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(Brandon Centre)
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COURT OF KING'S BENCH OF MANITOBA
(GENERAL DIVISION)

B E T W E E N:

		Appearances/Counsel
BRENDA ARLENE SPENCER,	)	
	)	SHARYNE HAMM
Plaintiff,	)	for the Plaintiff
- and -	)	
	)	
SUTTON-HARRISON REALTY,	)	GLEN HARASYMCHUK
BOB DAYMOND,	)	for the Defendants
Co-Defendants,	)	
	)	
	)	
	)	JUDGMENT DELIVERED:
	)	January 20, 2023

LEVEN J.

SUMMARY

[1] The plaintiff was in the process of negotiating a separation agreement (the "Separation Agreement"), with the benefit of counsel. The plaintiff and her ex-spouse jointly owned six parcels of farmland (the "Six Parcels"). The personal defendant ("Daymond") was a realtor and the corporate defendant ("Sutton-Harrison") was the real estate company that employed him.

[2] The plaintiff retained Daymond to provide an opinion of value ("OOV") in respect to the Six Parcels. The OOV valued the Six Parcels at $1.4 million. Daymond verbally explained that there is a difference between an OOV (which might cost about $300) and a formal appraisal (which might cost about $2,000 to $4,000). He would provide the former.

[3] Daymond looked at the assessed values of the Six Parcels and perhaps one recent sale of local farmland, texted the plaintiff six proposed values, and asked for her reaction. She texted back her approval. Daymond then put the six values into an extremely brief OOV and sent it to the plaintiff's lawyer. The OOV was used somehow in the process of preparing the Separation Agreement, although it is not clear precisely what role it played. Only a portion of the Separation Agreement was before the court.

[4] Later, two parcels of land (Parcel 2 and Parcel 3) sold for $600,000. The plaintiff was not sure if she and her ex-spouse split the $600,000 fifty-fifty.

[5] In any event, after the Separation Agreement came into effect, the plaintiff came to feel that the OOV was much too low. She sued the defendants for negligence. In the course of the litigation, she hired a certified appraiser (the "Appraiser") who reviewed the OOV, produced a formal Appraisal (including photos, maps, charts and other materials), and concluded that the OOV was deficient in various ways. The Appraiser felt that the Six Parcels were worth over $1.8 million ("a minimum of $1,884,630").

[6] For reasons explained below, the action fails. In simple terms, the plaintiff got exactly what she paid for. Although she is neither a realtor, nor a certified appraiser, she should be treated as a reasonable consumer. For the low price of $300, she got a very quick, very rough "ballpark" set of estimated land values. Even if the values were at the low end of the ballpark, that does not constitute negligence in the legal sense.

[7] A reasonable consumer would have realized that a $3,000 formal appraisal would be substantially different from a $300 opinion of value, and would have governed themselves accordingly. Furthermore, it is not clear what role the OOV played in the Separation Agreement so, even if Daymond violated a standard of care to the plaintiff, there was no evidence that the plaintiff incurred damages as a result.

FACTS

[8] This is not a comprehensive recitation of all evidence and argument; it is a concise summary of certain important matters.

[9] The trial took place on November 2 and 3, 2022. By agreement, it was a hybrid trial. Affiants filed affidavits in advance; the plaintiff and Daymond were examined for discovery in advance; the Appraiser was cross-examined on his affidavit in advance; and the plaintiff and Daymond were cross-examined on their affidavits in the courtroom.

[10] The Statement of Claim alleged that the defendants were negligent, and did not mention any specific quantum of damages.

[11] The Statement of Defence denied negligence. Among other things, it said:

> [13] … The Defendants further deny that they owed the Plaintiff a duty of care to exercise the degree of care, skill, diligence and expertise in the performance of their services as would be expected from a competent appraiser and further deny that the Defendants provide an appraisal to the Plaintiff but state that the Defendants provided an opinion of value to the Plaintiff.

Agreed Facts

[12] The parties filed an agreed statement of facts. By agreement, the Six Parcels were described. Parcel 1 was about 46 acres; Parcel 2 was about 156 acres; Parcel 3 was about 135; Parcel 4 was about 160; Parcel 5 was about 160, and Parcel 6 was about 155.

[13] In or around March 2018, the plaintiff phoned Daymond and informed him that she and her husband were separating. The plaintiff asked Daymond to prepare an OOV in respect of the Six Parcels. They had known each other for about 30 years.

[14] Daymond prepared the OOV on about April 4, 2018. The OOV valued the Six Parcels at $200,000, $200,000, $160,000, $200,000, $175,000, and $465,000 respectively. (Note that the combined values of Parcels 2 and 3 would have been $360,000). On about April 5, 2018, Daymond emailed the OOV to the plaintiff's family lawyer (the lawyer handling the separation).

[15] On about September 28, 2018, the plaintiff entered into the Separation Agreement.

[16] On about November 19, 2018, the plaintiff advised Daymond that Parcels 2 and 3 were listed for sale.

[17] In early January 2019, the plaintiff asked Daymond to prepare a further opinion of value for Parcels 2 and 3. He provided it on January 7, 2019. It said that the total value of Parcels 2 and 3 was between $570,000 and $595,000 (up from $360,000 in April 2018). Daymond emailed a copy to the family lawyer on January 11, 2019.

[18] Parcels 2 and 3 were sold in February 2019 for $600,000.

Municipal assessed values

[19] In April 2018, the municipal assessed values of the Six Parcels were: $134,000, $194,000, $152,900, $198,900, $173,200, and $539,000.

The Separation Agreement

[20] The only portion of the Separation Agreement placed before the court was found at Tab D to the plaintiff's affidavit, sworn August 5, 2022. It listed the Six Parcels and said that the two spouses owned the parcels as joint tenants. It mentioned that the plaintiff's former-husband would pay the plaintiff an "equalization payment". It also mentioned the plaintiff's "interest" in the Six Parcels was "taken into consideration when reaching agreement on the quantum of equalization payment due and owing" to the plaintiff.

[21] However, the portion of the Separation Agreement that spells out the amount of the equalization payment was never placed before the court. Indeed, large portions of the agreement were never placed before the court (the portion

of the agreement filed went up to paragraph 11, and included a reference to a paragraph 24).

Affidavits

[22] A broker at Sutton-Harrison filed an affidavit sworn August 15, 2022, saying that he had authority to speak for Sutton-Harrison; that he reviewed Daymond's affidavit [sworn August 15, 2022] and that he did not dispute any of its contents.

[23] Daymond swore an affidavit on August 15, 2022. In paragraph 11, he said,

> At no point did I tell Ms. Spencer, or to my firm belief, give her any reason to believe that I was qualified as an appraiser. In fact, I made it clear to her during our first conversation that I was not an appraiser but a realtor and could only provide an Opinion of Value.

[24] In paragraph 12, Daymond added,

> I certainly made her well aware of the difference in cost between an Opinion of Value, which I quoted the $300.00 range, versus that of a full-blown appraisal and I told her that that would likely cost her several thousand dollars. She indicated that she did not have or want to spend that amount of money for an appraisal.

[25] The plaintiff was examined for discovery. On page 13 of the transcript, at question 53, she was asked:

> Q: Do you recall [Daymond] telling you that you probably would be better off getting an appraisal?
>
> A: Yes.

[26] Daymond commented that he and the plaintiff communicated by text message at times. He included a copy of his March 29, 2018 text to the plaintiff. In that text, he listed the Six Parcels and their values (totalling $1.4 million). The text also said, "Let me know what you think before I send to lawyers. This is opinion of value in today's market."

[27] The plaintiff texted Daymond on April 2, 2018: "Yes Bob I looked over the figures and I agree with the appraisal. So you can go ahead and send it to the lawyer. Thanks again. You have been a huge help."

[28] The OOV was a short document on Sutton-Harrison letterhead and was signed by Daymond. It was dated April 4, 2018. It was marked: "RE: Land opinion of value". It listed the Six Parcels and their values, totalling $1.4 million. It said, "I am presently a real estate agent for Sutton Harrison Realty and I have been in the industry for 10 years."

[29] The January 7, 2019 opinion of value (in respect of Parcels 2 and 3 only), was similar in format (on Sutton Harrison letterhead and signed by Daymond). It said that the assessed value (by the municipality) of the two parcels was $346,900. It continued: "Given the current activity and sales in area of land with same type and class it is my opinion that these two parcels of land would have a sale price of $570,000 - $595,000." This was obviously a large increase from the OOV.

Discovery of plaintiff

[30] The plaintiff was examined for discovery on July 23, 2021. She was asked about her April 2, 2018 text to Daymond, in which she agreed with his dollar figures. At Question 78, she was asked about her agreement with the numbers:

> Q: Do you recall why you said you agree with [the numbers]? Why did you write that?
>
> A: I do not recall.
>
> Q: You did, you must have agreed with it at the time, right, you wrote it?
>
> A: Correct.

[31] At Question 114, the plaintiff was asked about the sale of Parcels 2 and 3:

> Q: So did you and your husband each receive one-half of the net sale proceeds?
>
> A: I'm not - - I don't know. I'm not sure. Can you rephrase that question?
>
> Q: Well, it was sold to [name of buyer]. Was there any mortgage owing against it? - -
>
> A: No.
>
> Q: - - that you remember? Okay. So after the regular cost sales such as the lawyer's bill, did you receive half the proceeds and your husband received the other half of the proceeds from that sale?
>
> A: I believe so.
>
> Plaintiff's lawyer: Was it part of the equalization payment, do you know that?
>
> A: I do not remember for sure.

[32] At that point, the plaintiff's lawyer made certain comments and the defendants' lawyer asked for production of the portion of the separation agreement that dealt with property division. The defendants' lawyer commented

that he was "confused by the answer". The plaintiff's lawyer said she understood the lawyer's question and would take the matter under advisement.

[33] At question 148, the plaintiff was asked about the Separation Agreement:

> Q: During the course of your separation with your husband, until I'll say a separation agreement was signed, did you ever approach him and say he should pay for the cost of an appraisal of the land?
>
> A: I don't recall.

[34] At Question 189, the plaintiff was asked about the difference between an opinion of value and an appraisal:

> Q: Back in 2018 then what was your understanding of the difference between an Opinion of Value and an appraisal of property, besides the price difference, of course, what was your understanding of any of the difference between the two?
>
> A: All I was aware of was the price difference.
>
> Q: Did you not think at the time that the price difference might mean that there's a very different level of time that goes into providing those two distinct reports, the appraisal and Opinion of Value?
>
> A: I was somewhat aware that there was more time put into it, or it was a person that would be, have more experience and more qualifications.

Realtors' Code

[35] The plaintiff placed the Realtor Code (*The Canadian Real Estate Association, The REALTOR® Code*, effective March 2016) (the "Code") before the court as tab 8 to a motions brief. Also, Daymond was cross-examined about various parts of the Code. The Code is a document written by the Canadian Real Estate Association. It contains general principles to guide the conduct of

realtors. The Code itself includes no "teeth". Its preamble mentions that, "Penalties for violations of the REALTOR Code shall be established by the local board or other board authorized to conduct discipline proceedings."

[36] Article 1 of the Code says: "A REALTOR shall be informed regarding the essential facts which affect current market conditions."

[37] Article 5 says: "A REALTOR shall ensure that all Service Agreements with consumers with the exception of Service Agreements with Buyers are in writing in clear and understandable language, expressing the specific terms, conditions, obligations and commitments of the parties to the agreement."

[38] Other articles are similar in nature. Article 12 requires realtors to provide skilled and conscientious service. Article 21 prohibits conduct that is disgraceful, unprofessional or unbecoming a realtor. Article 22 says that principals of brokerages must supervise and control the activities of their realtors.

The second opinion of value

[39] In about June 2019, the plaintiff retained a second real estate agent to provide an opinion of value for Parcels 1, 4, 5 and 6. The second agent communicated with Daymond, and Daymond helped her by answering her questions. The second agent provided an opinion of value saying the value of these four parcels was $1,2000,000. [The OOV, dated April 4, 2018, had given these four parcels a combined value of $1,040,000.]

The Appraiser

[40] The Appraiser filed an affidavit sworn August 5, 2022, and was cross-examined on his affidavit on October 4, 2022. The affidavit consisted mostly of a report dated August 5, 2022, entitled "Appraisal Review of Realtor's Opinion of Value Six (6) lots near Wawanesa by Bob Daymond Effective April 4, 2018". The report was over 100 pages long, and included photos, charts and maps. It also included general information about things like the historic average change in farmland values from 1985-2021 in each Canadian province. In addition to providing an estimate of the value of the Six Parcels as of April 4, 2018 (a minimum of $1,884,630), the report offered many editorial comments about the OOV and about what realtors should and should not do in general. For example, at page 56 of the report, the Appraiser commented that the "Daymond report appears to be an informal estimate of value. Real estate professionals, whether they are appraisers or brokers, should not produce informal estimates."

[41] The Appraisal report mentioned that Parcel 6 had sold in 2015 for $600,000.

[42] In cross-examination, the Appraiser explained his professional certification and the education and training required to obtain that certification. At Question 77, the Appraiser was asked about real estate agents and opinions of value in general:

> Q: So should Real Estate Agents only give Opinions of Value for clients if they have the Professional Appraisal designation - - Professional Appraiser designation?

> A: I believe they should refrain from providing Opinions of Value where the purpose is not to market the property for sale.

Cross-examination at trial

[43] The plaintiff and Daymond were cross-examined at trial. Daymond said that, between his April 2018 OOV and his January 2019 revised opinion about Parcels 2 and 3, he had looked at the sale price of one comparable parcel of land. In general, sale prices were increasing during that period of time.

LAW

[44] In ***Charter-York Ltd. v. Hurst,*** (1970), 2 R.P.R. 272 (Ont. H.C.), at paragraph 28, the court commented that real estate agents are under a legal obligation to exercise due care and skill in performance of their duties. They must exercise a reasonable degree of care and skill which persons of ordinary prudence and ability might be expected to show in the situation and profession of the agent.

[45] In ***Krawchuk v. Scherbak***, 2011 ONCA 352, at paragraph 125, the court observed that, "a real estate agent must exercise the standard of care that would be expected of a reasonable and prudent agent in the same circumstances."

[46] In ***S. Maclise Enterprises Inc. v Grover***, 2014 ABQB 591, at paragraphs 89-90, the court remarked that real estate agents owe contractual and fiduciary duties to their principals. The duties include an obligation to make full disclosure of all facts within the agent's knowledge that might that might affect the value of the property or the principal's decisions.

[47] In ***Campbell et al. v. Jones et al.,*** 2016 MBQB 10 ("***Campbell***"), the court looked at negligence and professionals. At paragraph 77, the court commented:

> Courts have long recognized that it is not possible in most instances to say that there is any one answer exclusive of all others to various problems of professional judgment. As was argued by the defendants, a court may prefer one body of opinion to the other, but that is not necessarily a basis for a conclusion of negligence.

[48] In ***McLeod Estate v. Cole et al.,*** 2021 MBQB 24 ("***McLeod Estate***"), at paragraph 343, the court observed that a "realtor's opinion of value is not subject to the same academic rigour or review processes as a typical appraisal and holding a realtor's opinion of value to the same professional standard as that of an appraiser is an error." [underlining added]

[49] At paragraph 344, the court added, "In practical terms, this means it would be an error to ask if the opinions of value offered by the Defendant Realtors are contradicted by the expert opinions of the appraisers who testified at trial…"

[50] At 2022 MBCA 73, the Court of Appeal upheld the trial decision in ***McLeod Estate***, although it faulted the trial judge for using certain intemperate language and disagreed with the trial judge about one legal issue (the "doctrine of suspicious circumstances"), which was not material to the ultimate decision.

[51] In ***Royal Bank of Canada v Westech Appraisal Services Ltd.***, 2018 BCSC 473 ("***Westech***"), at paragraph 163, the court noted certain general principles. One principle was that: "Property appraisal is not an exact science.

Variations in value among appraisals on the same property are not uncommon". Another principle was that: "Courts have recognized that an appraiser must be treated differently from professionals in more exacting fields such as architects, engineers or building inspectors".

[52] In ***Regency Mortgage Corp. v. Buchan,*** [1984] BCJ No. 973 (S.C.) (***"Regency"),*** at paragraph 9. Justice McLachlin (as she then was) pointed out that: "Variations, even wide variation, between the opinions of two or more appraisers are not uncommon. The profession of appraisal is not an exact one…Verification of one appraisal is not necessarily found in the market price at which the property later sells." [underlining added]

[53] In ***Haven Investments Ltd. v. Harper Appraisals Inc.,*** (1986), 10 BCLR (2d) 56, (BCCA) (***"Haven"),*** at page 60, the court observed that: "Differences of opinion among appraisers are, of course, common."

[54] In ***Bowman v Martineau***, 2020 ONCA 330, at paragraph 9, the court pointed out that, "limits are placed on compensation: a plaintiff can generally only recover for actual injury caused by the defendant's conduct, and not for damages that are too remote in that they are speculative or not reasonably foreseeable".

[55] In ***VSH Management Inc. v. Neufeld,*** 2002 BCSC 755 ("***VSH***"), at paragraph 80, the court observed that: "Courts have recognized that property appraisal is not an exact science and that variations in value among appraisals on the same property are not uncommon". [underlining added]

[56] In ***Bond v. Richardson,*** 2007 NBQB 264, the court found a real estate agent to be negligent. At paragraph 72, the court noted that a listing agreement was with the brokerage; an agency agreement was signed by the agent on behalf of the brokerage; and an invoice for commission was sent by the brokerage. The court found the brokerage vicariously liable for the agent's negligence.

[57] ***Forbes v. Morrison,*** 2014 SKQB 40 ("***Forbes***") was about negligent and fraudulent misrepresentation by a real estate agent. The court found liability, and had to address quantum of damages. At paragraph 170, the court concluded that "the plaintiffs' damages for fraudulent and negligent misrepresentations are the difference between what the plaintiffs paid for the property and what it was actually worth at the time the plaintiffs entered into the contract."

[58] ***Vickar v. MJ Roofing & Supply Ltd.,*** 2016 MBCA 77 dealt was a case of negligence where the quantum of damages was extremely hard to determine. At paragraph 52, the appeal court observed that, "while the calculation and the assessment of the damage may be difficult, a trial judge must do the best he can in the circumstances." The court awarded the round number of $25,000 as the quantum of damages.

[59] In ***R.D.F. (Litigation Guardian of) v. General Insurance Co.,*** 2004 MBCA 156 ("***RDF***"), at paragraph 36, the court summarized the elements of negligence: "The essential elements of the tort of negligence are well known: duty of care, breach of duty and damages. An actor must contemplate the

categories of people who it is reasonable to foresee would be adversely affected by a failure to take reasonable care when acting. By definition, some plaintiffs will fall outside the scope of this duty of care. Moreover, there is no breach without proof of consequential damages." [underlining added]

[60] The parties cited other cases, and I have carefully considered them all.

ARGUMENT

[61] No one raised any sort of scenario under which Daymond would be liable, but Sutton-Harrison would *not* be liable (or vice versa). Essentially, all arguments were based on the premise that it would be *both or neither*. The OOV was on Sutton-Harrison letterhead.

Plaintiff

[62] The plaintiff summarized that the issues were:

1) Did the defendants have a duty of care to the plaintiff?

2) If so, what was the standard of care?

3) Was Sutton-Harrison vicariously liable for the alleged negligence of Daymond?

4) If the defendants were liable, what is the appropriate quantum of damages?

[63] Plaintiff's counsel argued that, as a professional providing professional services to a client, Daymond had a duty of care to the plaintiff. The standard of care was based on the Code. Daymond violated the Code in several ways. The Code required him to enter into a written agreement with the plaintiff, and he

failed to do this. The Code required him to deal fairly with clients; the plaintiff submitted that Daymond did not deal fairly with the plaintiff. The Code required him to disclose all information; the plaintiff submitted that he failed to do this.

[64] Plaintiff's counsel argued that, by breaching the Code while serving the plaintiff, the defendants were negligent. Sutton-Harrison was vicariously negligent. The quantum of damages should be half of the difference between Daymond's OOV ($1.4 million) and the Appraiser's appraisal (over $1.8 million). The "half" was based on the principle that family property is generally divided equally between former spouses/partners after separation.

Defendants

[65] Of course, the defendants denied all liability. They argued that an opinion of value is not to be held up to the same standard as a formal appraisal (see ***McLeod Estate***). Indeed, the case law suggests that, even among appraisals, there may be differences, even big differences (see ***Westech***, ***VSH***, ***Regency*** and ***Haven***). In other words, the fact that, in the case at bar, the OOV was about $400,000 less than the Appraisal is not, in itself, proof of negligence.

[66] As for the Code, even if Daymond violated the Code, there is no case law stating that every violation of such a code amounts to negligence.

[67] At all material times, the plaintiff had legal counsel who must have known the difference between an opinion of value and an appraisal.

DECISION

[68] The onus was on the plaintiff to prove her case on a balance of probabilities.

[69] It is almost trite law that realtors have at least some duty of care to their clients, and that their standard of care is that of reasonable realtors. The Code is certainly one useful tool in determining what a reasonable realtor should do. However, the Code is not a codification of the law of negligence. It could fairly be described as a summary of best practices for diligent Canadian realtors.

[70] In a capitalist society, it is accepted that one generally gets what one pays for. In general, one pays more for goods and services of higher quality. It would be fair and reasonable to think of the plaintiff as a reasonable consumer, particularly as she had a lawyer at the time. She was certainly aware of the huge price difference between an opinion of value and an appraisal. A reasonable consumer in her place would have realized that a $300 opinion of value would be a rough, "ballpark" estimate of the values of the Six Parcels. A reasonable consumer in her place would have realized that, for an extra few thousand dollars, one could buy a much more precise estimate (i.e. an appraisal from a certified appraiser).

[71] The OOV was roughly based on the municipal assessed values of the Six Parcels, adjusted slightly to reflect Daymond's intuition about farmland prices in the area. It was indeed a "ballpark" estimate. In hindsight, it was probably at the low end of the ballpark. However, the plaintiff got exactly what she paid for.

I cannot find that Daymond violated his duty of care to her by selling her precisely what she paid for.

[72] In the event that I have erred about the duty of care, I will further analyze the facts and the law.

[73] The starting point is the definition of negligence, concisely summarized in ***RDF***:

> [36] The essential elements of the tort of negligence are well known: duty of care, breach of duty and damages. An actor must contemplate the categories of people who it is reasonable to foresee would be adversely affected by a failure to take reasonable care when acting. By definition, some plaintiffs will fall outside the scope of this duty of care. Moreover, there is no breach without proof of consequential damages. …

[74] Only a portion of the Separation Agreement was before the court. The plaintiff (who had legal counsel) chose to obtain the OOV and then finalize the Separation Agreement. There is no evidence about whether or not the plaintiff's former-spouse obtained either an opinion of value, an appraisal or both. We do not even know exactly what the Separation Agreement said about the value of each of the Six Parcels. The plaintiff said that Parcel 2 and Parcel 3 sold for $600,000, but the plaintiff was not sure if she and her ex-husband split the $600,000 fifty-fifty.

[75] The Separation Agreement mentioned an equalization payment, but the portion of the agreement that was before the court did not mention the *amount* of that payment.

[76] In simple terms, the plaintiff's theory of the case was based on the following premises:

1) The $1.8 million Appraisal was correct and the $1.4 million OOV was incorrect;

2) Based on the incorrect $1.4 million OOV, the plaintiff and her former-spouse agreed that the former-spouse would pay the plaintiff $700,000 in family property equalization and the former-spouse would get the Six Parcels;

3) The former spouse sold Parcels 2 and 3 and kept the entire $600,000 from that sale (and presumably used the $600,000 as part of the $700,000 equalization payment;

4) If the OOV had used the correct $1.8 million figure, the plaintiff would have ended up with an extra $200,000 or so in her pocket;

5) Therefore, the defendants were negligent, and the quantum of damages is $200,000 or so. (I use round numbers; the plaintiff calculated that the correct quantum was somewhat more than $200,000).

[77] Unfortunately for the plaintiff, none of the above premises is supported by the evidence or the case law. Firstly, the parties filed no case law to support the notion that every violation of a realtor's code amounts to negligence in law. The case law suggests that all realtors have a duty of care to their clients, and that the standard of care is that of a reasonable realtor. However, the tort of

negligence also requires damages: "there is no breach without proof of consequential damages."

[78] Discourtesy to a client might be a violation of a realtor's code. Mere hurt feelings do not generally constitute "damages" in tort law. Therefore, there might well be occasions where a discourteous realtor violates a realtor's code, but is not thereby negligent. (I hasten to add that best practices for realtors would always include courtesy to clients.)

[79] Secondly, the case law is clear that there may be legitimate differences, even large differences, even between formal appraisals (see ***Westech***, ***VSH***, ***Regency*** and ***Haven***). The fact that a plaintiff is able to produce an appraisal much higher than the appraisal provided by a defendant to the plaintiff, does not mean that the defendant was negligent, and certainly does not mean that the quantum of damages is the difference between the two appraisals. That being the case, it is crystal clear that when an appraisal is larger than a mere opinion of value, that in itself does not prove that the author of the opinion of value was negligent.

[80] Thirdly, the plaintiff failed to place the entire Separation Agreement before the court, and her memory about the details of that agreement was far from perfect. It is conceivable that the former spouse never obtained his own opinion of value or appraisal and that the parties (both represented by counsel) decided to draw up a separation agreement solely on the basis of Daymond's OOV. It is conceivable that the Separation Agreement contained a provision that

the former-spouse would pay the plaintiff an equalization payment of $700,000 (half of $1.4 million), and that the former-spouse would get title to the Six Parcels. It is conceivable that the spouses sold Parcels 2 and 3 and the former-spouse kept the entire $600,000 (and used it to help pay his $700,000 payment to the plaintiff). This is all conceivable, but not necessarily true.

[81] In short, I do not know exactly how the OOV was used in constructing the Separation Agreement. Also, I do not know the amount of the equalization payment mentioned in the agreement.

[82] Again, the Statement of Claim did not spell out any specific quantum of damages.

[83] The plaintiff and her former-spouse might have had other valuable family property. They might have engaged in some "horse-trading" in hammering out their Separation Agreement. They might have agreed to use a number other than $1.4 million as part of this horse-trading. I simply do not know. At the risk of repetition, I point out again that the plaintiff had legal counsel.

[84] In short, even if I were to conclude that the defendants violated their standard of care to the plaintiff, and even if I were to conclude that $1.8 million was the "correct" value and that $1.4 million was an "incorrect" value, I do not have enough evidence to support the notion that the plaintiff suffered any actual damages as a result of a violation of the standard of care.

[85] Finally, I certainly have no evidence that any quantum of damages should be about $200,000. Again, such a finding would be premised on the notion that

$1.8 million was "correct" and that $1.4 million was "incorrect"; and the premise that, but for the negligence, the Separation Agreement would have simply divided $400,000 in half, and the plaintiff would have ended up with an extra $200,000 or so in her pocket. Again, these premises are simply not supported by the facts or the case law.

[86] The onus was on the plaintiff to prove all elements of her case on a balance of probabilities. She has not done so. I must dismiss her claim with ordinary (tariff) costs. If the parties are unable to agree upon precise costs, they may make an appointment to speak with me.

[87] Parenthetically, it is not necessary for me to comment upon every statement made in the Appraisal. The Appraiser expressed his opinion that realtors should never provide informal opinions of value. I am not aware of any case law that might support such a notion.

[88] I thank counsel for agreeing upon an Agreed Statement of Facts, and for their courtesy at trial.

_____J.