

## Agency

Knowledge of agency relationships is important to the practice of real estate in California. In light of recent changes to the Civil Code and constantly changing common law cases, an on-going continuing education program is essential to protect California consumers and avoid unnecessary and costly litigation.

We will examine the Civil Code, with references to pertinent sections relating to agency and agency disclosure. We will then look at two relevant court cases that relate to agency relationships and disclosures in California.

### Civil Code

An agent is a person who represents another (called a principal) in dealings with third persons (CC 2295).

In real estate transactions, the *agent* is a licensed real estate broker representing his principal in the transaction. The *principal* is usually the seller, buyer, lessor, or lessee in the transaction. *Third parties* are other parties in the transaction who have dealings with the agent.

An agency relationship is established between the principal and agent when a written employment agreement (called a listing agreement) is executed between them. However, it should be noted that an agency relationship can also be established by actual or ostensible authority. (CC 2298).

An agency is actual when the agent is really employed by the principal (CC 2299).

An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him (CC 2300). An agency may be created by precedent authorization (listing agreement) or by subsequent ratification (ostensible) (CC 2307).

An agent can never have authority, either actual or ostensible to perpetrate fraud upon the principal (CC 2306).

Consideration (bargained for exchange) is not required for an agency relationship (CC 2308).

Even though not common in the real estate industry, an oral authorization is sufficient to establish an agency relationship; except, when an instrument is required to be in writing (Statute of Frauds), then the agency can only be conferred in writing (CC 2309). Since all real estate contracts are required to be in writing (except leases of

a year or less) because of the Statute of Frauds, agency relationships are normally established in writing in California.

A ratification may be rescinded when made without such consent as is required in a contract, or with an imperfect knowledge of the material facts of the transaction ratified, but not otherwise (CC 2314). A principal can ratify an agency relationship by accepting the agent's actions, and thereby ratifying the agency. However, the principal can rescind the ratification if he is not in possession of the material facts relevant to the transaction. If the purported agent has not disclosed all material facts, then the principal may be able to rescind the ratified agency relationship.

One who assumes to act as an agent thereby warrants, to all who deal with him in that capacity, that he has the authority which he assumes (CC 2342). When an agent acts as an agent for a principal, he is warranting that he has the authority to act for the principal. He could be liable for damages if he does not indeed have this authority.

One who assumes to act as an agent is responsible to third persons as a principal for his acts in the course of his agency, in any of the following cases, and in no others (in other words the agent is responsible for his actions, not the principal):

- When, with his consent, credit is given to him personally in a transaction.
- When he enters into a written contract in the name of his principal, without believing, in good faith, that he has authority to do so.
- When his acts are wrongful in their nature (just about everything else) (CC 2343).

The Civil Code requires that all real estate transactions of one-to-four unit residential properties (and mobilehomes), including options, ground leases, and real property sales contracts where an agent is involved in the transaction, an *agency relationship disclosure* must be given to both the buyer and the seller (CC 2079.1).

Agency is best defined as the relationship between the principal (seller or buyer) and another person who can act on their behalf (broker). In this capacity, the seller or buyer's agent is the broker who is acting on their behalf.

The standard of care owed by the broker is the degree of care that a "reasonably prudent real estate licensee would exercise." This is measured by the degree of knowledge through education, experience, and examination (CC 2079.2).

The broker may employ salespersons who are sub-agents of the broker. For example:

**Principal (seller or buyer)**  
*Agency*  
**Agent (broker)**  
*Subagency*  
**Subagent (salesperson)**

The salesperson obtaining the listing from the seller is really the seller's subagent. The broker is the seller's agent. However, the salesperson is considered an employee of the broker, and the broker thus has *vicarious liability* for the actions of the agent. This means that the broker is liable for all misrepresentations regarding the agency relationship or other material misrepresentations made by the salesperson. For this reason real estate brokers generally carry errors and omissions insurance to protect them against litigation resulting from misrepresentations of their salespeople, as well as their own actions.

It is the duty of a real estate broker or salesperson to a prospective purchaser to *disclose to that prospective purchaser all facts materially affecting the value or desirability of the property that an investigation would reveal*. This requires the broker to have a written contract with the seller to find or obtain a buyer, or is a broker who acts in cooperation (MLS for example) with that broker to find and obtain a buyer (CC 2079(a)).

The property inspection does not include areas that are reasonably and normally inaccessible. It also does not include an affirmative inspection of areas off the site of the subject property, public records, permits concerning the title or use of the property. The property inspection does not include a planned development, condominium, or stock cooperative or more than the unit(s) offered for sale (CC 2079.3).

A breach of duty regarding an agency relationship shall not exceed two years from the date of possession, which means the date of recordation, date of close of escrow, or the date of occupancy, whichever occurs first (CC 2079.4)

Nothing shall relieve the buyer of the duty to exercise reasonable care to protect himself or herself, including those facts which are known to or within the diligent attention and observation of the buyer or prospective buyer (CC 2079.5)

Division 4 (commencing with Section 10000) of the Civil Code does not apply to transfers that require a public report by the Real Estate Commissioner (CC 2079.6). An example would be a subdivision of new homes.

If a consumer information booklet (Environmental Hazards Booklet) is delivered to a transferee (buyer) in connection with the transfer of real property (including manufactured housing) a seller or broker is not required to provide additional information concerning common environmental hazards (CC 2079.7(a)). This does not alter the seller or broker's duty to disclose the existence of known environmental hazards on or affecting the real property (CC 2079.7(b)).

If the Homeowner's Guide To Earthquake Safety booklet is delivered to a transferee (buyer) in connection with the transfer of real property a seller or broker is not required to provide additional information concerning geologic and seismic hazards (CC 2079.8(a)). This does not alter the seller or broker's duty to disclose the existence of known hazards on or affecting the real property (CC 2079.8(b)).

The Natural Hazards Disclosure commonly in use in California is not mentioned in the Civil Code; however, it provides important disclosures regarding environmental, geologic, and seismic hazards. . .as well as several other required disclosures.

If the Commercial Property Owner's Guide To Earthquake Safety booklet is delivered to a transferee (buyer) in connection with the transfer of real property a seller or broker is not required to provide additional information concerning geologic and seismic hazards (CC 2079.9(a)). This does not alter the seller or broker's duty to disclose the existence of known hazards on or affecting the real property (CC 2079.9(b)).

If the informational booklet concerning the statewide home energy rating program is delivered to a transferee (buyer) in connection with the transfer of real property (including manufactured housing) a seller or broker is not required to provide additional information concerning home energy ratings (CC 2079.10(a)). This does not alter the seller or broker's duty to disclose the existence of known home energy rating program affecting the real property (CC 2079.10(b)).

Every lease or rental agreement for residential real property and every contract for sale of residential real property comprising one-to-four units (entered into after July 1, 1999), shall contain, in not less than eight-point type, the following notice (CC 2079.10a.(a)):

Notice: The California Department of Justice, sheriff's departments, police departments serving jurisdictions of 200,000 or more and many other local law enforcement authorities maintain for public access a data base of the locations of persons required to register pursuant to paragraph (1) of subdivision (a) of Section 290.4 of the Penal Code. The data base is updated on a quarterly basis and a source of information about the presence of these individuals in any neighborhood. The Department of Justice also maintains a Sex Offender Identification Line through which inquiries about individuals may be made. This is a "900" telephone service. Callers must have specific information about individuals they are checking. Information regarding neighborhoods is not available through the "900" telephone service.

Upon delivery of the notice to the lessee or transferee of the real property, the lessor, seller, or broker is not required to provide information in addition to that contained in the notice regarding the proximity of registered sex offenders. The information in the notice shall be deemed to be adequate to inform the lessee or transferee about the existence of a statewide data base of the locations of registered sex offenders and information from the data base regarding those locations. The information in the notice shall not give rise to any cause of action against the disclosing party by a registered sex offender (2079.10a (b)).

That Sections 2079 to 2079.6, inclusive, of this article should be construed as a definition of the duty of care found to exist by the holding of *Easton v. Strassburger*, 152 Cal. App. 3d 90, and the manner of its discharge, and is declarative of the common law regarding this duty. However, nothing in this section is intended to affect the court's ability to interpret Sections 2079 to 2079.6, inclusive.

The State Legislature has attempted to codify the *Easton v. Strassburger* case that was the landmark case that defined agency relationships in California. Many brokers were having a difficult time obtaining errors and omissions insurance because of the lack of clarity in the common law regarding agency relationships and disclosures. The preceding Civil Code recitations are an attempt to resolve this issue.

### **Agency Terms Defined**

"Agent" means a person acting under provisions of Title 9 (commencing with Section 2295) in a real property transaction, and includes a person who is licensed as a real estate broker under

Chapter 3 (commencing with Section 10130) of Part 1 of Division 4 of the Business and Professions Code, and under whose license a listing is executed or an offer to purchase is obtained (CC 2079.13.(a)).

"Associate licensee" means a person who is licensed as a real estate broker or salesperson under Chapter 3 (commencing with Section 10130) of Part 1 of Division 4 of the Business and Professions Code and who is either licensed under a broker or has entered into a written contract with a broker to act as the broker's agent in connection with acts requiring a real estate license and to function under the broker's supervision in the capacity of an associate licensee.

The agent in the real property transaction bears responsibility for his or her associate licensees who perform as agents of the agent. When an associate licensee owes a duty to any principal, or to any buyer or seller who is not a principal, in a real property transaction, that duty is equivalent to the duty owed to that party by the broker for whom the associate licensee functions (CC 2079.13.(b)).

"Buyer" means a transferee in a real property transaction, and includes a person who executes an offer to purchase real property from a seller through an agent, or who seeks the services of an agent in more than a casual, transitory, or preliminary manner, with the object of entering into a real property transaction. "Buyer" includes vendee or lessee (CC 2079.13.(c)).

"Dual agent" means an agent acting, either directly or through an associate licensee, as agent for both the seller and the buyer in a real property transaction (CC 2079.13.(d)).

"Listing agreement" means a contract between an owner of real property and an agent, by which the agent has been authorized to sell the real property or to find or obtain a buyer (CC 2079.13.(e)).

"Listing agent" means a person who has obtained a listing of real property to act as an agent for compensation (CC 2079.13.(f)).

"Listing price" is the amount expressed in dollars specified in the listing for which the seller is willing to sell the real property through the listing agent (CC 2079.13.(g)).

"Offering price" is the amount expressed in dollars specified in an offer to purchase for which the buyer is willing to buy the real property (CC 2079.13.(h)).

"Offer to purchase" means a written contract executed by a buyer acting through a selling agent which becomes the contract for

the sale of the real property upon acceptance by the seller (CC 2079.13.(i)).

"Real property" means any estate specified by subdivision (1) or (2) of Section 761 in property which constitutes or is improved with one-to-four dwelling units, any leasehold in this type of property exceeding one year's duration, and mobilehomes, when offered for sale or sold through an agent pursuant to the authority contained in Section 10131.6 of the Business and Professions Code (CC 2079.13.(j)).

"Real property transaction" means a transaction for the sale of real property in which an agent is employed by one or more of the principals to act in that transaction, and includes a listing or an offer to purchase (CC 2079.13.(k)).

"Sell," "sale," or "sold" refers to a transaction for the transfer of real property from the seller to the buyer, and includes exchanges of real property between the seller and buyer, transactions for the creation of a real property sales contract within the meaning of Section 2985, and transactions for the creation of a leasehold exceeding one year's duration (CC 2079.13.(l)).

"Seller" means the transferor in a real property transaction, and includes an owner who lists real property with an agent, whether or not a transfer results, or who receives an offer to purchase real property of which he or she is the owner from an agent on behalf of another. "Seller" includes both a vendor and a lessor (CC 2079.13.(m)).

"Selling agent" means a listing agent who acts alone, or an agent who acts in cooperation with a listing agent, and who sells or finds and obtains a buyer for the real property, or an agent who locates property for a buyer or who finds a buyer for a property for which no listing exists and presents an offer to purchase to the seller (CC 2079.13.(n)).

"Subagent" means a person to whom an agent delegates agency powers as provided in Article 5 (commencing with Section 2349) of Chapter 1 of Title 9. However, "subagent" does not include an associate licensee who is acting under the supervision of an agent in a real property transaction (CC 2079.13.(o)).

### **Agency Agreement**

An agency agreement is usually the listing agreement and must have:

- Mutuality of agreement between the principal and his agent.
- Legal Purpose. The agent cannot be used to fly drugs from Colombia into the U.S.

- Both parties must have the capacity to enter into an agency contract. Minor and incompetents cannot contract and, therefore cannot enter into agency relationships. Minors can contract if they are emancipated by the courts, married, or in the U.S. armed forces.
- There must be consideration (except gratuitous agents), which is a bargained for exchange. The principal agrees to pay the agent a commission if she finds a suitable property for her to purchase.
- The agreement must be in writing, if required by law.

### **Termination of Agency Relationship**

An agency agreement may be terminated by:

- The expiration of the term.
- The extinction of its subject matter (house burns down).
- The death of the agent.
- The agent's renunciation of the agency.
- The incapacity of the agent to act as such.
- Revocation by the principal.
- The death of the principal.
- The incapacity of the principal to contact.

### **Agency Disclosure Requirements**

On December 31, 1987 California was one of the first states to require an agency disclosure to be completed for all one-to-four unit residential properties sold or exchanged in the state. Prior to this law there was much confusion regarding who each agent is really representing.

This agency disclosure required agents to disclose the various types of agencies and agency relationships to their principal(s). The following disclosure form was adopted as a uniform vehicle for agents to comply with this requirement.

**DISCLOSURE REGARDING  
REAL ESTATE AGENCY RELATIONSHIP**  
(As required by the Civil Code)

When you enter into a discussion with a real estate agent regarding a real estate transaction, you should from the outset understand what type of agency relationship or representation you wish to have with the agent in the transaction.

**SELLER'S AGENT**

A Seller's agent under a listing agreement with the Seller acts as the agent for the Seller only. A Seller's agent or a subagent of that agent has the following affirmative obligations:

To the Seller:

A fiduciary duty of utmost care, integrity, honesty, and loyalty in dealings with the Seller.

To the Buyer and the Seller:

(a) Diligent exercise of reasonable skill and care in performance of the agent's duties.

(b) A duty of honest and fair dealing and good faith.

(c) A duty to disclose all facts known to the agent materially affecting the value or desirability of the property that are not known to, or within the diligent attention and observation of, the parties.

An agent is not obligated to reveal to either party any confidential information obtained from the other party that does not involve the affirmative duties set forth above.

**BUYER'S AGENT**

A selling agent can, with a Buyer's consent, agree to act as agent for the Buyer only. In these situations, the agent is not the Seller's agent, even if by agreement the agent may receive compensation for services rendered, either in full or in part from the Seller. An agent acting only for a Buyer has the following affirmative obligations:

To the Buyer:

A fiduciary duty of utmost care, integrity, honesty, and loyalty in dealings with the Buyer.

To the Buyer and the Seller:

(a) Diligent exercise of reasonable skill and care in performance of the agent's duties.

(b) A duty of honest and fair dealing and good faith.

(c) A duty to disclose all facts known to the agent materially affecting the value or desirability of the property that are not known

to, or within the diligent attention and observation of, the parties. An agent is not obligated to reveal to either party any confidential information obtained from the other party that does not involve the affirmative duties set forth above.

**AGENT REPRESENTING BOTH SELLER AND BUYER**

A real estate agent, either acting directly or through one or more associate licensees, can legally be the agent of both the Seller and the Buyer in a transaction, but only with the knowledge and consent of both the Seller and the Buyer.

In a dual agency situation, the agent has the following affirmative obligations to both the Seller and the Buyer:

- (a) A fiduciary duty of utmost care, integrity, honesty and loyalty in the dealings with either the Seller or the Buyer.
- (b) Other duties to the Seller and the Buyer as stated above in their respective sections.

In representing both Seller and Buyer, the agent may not, without the express permission of the respective party, disclose to the other party that the Seller will accept a price less than the listing price or that the Buyer will pay a price greater than the price offered.

The above duties of the agent in a real estate transaction do not relieve a Seller or Buyer from the responsibility to protect his or her own interests. You should carefully read all agreements to assure that they adequately express your understanding of the transaction.

A real estate agent is a person qualified to advise about real estate. If legal or tax advice is desired, consult a competent professional.

Throughout your real property transaction you may receive more than one disclosure form, depending upon the number of agents assisting in the transaction. The law requires each agent with whom you have more than a casual relationship to present you with this disclosure form. You should read its contents each time it is presented to you, considering the relationship between you and the real estate agent in your specific transaction.

This disclosure form includes the provisions of Sections 2079.13 to 2079.24, inclusive, of the Civil Code set forth on the reverse hereof. Read it carefully.

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Agent	(date)	Buyer/Seller (Signature)	(date)
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Associate Licensee (Signature)	(date)	Buyer/Seller (Signature)	(date)
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As soon as practicable, the selling agent shall disclose to the buyer and seller whether the selling agent is acting in the real property transaction exclusively as the buyer's agent, exclusively as the seller's agent, or as a dual agent representing both the buyer and the seller. This relationship shall be confirmed in the contract to purchase and sell real property or in a separate writing executed or acknowledged by the seller, the buyer, and the selling agent prior to or coincident with execution of that contract by the buyer and the seller, respectively (CC 2079.17.(a)).

As soon as practicable, the listing agent shall disclose to the seller whether the listing agent is acting in the real property transaction exclusively as the seller's agent, or as a dual agent representing both the buyer and seller. This relationship shall be confirmed in the contract to purchase and sell real property or in a separate writing executed or acknowledged by the seller and the listing agent prior to or coincident with the execution of that contract by the seller (CC 2079.17.(a)).

The confirmation required by subdivisions (a) and (b) shall be in the following form (CC 2079.17.(b)):

\_\_\_\_\_ is the agent of (check one):  
(Name of Listing Agent)  
 the seller exclusively; or  
 both the buyer and seller.

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(Name of Selling Agent if not the same as the Listing Agent)  
is the agent of (check one):  
 the buyer exclusively; or  
 the seller exclusively; or  
 both the buyer and seller.

No selling agent in a real property transaction may act as an agent for the buyer only, when the selling agent is also acting as the listing agent in the transaction (CC 2079.18).

The payment of compensation or the obligation to pay compensation to an agent by the seller or buyer is not necessarily determinative of a particular agency relationship between an agent and the seller or buyer. A listing agent and a selling agent may agree to share any compensation or commission paid, or any right to any compensation or commission for which an obligation arises as the result of a real estate transaction, and the terms of any such

agreement shall not necessarily be determinative of a particular relationship (CC 2079.19).

Nothing prevents an agent from selecting, as a condition of the agent's employment, a specific form of agency relationship not specifically prohibited by this article if the requirements of Section 2079.14 and Section 2079.17 are complied with (CC 2079.20).

A dual agent shall not disclose to the buyer that the seller is willing to sell the property at a price less than the listing price, without the express written consent of the seller. A dual agent shall not disclose to the seller that the buyer is willing to pay a price greater than the offering price, without the express written consent of the buyer.

This section does not alter in any way the duty or responsibility of a dual agent to any principal with respect to confidential information other than price (CC 2079.21).

Nothing in this article precludes a listing agent from also being a selling agent, and the combination of these functions in one agent does not, of itself, make that agent a dual agent (CC 2079.22).

A contract between the principal and agent may be modified or altered to change the agency relationship at any time before the performance of the act which is the object of the agency with the written consent of the parties to the agency relationship (CC 2079.23).

Nothing in this article shall be construed to either diminish the duty of disclosure owed buyers and sellers by agents and their associate licensees, subagents, and employees or to relieve agents and their associate licensees, subagents, and employees from liability for their conduct in connection with acts governed by this article or for any breach of a fiduciary duty or a duty of disclosure (CC 2079.24).

Listing agents and selling agents shall provide the seller and buyer in a real property transaction with a copy of the Disclosure Regarding Real Estate Agency Relationships shall obtain a signed acknowledgment of receipt from that seller or buyer as follows:

- The listing agent, if any, shall provide the disclosure form to the seller prior to entering into the listing agreement (CC 2079.14.(a)).
- The selling agent shall provide the disclosure form to the seller as soon as practicable prior to presenting the seller with an offer to purchase, unless the selling agent previously provided the seller with a copy of the disclosure form pursuant to subdivision (a) above (CC 2079.14.(b)).
- Where the selling agent does not deal on a face-to-face basis with the seller, the disclosure form prepared by the

selling agent may be furnished to the seller (and acknowledgment of receipt obtained for the selling agent from the seller) by the listing agent, or the selling agent may deliver the disclosure form by certified mail addressed to the seller at his or her last known address, in which case no signed acknowledgment of receipt is required (CC 2079.14.(c)).

- The selling agent shall provide the disclosure form to the buyer as soon as practicable prior to execution of the buyer's offer to purchase, except that if the offer to purchase is not prepared by the selling agent, the selling agent shall present the disclosure form to the buyer not later than the next business day after the selling agent receives the offer to purchase from the buyer (CC 2079.14.(d)).

In any circumstance in which the seller or buyer refuses to sign an acknowledgment of receipt pursuant to Section 2079.14, the agent, or an associate licensee acting for an agent, shall set forth, sign, and date a written declaration of the facts of the refusal (CC 2079.15).

Many real property disclosures are required for properties in California. Even though many states in the United States are just beginning to require property disclosures, California has been on the forefront of disclosure requirements.

The Real Estate Agency Relationships Disclosure is designed to inform the buyer and seller regarding WHO their agent is in the transaction and WHAT TYPE of agency relationship exists between them and the broker(s) involved in the transaction.

### **Common Law Cases**

There are several recent court cases that give additional information on the status of agency law and agency disclosures in California. We have selected two cases that reflect the opinions of the California Appeals Court. The following cases are both educational and quite entertaining.

## **Harry Brown, Plaintiff and Appellant, v. FSR Brokerage, Inc, et al., Defendants and Respondents**

This case addresses full disclosure of dual agency. The case initially came to trial in the Superior Court of Los Angeles County in 1998. FSR Brokerage, Inc. was successful in their request for summary judgment and the case was decided in their favor. There was not enough evidence or legal dispute to bring the complaint to trial.

Mr. Brown appealed the case to the Court of Appeal of California, Second Appellate District, Division Four and the decision was reversed. Here are the facts in the case and reasons why Justice Epstein (with Justices Vogel and Czuleger concurring) ruled in favor of Mr. Brown, the appellant.

### **FACTS OF THE CASE**

Harry Brown, the seller, was the plaintiff in the trial court proceedings, and is the appellant here. The defendants are FSR Brokerage, Inc., a California Corporation and Sid K. FSR is a licensed real estate brokerage, and Sid K. is a licensed real estate salesperson working under FSR's broker's license.

Brown acquired the subject property, a large residence in Beverly Hills, on January 13, 1994. Some three months later, in April 1994, he listed it for sale with another broker. The asking price was \$ 3,950,000. Over the course of the next 20 months, Brown successively reduced the listing price for the property, and relisted it. By June 1995 the asking price had been dropped to \$ 2,895,000.

Brown gave an exclusive listing to FSR on December 19, 1995, with a listing price of \$2,695,000. The selling price was eventually reduced to \$2,495,000. The listing agents, each of whom was employed by FSR, were Barbara T. and Sid K. Brown had met Barbara and, through her, had agreed to list the property with FSR. It turned out that Barbara had a partnership arrangement with Sid, through which each was a listing agent on any property listed by the other.

The listing with FSR was extended, and was in force in May and June of 1996. Up to then, Brown had not received a single written offer to buy the property since its initial listing more than two years before. On May 31 or June 1, 1996, Sid brought over a prospect who, he told Brown, was interested in the property. That was Bernard Lafferty, about whom more will follow.

On leaving the residence, Sid told Brown that he expected that Lafferty would return with an offer. Sid and Lafferty returned later that day, or the next day. Lafferty was accompanied by an attorney, John D. Forbess. Barbara also was present.

Sid took Brown aside for a private conversation. Brown did not want to come below \$2,495,000. Sid insisted that he lower the price to \$ 2.4 million and said he would lose the buyer if he did not. "He was very convincing and he told me in the course of the discussion that he was working exclusively for me and only had my interests in mind. I felt reassured by this statement, and comfortable, although reluctant, in allowing myself to be persuaded by him that I should reduce the price to \$ 2.4 million. I thereupon decided I would accept \$2.4 million from the buyer. I never communicated this price until after Sid had persuaded me as set forth above." Sid told him that the buyer would not pay more than \$2.4 million.

Besides trying to buy the property for a lower price, Lafferty insisted on a most unusual term of sale: Brown had to vacate the residence so that Lafferty could move in, in less than a week!

In the same conversation as the one in which Sid asked Brown to agree to the \$ 2.4 million price, or in a different discussion--Brown was not sure which--Barbara urged Brown to hold to the \$ 2,495,000 price "because there's nothing else like it (the house) on the market. These people need the house, they want it in three days, which is unheard of. There's nobody else in the whole city that could deliver a house in three days like you can. You should get your full price" she said, "first of all, because it's worth it." (At one point, Barbara suggested to Brown that he consult his own lawyer, pointing out that Forbess was Lafferty's attorney. Apparently, she undertook to furnish Brown with the name of an attorney, but by the time the person called, the deal had been completed.)

Brown decided to follow Sid's advice. During the negotiations, Sid said, "he was working exclusively for me," that "I'm trying to get you the best price I can." In his conversation with Brown, Sid repeatedly said that he was working exclusively for Brown. The day before (a Saturday), Sid told Brown, in the presence of Brown's girlfriend, "that he was working exclusively for us and the price and everything that he can get, it was just me, my girlfriend and him."

Brown thought the residence was worth \$ 2,495,000. Asked at deposition why, in light of this, he agreed to accept \$ 2.4 million he

replied: "Because Sid, working exclusively for me, for the fifteenth time, told me that this is the best he's going to get and I'm going to blow the deal. He was the one promoting the two million four." (The reference to the "fifteenth time" is apparently a sarcastic comment that this or similar questions had been asked before at the deposition.) Again, asked why he did not simply say that \$ 2.4 million was not good enough, Brown said that Sid "told me that he's working exclusively for me and he said he's been working on two million three fifty and it's the best he's going to get, he's not going to get any more. That's what he told me." Brown agreed to the price urged by Sid "because I assumed he was working for me exclusively and this was the best he was going to get. That's what he told me, and he's my xxxxxx broker, okay?"

Forbess thought the property was worth less than \$ 2.4 million and that "there was not a prayer in the world that [Lafferty would have paid] more than \$ 2.4 million because he would--he would basically have to have beaten me up to get me to agree to it." Forbess also testified that while he realized it would be difficult for Brown to complete the sale, pack up and leave within a week ("almost an impossible undertaking"), Lafferty "was at a state of urgency in his own life, and if that sale was to take place it had to take place on those terms." Lafferty was, in fact, "almost at the point of a nervous breakdown, considering his position of not having a house and having his dogs--I think there were 11--and of which he was extremely fond, and all of which who were in a boarding facility or pound of some sort and not doing well physically. They were sick, some of them were sick and he was very concerned that they were going to start dying on him." And while Mr. Doyle, Lafferty's Chicago lawyer, was concerned about paying \$ 2.4 million, Forbess understood that Lafferty "perceived that he was the client and had the ultimate say in the matter, and he told us that he didn't care what we said, what our advice was, that he was going to buy the place."

On Sunday, Brown agreed to the \$ 2.4 million price. According to Forbess, Brown told him directly that he would not sell for the \$ 2,350,000 then offered, and would not take less than \$ 2.4 million. Brown denied saying this to Lafferty or to Forbess.

The next day, June 4, 1996, Barbara told Brown that it was time to go to escrow, and they did. Up to then, there was no written offer or signed agreement for purchase and sale of the residence. At the escrow office, Brown signed documents presented to him by Barbara for execution. Barbara identified the escrow instructions and asked

Brown to sign them. Brown looked at the first page, saw that the agreed-upon purchase price was correctly stated, and read nothing more. He signed or initialed each of the succeeding pages and attachments as indicated. One of the attachments he initialed was a document entitled "Real Estate Agency Relationships." Paraphrasing the statute, it states the duties of the seller's agent and the buyer's agent, and then deals with the case where the same agent represents both. That is legal, it states, only with the knowledge and consent of both seller and buyer. The dual agent has "a fiduciary duty of utmost care, integrity, honesty and loyalty in the dealings with either the Seller or the Buyer," and may not, without express permission, disclose to the buyer that the seller will take less than the listing price, or that the buyer will pay more than the amount offered. Barbara gave this document to Brown and directed him to sign it, but he did not know what it was. He thought it was merely a form to facilitate consummation of the transaction.

Paragraph 17 of the escrow instructions, located at page 16 of that document, recites that "FSR is the agent of both the Buyer and the Seller. Sid and Barbara are the listing agents and Sid is the selling agent." Another document, titled "Commission Instructions," instructed escrow to pay FSR \$ 120,000 in commissions, and stated: "Listing agents (Sid/Barbara) shall receive \$ 60,000.00. Selling agent (Sid) shall receive \$ 60,000.00." Brown initialed these pages, but did not read them. There was no discussion about them.

Sid heard from Doyle, the Chicago attorney apparently in charge of Lafferty's legal representation, on the evening of Friday, May 31, 1996. Doyle said that his client, Lafferty, wanted a home and was unhappy with the brokers with whom he had been dealing for the last nine months. According to Sid, Doyle "wanted me to roll up my sleeves and try to find him a house to lease for him and his 11 dogs." Asked, "So it was your understanding that Mr. Lafferty wanted to stop using the services of his other brokers and start using your services," Sid answered, "That's correct." That was the understanding he gained from his discussion with Doyle, "and the following day, when Mr. Lafferty--he expressed the same thing to me."

Sid met with Forbess, learned what the Lafferty side wanted to pay and gained an understanding of what it would pay, and promised Forbess to try to work Brown down to \$ 2.4 million. He specifically told Forbess that if Lafferty would offer \$ 2.4 million he thought Brown would accept it.

Sid declared that when he showed the property to Lafferty, Sid "verbally told plaintiff Harry Brown that I was representing Mr. Lafferty." As we have seen, Brown denies this. According to Brown, he learned of the dual agency from his girlfriend, several days after the close of escrow, when she was leafing through the transaction documents. He had never consented to a dual agency.

Brown filed suit against FSR and Sid in August 1996. The issue was joined and, after discovery, defendants moved for full summary judgment. The motion was opposed and was ultimately granted. In it, the court states that the evidence submitted establishes that FSR advised Brown that it was acting as a dual agent and not to accept less than the listing price for the property, but that Brown himself directly told the buyer what his bottom price was. As a result, the court concluded, FSR breached no duty to Brown and did not cause him any damage.

Judgment was duly entered, and a timely notice of appeal was filed.

Court of Appeal of California, Second Appellate District, Division Four Judge J. Epstein responded:

"Common sense and ancient wisdom join the law in teaching that an agent is not permitted to simultaneously serve two principals whose interests conflict about the matter served--at least, not without full disclosure and consent from both. In the context of brokered real estate transactions, this principle is codified in Civil Code sections 2079.14 and 2079.16,."

Civil Code section 2079.14, a 1995 statute that was in force at the time of the representation and acts at issue here, provides:

"Listing agents and selling agents shall provide the seller and buyer in a real property transaction with a copy of the disclosure form specified in Section 2079.16, and, except as provided in subdivision (c), shall obtain a signed acknowledgment of receipt from that seller or buyer, except as provided in this section or Section 2079.15, as follows: "(a) The listing agent, if any, shall provide the disclosure form to the seller prior to entering into the listing agreement.

"(b) The selling agent shall provide the disclosure form to the seller as soon as practicable prior to presenting the seller with an offer to purchase, unless the selling agent previously provided the seller with a copy of the disclosure form pursuant to subdivision (a).

"(c) Where the selling agent does not deal on a face-to-face basis with the seller, the disclosure form prepared by the selling agent may be furnished to the seller (and acknowledgment of receipt obtained for the selling agent from the seller) by the listing agent, or the selling agent may deliver the disclosure form by certified mail addressed to the seller at his or her last known address, in which case no signed acknowledgment of receipt is required.

"(d) The selling agent shall provide the disclosure form to the buyer as soon as practicable prior to execution of the buyer's offer to purchase, except that if the offer to purchase is not prepared by the selling agent, the selling agent shall present the disclosure form to the buyer not later than the next business day after the selling agent receives the offer to purchase from the buyer."

The referenced provision, Civil Code section 2079.16, provides: "The disclosure form required by Section 2079.14 shall have Sections 2079.13 to 2079.24, inclusive, excluding this section, printed on the back, and on the front of the disclosure form the following shall appear: "Disclosure Regarding Real Estate Agency Relationship (As required by the Civil Code)

"When you enter into a discussion with a real estate agent regarding a real estate transaction, you should from the outset understand what type of agency relationship or representation you wish to have with the agent in the transaction."

The duty of a real estate agent to faithfully represent the interests of his or her principal, and to make full disclosure of adverse interests, long antedated this statute. Breach of these duties may result in loss of the right to compensation. (See [\*18] *Baird v. Madsen* (1943) 57 Cal. App. 2d 465, 475 [134 P.2d 885]; *Sierra Pacific Industries v. Carter* (1980) 104 Cal. App. 3d 579, 582 [163 Cal. Rptr. 764].)

It should be noted that the statute requires disclosure to the seller "as soon as practicable *prior* to presenting the seller with an offer to purchase" unless disclosure already had been made. (Civ. Code, § 2079.14, subd. (b), italics added.) The contemplated disclosure is to be in writing. The only written disclosures in this case were made when the escrow instructions were signed. Sid claims to have informed Brown, orally, that he was representing Lafferty when he first brought Lafferty over to see the property. But Brown denies that this occurred, leaving an unresolved triable issue of

material fact.

The trial court emphasized evidence that Brown took charge of the negotiations himself, and personally informed Forbess of his bottom-line price. Again, Brown denies it, leaving the issue unresolved and unresolvable for purposes of summary judgment. But even if the claim were to be credited, it would not resolve the issue in respondents' favor. According to Brown, it was Sid who talked him into agreeing to the \$ 2.4 million price, against Brown's better judgment. He did this, again according to Brown's evidence, while repeatedly reassuring Brown that he was acting for Brown alone, and without disclosing that he also was acting for Lafferty. He particularly did not disclose that he had promised Forbess to try to talk Brown down to \$ 2.4 million and that he had informed Forbess that that was as low as Brown would go.

Even in a consented dual agency situation, the statute specifically forbids the agent from disclosing to the buyer, without express permission from the seller, that the seller will accept less than the listing price. (Civ. Code, § 2079.21.) Based on Forbess's testimony, that is substantially what Sid did.

Respondents argue that the documents signed or initialed by Brown include adequate disclosures, and that it was his decision not to read them. It is, of course, true that "*when a person with the capacity of reading and understanding an instrument signs it, he may not, in the absence of fraud, coercion or excusable neglect, avoid its terms on the ground he failed to read it before signing it.*" ( *Bolanos v. Khalatian* (1991) 231 Cal. App. 3d 1586, 1590 [283 [\*20] Cal. Rptr. 209].)

There are at least two reasons this doctrine is not sufficient to secure victory to respondents. First, the statute and common sense require that the dual agent call attention to the fact of dual agency, and Brown has submitted substantial evidence that they failed to do so. He was not on notice that any of the documents he signed or initialed was anything other than a routine instrument technically required for consummation of the sales transaction. Second, by the time the escrow papers were being signed, Brown already had "broken" HIS PRICE: he could hardly then demand a greater price, particularly since, so far as the record discloses, the buyer was guilty of no impropriety except through his dual agent.

Respondents argue, and convinced the trial court, that disclosure would not have made a difference because Lafferty would not have paid more than \$ 2.4 million. They cite Forbess's testimony at deposition that Lafferty would have had to fight Forbess in order to go higher. There is, however, substantial evidence that a higher price would have been achieved.

- First, the asking price of \$ 2,495,000 is only 3.8 percent greater than the sales price.
- Second, Lafferty had an urgent need for a suitable residence to house himself and his passel of dogs: He was demanding occupancy for himself and ouster of the resident-owner, all within a few days.
- Third, Lafferty himself had made it clear to Forbess that it was his money and that he was going to buy the place.

Finally, respondents argue that appellant Brown has waived his claims because he did not seek to rescind the real estate transaction. They cite two cases. Neither supports them. The first, *Vice v. Thacker* (1947) 30 Cal. 2d 84 [180 P.2d 4], is a dual agency case in which the seller *did* rescind. The case does not deal with remedies other than those related to rescission. The other case, cited as a "see also," is *Gordon v. Beck* (1925) 196 Cal. 768 [239 P. 309]. It too deals with the right to rescind and nothing else. Brown has not sought to rescind the sale of his property to Lafferty. We see no reason why he was compelled to seek rescission. He has, instead, chosen to sue the dual agent, Sid, and the broker, FSR, for losses he claims to have suffered because he relied on their advice unaware that they were representing both sides of an adversarial transaction.

We end our discussion as we began it: To the degree Brown can prove a monetary loss on account of actions and failures to act by respondents, he is entitled to appropriate monetary recovery. The amount is not an issue before us, and we do not address it. We hold, only, that respondents were not entitled to summary judgment and that appellant is entitled to have the ensuing judgment in their favor reversed.

**CLARIDGE v. THE PINES RESORTS** addresses a breach of fiduciary duty owed by an agent to his principal.

JOSEPH CLARIDGE et al., Plaintiffs, Cross-Defendants, and Appellants, v. THE PINES RESORTS, Defendant, Cross-Complainant, and Appellant; Rudolf R. Shulte et al. Defendants, Cross-defendants, and Respondents; Stephen Welch et al., Defendants and Respondents.

#### FACTS OF THE CASE

Plaintiffs in this case are Gail and Joseph Claridge (the Claridges). Joseph Claridge is a retired police officer. He holds a real estate sales license. Gail Claridge is an interior designer who owns her own design firm. Her projects have included renovations of large estates and commercial shopping centers. She holds a general contractor's license. In the 1980's, the Claridges designed and constructed a 7,000 square foot house in Northridge which was their primary residence for many years.

Defendants include a corporation, the Pines Resort; Rudolf Schulte; and Stephen Welch. The Pines owns and operates several businesses in Bass Lake, a resort town in Madera County. Rudolf Schulte owns most of the stock in the Pines. Stephen Welch has a 2 percent ownership interest in the Pines, and is a manager of a number of businesses operated by the Pines. Welch is a licensed real estate broker. (For convenience, we sometimes refer to these defendants collectively as the Pines).

The other defendants are Donna Pride, Pride Land Company, and The Land Office, a realty company in Bass Lake. (We refer to these defendants collectively as the Land Office). The Land Office was owned 25 percent by the Pines and 75 percent by Pride Land Company. Pride Land Company is owned by Donna Pride, a licensed real estate broker, and her husband, who is not a party in this action. Donna Pride managed the day-to-day affairs of the Land Office. Welch assisted her with the business as needed.

The Pines owned a resort lodge known as Ducey's, located on approximately 20 acres of land overlooking Bass Lake. In June 1988, the Ducey's lodge was destroyed by fire. After conducting a land use study, the Pines determined that the best use for the Ducey's property was residential. It decided to sell the 20-acre parcel to a developer and use the proceeds to build a new lodge at a different location in Bass Lake. The Pines listed the Ducey's property for sale at \$ 1.9 million, hoping for a quick sale.

Soon after putting the property on the market, the Pines received two offers from developers, one for \$ 1.9 million, and the other for \$ 1.8 million. While the Pines was considering these offers, Garry Morris, a real estate expediter who owned a house near Bass Lake, became interested in the Ducey's property. Morris knew Gail Claridge from projects they had worked on together. Morris's proposal was to buy an option on the Ducey's property, which would be exercised upon locating an investor for the purchase price. He intended to take a 25 percent interest, and offered the Claridges a 25 percent interest in return for Gail's assistance in configuring the lots and designing homes for the subdivision. The remaining 50 percent interest would go to an investor who would contribute the funding for the purchase and development of the property.

The Claridges went to Bass Lake in early January 1990 to view the property with Morris and his wife. They met with Welch and Pride. Pride and the Land Office represented the Pines as seller, and also represented the prospective purchasers. Welch and Pride told the Claridges and Morris that this project was a once-in-a-lifetime opportunity because this land could be sold in fee simple, while the other land in the area was long-term leasehold, and that the lots should sell "like hotcakes."

On January 7, 1990, the Morris and Claridges offered to purchase the Ducey's property for \$ 2 million in cash. They each deposited \$ 10,000. The Pines accepted the offer and the parties agreed to a four-month escrow. The agreement recited that the Land Office was representing both sellers and purchasers; that the Pines owned a 25 percent interest in the Land Office; that Pride and Welch were both real estate brokers; that Welch had an ownership interest in the Pines; and that Joseph Claridge was a licensed real estate agent.

After execution of the purchase agreement, the Claridges and Morris formed a corporation, Clarmor, for the purpose of taking title to the property. They each owned 25 percent of the stock; the remaining 50 percent was to be sold to investors in the project.

As of May 1, 1990, Morris had been unable to find an investor, and the Pines agreed to extend the closing date to July 28, 1990. During that period, the Claridges invested approximately \$ 20,000 more for gas tank removal and other work on the property. In early July, Morris told the Claridges he was unable to interest an investor

with an offer of only 50 percent, and asked them to withdraw from the project. He said if they withdrew, when the project was complete he would give them one of the lots or \$ 100,000. The Claridges reluctantly withdrew.

Morris still could not find an investor. In a September 14, 1990 letter, Morris informed the Pines of this, and suggested that the Pines become an investor in the project. Morris stated in the letter that he had discussed this with Gail Claridge, who still liked the Ducey's project and had \$ 270,000 which she needed to invest by October 2 to qualify for a tax-free property exchange.

Garry Morris and Gail Claridge met with Schulte at his ranch in Santa Barbara in late September. Welch was present but Donna Pride was not; she had not been invited to this meeting. Morris asked that the Pines become a partner in the project, but Schulte rejected that proposal. The Pines wanted cash from the sale of the property to put into the construction of the new lodge. Morris and Claridge asked the Pines to return their deposit and allow them to cancel the transaction. Schulte proposed instead that Morris or Claridge purchase the property themselves. They each told Schulte they did not have \$ 2 million in cash. Claridge told Schulte she had \$ 275,000 available from the property exchange.

One or two days after the meeting, Schulte asked Gail Claridge to meet with him at his office in Santa Barbara to discuss the transaction further. Claridge and her adult daughter met with Schulte and his financial advisor. Neither Welch nor Pride was present. Schulte proposed that the Claridges purchase the property themselves. According to the proposal, if the Claridges applied the \$ 275,000 from the property exchange, and obtained \$ 1 million from a second trust deed on their home, the Pines would carry a note for \$ 725,000 which was to be repaid from the sale of the developed lots on the property.

Gail explained that even if they were able to obtain funds to purchase the property, they had no money for development costs. Schulte told her she would be able to get a construction loan for development costs, and that the Pines would subordinate the balance due on the \$ 725,000 note to a construction loan to cover development costs, which were estimated at \$ 1 million. Schulte volunteered to have his attorneys draw all the papers to enable the exchange to be completed by Gail's impending deadline.

The Claridges agreed to the transaction. The purchase agreement was drafted as an amendment to the original purchase agreement entered into by the Pines as seller and the Claridges and the Morrises as purchasers. The Claridges signed the necessary documents at the office of the Pines' attorney. The Claridges had no attorney or real estate broker with them when they executed these documents.

The "Amendment to Escrow Instructions," dated September 28, 1990, provided that the Claridges would purchase the property for \$ 2 million. Of that amount, the Claridges would pay \$ 275,000 from their tax free property exchange; the balance would come from two notes secured by the property. One note, for \$ 1 million, was due in 120 days. The other, for \$ 725,000, was due in two years. The agreement also provided that the Pines would subordinate its second note for up to \$ 1 million in construction financing from an institutional lender. The Claridges agreed to use the proceeds from the construction loan "solely for purposes of development of the real property subject of this sale."

The amendment contained a default provision, in the event the Claridges were unable to pay the \$ 1 million note by February 1. Under those circumstances, upon their voluntary conveyance of good title to the seller, the seller agreed to execute a noninterest bearing note in the amount of \$ 275,000, less any transactional costs, payable in three years. In the event sellers received more than \$ 2 million for the property, they agreed to reimburse the buyers up to \$ 50,000 from the excess.

Escrow closed on October 1, 1990. The Land Office received an \$ 80,000 commission for the sale of the Ducey's property. The Pines paid Welch a commission on the sale.

Shortly after the close of escrow, the Pines sought some changes in the agreement. The Claridges retained an attorney, Laurence Mandell, to review the proposed changes. Mandell entered into a series of negotiations with the Pines' attorney as to several terms of the agreement, including the default provision.

The terms of this default provision were subsequently renegotiated when the Claridges retained counsel. The revised terms reduced the period of the note to two years, and increased their

potential reimbursement to \$ 100,000.

At the same time, the Claridges sought a second mortgage on their home to pay off the \$ 1 million note. They were unable to obtain a loan from an institutional lender, but did obtain a loan from a private lender, secured by their home and a property owned by Gail's mother. After deducting points and interest, they received less than \$ 1 million in net proceeds. The Pines accepted this amount and agreed that the difference could be added to the \$ 725,000 note. The Claridges and the Pines entered into a note modification agreement on February 15, 1991 which reflected the modifications worked out by the attorneys, the payment by the Claridges of \$950,000 on the first note, and the increased amount of the second note.

The Claridges were unable to obtain a construction loan from an institutional lender. Instead they obtained funds from private lenders, including a \$ 500,000 loan in July 1991 through Ty Ebright; a \$ 200,000 loan in November 1991 from their neighbor, Jim McGraw; and a \$ 125,000 loan in January 1992 through Ty Ebright, in the total amount of \$ 825,000. The Pines subordinated to these three loans.

The Claridges retained surveyors, engineers, a general contractor and various subcontractors. The tentative subdivision map was approved in November 1991, and construction began in mid-1992. By late 1992, the Claridges had defaulted on payments due to their general contractor and other providers. The Claridges also defaulted on their construction loans. In October 1992, when the Pines' note was due in full, the Claridges defaulted on that note. In December 1992, they transferred the property to a business trust, the Gold Coast Trust. This transfer was without the knowledge or consent of the Pines or Ebright.

McGraw gave notice of default in February 1993, and the Pines agreed to subordinate to another loan in favor of McGraw to prevent foreclosure. In May 1993, Ebright scheduled a foreclosure sale. The Pines paid the delinquent interest the Claridges owed to Ebright, adding approximately \$ 93,000 to the amount owed on its note. By late 1993, when the Claridges were unable to obtain any other financing for the project, they put Gold Coast Trust into bankruptcy; that action was dismissed as a bad faith filing on motion of the bankruptcy trustee.

By April 1994, the Claridges were again in default on the Ebright note. The Pines foreclosed in April 1994, repurchased the property at the foreclosure sale, and cleared all liens and notes on the property. The Pines completed the project, and as of the time of trial, had sold two of the lots.

In September 1995, the Claridges filed a complaint against the Pines, Schulte, Welch, the Land Office, Donna Pride and Pride Land Company, alleging breach of fiduciary duty, negligence, breach of contract, and fraud arising from the purchase and loss of the Ducey's property. The Pines cross-complained against the Claridges, alleging the Claridges breached their contract by diverting proceeds from construction loans to other purposes. The Claridges filed a cross-complaint against Schulte, Pride, and the Land Office, seeking indemnity for any liability they might have on the Pines' cross-complaint. Trial was by jury. The jury received no instructions on the indemnity cross-complaint.

The jury rejected the Claridges' fraud claims, but found defendants liable for breach of fiduciary duty and negligence, and awarded the Claridges \$ 2.5 million. The jury awarded the Pines \$ 300,000 on its cross-complaint. After judgment was entered, defendants moved for judgment notwithstanding the verdict or new trial on the complaint. The court granted both motions. The Claridges' motions for judgment notwithstanding the verdict or for new trial on the Pines' cross-complaint were denied. The Claridges appeal from this judgment in case number B119180. In a cross-appeal, the Pines seeks correction of the judgment as to their award on the cross-complaint.

Justice Epstein had the follow response(s): A real estate broker has the same obligation of undivided service and loyalty to his or her client as a trustee has to his or her beneficiary. ( Ford v. Cournale (1973) 36 Cal. App. 3d 172, 180, 111 Cal. Rptr. 334.) This relationship not only imposes on the agent "the duty of acting in the highest good faith towards his principal but precludes the agent from obtaining any advantage over the principal in any transaction had by virtue of his agency. [Citation.] "Such an agent is charged with a duty of fullest disclosure of all material facts concerning the transaction that might affect the principal's decision. [Citations.]"" (Jorgensen v. Beach ' N'Bay Realty, Inc. (1981) 125 Cal. App. 3d 155, 161, 177 Cal. Rptr. 882.) There is a stricter standard of materiality regarding

information which must be disclosed by one acting in a dual fiduciary capacity; a fact will be considered material in this context "if it is one which the agent should realize would be likely to affect the judgment of the principal in giving his consent to the agent to enter into the particular transaction on the specified term." ( *Id.* at p. 162.) Materiality of the information is a factual question for the jury. ( *Id.* at p. 161.)

"A broker's fiduciary duty to his client requires the highest good faith and undivided service and loyalty. [Citations. ] 'The broker as a fiduciary has a duty to learn the material facts that may affect the principal's decision. He is hired for his professional knowledge and skill; he is expected to perform the necessary research and investigation in order to know those important matters that will affect the principal's decision, and he has a duty to counsel and advise the principal regarding the propriety and ramifications of the decision. The agent's duty to disclose material information to the principal includes the duty to disclose reasonably obtainable material information. The facts that a broker must learn, and the advice and counsel required of the broker, depend on the facts of each transaction, the knowledge and the experience of the principal, the questions asked by the principal, and the nature of the property and the terms of sale. The broker must place himself in the position of the principal and ask himself the type of information required for the principal to make a well-informed decision. This obligation requires investigation of facts not known to the agent and disclosure of all material facts that might reasonably be discovered.' (2 Miller & Starr, Cal. [\*18] Real Estate 2d (1989) Agency, § 3.17, pp. 94, 96-97, 99, fn. omitted.)" ( *Field v. Century 21 Klownen-Forness Realty* (1998) 63 Cal.App.4th 18, 25.)

The Claridges based their breach of fiduciary duty claim on the defendants' failure to disclose to them or properly advise them as to the financial viability of the transaction in light of the Claridges' financial circumstances and their real estate investment and development experience. The Claridges presented the expert testimony of Dr. Cynthia Mertens as to the standard of care expected of a real estate broker. According to Dr. Mertens, that standard requires a broker to consider the suitability of the project for the client. This includes making sure that "the client understands all of the potential ins and outs of the transaction. And to give some examples directly related here, if you need to go out and borrow what amounts to \$ 2 million, you send your client out to see if they financially qualify for that \$ 2 million before you get them committed

to the deal with the potential of losing their money."

Gail Claridge testified that at the Santa Barbara meeting in which Clarmor withdrew from the transaction, she and Garry Morris both informed Schulte and Welch that they did not have the money to purchase the property, and that the only cash they had available was \$ 275,000 to invest in a tax-free property exchange. Yet two days later, without additional information or research as to the Claridges' financial circumstances, the Pines, through Schulte, advised them that they could obtain the necessary funding, without explaining the risks or costs of obtaining loans of that size in light of their personal finances. Gail also testified that at the time Schulte suggested that the Claridges purchase the property themselves, he assured her that she and her husband would have no difficulty completing the project, despite the fact that they had no prior experience in subdivision development. He reassured her that their living far from the property would not be a problem, since the Pines had all the right people to do the work, and she really would not need to be at Bass Lake.

Neither the Land Company nor the Pines explained the terms of the October 1, 1990 amended escrow agreement to the Claridges. Welch was aware that Donna Pride had not participated in the amendment of the transaction, yet he did not refer the Claridges to Pride for any explanation of the terms and conditions of the purchase agreement. It is undisputed that the Claridges were not accompanied by counsel or a broker at the time they entered into the purchase agreement. From this, the jury could reasonably find a breach of the broker's fiduciary duty to explain the important details of the transaction and ascertain the client's ability to qualify financially for the transaction.

Dr. Mertens testified that a broker should include sufficient contingencies in the purchase contract to protect the client, including contingencies about the source of the financing; the contract should provide that if the necessary loan is not available from appropriately defined sources, the client will be able to cancel the transaction without losing the deposit money. Similar contingencies should be in place with regard to obtaining necessary construction financing. The standard of care requires the broker to structure the transaction so that if the contingencies cannot be met, the client can get out of the transaction "whole."

The jury had before it the contract, as amended, with regard to the purchase of the Ducey's property. It contained no cancellation contingency with regard to obtaining construction financing. While it contained a default clause permitting the Claridges to withdraw from the contract if they were unable to pay the \$ 1 million note by February 1, 1991, they would not be able to obtain an immediate refund of their \$275,000 upon withdrawal; that money would only be repaid to them after a period of two years or completion and sale of the project. That would give the Pines use of their money for a lengthy period of time. The jury was entitled to consider this contingency inadequate to protect the Claridges. The jury also could conclude that this provision favored the sellers over the buyers, reflecting a breach of the dual agents' fiduciary duty to the buyers.

*The fiduciary duty of a broker to a client precludes the broker from gaining an advantage over the client by means of the transaction.* Dr. Mertens pointed to the clause in the contract giving the Land Office the exclusive listing for resale of the lots as indicating that the dual agent placed its own interests above those of the client. The jury was entitled to reach the same conclusion.

This is not the only evidence that the exclusive listing clause resulted in the broker putting its own interests above those of the client. In 1992 or 1993, Donna Pride received a verbal inquiry about an as-is purchase of the property, in bulk, for \$ 4 million. According to Gail Claridge, Ms. Pride recommended against pursuing the offer, stating, "Why would you want to take \$ 4 million for the property? You're almost done with it, you know. It'll be worth 10 million in another, you know, few months." According to the contract, the Land Company would receive a commission if it sold the lots individually, but the contract did not provide for a commission to the Land Company if there was a bulk sale. The jury could have credited Claridges' testimony as to Pride's recommendation, and considered that Pride's advice was premised on the Land Company's own interest in receiving commissions from subsequent sales of the lots.

Encouraging the Claridges to continue with the transaction rather than entertain an offer of a bulk sale is even more questionable in light of evidence that before this bulk sale opportunity, Stephen Welch had indicated to the Claridges' construction lender that he did not believe the Claridges had the financial ability to complete the project. Welch stated that they were "tapped out," and also indicated that Gail Claridge had no experience in this type of project.

The Claridges presented testimony of another expert, John Reed, as to the standard of care of a real estate broker to an investment client interested in purchasing real estate. According to Mr. Reed, the standard of practice requires a broker to proceed with three specific steps: first determine the client's goals; next determine the client's ability, based on financial ability and expertise; and then analyze the particular purchase. Mr. Reed utilized these steps to analyze the Ducey's purchase, with the assumption "that the purchaser of the property was fairly naive as far as the development process and unaware of the market conditions and the real estate market and how it worked in the Bass Lake area."

Utilizing what he considered a realistic selling price for the lots, and taking into account closing costs, commissions, the cost of carrying construction loans for at least a two-year period, and the cost of the land, Mr. Reed concluded the project would result in a net loss of \$ 296,000. For that reason, he would have advised the Claridges that "this project doesn't make any sense at that purchase price." It was his opinion that The Land Office "highly overestimated" the prospective sales price of the lots to be sold.

Based on his review of the documents relating to the transaction, Mr. Reed found "it is very clear that they did not have the money to subdivide the property; otherwise, they would not have needed all of the loans, seller financing and all of the hard money, high-priced personal loans they had to go out and pay for in order to try to keep the project alive." Mr. Reed had seen the Claridges' balance sheet that showed they had total assets of approximately \$ 14 million and a net worth of approximately \$ 8 million. Asked whether the \$ 8 million in net worth was "worth something," Mr. Reed replied: "Not if you can't draw on it. Not if you've got to pay an engineer or a bulldozer operator right there, write him a check. You can have a net worth of \$200,000,000. If you can't get the cash, you're in trouble."

Defendants' own real estate expert, Brad Ditton, testified that if a broker is dealing with a client who is unfamiliar with the local real estate market, the broker has the duty to advise the client about that market. This includes informing the client of "the broker's best opinion of what the lots will sell for when they're created." According to Gail Claridge, Donna Pride advised her that the lots could be sold for between \$ 99,000 and \$ 150,000. The Claridges' expert, John Reed, testified that a realistic selling price for the lots was

substantially lower. This opinion could support the conclusion that *the broker failed to advise the client accurately about the local real estate market.*

Mr. Ditton testified that he ascertains his clients' financial capabilities, asking them if they have the money and informing them about the cost of the project; he does not verify whether the clients can actually perform. In analyzing a potential transaction, he would not rely on appraisals, but would "do the numbers" himself to determine "whether this project does or doesn't make any sense" in terms of cost and potential profit for an investor. He then would relay that information to his clients. Mr. Ditton was asked what he would do if he concluded that his clients did not have the financial capability or the experience to complete a project. He replied, "I'd tell them to go home."

Ken Neal, who was the contractor on the Ducey's project, testified that he had ongoing conversations with Gail Claridge throughout the course of the project. Based on those conversations, he believed Claridge did not know anything about the construction process or how to develop a subdivision. Both Gail and Joseph Claridge provided similar testimony. Gail also testified that she did not understand the financial risks of the transaction, which were not explained to her by any of the defendants.

There was a great deal of evidence presented which conflicted with what we have summarized. But in ruling on a judgment notwithstanding the verdict, the trial court is not entitled to weigh the evidence, or judge the credibility of witnesses. Disregarding conflicting evidence and indulging all legitimate inferences which can be drawn from the Claridges' evidence, we conclude that there is sufficient evidence to support the verdict in their favor on the basis of breach of fiduciary duty.

This conclusion as *to breach of fiduciary duty* necessarily carries over to the negligence verdict. The same conduct which supports the conclusion that *the broker failed to meet its duty as a fiduciary also supports the conclusion that the broker failed to exercise the requisite standard of care required of a real estate broker.*

The trial court erred in granting defendants' motions for judgment notwithstanding the verdict.

The court characterized as "preposterous and incredible" Gail's testimony that she did not need the tax benefit from the tax free exchange because she had other losses, and that it was the sellers who had the urgent need to close the transaction. The court correctly observed there was no evidence the sellers had a specific deadline for concluding the transaction. It found that "Gail's testimony that she was reluctant, but importuned, overwhelmed and misled into taking over the purchase by Schulte during a single meeting is irreconcilable with all of the documented and largely undisputed evidence of the economic elements of the transaction and Gail's accomplishments and persona." A reasonable trier of fact could have reached this conclusion based on the evidence at trial.

The court was unconvinced by the Claridges' claim that they were misled regarding sales prices and demand for finished lots. The court relied on undisputed evidence that the real estate market suffered a "catastrophic drop" which would affect the sales price of the lots. The court noted that Gail Claridge's testimony regarding Donna Pride's miscalculations of sale prices ignored that phenomenon, and ignored the Claridges' right to set their own sales prices. Our review here is in the light most favorable to the trial court's ruling. Under that standard, we find the ruling amply supported.

The court rejected the Claridges' evidence that they entered into the transaction without appropriate advice from their fiduciary. The court also took the view that the default provision permitting the Claridges to withdraw from the transaction prior to February 1, 1991 and receive a note for later repayment of their \$ 275,000 and possible reimbursement of expenses provided a full remedy for any possible misrepresentations which preceded that date. The court believed that if the Claridges justifiably relied on representations by the defendants, that reliance was no longer justified once the Claridges retained their own attorney to assist with the transaction. The court disbelieved Gail Claridge's testimony that she did not exercise the contingency because defendants did not offer to return her down payment in cash. Instead, the court believed "Gail turned down the offer clearly because she remained enamored of the substantial profits which had been the lure" since she and Gary Morris first independently evaluated the project. The evidence, while conflicting, supports the court's view.

In case number B119180, the order granting judgment notwithstanding the verdict as to the Claridges' complaint is reversed. The order granting a new trial as to the Claridges' complaint is affirmed, and the cause remanded for new trial.

Sometimes it's difficult to decide who's the hero and who's the villain.

Agency laws and disclosures are important knowledge areas for the real estate practitioner. An understanding of their requirements will keep the real estate agent out of unnecessary litigation and cashing more commission checks.