**CITATION:** Highclass v. Ansari, 2023 ONSC 4138
**COURT FILE NO.:** CV-15-4026
**DATE:** 2023 07 13

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Hannif Highclass and Genie Sabre Realty Ltd.

**AND:**

Ali Hashsham Ansari, Doctors Urgent Care Inc., 2323398 Ontario Inc. and North American Health Care Inc.

**BEFORE:** M.T. Doi J.

**COUNSEL:** Jonathan Rosenstein, for the Plaintiffs

John I. O'Kane, for the Defendants

**HEARD:** January 12, 13, 16, 17 and 18, 2023



## REASONS FOR JUDGMENT

### Overview

[1] In this action, the Plaintiffs seek to recover real estate commissions and other amounts from the purchase and sale of certain units in a commercial plaza.[1]

[2] For the reasons that follow, the action is granted in part.

### Parties

[3] The individual Plaintiff, Hannif Highclass, is a realtor. The other Plaintiff, Genie Sabre Realty Ltd. ("Genie Realty"), carries on business as a real estate brokerage. Mr. Highclass is the broker of record for Genie Realty which is his closely-held company.

[4] The Defendant, Dr. Ali Hashsham Ansari ("Dr. Ansari"), is a family physician. He is also a principal officer and director of the Defendant corporations Doctors Urgent Care Inc., 2323398 Ontario Inc. ("398"), and North American Health Care Inc. ("North American Health"), which are provincially-incorporated companies. Dr. Khalid Saeed Malik ("Dr. Malik") and Dr. Muhammad

Ali Vajid ("Dr. Vajid") previously were principal officers and directors with 398 and North American Health, respectively, but are no longer involved with either company.[2]

**Background**

[5] This action arises from the sale of commercial units in a plaza located in Scarborough.

[6] During his career, Mr. Highclass came to know Parm Joshi who developed several commercial plazas in Brampton. When Mr. Joshi chose to develop a plaza in Scarborough, he engaged Mr. Highclass to acquire vacant land for the development project. Mr. Joshi later retained Mr. Highclass sell units in the plaza. Mr. Joshi owns the company that owns the plaza.

[7] Over the years, Mr. Highclass bought and sold his own units in the Scarborough plaza. He still owns one unit in the plaza that is occupied by a tenant. Mr. Highclass has no ownership interest in the company that owns the plaza.

[8] This action relates to the sale of units #12, 13, 14 and 15 in the Scarborough plaza. Initially, after the plaza was built, a chiropractor bought these units, along with unit #16, and took a second mortgage to fund extensive renovations that led to more than $350,000.00 in total leasehold improvements to the units. After the renovations were completed, the chiropractor defaulted on the second mortgage. In late May 2012, 2322669 Ontario Inc. ("669"), a company owned by Mr. Joshi, retained Genie Realty to sell all of these units under power of sale.

[9] To sell the units, Genie Realty and 669 entered into listing agreements. Due to computer storage and retrieval issues, the Plaintiffs apparently could not produce all of the sale records. Instead, they produced only a limited number of records. Their productions included the listing agreement for unit #16 dated May 25, 2012. Under this agreement, Genie Realty was entitled to receive 6% in total commissions (i.e., based on the seller and buyer each paying a 3% commission) in accordance with Mr. Joshi's instructions on behalf of 669. Mr. Highclass and Mr. Joshi testified that Genie Realty and 669 entered into similar listing agreements that day for units #12 to #15 on the same commission terms. They also testified that leasehold improvement costs for each unit were to be separately negotiated (i.e., as an adjustment to each unit's purchase price) under the terms of each listing agreement. Mr. Joshi explained that this pricing approach reflected a

marketing decision to list all of the available renovated and unfinished units for sale at the same price and to recover the leasehold improvement costs separately.

[10] The Plaintiffs produced a joint MLS listing for units #14 and #15 that collectively referred to all five (5) units, set out their configurations (i.e., unit #12 was a physiotherapy clinic, unit #13 was a chiropractic clinic, units #14 and #15 were clinics for family doctors, and unit #16 was a pharmacy), and expressly provided (i.e., by stating "*Leasehold Improvements Negotiable*" as a listing term) that leasehold improvement costs were separately negotiable from the purchase price. Mr. Highclass and Mr. Joshi testified that the listing for each unit contained the same commission and leasehold improvement terms. Their evidence on this point was corroborated by the invoices that Genie Realty later provided the Defendant buyers via their solicitor which set out the 3% commission and leasehold improvement costs that each buyer owed the brokerage.[3] From all of the oral and documentary evidence, such as it is, I find that 669 retained Genie Realty to sell units #12 to #16 and entered into listing agreements by which: a) Genie Realty was entitled to a 6% total commission on each unit sold (i.e., comprising a 3% commission plus HST payable by 669, and a further 3% commission plus HST payable by the buyer); and b) leasehold improvement costs were to be negotiated and separately paid over and above each unit's listing price.

[11] Around this time, Dr. Ansari and several colleagues were looking to acquire commercial premises to start up a multi-service health clinic with a pharmacy. One colleague, Jay Rajora, a pharmacist, learned of the units for sale in the Scarborough plaza and told Dr. Ansari about them. Along with their colleagues Dr. Malik and Dr. Vajid, Dr. Ansari and Mr. Rajora developed an interest in these available units in the plaza.

**Purchase of the Units in the Plaza**

[12] Dr. Ansari and Mr. Rajora visited the plaza to view the listed units. Both met Mr. Highclass who showed the units, shared the MLS listings (i.e., which posted a listing price of $375,000.00 for each of units #12 to #15 and $475,000.00 for unit #16, respectively), gave a per unit estimate of the leasehold improvement costs (i.e., which Mr. Highclass stated was $60,000.00 to $70,000.00 per unit based on an estimated $355,000.00 in total leasehold improvements for all of the units), advised that leasehold improvement costs had to be negotiated as an adjustment to the purchase price for each unit, explained the commission structure that included a 3% buyer's commission,

and gave some information about the vendor.[4] Although Dr. Ansari and Mr. Rajora liked the units, they felt that the listing prices, leasehold improvement costs and commission amounts were high. As a result, they continued to look at other properties while periodically returning to the plaza to further view the units as they considered which premises they wished to acquire.

[13] During a visit to the plaza, Dr. Ansari claims that Mr. Highclass told him and Mr. Rajora that he would be the realtor for both the seller and the buyer on any unit purchases. According to Dr. Ansari, he and Mr. Rajora responded by telling Mr. Highclass that they were entitled to have their own realtor. Dr. Ansari claims that he told Mr. Highclass that his friend and neighbour, Shafi Azam, had been his realtor when he bought his home, and that Mr. Highclass was less than enthusiastic on hearing that Dr. Ansari might retain Mr. Azam as his co-operating realtor to buy a listed unit in the plaza.

[14] Sometime thereafter, Dr. Ansari and Mr. Rajora met with Mr. Highclass who asked if they were still interested in buying the units as another group of doctors was thinking of acquiring them. Dr. Ansari and Mr. Rajora responded by expressing interest in the units.

[15] A few weeks later, Dr. Ansari claims that he and Mr. Azam went to the plaza to speak with Mr. Highclass about the units for sale. Before going to the plaza, Dr. Ansari did not formally retain Mr. Azam to act as his realtor. When they arrived at the plaza, Dr. Ansari claims that Mr. Highclass told Mr. Azam to return to his car and stay there. Dr. Ansari then met Mr. Highclass alone and purportedly learned that he could not buy a unit without Genie Realty as his co-operating realtor after Mr. Highclass indicated that he would not present any offers from other realtors. Dr. Ansari allegedly understood from this that retaining his own realtor would effectively prevent him from buying a unit in the plaza. Without Mr. Highclass as his realtor, no deal would be possible.

[16] Mr. Highclass denies that Dr. Ansari or any of his colleagues ever had their own realtor, denies meeting Mr. Azam or telling him to go to his vehicle, denies requiring buyers to retain him as their co-operating realtor to buy any units, and denies threatening to withhold units from buyers that did not retain him. He claims that realtors for other buyers visited the plaza on occasion to view the listed units. He agreed that it would be highly improper for a listing realtor to insist on being retained as the co-operating realtor (i.e., over the buyer's objections) in order for a buyer to make an offer or to close a deal. He also testified that a listing realtor who engaged in this kind of

blatant misconduct would inevitably face serious repercussions because a co-operating realtor in such a situation would almost certainly make a complaint to the Real Estate Council of Ontario ("RECO") and seek regulatory enforcement action. In turn, Mr. Highclass testified that he would never engage in this type of serious misconduct.

[17] Sometime before July 2012, Dr. Ansari, Mr. Rajora, Mr. Highclass and Mr. Joshi met to discuss the units that were listed for sale. During the meeting, Mr. Joshi claims that he described the units and the power of sale, confirmed the listing price for each unit, confirmed the buyer's obligation to pay 3% plus HST in commissions, and asked for $70,000.00 to $75,000.00 per unit in leasehold improvements before expressing his willingness to settle for $50,000.00 per unit. He claims that Dr. Ansari and Mr. Rajora offered $50,000.00 per unit in leasehold improvements but declined to pay any commissions. Although prepared to settle for $50,000.00 per unit in leasehold improvements, Mr. Joshi was not prepared to assume the buyer's commission costs. As such, he declined their offer and left the meeting.

[18] In his evidence at trial, Dr. Ansari initially claimed that Mr. Joshi never asked for more than $25,000.00 per unit in leasehold improvement costs. However, during his examination for discovery in 2019, Dr. Ansari had no recollection of discussing the leasehold improvements with Mr. Joshi. When challenged, Dr. Ansari claimed that his memory had improved over time after he had reviewed transcripts and other case materials, and after he had thought more carefully about the events that unfolded in this matter.

[19] After Mr. Joshi left the meeting, Mr. Highclass claims that Dr. Ansari continued to state an unwilling to pay any commissions as he recently bought a home whereby the seller had paid all commissions on the deal. Mr. Highclass replied that residential deals differ from commercial ones where the buyer typically pays the co-operating realtor's commission. Later on, Dr. Ansari claims that he tried to negotiate a 1.5% commission with Genie Realty as the listing and cooperating brokerage. Mr. Highclass denies that any such negotiations ever occurred.

[20] Thereafter, Dr. Ansari periodically visited the plaza to speak with Mr. Highclass about the power of sale, hydro meters for the units, and other details related to the listings. After viewing the units several times, Dr. Ansari and his colleagues offered to pay $25,000.00 per unit in

leasehold improvements. Mr. Highclass declined the offer knowing that Mr. Joshi would not agree to it.

[21] Mr. Highclass and Mr. Joshi testified that Mr. Rajora then offered to contribute $25,000.00 in leasehold improvements for each unit that Dr. Ansari or another doctor bought (i.e., in addition to $25,000.00 per unit in leasehold expenses that each buyer would themselves pay) to help close a deal. Mr. Rajora had plans to operate a pharmacy in unit #16 and wanted the doctors to establish a clinic in the plaza that would generate business to make the pharmacy financially viable. Although Dr. Ansari denies that any such offer was made, Mr. Rajora (who was listed as a defence witness) did not testify at trial for reasons that were not explained.

[22] In June 2012, Mr. Highclass and Mr. Joshi met with Dr. Ansari and his brother to further negotiate pricing and leasehold improvement costs. I find that Dr. Ansari spoke for his colleagues at the meeting. After Mr. Joshi indicated that he was prepared to accept Mr. Rajora's proposal, Dr. Ansari advised that the doctors were short of cash and could not afford their $25,000.00 share of the leasehold improvements. Among other things, Dr. Ansari explained that he had just bought a home and needed a one (1) year interest-free period before paying $25,000.00 in improvement costs for his unit. Mr. Joshi refused to defer any payments and insisted on being paid up-front. The parties discussed various financing options but could not agree on terms. To preserve the deal, Mr. Highclass proposed: a) that Mr. Joshi be paid the doctors' share of the unit leasehold improvement costs by offsetting these amounts against the commissions payable by the developer to Mr. Highclass for having sold units in the plaza; and b) that each doctor receive a 1-year interest-free period from him to pay their leasehold improvement costs and buyer commissions which would come due when the interest-free period ended. His proposal contemplated that each doctor would pay a 3% buyer's commission on the purchase price of each unit. I am satisfied that everyone agreed on these terms.

[23] In his evidence at trial, Dr. Ansari initially claimed that he only attended one meeting with Mr. Joshi to discuss the units despite agreeing during his 2019 examination for discovery that he had attended two meetings with Mr. Joshi. Dr. Ansari later tried to reconcile this discrepancy in his evidence by explaining that he had attended only one "serious" meeting and maybe a second "casual" meeting with Mr. Joshi.

[24] During negotiations, Dr. Ansari and his colleagues collectively expressed their interest in buying all five (5) available units. The first unit to be acquired was unit #15 which Dr. Ansari bought. Despite his inability to negotiate better terms to purchase the unit, which he believed was priced too high, the plaza was conveniently located near his home and seemed to offer good potential for building a family medicine practice. Ultimately, he decided to buy the unit.

[25] On July 9, 2012, Dr. Ansari signed: a) a buyer representation agreement ("BRA") for Genie Realty to act as his agent to buy unit #15 in the plaza with a 3% commission on the $375,000.00 purchase price plus HST and a $25,000.00 adjusted sale price (i.e., for the leasehold improvement costs that Mr. Highclass fronted);[5] and b) an agreement of purchase and sale ("APS") for a company to be incorporated to buy unit #15 from 669 for $375,000.00. The APS named Genie Realty as both the listing and co-operating brokerage for the transaction. Mr. Highclass testified that Mr. Rajora was present when Dr. Ansari signed both agreements after their terms were explained to him. Later that day, Mr. Joshi signed the APS on behalf of 669. Within days, Mr. Highclass emailed signed copies of the BRA and APS to Dr. Ansari, Mr. Rajora and Tejdeep Chattha, the buyers' solicitor.[6] The closing was set initially for August 31, 2012 before it was extended twice to October 4, 2012 as Dr. Ansari was unable to close before then.

[26] After signing the APS to buy unit #15, Dr. Ansari and others met with Mr. Highclass and negotiated a first option for the doctors to buy units #12, #13 and #14 within six (6) months on the same terms (i.e., a $375,000.00 per unit price plus $25,000.00 in leasehold improvements payable a year later without interest). Similarly, the doctors negotiated a first option to buy units #11 and #17 in the plaza (i.e., for purchase prices of $238,000.00 and $365,000.00, respectively) with the same arrangement for paying the leasehold improvement costs. Dr. Ansari claims that these options were negotiated after Mr. Highclass advised that others were interested in buying the units. Dr. Ansari memorialized the options in an email to Mr. Highclass on August 18, 2012 that also confirmed Dr. Malik's intention to enter into an APS that day to buy the unit #14 family clinic on terms mirroring Dr. Ansari's purchase of unit #15 (i.e., a $375,000.00 purchase price and $25,000.00 for improvements payable in one year without interest) with a March 30, 2013 closing.

[27] On August 18, 2012, Dr. Ansari and Dr. Malik met Mr. Highclass at the plaza. During this meeting, Dr. Malik signed: a) a BRA for Genie Sabre to act as his agent to purchase unit #14 in exchange for a 3% commission on the $375,000.00 purchase price plus a further sum of $25,000.00

as an adjustment to the seller for leasehold improvements; and b) an APS on behalf of a company to be incorporated to purchase unit #14 from 669 on the above-mentioned terms with a $10,000.00 deposit. Along with the BRA, Dr. Malik also signed a standard Ontario Real Estate Association ("OREA") form entitled "*Working with a Commercial Realtor: The Agency Relationship*" to acknowledge his agency relationship with Genie Sabre. Mr. Highclass claims that the other buyers signed the same OREA form to acknowledge their respective agency relationships with Genie Realty. However, although the form that Dr. Malik signed was produced, the forms that Dr. Ansari and Dr. Vajid signed were lost (i.e., apparently due to computer problems). The same OREA form that Mr. Rajora is said to have signed around that time to buy unit #16 was also produced.



[28] By email to Mr. Chattha on or about September 28, 2012, Genie Realty invoiced Dr. Ansari for its commission on the purchase of unit #15 (i.e., $11,250.00 or 3% of the $375,000.00 purchase price and $1,462.50 in HST) plus the buyer's $25,000.00 share of leasehold improvement costs, for a total of $37,712.50 payable by September 1, 2013 without interest. In the same email, Genie Realty also invoiced Mr. Rajora for the commission and leasehold improvement costs that he owed the brokerage on his purchase of unit #16.

[29] When he received his invoice from Genie Realty, Dr. Ansari claims that he was surprised to learn that his $25,000.00 share of the leasehold improvement costs for unit #15 was to be paid separately to the brokerage and not financed through the mortgage on the unit as he had expected. But when asked about his financing arrangements with his banker, Dr. Ansari conceded that he never told his banking officer that he needed to finance a further $37,712.50 (i.e., the 3% buyer's commission and leasehold improvement costs) in addition to the $375,000.00 purchase price for his unit. Although Dr. Ansari gave his banker a business plan for the mortgage, it did not include the commission or leasehold improvement costs and his banker never offered to lend additional funds before the purchase transaction closed. As a result, it is unclear why Dr. Ansari would have expected his lender to extend mortgage financing for any more than the purchase price of the unit at closing. Dr. Ansari did not raise this issue with his solicitor or instruct him to inquire about financing before closing. Dr. Ansari later suggested that he may have inquired about a further $37,000.00 loan with his banker who required documentation to show that the leasehold improvements belonged to the seller, but no records were produced to corroborate this. In any event, Dr. Ansari maintains that he knew that the leasehold improvement costs were owed but that

he was not aware that a separate payment for these costs would be required. In addition, Dr. Ansari denies that he had negotiated a 1-year interest-free period with Mr. Highclass or that he had agreed to pay these amounts by September 1, 2013. But on this last point, Dr. Ansari's own notes from the negotiations show that he obtained an interest-free period for paying the commission and improvement costs to Genie Realty, as set out in its invoice to him.

[30] By email to Mr. Highclass sent on September 28, 2012, Mr. Chattha wrote that he had forwarded the invoices to his clients and that funds and closing documents would be released after "*everything is worked out between [Mr. Highclass] and [Mr. Chattha's] clients … to complete the transaction.*" According to Mr. Chattha, the commission payments still needed to be worked out. On October 1, 2012, Mr. Highclass replied that he had "*talked with both Dr. Ansari & Jay [Rajora] re: the Real Estate Commission and [sic] Jays Shareholders Agreement. <u>There is no problem with it and we can deal with it later – after the deal has closed</u>.*" [Emphasis added]

[31] At trial, Mr. Chattha testified that his understanding from his clients was that Genie Realty's invoices had to be resolved before the release of escrow on closing. Dr. Ansari claims that the "*it*" mentioned by Mr. Highclass in his October 1, 2012 email was the matter of Genie Realty's commissions which remained unresolved. But the BRA's for units #12, #13 and #14 clearly set out the terms for Genie Realty's commissions and were fully executed when Mr. Chattha received them. Mr. Highclass denies that Genie Realty's entitlement to the invoiced commissions was unresolved and testified that the only outstanding matter for the units was Mr. Rajora's request to have a hydro meter and disconnection device installed in unit #16 (i.e., as these devices previously had been shared with unit #17 and installed there). Mr. Highclass explained that Mr. Rajora agreed to have a master electrician install the devices in unit #16 after the deal closed. He also testified that Mr. Rajora had considered buying unit #17 which, if purchased, would have removed the need to install the devices in unit #16 and explains why he indicated in his October 1, 2012 email that the matter could later be dealt with after closing. Mr. Chattha could not recall whether any hydro-related issues were outstanding at that time. As stated earlier, Mr. Rajora did not testify at trial. Dr. Ansari's notes from the negotiations confirm the arrangement in place for the above-mentioned devices to be installed.

[32] On December 6, 2012, Dr. Ansari, Dr. Malik and Dr. Vajid signed: a) a BRA to appoint Genie Sabre as their agent to buy units #12 and #13; and b) an APS which named themselves and

North American Health as the buyers for the purchase of units #12 and #13 from 669 for a price of $750,000.00 with a $10,000.00 deposit and a March 29, 2013 closing date.

[33] By invoice dated March 27, 2013, Genie Realty confirmed the buyer's commission payable for the purchase of units #12 and #13 (i.e., being $22,500.00 or 3% of the $750,000.00 purchase price and $2,925.00 for HST on the commission) and the buyer's $50,000.00 share of leasehold improvements for both units, for a total of $75,425.00 due on or before March 29, 2014 without interest. In a further invoice that day, Genie Realty confirmed the buyer's commission payable for the purchase of unit #14 (i.e., being $11,250.00 or 3% of the $375,000.00 purchase price and $1,462.50 in HST on the commission) and the buyer's $25,000.00 share of leasehold improvement costs for the unit, for a total of $37,712.50 payable on or before March 29, 2014 without interest.[7] Mr. Highclass emailed the invoices to Mr. Chattha on March 27, 2013. Mr. Chattha responded by asking Mr. Highclass to seek payment directly from his clients who instructed him to convey this.

[34] After the invoices were sent, Mr. Highclass approached Dr. Ansari to have the buyers sign promissory notes to secure the outstanding commission and leasehold improvement payments. Mr. Highclass claims that Dr. Ansari responded by assuring him that Genie Realty would be paid when its debts came due, and by refusing to sign promissory notes. Dr. Ansari and Mr. Highclass then discussed different financing options for paying the leasehold improvement costs but were unable to agree on a payment method. Dr. Ansari claims that he requested written confirmation that 669 owned the leasehold improvements so that he could arrange to have the improvement costs paid under the mortgage with his bank which needed the confirmation. But the confirmation was not given which Dr. Ansari claims left him unable to pay for the improvement costs. After exhausting their discussions about financing, Mr. Highclass chose to trust the buyers, including Dr. Ansari whom he regarded as his family doctor, and wait until the debts came due before demanding payment on the invoices.

[35] The invoice for unit #15 came due on September 1, 2013 but was not paid. The invoices for units #12, #13 and #14 went unpaid after the March 29, 2014 payment date expired. The total debt was over $150,000.00.

[36] On April 20, 2014, Mr. Highclass, Dr. Ansari, Dr. Malik and Dr. Vajid met at a restaurant in Markham to discuss the overdue debts. During the meeting, Dr. Ansari advised that the doctors

could not afford to pay their invoices as the clinics had not been as profitable as they previously had expected. Some of this was due to the fact that the chiropractic clinic in unit #12 and the physiotherapy clinic in unit #13 had remained vacant. To make better use of the premises and reduce carrying costs, Mr. Highclass claims that Dr. Ansari advised that the doctors were thinking of converting unit #12 to a medical imaging facility and selling unit #13 within a 6-month period. Mr. Highclass claims that he responded by expressing a willingness to extend the due date on the invoice for unit #13 until after the unit sold by charging interest (i.e., after the 1-year interest-free period had expired), which then prompted Dr. Ansari to seek better loan terms. Dr. Ansari claims that the doctors offered to pay the outstanding 3% commissions and asked to confirm ownership of the leasehold improvements in writing to secure mortgage financing for those costs, which led Mr. Highclass to suggest other financing options (i.e., a line of credit or a private loan) that were unacceptable to the buyers. By the end of the meeting, Mr. Highclass indicated that the interest-free period would be extended for a further 6 months when full payment of the debt was due or, in the alternative, interest payments (i.e., based on an 8% annual rate) to carry the debt would begin. Dr. Ansari understood that Mr. Highclass wanted to charge 8% on the debt if it remained unpaid after the further 6-month interest-free period expired, but claims that none of the doctors agreed to this or any other terms that Mr. Highclass proposed or announced. Later that day, Mr. Highclass emailed Dr. Ansari and Dr. Malik to memorialize the discussion at the meeting.

[37] After waiting 6 months, Mr. Highclass met with Dr. Ansari on October 24, 2014 to demand payment. According to Mr. Highclass, Dr. Ansari advised that unit #13 was being sold and asked to have until March 2015 to repay the entire debt with 8% interest. Mr. Highclass testified that he agreed to these terms. Dr. Ansari did not clearly recall this meeting but claims that he stated a willingness to pay the outstanding 3% commission subject to leasehold improvement costs being paid with mortgage financing.

[38] Later in March or April 2015, Mr. Highclass claims that he agreed to Dr. Ansari's request for a further extension of 2 or 3 months to allow the sale of unit #13 to close, understanding that the doctors would use the sale proceeds to pay the outstanding debt to Genie Realty. Dr. Ansari claims that he offered to pay the 3% commission at the meeting (i.e., in partial satisfaction of what he owed under the invoice) but that Mr. Highclass insisted on receiving a single full payment and

provided another interest-free period. Dr. Ansari claims that it never occurred to him to give Genie Realty partial payments against the invoiced debt.

[39] The sale of unit #13 later closed but the debts to Genie Realty remained unpaid.

[40] On August 1, 2015, Mr. Highclass emailed Dr. Ansari, Dr. Vajid and Dr. Malik to demand payment and attended Dr. Ansari's clinic to discuss the matter. During this meeting, Dr. Ansari declined to pay Mr. Highclass at Mr. Rajora's behest as Mr. Highclass had started a collections lawsuit against his pharmacy.

[41] According to Dr. Ansari, unit #12 is now owned by North American Health (n.b., which previously also owned unit #13 before the unit was sold), unit #14 is currently owned by 398, and unit #15 is now operated by Doctors Urgent Care Centre Inc. (i.e., which is a different entity from Doctors Urgent Care Inc., which is named as a Defendant).

**Limitations**

[42] For the reasons that follow, I find that the claim falls within the limitation period.

[43] The claim is subject to ss. 4 (*Basic limitation period*) and 5 (*Discovery*) of the *Limitations Act, 2002*, SO 2002, c 24, Sched B ("*Limitations Act*"), which state:

> **Basic limitation period**
> 4. Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.
>
> **Discovery**
> 5. (1) A claim is discovered on the earlier of:
>
> (a) the day on which the person with the claim first knew,
>
> (i) that the injury, loss or damage had occurred,
> (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
> (iii) that the act or omission was that of the person against whom the claim is made, and
> (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and

> (b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).
>
> **Presumption**
> (2) A person with a claim shall be presumed to have known of the matters referred to in clause (1)(a) on the day the act or omission on which the claim is based took place, unless the contrary is proved.
>
> **Demand Obligations**
> (3) For the purposes of subclause (1) (a) (i), the day on which injury, loss or damage occurs in relation to a demand obligation is the first day on which there is a failure to perform the obligation, once a demand for the performance is made



[44] A claim is statute-barred unless commenced within two years from the date on which the claim is discovered: s. 4 of the *Limitations Act*.

[45] A claimant is presumed to have known of the claim on the day the act or omission on which the claim is based took place, unless the contrary is proved: ss. 5(2) of the *Limitations Act*. The claimant bears the burden of showing that they could not have discovered the claim on the day the act or omission took place: *1352194 Ontario Inc. v. Vince*, 2021 ONSC 8192 (Div Ct) at para 22.

[46] In *Clarke v. Sun Life Assurance Company of Canada*, 2022 ONCA 11, the Court of Appeal gave the following guidance in addressing the discoverability of a claim:

> [19] The discoverability analysis required by s. 5(1) and (2) of the *Act* contains cumulative and comparative elements.
>
> [20] Section 5(1)(*a*) identifies the four elements a court must examine cumulatively to determine when a claim was "discovered". When considering the four s. 5(1)(*a*) elements, a court must make two findings of fact:
>
> > (i) the court must determine the "day on which the person with the claim first knew" all four of the elements. In making this first finding of fact, the court must have regard to the presumed date of knowledge established by s. 5(2): "A person with a claim shall be presumed to have known of the matters referred to in clause (1)(*a*) on the day the act or omission on which the claim is based took place, unless the contrary is proved"; and
> >
> > (ii) the court must also determine "the day on which a reasonable person with the abilities and in the circumstances of the person with the

> claim first ought to have known" of the four elements identified in s. 5(1)(*a*).
>
> Armed with those two findings of fact, s. 5(1) then requires the court to compare the two dates and states that a claim is discovered on the earlier of the two dates: see *Nasr Hospitality Services Inc. v. Intact Insurance* (2018), 142 O.R. (3d) 561, [2018] O.J. No. 4514, 2018 ONCA 725, at paras. 34-35.

[47] The items in ss. 5(1)(a)(i) to (iv) are conjunctive. Accordingly, the limitation period does not run until a claimant is actually aware of all these items or until a reasonable person, with the abilities and in the circumstances of the claimant, first ought to have known of them: *Longo v. MacLaren Art Centre*, 2014 ONCA 526 at para 41. In addition, ss. 5(2) establishes a rebuttable presumption of the claimant's knowledge of these items which codifies their need to diligently pursue a claim: *Kumarasamy v. Western Life Assurance Company*, 2021 ONCA 849 at para 24.

[48] The discoverability analysis under ss. 5(1)(a) and (b) includes a requirement for the court to find: a) under ss. 5(1)(*a*)(iv), the day when the claimant first knew that a proceeding would be an appropriate means to remedy the claim having regard to the injury, loss or damage; and b) under ss. 5(1)(b), the day when a reasonable person with the abilities and in the circumstances of the claimant first ought to have known of that matter: *Clarke* at para 21. An "appropriate" means under ss. 5(1)(a)(iv) refers to a legally appropriate means, which does not allow a party to delay the start of a proceeding for tactical or other reasons: *Markel Insurance Co. of Canada v. ING Insurance Co. of Canada*, 2012 ONCA 218 at para 34.

[49] Courts have applied the ss. 5(1) factors to find that the limitation period on an unpaid invoice begins to run once a reasonable period of time for its payment has elapsed: *Collins Barrow Toronto LLP v. Augusta Industries Inc.*, 2017 ONCA 883 at paras 5-6; *Vince* at para 24.

[50] In this case, I find that Dr. Ansari, on behalf of Dr. Malik, Dr. Vajid and himself, agreed to Mr. Highclass' proposal at the June 2012 meeting for each doctor to receive a 1-year interest-free period to pay the leasehold improvement costs and buyer commissions owed to Genie Realty on the purchase of their units under their BRA's. By invoice dated September 28, 2012, Genie Realty invoiced Dr. Ansari for $37,712.50 (i.e., the leasehold improvement costs and commissions) on his purchase of unit #15 with payment due by September 1, 2013. Later, on March 27, 2013, the brokerage similarly invoiced Dr. Malik for $37,712.50 on his purchase of unit #14, and separately

invoiced Drs. Ansari, Malik and Vajid for $75,425 on their group purchase of units #12 and #13, with payment for each invoice due by March 29, 2014.

[51] Genie Realty's invoice for the purchase of unit #15 went unpaid after the 1-year interest-free period ended on September 1, 2013 and the debt came due.[8] Subsequently, its invoices for the purchase of units #12 and #13, and of unit #14, respectively, went unpaid after the interest-free period for both invoices ended on March 29, 2014.

[52] The Plaintiffs started this action on August 31, 2015.

[53] I am not persuaded that the action is untimely. The invoices from Genie Realty stated that payment was due on September 1, 2013 and March 29, 2014, respectively. The limitation period on an unpaid invoice starts to run once a reasonable period of time for its payment has elapsed: *Collins Barrow* at paras 5-6; *Vince* at para 24. It follows that the limitation period started to run when the Plaintiffs first knew of the loss when the invoices went unpaid after the due dates passed. In addition, I find that the Plaintiffs first knew that a proceeding would be an appropriate means to remedy the loss only after the invoices went unpaid past the due dates, when a reasonable person would first have come to know that: *Clarke* at para 21. The initial invoice from Genie Realty came due on September 1, 2013. It follows that this action, which was issued on August 31, 2015, was started within the applicable 2-year limitation period.

[54] Accordingly, I find that the claim is not statute-barred.

**Amount of the Claim**

[55] In this case, the amount of the underlying claim is not controversial.

[56] As set out earlier, Genie Realty invoiced Dr. Ansari on September 28, 2012 for $37,712.50 on his purchase of unit #15. Similarly, on March 17, 2012 the brokerage invoiced Dr. Malik the same amount on his purchase of unit #14, and separately invoiced Drs. Ansari, Malik and Vajid for $75,425.00 on their group purchase of units #12 and #13. None of this is disputed.

[57] After the invoices were sent, Mr. Highclass approached Dr. Ansari to have the buyers sign promissory notes to secure the outstanding leasehold improvement and commission payments. Although Dr. Ansari refused to have any promissory notes signed, I find that he acknowledged the

amounts owed under the invoices and assured Mr. Highclass that Genie Realty would be paid as the payment dates under the invoices came due.

[58] During the restaurant meeting on April 20, 2014, Dr. Ansari, Dr. Malik and Dr. Vajid met with Mr. Highclass to discuss the overdue debt. During the meeting, I find that the doctors asked for additional time to pay the invoices and acknowledged their indebtedness to Genie Realty. I also find that the doctors further acknowledged their indebtedness to Genie Realty in subsequent meetings held on October 24, 2014 and later in March or April 2015 when additional extensions to pay the invoiced debts were negotiated and granted.



**Interest**

[59] In my view, pre-judgement interest should apply to the unpaid debts after the forbearance extensions had expired.

[60] As part of the forbearance arrangement, Mr. Highclass claims that the parties agreed to an 8% compounded interest rate that was payable once the extended interest-free period had expired. Dr. Ansari denies that the parties agreed to apply an 8% rate or to compound the interest.

[61] I accept that Mr. Highclass proposed an 8% interest rate on unpaid debts that were past due at the April 20, 2014 meeting and in his follow-up email message. However, I find that the doctors never agreed to apply this or any other interest rate after the interest-free payment period ended. Furthermore, I find that the parties never expressly agreed to apply compound interest as required to have this form of interest: *Khan v. Shaheen Investment Inc.*, 2022 ONSC 3033 at para 18.

[62] In the alternative, the Plaintiffs seek to apply a 5% interest rate to unpaid debts that were past due by relying on s. 3 of the *Interest Act*, RSC 1985, c. I-15 which provides:

> **Interest rate when none provided**
> 3 Whenever any interest is payable by the agreement of parties or by law, and no rate is fixed by the agreement or by law, the rate of interest shall be five per cent per annum. [Emphasis added]

However, it is clear from s. 3 of the *Interest Act* that its default 5% interest rate will not apply in the absence of an agreement that interest is payable. Moreover, the interest provisions at ss. 128

to 130 of the *Courts of Justice Act*, RSO 1990, c. C.43 provide law for the payment of interest that ousts the application of the default rate under s. 3 of the *Interest Act*: *Pizzey v. Crestwood Lake Limited* (2004), 69 OR (3d) 306 (CA) at para 25. It follows that the default 5% interest rate under s. 3 of the *Interest Act* should not apply in this case.

[63] Absent an agreement on interest by the parties, I conclude that pre-judgment interest under ss. 128 (1) of the *Courts of Justice Act*, RSO 1990, c. C.43, should apply to the unpaid debts as of August 1, 2015 when the forbearance extensions for paying the debts without interest had ended.

**Liability of Defendant Corporations**

[64] As further explained below, I find that the corporate Defendants North American Health and 398 should be jointly and severally liable for the amounts owed to Genie Realty under the BRA's for units #12, 13 and 14, respectively. In addition, I find that the other corporate Defendant, Doctors Urgent Care Inc., should not be liable under the BRA for unit #15.

[65] At trial, the Plaintiffs sought to have Dr. Ansari and all three (3) defendant corporations, namely North American Health, 398 and Doctors Urgent Care Inc., held liable for any judgment on the claims under the BRA's by relying on the pre-incorporation provision under ss. 21(3) of the *Business Corporations Act*, RSO 1990, c B.16 ("*OBCA*"), which provides:

> **Non-adoption of contract**
> (3) Except as provided in subsection (4), whether or not an oral or written contract made before the coming into existence of a corporation is adopted by the corporation, a party to the contract may apply to a court for an order fixing obligations under the contract as joint or joint and several or apportioning liability between the corporation and the person who purported to act in the name of or on behalf of the corporation, and, upon such application, the court may make any order it thinks fit.

[66] Pursuant to ss. 21(3) of the *OBCA*, the court may impose liability on a corporation for a pre-incorporation contract made on its behalf before it came into existence, regardless of whether or not the corporation later adopts the contract: *MacNaughton Hermsen Britton Clarkson Planning Limited v. The Royalton Retirement Residence Inc.,* 2011 ONSC 179 at para 39.

[67] At trial, Dr. Ansari testified that North American Health now owns unit #12 (i.e., and also owned unit #13 before it was sold), 398 now owns unit #14, and Doctors Urgent Care Centre Inc. now owns unit #15.

[68] From the evidence, I find that the doctors entered into the BRA's to engage Genie Realty as their co-operating brokerage to buy units #12, 13, 14, and 15 on behalf of their corporations. For instance, the APS for units #12 and #13 identifies the buyer under the agreement as "*Dr. M. Vajid & Dr. A. Ansari & Dr. K. Malik (North American Health Care Inc.),*" and clearly shows that the doctors bought these units for North American Health.

[69] In addition, the APS for unit #14 clearly identifies the buyer as "*Khalid Malik (COMPANY TO BE INCORPORATED),*" and the APS for unit #15 identifies the buyer as "*Dr. Ansari Ali Hashsham (COMPANY TO BE INCORPORATED),*" respectively. It is noteworthy that the BRA and the APS for each of these units were signed simultaneously on the same day.[9] Based on this, I find that Dr. Malik bought unit #14 for 398.

[70] Although there is no evidence that any of the above-mentioned corporations ever adopted the BRA's, I accept that North American Health and 398 clearly benefitted from the BRA's which enabled them to acquire the respective units which they now own. Given that North American Health and 398 obviously are connected to and have benefitted from the purchases of their respective units under their BRA's, I find that it is fair and just to apply ss. 20(3) of the *OBCA* to impose liability under the BRA for units #12 and #13 on North American Health. Similarly, I find that liability under the BRA for unit #14 should be imposed on 398. In addition, I find that both corporations should be liable under ss. 20(3) for the oral agreements to extend the period for paying the leasehold improvement costs and commissions owed to Genie Realty under the BRA's as they had benefitted from these extensions.

[71] Dr. Ansari explained that unit #15 is owned by Doctors Urgent Care Centre Inc. which is *not* a party to this action and is separate and distinct from Doctors Urgent Care Inc. that has been named as a Defendant. In his uncontradicted evidence on this point, Dr. Ansari testified that Doctors Urgent Care Inc. operates the medical practice at the clinic in unit #15, whereas Doctors Urgent Care Centre Inc. is a separate entity that owns the premises. Given this arrangement, I find that Dr. Ansari bought unit #15 on behalf of Doctors Urgent Care Centre Inc. and *not* for Doctors

Urgent Care Inc., which is a separate entity. In the circumstances, I find that Doctors Urgent Care Inc. should not be liable as the "buyer" under the BRA for unit #15 and I decline to impose liability on the corporation under ss. 20(3) of the *OBCA*.

**The Entire Agreement Clause**

[72] I am not persuaded that the entire agreement clauses that appear in each of the BRAs should apply to exclude the buyer commissions, leasehold improvement costs, or the 1-year interest-free period for paying these amounts.

[73] As mentioned earlier, I am satisfied that Mr. Highclass and Dr. Ansari, who spoke for his colleagues, agreed to the buyer commissions, leasehold improvement costs, and the 1-year interest-free payment period at the June 2012 meeting.

[74] Thereafter, the doctors entered into BRA's with Genie Sabre to have the brokerage act as their co-operating realtor on the purchase of the subject units in the plaza. Each BRA included the following entire agreement clause:

> If there is any conflict or discrepancy between any provision added to this Agreement and any provision in the standard pre-set portion hereof, the added provision shall supersede the standard pre-set provision to the extent of such conflict or discrepancy. This Agreement, including any provisions added to the Agreement, shall constitute the entire Authority from the Buyer to the Brokerage. <u>There is no representation, warrant, collateral agreement or condition, which affects this Agreement other than as expressed herein</u>. [Emphasis added]

[75] An entire agreement clause is construed in the same manner as an exclusionary clause: *Shelanu Inc. v. Print Three Franchising Corp.* (2003), 64 OR (3d) 533 (CA) at paras 30-36. It follows that the following 3-stage analysis for an exclusion clause applies to the construction of an entire agreement clause:

> (a) Did the parties intend for the exclusion clause to apply to the circumstances of the particular case?
>
> (b) If the clause applies, was it unconscionable?
>
> (c) If the clause applied and was not unconscionable, was it contrary to overriding policy?

*Tercon Contractors v. British Columbia (Minister of Transportation and Highways)*, 2010 SCC 4 at paras 121-123;

[76] The defence submits that the entire agreement clause in each BRA specifically precludes any representation, collateral agreement or condition made outside of the BRA from affecting its terms. In turn, the defence argues that the entire agreement clause excludes the prior agreement from the June 2012 meeting for the buyers to have a 1-year interest-free period to pay Genie Realty the leasehold improvement costs and buyer commissions owing on each unit that was purchased.

[77] Under step one of the *Tercon* analysis, I am satisfied that the parties did not intend for the exclusion clause to preclude the buyers from paying commissions or leasehold improvement costs to Genie Realty as each BRA had a term that expressly required the buyer to pay the brokerage the following commissions and leasehold improvement costs:

a. A commission of 3% of the $750.000.00 purchase price (i.e., $22,500.00) + HST plus $50,000.00 in unit improvement costs for units #12 and #13;

b. A commission of 3% of the $375,000.00 purchase price (i.e., $11,250.00) + HST and a further $25,000.00 in unit improvement costs for unit #14; and

c. A commission of 3% of the $375,000.00 purchase price (i.e., $11,250.00) + HST and a further $25,000.00 in unit improvement costs for unit #15.

The parties clearly agreed that buyers would pay these commissions and leasehold improvements to Genie Realty. These costs were not intended to be excluded from the BRAs.

[78] Furthermore, I am satisfied that the parties did not intend to apply the entire agreement clause to exclude the prior oral agreement for the 1-year interest-free period for buyers to pay their commissions and leasehold improvement costs. The buyers clearly benefited from the interest-free period which they negotiated at the June 2012 meeting after asking for more time to pay given their limited funds at the time. Moreover, after receiving the invoices from Genie Realty, none of the buyers raised any concerns with the 1-year interest-free period for paying the brokerage, as clearly set out in each invoice.

[79] Step two of the *Tercon* analysis focusses on whether the clause is unconscionable by considering the combination of inequality of bargaining power and the stronger party's use of that inequality to obtain an improvident bargain: *ABB Inc. v. Domtar Inc.*, 2007 SCC 50 at para 82; *2190322 Ontario Ltd. v. Ajilon Consulting*, 2014 ONSC 21 (Div Ct) at para 67. I do not find that such circumstances existed in this case. Both sides to each transaction were sophisticated and neither had a stronger informational position that led to an improvident agreement. In my view, the agreements were freely concluded and not unconscionable: *Tercon* at para 131, citing *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 SCR 426 at 462.

[80] Under the third step of the *Tercon* analysis, I find that there is a public policy reason for not applying the entire agreement clause in each BRA to exclude the oral agreements reached on the 1-year interest-free period for paying the buyer commissions and leasehold improvement costs. The doctors agreed to the commissions and improvement costs payable on each unit they bought after negotiating hard to obtain the interest-free period. They clearly benefitted from having their realtor front the leasehold improvement costs and extend an interest-free payment period that made it more immediately affordable for them to buy their units. In light of this, I find that the doctors should not be allowed to shelter under the entire agreement clause to avoid their contractual obligations and realize an unintended windfall, which would be contrary to public policy.

[81] Accordingly, I am satisfied that the entire agreement clause as set out in each BRA should not apply to exclude the commissions, improvement costs, or the 1-year interest-free period to pay these costs. To find otherwise would not align with the parties' intentions and cause an injustice.

**Defence of Illegality**

[82] For the reasons that follow, I find that Mr. Highclass' non-compliance with regulatory requirements under the *Real Estate and Business Brokers Act, 2002*, SO 2002, c 30, Sched C ("*REBBA*"), and specifically the *Code of Ethics* under O.Reg. 580/05 ("*Code of Ethics*"), should not implicate the defence of illegality in this case.

[83] The defence of illegality, also known as the *ex turpi causa* doctrine, bars an otherwise valid claim due to a party's wrongdoing: *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63 at para 98. In the leading case of *Hall v. Hebert*, [1993] 2 SCR 159 at 170-171, McLachlin J. (as she then was) described the rationale for the defence of illegality as follows:

> The power expressed in the maxim *ex turpi causa non oritur actio* finds its roots in the insistence of the courts that the judicial process not be used for abusive, illegal purposes. Thus Professor Gibson, in "Comment: Illegality of Plaintiff's Conduct as a Defence" (1969), 47 *Can. Bar Rev.* 89, at p. 89, writes:
>
> > Few would quarrel with the proposition that a man who murders his wealthy aunt should not be allowed to receive the proceeds of her life insurance as beneficiary, or that two robbers who disagree over the division of the spoils would not be allowed to settle their dispute in a court of law. It was to deal with flagrant abuses like these that English courts developed the principle expressed in the maxim: *ex turpi causa non oritur actio* -- no right of action arises from a base cause. [Emphasis added.]
>
> The use of the doctrine of *ex turpi causa* to prevent abuse and misuse of the judicial process is well established in contract law and insurance law, where it provokes little controversy.

See also *British Columbia v. Zastowny*, 2008 SCC 4 at para 20.

[84] Relying on the principles set out in *Hall* and *Zastowny*, the Supreme Court summarized the defence of illegality in *Deloitte* at para 98 as follows:

> [98] The defence of illegality bars an otherwise valid action in tort on the basis that the plaintiff has engaged in illegal or immoral conduct and, therefore, should not recover (*Hall v. Hebert*, 1993 CanLII 141 (SCC), [1993] 2 S.C.R. 159, at p. 169; *British Columbia v. Zastowny*, 2008 SCC 4, [2008] 1 S.C.R. 27, at para. 20). Grounded in public policy, it is available in very "limited" circumstances, only where it is necessary to preserve the "integrity of the justice system" (*Hall*, at pp. 179-80). And, the integrity of the justice system will only be compromised where a "damage award in a civil suit would, in effect, allow a person to profit from illegal or wrongful conduct, or would permit an evasion or rebate of a penalty prescribed by the criminal law" (*Hall*, at p. 169; *Zastowny*, at para. 3).

[85] The defence of illegality bars an otherwise valid action on the basis that the claimant has engaged in illegal or immoral conduct and, therefore, should not recover damages to preserve the integrity of the justice system: *Ibid*; *Hall* at 179-80; *Zastowny* at para 20. It is available in only very limited circumstances when necessary to preserve the integrity of the justice system where awarding civil damages would amount to profiting from illegal or wrongful conduct, or evading a penalty under criminal law: *Hall* at 169; *Zastowny* at paras 3 and 20. The defendant has the onus to prove the illegal or immoral conduct that precludes the claim: *Zastowny* at para 20. That said, the defence does not confer a discretion to withhold a remedy for civil damages merely because

the plaintiff has engaged in misconduct, as the overriding concern is whether permitting recovery would give rise to inconsistency in the law and damage the integrity of the legal system: *Aviva Canada Inc. v. 1843538 Ontario Inc.*, 2019 ONSC 3874 at para 66, citing *Livent Inc v. Deloitte & Touche,* 2016 ONCA 11 at para 113, reversed but not on this point 2017 SCC 63. The defence of illegality calls for claims constituting profit from illegal or immoral conduct, or the evasion of a criminal law penalty, to be distinguished other claims: *Zastowny* at para 20.

[86] To maintain the integrity of the legal system, the court may determine whether to decline to apply the defence of illegality to avoid an unjust enrichment after weighing the illegality and the unjust enrichment in balancing these competing policies: *First City Development Corp. Ltd. v. Durham (Regional Municipality),* [1989] OJ No 87 (HC) at paras 116-118, citing *Menard v. Genereux* (1982), 39 OR (2d) 55 (HC) at 72, and *Berne Development Ltd. v. Haviland* (1983), 40 OR (2d) 238 (HC) at 250-251. The test for unjust enrichment has three elements: i) the enrichment of one party; ii) a corresponding deprivation by the other party; and iii) an absence of juristic reason for the enrichment: *Madi v. King,* 2023 ONCA 443 at para 23, citing *Garland v. Consumers' Gas Co.*, 2004 SCC 25 at para 30.

[87] To invoke the doctrine of illegality, the defence submits that Mr. Highclass engaged in unlawful or wrongful conduct by variously breaching his regulatory duties as a realtor.

[88] Relying on the *Code of Ethics* at OReg 580/05 to the *Real Estate and Business Brokers Act, 2002*, the defence submits that Mr. Highclass unlawfully insisted that Dr. Ansari retain him as his co-operating broker and refused to present any offers from Dr. Ansari unless retained in this role. Both sides agree that this alleged conduct would contravene the *Code of Ethics*.[10]

[89] In my view, the defence has not proven that Mr. Highclass engaged in illegal or wrongful conduct by improperly insisting on being Dr. Ansari's broker. Only after the action was started did Dr. Ansari raise this uncorroborated allegation, which Mr. Highclass flatly denies. Dr. Ansari claims that Mr. Highclass insisted on being his broker on two separate occasions when Mr. Rajora and Mr. Azam were present, but neither were called to testify despite being listed as defence witnesses. The defence initially asserted that Mr. Azam was to have been Dr. Ansari's realtor on the purchase of unit #15, but Dr. Ansari conceded under cross-examination that he never actually

retained Mr. Azam. Having regard to all of the evidence, I find on balance that Mr. Highclass did not act unlawfully or wrongfully as alleged on this point.

[90] In addition, the defence raised the defence of illegality by claiming that Mr. Highclass failed to properly disclose in writing to the buyers: a) his relationship to the seller, namely to 669 and Mr. Joshi, contrary to s. 17 of the *Code of Ethics*, and b) his interest in the plaza contrary to ss. 18(1)(1.) and (2) to (3) of the *Code of Ethics*. (Sub)sections 17 and 18(1) to (3) of the *Code of Ethics* provide as follows:

> **Nature of relationship**
> **17.** If a registrant represents or provides services to more than one buyer or seller in respect of the same trade in real estate, the registrant shall, in writing, at the earliest practicable opportunity and before any offer is made, inform all buyers and sellers involved in that trade of the nature of the registrant's relationship to each buyer and seller.
>
> **Disclosure of interest**
> **18.** (1) A registrant shall, at the earliest practicable opportunity and before any offer is made in respect of the acquisition or disposition of an interest in real estate, disclose in writing the following matters to every client represented by the registrant in respect of the acquisition or disposition:
>
> 1. Any property interest that the registrant has in the real estate.
> 2. Any property interest that a person related to the registrant has in the real estate, if the registrant knows or ought to know of the interest.
> 3. Any property interest that a personal real estate corporation controlled by the registrant has in the real estate.
> 4. Any property interest that a person related to a personal real estate corporation controlled by the registrant has in the real estate, if the registrant knows or ought to know of the interest.
>
> (2) A brokerage shall, at the earliest practicable opportunity and before any offer is made in respect of the acquisition or disposition of an interest in real estate, disclose in writing the matters referred to in paragraphs 1 and 2 of subsection (1) to every customer with whom the brokerage has entered into an agreement in respect of the acquisition or disposition.
>
> (3) A broker or salesperson shall, at the earliest practicable opportunity and before any offer is made in respect of the acquisition or disposition of an interest in real estate, disclose in writing the matters referred to in paragraphs 1 and 2 of subsection (1) to every customer of the broker or salesperson with whom the

> brokerage that employs the broker or salesperson has entered into an agreement in respect of the acquisition or disposition.

[91] In his evidence, Mr. Highclass conceded that he did not arrange for the buyers and sellers to sign a *Confirmation of Co-operation and Representation* (OREA Form 320) and, thereby, failed to provide written notice to the buyers of his relationship to the seller in breach of the requirement at s. 17 of the *Code of Ethics*. But before any offers were made, I accept that Mr. Highclass met Dr. Ansari (i.e., who was acting for Drs. Malik and Vajid) and Mr. Rajora. During this meeting, I find that Mr. Highclass verbally advised them that he (i.e., through his brokerage, Genie Realty) was acting for the seller as the listing realtor, confirmed that the listed units were being sold under power of sale, reviewed the sale terms (i.e., the purchase prices, commissions, and leasehold improvement costs for the listed units), shared the MLS listing for the listed units which confirmed these details, and gave them some information about the seller. More importantly, Dr. Ansari, Mr. Rajora, Mr. Joshi and Mr. Highclass attended an in-person meeting to discuss the terms of sale for the listed units before any formal offers to buy the units were made. Taking this all into account, I find that Mr. Highclass' relationship to both the buyers and the seller was clearly disclosed at these meetings and, therefore, was quite apparent to everyone involved in the purchase and sale of the listed units. Although his failure to give written disclosure of his relationships breached s. 17 of the *Code of Conduct*, I accept that the breach was mitigated by oral disclosures *before* any offers were made. As a realtor, he was obliged to serve his clients fairly, honestly and with integrity to promote and protect their best interests using reasonable knowledge, skill and judgment, which included complying with written notice requirements: ss. 2(1) and 3-5 of the *Code of Conduct*. That said, and without condoning his omission, I am persuaded that his breach of s. 17 of the *Code of Conduct* by not giving written disclosure of his client relationships was less serious than otherwise would have been the case had these relationships not previously been disclosed verbally and during in-person meetings.

[92] Similarly, I accept the defence submission that Mr. Highclass breached ss. 25(1) and (2) of the *Code of Conduct* by failing to disclose the existence and details of his seller's commission to the buyers. Subsections 25(1) and (2) of the *Code of Conduct* provide as follows:

> **Agreements relating to remuneration**
> **25.** (1) If a brokerage has a seller as a client and an agreement between the brokerage and the seller contains terms that relate to remuneration and that may affect whether an offer to buy is accepted, the brokerage shall disclose the existence of and the details of those terms to any person who makes a written offer to buy, at the earliest practicable opportunity and before any offer is accepted.
>
> (2) Subsection (1) applies, with necessary modifications, to a brokerage that has a seller as a customer, if the brokerage and the seller have an agreement that provides for the brokerage to receive written offers to buy.



[93] Mr. Highclass testified that he disclosed the full commission structure to the buyers, and implicitly revealed the seller's 3% commission (i.e., by indicating that the 6% total commission included 3% payable by the buyers), although Dr. Ansari denies that the seller's commission was ever disclosed. On balance, I accept that Mr. Highclass did not adequately reveal the seller's commission to satisfy his obligation under s. 25 of the *Code of Conduct* to make this disclosure. Nevertheless, and without condoning this omission, I am satisfied that this lack of disclosure did not prejudice the buyers as none was raised by the defence when specifically asked by the court to identify any during submissions.

[94] I am not persuaded that Mr. Highclass breached a disclosure obligation under ss. 18(1)(1.) of the *Code of Ethics* by not advising the doctors that he owned another unit in the same plaza where the listed units were being sold. To properly understand a registrant's disclosure obligation under ss. 18(1)(1.), the words of that provision should be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme, object and legislative intent of the *Code of Ethics* and the *Real Estate and Business Brokers Act, 2002*, respectively: *Carmichael v. GlaxoSmithKline Inc.*, 2020 ONCA 447 at para 79, citing *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 21. Based on the words in ss. 18(1)(1.), I find that the disclosure requirement is meant to address or mitigate actual or potential conflicts of interest from any property interest the registrant has in the real estate being bought and sold. There is no evidence that Mr. Highclass' unit was related to any units that were listed for sale, or that his unit would have impacted or been impacted by the listed units. Accordingly, on the particular facts of this case, I see no potential conflicts or other concerns arising from his ownership of another unit in the plaza to justify a requirement under ss. 18(1)(1.) to disclose this interest, particularly as the defence did not identify any clear conflicts or prejudice in submissions. Accordingly, I am satisfied that Mr. Highclass'

non-disclosure of his interest in another unit in the plaza did not breach ss. 18(1)(1.) of the *Code of Ethics*.

[95] I do not find that Mr. Highclass breached ss. 18(1)(1.) of the *Code of Conduct* by not giving written disclosure (i.e., before offers to purchase were made) of a purported interest in the listed units that arose when he agreed to front the leasehold improvement costs for the buyers. From the evidence, I find that Mr. Highclass and Mr. Joshi met Dr. Ansari (i.e., who represented the other buyers) and his brother in June 2012 to negotiate a purchase of the listed units. During this meeting, I find that Mr. Highclass agreed to give the buyers a 1-year interest-free period to pay the leasehold improvements and commissions on each unit purchased. In the circumstances, I accept that everyone involved in the transactions had clear prior knowledge of the amounts that would come due under the payment terms. That said, I am not persuaded that any contractual rights to these payments should constitute an interest in "real estate" under ss. 18(1)(1.) of the *Code of Conduct* as the provision, in my view, clearly refers to property being bought or sold and not to interests rising from contractual obligations related to any such sale.

[96] Taking the foregoing into account, I find that the defence has shown that Mr. Highclass and Genie Realty breached ss. 17 and 25 of the *Code of Conduct* by failing to disclose to the buyers in writing their relationship to the seller and the seller's commission. However, I am not persuaded that this should justify an application of the defence of illegality to preserve the integrity of the justice system. The breach under the *Code of Conduct* was mitigated by the verbal disclosure of the realtors' relationship with the seller. The buyers clearly knew about the relational dynamics surrounding the sale of the listed units in the plaza. Moreover, I would attribute the lack of written disclosure to inattention or neglect, and not to any flagrant or nefarious abuse that would implicate the defence of illegality: *Hall* at 170-171. Importantly, the buyers were not prejudiced by the lack of written disclosure. In my view, this is not one of those very limited instances where the doctrine of illegality must be applied to preserve the integrity of the justice system: *Deloitte* at para 98. To the contrary, I find that barring the claim under the doctrine of illegality would cause unjust enrichment by discharging the buyers from otherwise binding contractual debt obligations that would confer a windfall at the expense of the realtors without adequate juristic reason given the parties' knowledge and expectations and the lack of any prejudice from the wrongful omission: *Madi* at para 23.

[97] Accordingly, I decline to apply the defence of illegality.

**Outcome**

[98] Based on all of the foregoing, the action is allowed in part.

[99] The Plaintiffs shall have judgment in accordance with these reasons, including:

a. a declaration that the claims are not statute-barred;

b. the Defendants Dr. Ali Hashsham Ansari and North American Health Care Inc. are jointly and severally liable for the amount of $75,425.00 (i.e., being $25,425.00 in commissions, inclusive of HST, plus $50,000.00 in leasehold improvements on the purchase of units #12 and #13 in the plaza);

c. the Defendant 2323398 Ontario Inc. is liable for the amount of $37,712.50 (i.e., being $12,712.50 in commissions, inclusive of HST, plus $25,000.00 in leasehold improvements costs owing on the purchase of unit #14 in the plaza);

d. the Defendant Dr. Ali Hashsham Ansari is liable for the amount of $37,712.50 (i.e., being $12,712.50 in commissions, inclusive of HST, plus $25,000.00 in leasehold improvement costs owing on the purchase of unit #15 in the plaza);

e. effective August 1, 2015, pre-judgment interest shall run at 1% per annum pursuant to the *Courts of Justice Act*;

f. post-judgment interest shall apply at 6% per annum pursuant to the *Courts of Justice Act*; and

g. apart from costs, the balance of the claims in the action are dismissed.

[100] Should the parties be unable to resolve the matter of costs, the Plaintiffs may deliver written costs submissions not exceeding five (5) pages (excluding any bill of costs and offer(s) to settle) within 15 days, the Defendants may deliver costs submissions on the same terms within a further

15 days, and the Plaintiffs may deliver reply costs submissions not exceeding two (2) pages within a further 10 days.

M.T. Doi J.

**Date:** July 13, 2023



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[1] Although a counterclaim was pleaded, the Defendants abandoned the counterclaim at trial.

[2] The Plaintiff initially named Dr. Malik and Mr. Vajid as Defendants in the action. By consent Order dated March 6, 2020, the action as against Dr. Malik and Mr. Vajid was dismissed without costs.

[3] Although the invoices from Genie Sabre purported to require the unit buyers to sign promissory notes (i.e., which Mr. Highclass later delivered in draft for them to sign), I am satisfied that the buyers never agreed to any such requirement as Mr. Highclass candidly conceded in his evidence at trial. That said, I accept that the intent behind the draft promissory notes was to memorialize the debt terms which the parties previously had agreed to verbally.

[4] When the individual defendants made pre-purchase inquiries into the value of the leasehold improvements for the purpose of obtaining property insurance quotes, Mr. Highclass inquired with the contractor who renovated all five units which informed his $355,000.00 estimated total cost for all of the leasehold improvements.

[5] On or about May 21, 2012, Mr. Highclass prepared the BRA and gave a copy to Dr. Ansari for his lawyer to review before signing the document. Although Mr. Highclass expected Dr. Ansari to sign the BRA within a week or so, Dr. Ansari did not sign the BRA until July 9, 2012 when he also signed the APS to purchase the family clinic at unit #15 in the plaza.

[6] At trial, the defence asserted that the version of the BRA which Mr. Chattha received was missing the second page (i.e., which set out the commission and adjusted price terms). Mr. Highclass responded that Mr. Chattha never indicated that he was missing a page to the BRA or asked for the missing page to be sent over.

[7] By email sent on March 27, 2013, Mr. Highclass sent both invoices to Mr. Chattha who wrote that he was not dealing with these matters and that Mr. Highclass should deal directly with his clients for payment.

[8] Although Genie Realty's invoice to Dr. Ansari dated September 18, 2012 stipulates a September 1, 2013 payment due date, I find that Dr. Ansari had until at least September 28, 2013 (i.e., one year from the date of the invoice) to make payment after the 1-year interest-free period would have expired, if not until October 4, 2013 which was one year after the deal to buy unit #15 closed. However, as the action was brought on August 31, 2015, none of these dates are material to my finding that the action was commenced in timely fashion.

[9] On May 1, 2012, Dr. Malik signed the BRA and APS to buy unit #15. On August 18, 2012, Dr. Malik signed the BRA and APS to buy unit #14. On December 6, 2012, Drs. Vajid, Ansari and Malik signed the BRA and APS to buy units #12 and #13.

[10] See ss. 2(1) (*Brokers and salespersons*), 3 (*Fairness, honesty, etc.*), 4 (*Best interests*), 7(1) and (2) (*Dealings with other registrants*), 8(2) (*Services from others*); 24 (*Conveying offers*); 38 (*Error, misrepresentation, fraud, etc.*); 39 (*Unprofessional conduct, etc.*) and 40 (*Abuse and harassment*) of the *Code of Ethics*.

**CITATION:** Highclass v. Ansari, 2023 ONSC 4138
**COURT FILE NO.:** CV-15-4026
**DATE:** 2023 07 13

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Hannif Highclass and Genie Sabre Realty Ltd.

**AND:**

Ali Hashsham Ansari, Doctors Urgent Care Inc., 2323398 Ontario Inc. and North American Health Care Inc.

**BEFORE:** Doi J.

**COUNSEL:** Jonathan Rosenstein, for the Plaintiffs

John I. O'Kane, for the Defendants

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**REASONS FOR JUDGMENT**

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M.T. Doi J.

DATE: July 13, 2023