licensed as a broker or through different associate licensees acting for the Broker. The associate licensees may be working out of the same or different office locations. Buyer and Seller understand that broker may represent more than one buyer or seller and even both buyer and seller on the same transaction." The form described the broker's disclosure duties "in the event of dual agency" as follows: "Seller and Buyer agree that: (a) Broker, without the prior written consent of the Buyer, will not disclose to Seller that the Buyer is willing to pay a price greater than the offered price; (b) Broker, without the prior written consent of the Seller, will not disclose to the Buyer that Seller is willing to sell property at a price less than the listing price; and (c) other than as set forth in (a) and (b) above, **a Dual Agent is obligated to disclose known facts materially affecting the value or**

desirability of the property to both parties." The form further specified that, absent a confidentiality agreement, the seller or listing agent could "disclose the existence, terms, or conditions of Buyer's offer." Cortazzo also signed this form on behalf of Coldwell Banker.

Cortazzo did not provide Horiike a handwritten note advising him to hire a qualified specialist to verify the square footage of the home, as he had done in the disclosures he provided to the potential buyers in the transaction that was canceled in March 2007. Cortazzo did, however, provide Horiike, through Namba, a copy of the residence's building permit and a form advisory stating: "Only an appraiser . . . can reliably confirm square footage . . . . Representations . . . in a Multiple Listing Service, advertisements, and from property tax assessor records are often approximations, or based on inaccurate or incomplete records. . . . Brokers have not verified any such representations. Brokers do not have expertise in this area. If Buyer wants information about the exact square footage . . . Broker recommends that Buyer hire an appraiser or licensed surveyor . . . ." Horiike also signed an advisory stating that "Broker . . . shall not be responsible for verifying square footage." Horiike purchased the property without further investigating its square footage.

In 2009, when preparing to do work on the property, Horiike reviewed the building permit and noticed that it appeared to contradict Cortazzo's representation that the property offered approximately 15,000 square feet of living space. Horiike filed suit against Cortazzo and Coldwell Banker, alleging, among other things, that both defendants had breached their fiduciary duties toward Horiike by "either deliberately misrepresenting the square footage of the living area of the residence and failing to act with the utmost care, integrity and

honesty as to Horiike and or simply failing to determine the accuracy of the representations they were making as to the living area square footage."

The case was tried to a jury. After the close of Horiike's case, Cortazzo moved for nonsuit on Horiike's cause of action for breach of fiduciary duty. The trial court granted the motion, ruling that Cortazzo exclusively represented the seller in the transaction and therefore did not owe a fiduciary duty to Horiike. Because Horiike had also stipulated that he did not seek recovery for breach of fiduciary duty based on Namba's conduct, the trial court instructed the jury that, in order to find Coldwell Banker liable for breach of fiduciary duty, the jury had to find that an agent of Coldwell Banker other than Cortazzo or Namba had breached a fiduciary duty to Horiike. The jury returned a special verdict in favor of Coldwell Banker on all causes of action.

The Court of Appeal reversed the judgment on the breach of fiduciary duty claim against Cortazzo and Coldwell Banker. The court concluded that Cortazzo, as a salesperson working under Coldwell Banker's license, owed a duty to Horiike "equivalent" to the duty owed to him by Coldwell Banker. (Civ. Code, § 2079.13, subd. (b).) The court reasoned that because Coldwell Banker acted as the dual agent of the buyer and seller in the transaction, as confirmed on the disclosure forms provided to Horiike, it owed "a fiduciary duty of utmost care, integrity, honesty, and loyalty in dealings with either the seller or the buyer." Observing that Cortazzo executed the forms on behalf of Coldwell Banker as its associate licensee, the court held that Cortazzo owed the same duty to Horiike. The court concluded that a properly instructed jury could find that "Cortazzo breached his fiduciary duty by failing to communicate all of the material information he knew about the square footage," including the apparent contradiction between Cortazzo's representations and the square footage

measurements in public record documents. The court remanded the case for a new trial on Horiike's breach of fiduciary duty claim. (**See Appellate Opinion and Case Study in archives:** www.ernestalongadr.com)

The California Supreme Court granted defendants' petition for review. In her opinion, Justice Kruger indicated the sole question on appeal is whether Cortazzo, as an associate licensee representing Coldwell Banker in the sale of the Malibu residence, owed a duty to Horiike to take certain measures to inform him about the residence's square footage: specifically, to investigate and disclose all facts materially affecting the residence's value or desirability, regardless of whether such facts could also have been discovered by Horiike or Namba through the exercise of diligent attention and observation. Defendants acknowledge that Coldwell Banker was a dual agent, and, as such, owed this **fiduciary duty** of disclosure to both Horiike and the trust. But defendants contend that Cortazzo himself exclusively represented the trust and therefore could not have breached any fiduciary duty toward Horiike — who, they assert, was represented exclusively by Namba.

The relationship between Horiike and Cortazzo was governed by a set of agreements whose contents either were specified by the agency relationship disclosure statute or elaborated on the statutory provisions. (See Civ. Code, §§ 2079.14, 2079.16, 2079.17.) The opinion begins by examining the text of the statute. Horiike's submission rests primarily on the final sentence of Civil Code section 2079.13, subdivision (b): "**When an associate licensee owes a duty to any principal, or to any buyer or seller who is not a principal, in a real property transaction, that duty is equivalent to the duty owed to that party by the broker for whom the associate licensee functions**." Horiike contends that the provision extends to salespeople the same — or "equivalent" — fiduciary duties

as those owed by the brokerages for which they work. Defendants counter that, read in context, the "equivalent" duty language merely expands on the point made in the preceding sentence: "The agent in the real property transaction bears responsibility for his or her associate licensees who perform as agents of the agent." (CC § 2079.13, subd. (b).) Defendants read the sentence following merely as clarifying that the agent's responsibility includes assuming whatever duties its salespeople owe to the parties in a transaction. In other words, defendants read the "equivalent" language to call for imputing the duties of the salesperson to the brokerage, but not the other way around.

The Supreme Court favors Horiike's view, indicating that by describing an associate licensee's duty in a real property transaction as "equivalent to" the duty of the "broker for whom the associate licensee functions," the provision specifies that **when an associate licensee represents a brokerage in a real property transaction, his or her duties are the same as those of the brokerage.** The Legislature focused on the duties of the associate licensee relative to that of the broker. Under the law, **it is solely on the broker's behalf that an associate licensee is empowered to act in a real estate transaction.** An associate licensee, by definition, is either "licensed under a broker" or has contracted "to act as the broker's agent in connection with acts requiring a real estate license," and "functions under the broker's supervision." (Civ. Code, § 2079.13, subd. (b).) When the disclosure statute was enacted, as now, the **Real Estate Law provided that a salesperson "is licensed only to act as an agent for, on behalf of, and in place of, the real estate broker under whom he or she is licensed**." (*People v. Asuncion* (1984) 152 Cal.App.3d 422, 425; see also Bus. & Prof. Code, §§ 10137) **Brokers, in turn, are required to supervise the activities of their salespersons and may be disciplined and held liable based on salespersons' conduct within**

the scope of their employment. (Civ. Code, § 2338; see also Bus. & Prof. Code, § 10177, subd. (h))

Under these provisions, **an associate licensee has no power to act except as the representative of his or her broker.** This means that an associate licensee does not have an independent agency relationship with the clients of his or her broker, but rather **an agency relationship that is derived from the agency relationship between the broker and the client**. Against that backdrop, Civil Code section 2079.13, subdivision (b), is most naturally read to mean that **the associate licensee owes the parties to that transaction the same duties as the broker on whose behalf he or she acts.**

The legislative history of Civil Code section 2079.13 is consistent with this conclusion. As originally introduced, the disclosure bill made clear that broker–agents owe fiduciary duties to their clients, but made no mention of the duties of associate licensees. The Assembly amended the bill's definition of "associate licensee" to state: "An associate licensee owes a duty to each party in a real property transaction which is equivalent to the duty owed each party by the broker under whom the associate licensee is licensed.

Defendants point to statements in the legislative record that suggest that the law had been understood as designed simply to ensure that agency relationships are disclosed, rather than to modify them. They therefore focus on certain background principles of agency law that, they claim, are inconsistent with Horiike's reading of section 2079.13, subdivision (b). In particular, they point to the general rule that an "agent cannot be vicariously liable for the wrongful acts of the principal" and the rule that "a mere agent of an agent is not responsible as such to the principal of the latter" (Civ. Code, § 2022). This is not,

however, a case of vicarious liability. Horiike seeks to hold Cortazzo accountable for *his* breach of duty, and principles of agency law do not immunize Cortazzo from liability for his own conduct. Defendants' argument boils down to a disagreement about what kind of duty Cortazzo owed Horiike. There is no dispute that Cortazzo had a nonfiduciary duty to Horiike in the transaction. (See Civ. Code, § 2079.) There is also no dispute that Coldwell Banker, on whose behalf Cortazzo functioned as an associate licensee, owed a fiduciary duty to Horiike. The disclosure statute and Real Estate Law make clear that an associate licensee who "owes a duty to any principal, or to any buyer or seller who is not a principal, in a real estate transaction" (Civ. Code, § 2079.13, subd. (b)) stands in the shoes of the brokerage and assumes the broker's duties. Accordingly, **when Coldwell Banker agreed to act as a dual agent for both Horiike and the trust in the transaction for the sale of the Malibu residence, Cortazzo, as an associate licensee of Coldwell Banker in the transaction, assumed equivalent duties to Horiike**.

It is undisputed that Coldwell Banker owed a fiduciary duty to Horiike, including a duty to learn and disclose all information materially affecting the value or desirability of the residence. That duty extended to information known only to Cortazzo, since a broker is presumed to be aware of the facts known to its salespersons. A broker cannot discharge a duty to disclose information known only to its associate licensee except through the licensee himself. (*Black v. Bank of America* (1994) 30 Cal.App.4th 1, 6)

Defendants observe that agency requires consent, and they contend that charging associate licensees with carrying out their brokers' fiduciary duties in a dual agency transaction imposes unconsented-to dual agency. In their view, Cortazzo and Horiike never agreed to an agency relationship, so only Namba

and not Cortazzo could owe fiduciary duties to Horiike. But Cortazzo and Horiike did agree to an agency relationship: **Cortazzo, as a salesperson acting under Coldwell Banker's corporate license, could not represent any party in the transaction independently of Coldwell Banker, the broker under which he was licensed.** (See Bus. & Prof. Code, § 10137.) And Coldwell Banker opted to represent Horiike as a dual agent rather than act as the exclusive representative of the trust. Coldwell Banker's agreement with Horiike, which Cortazzo signed as Coldwell Banker's representative, specified that Coldwell Banker was acting as a dual agent "through different associate licensees acting for the Broker" who "may be working out of the same or different office locations," identified Cortazzo as one of its associate licensees, and explained that a dual agent owes fiduciary duties to both parties, including the duty to disclose known facts materially affecting the value or desirability of the property. **Cortazzo was thus charged with carrying out Coldwell Banker's fiduciary duty to learn and disclose all material information affecting the value or desirability of the property.**

The fiduciary duty of disclosure that Horiike alleges Cortazzo breached is, in fact, strikingly similar to the nonfiduciary duty of disclosure that Cortazzo would have owed Horiike in any event. **Even in the absence of a fiduciary duty to the buyer, listing agents are required to disclose to prospective purchasers all facts materially affecting the value or desirability of a property that a reasonable visual inspection would reveal. And regardless of whether a listing agent also represents the buyer, it is required to disclose to the buyer all known facts materially affecting the value or desirability of a property that are not known to or reasonably discoverable by the buyer.** (*Lingsch v. Savage* (1963) 213 Cal.App.2d 729, 735; *Peake v. Underwood* (2014) 227 Cal.App.4th 428, 444) The State Courts of Appeal have held, to take a few examples, that a listing agent had a duty to

disclose to the seller the fact that a murder had occurred on the property (*Reed v. King* (1983) 145 Cal.App.3d 261, 265–268), that "a neighborhood contains an overtly hostile family who delights in tormenting their neighbors with unexpected noises or unending parties" (*Alexander v. McKnight* (1992) 7 Cal.App.4th 973, 977), that a lot was filled with debris thereafter covered over (*Clauser v. Taylor* (1941) 44 Cal.App.2d 453, 453–454), that the house sold was constructed on filled land (*Burkett v. J. A. Thompson & Son* (1957) 150 Cal.App.2d 523, 525–527), and that improvements were added without a building permit and in violation of zoning regulations (*Barder v. McClung* (1949) 93 Cal.App.2d 692, 695–697) or in violation of building codes (*Curran v. Heslop* (1953) 115 Cal.App.2d 476, 481–483).

The primary difference between the disclosure obligations of an exclusive representative of a seller and a dual agent representing the seller and the buyer is the dual agent's duty to learn and disclose facts material to the property's price or desirability, including those facts that might reasonably be discovered by the buyer. (*Assilzadeh v. California Federal Bank* (2000) 82 Cal.App.4th 399, 414–416; see also *Salahutdin v. Valley of California, Inc*. (1994) 24 Cal.App.4th 555, 563) Horiike contends that Cortazzo breached his fiduciary duty by making representations to Horiike about the square footage of the residence's living area that he did not know to be true, failing to disclose the discrepancy between these representations and the information about the residence's square footage contained in publicly recorded documents, and neglecting to specifically advise Horiike to hire a specialist to verify the square footage, as he advised the couple who made the earlier offer on the property. The Court will express no view about whether, as a factual matter, Cortazzo breached this duty. For present purposes**, the critical point is only that to disclose such information, or to alert Horiike that his representations were unverified, would not have required Cortazzo to reveal any confidential**

information he had obtained from the trust, nor would it otherwise have compromised his ability to fulfill his fiduciary obligations toward the trust.

In other cases, a plaintiff's allegations may raise more difficult questions about the scope of a real estate salesperson's fiduciary duties when functioning as a dual agent in a transaction. Defendants argue that if salespeople owe precisely the same duties as their employers, then buyers and sellers would not have the benefit of the "undivided loyalty of an exclusive salesperson," and, worse, "salespersons would have a duty to harm their original client by disclosing to the other side confidential information about the client's motivations or the salesperson's beliefs." These are significant concerns, but they are also **concerns inherent in dual agency**, whether at the salesperson or the broker level. Although the Legislature was certainly aware of these concerns when it enacted the disclosure statute, it opted not to address them directly. In approving the practice of consented-to dual agency, however, the Legislature undoubtedly understood that the dual agent's loyalty must extend to both parties, and that it cannot bear any fiduciary duty to one party that requires it to breach its duty to the other party.

To the extent there is any uncertainty about the scope of a dual agent's fiduciary duties in other contexts, the ***Legislature certainly could enact*** defendants' preferred solution to the problem by, for example, adopting legislation to uncouple associate licensees' duties from those of the brokers they represent. But **as presently written, the statute provides no basis for distinguishing between a broker's duty to learn of and disclose all facts materially affecting the value or desirability of the property and its associate licensee's duty to do the same.**

Because Cortazzo, as an agent of Coldwell Banker in the transaction, owed Horiike a duty to learn and disclose all facts materially affecting the value or desirability of the property, the trial court erred in granting nonsuit on Horiike's breach of fiduciary duty claim against Cortazzo and in instructing the jury that it could not find Coldwell Banker liable for breach of fiduciary duty based on Cortazzo's conduct. Accordingly, the judgment of the Court of Appeal is affirmed.

All Case Studies and original Opinions from 2008 through the present are now archived on our Website: http://ernestalongadr.com/sacramento-alternative-dispute-resolution-case-studies-case-library

/////

This case study is provided in the hope it may prove useful in your practice or in the handling of litigated cases. If you receive a forwarded copy of this message and would like to be added to the mailing list, let me know.

Mediation and Binding Arbitration are economical, private and final. Alternative dispute resolution will allow you to dispose of cases without the undue time consumption, costs and risks of the courtroom. Your inquiries regarding an alternative means to resolve your case are welcome.