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Restitution - Purchaser's Remedies Where Real Estate Broker Falsely Purports to be Owner's Agent and Misrepresents Owner's Minimum Price

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RESTITUTION—PURCHASER'S REMEDIES WHERE REAL ESTATE BROKER FALSELY PURPORTS TO BE OWNER'S AGENT AND MISREPRESENTS OWNER'S MINIMUM PRICE—Defendant, a licensed real estate broker, represented that he was exclusive agent for the sale of 72 acres of property. Plaintiff made him an offer to purchase at \$4,000 per acre, but was later informed by defendant that the owner had rejected the offer, insisting on at least \$5,000 per acre. Plaintiff then submitted an offer of \$5,000 per acre, which defendant subsequently indicated that the owner had accepted. The deal was consummated with most of the papers handled through a third party employee of defendant. Plaintiff subsequently learned that defendant had never been the agent of the owner, had never presented plaintiff's offers

to the owner, had misrepresented the minimum price of the property, and instead had purchased the property himself and resold it to plaintiff at a profit of \$1,000 per acre. Plaintiff brought an action for damages in the superior court against defendant broker and the third party employee for violation of a fiduciary obligation. The superior court rendered judgment against both defendants for \$72,049 compensatory damages, and awarded exemplary damages of \$36,000 against defendant broker individually. The district court of appeal held that although the allegation of fiduciary relationship was not sustained by the evidence, plaintiff could still recover in quasi-contract due to defendant's unjust enrichment. The court accordingly struck out the award of exemplary damages, reversed the judgment as against the third party, and affirmed the judgment against defendant on the reduced amount.¹ On rehearing, *held*, the cause should be reversed generally, one judge dissenting. No fiduciary relationship is created when a broker makes false representations to a buyer. But at the election of the defrauded party, a constructive trust may be imposed upon the wrongdoer based on unjust enrichment rather than tort. Since the plaintiff disavowed the theory of unjust enrichment, however, an affirmance of the judgment for the plaintiff upon that theory is not proper, though plaintiff will be given leave to amend his complaint. *Ward v. Taggart*, (Cal. App. 1958) 329 P. (2d) 320.

A person is not permitted to profit by his own wrong at the expense of another.² Accordingly, most cases hold a real estate broker liable where he not only misrepresents to the purchaser the owner's minimum price but also misrepresents himself to be the owner's agent.³ The purchaser's remedy may be in tort for deceit⁴ or breach of fiduciary obligation,⁵ or in restitution under either a theory of quasi-contract⁶ or constructive trust.⁷ Since in the principal case the value of the land was not shown to be less than the price paid to the broker, the purchaser did not prove a pecuniary loss and the tort remedy of deceit was precluded.⁸ Recovery

¹ *Ward v. Taggart*, (Cal. App. 1958) 325 P. (2d) 502.

² RESTITUTION RESTATEMENT §3 (1937); DAWSON, UNJUST ENRICHMENT 3 (1951).

³ See 55 A.L.R. (2d) 342 at 374 (1957). Where the broker is in fact the agent of the owner and misrepresents the owner's minimum price to the purchaser, the cases are in conflict as to whether the purchaser can recover from the owner's broker. *Id.* at 357.

⁴ *Stevens v. Reilly*, 56 Okla. 455, 156 P. 157 (1916); *Isenbeck v. Burroughs*, 217 Mass. 537, 105 N.E. 595 (1914).

⁵ *Chung v. Johnston*, 128 Cal. App. (2d) 157 at 164, 274 P. (2d) 922 (1954); *Anderson v. Thacher*, 76 Cal. App. (2d) 50, 172 P. (2d) 533 (1946).

⁶ *Briggs v. Rodriguez*, (Tex. Civ. App. 1951) 236 S.W. (2d) 510; *Clifford Banking Co. v. Donovan Commission Co.*, 195 Mo. 262 at 288, 94 S.W. 527 (1906). See also RESTITUTION RESTATEMENT §§130 and 166, comment *b*, p. 674 (1937).

⁷ *Harper v. Adametz*, 142 Conn. 218, 113 A. (2d) 136 (1955); *Teuscher v. Gragg*, 136 Okla. 129 at 133, 276 P. 753 (1929). See also RESTITUTION RESTATEMENT §§160 and 166.

⁸ Principal case at 322; PROSSER, TORTS 566 (1955); 3 TORTS RESTATEMENT §§525 and 549; *McLennan v. Investment Exchange Co.*, 170 Mo. App. 389, 156 S.W. 730 (1913).

for breach of fiduciary obligation was properly denied, as courts generally refuse to find a fiduciary relationship between a real estate broker and a prospective client, where there is no principal-agent agreement.⁹ Thus plaintiff's recovery must be founded on a theory of restitution for unjust enrichment. Although the two principal restitutionary remedies of quasi-contract and constructive trust¹⁰ closely resemble each other, the quasi-contract remedy is more appropriate on the facts of the principal case since it is a legal remedy imposing personal liability upon the defendant to pay a sum of money, whereas the constructive trust is an equitable remedy generally employed for the recovery of specific property.¹¹ In a quasi-contract action, however, the plaintiff must not only show that there was unjust enrichment of the defendant, but must usually establish that the defendant's enrichment was obtained at the expense of the plaintiff.¹² As the plaintiff in the principal case presumably paid the defendant no more than the land was worth, it can be argued that the defendant's profit from the transaction was not obtained at the expense of the plaintiff. Nevertheless, the fact remains that if the defendant broker had observed the canons of common honesty, the plaintiff could have obtained the property for about \$70,000 less than he paid for it. Perhaps defendant's conduct could be regarded as a fraudulent interference with the expectation of a contract right, giving rise to a quasi-contract action in the same way that a defendant who fraudulently interferes with an expectation of a gift or other succession to property is held to be a constructive trustee for the intended donee.¹³ In any event, the fact that the unjustified gain came directly from the plaintiff is sufficient to satisfy the requirements for restitution. To allow the defendant in the principal case to keep the

⁹ *Morrish Estate*, 156 Pa. Super. 394 at 400, 40 A. (2d) 907 (1945); 3 BOGERT, TRUSTS AND TRUSTEES §482, p. 87 (1946; Supp. 1956). But see *Stevens v. Reilly*, note 4 supra; *Greig v. Interstate Investment Co.*, 121 Ore. 15 at 21, 253 P. 877 (1927). It could be argued that an agent-principal relationship existed between plaintiff and defendant for the limited purpose of defendant's faithful transmission of communications to the seller. See note, 35 BOST. UNIV. L. REV. 604 at 608 (1955).

¹⁰ Note, 12 UNIV. CIN. L. REV. 390 at 392 (1938).

¹¹ RESTITUTION RESTATEMENT, §160, comment *a* (1937); WOODWARD, QUASI-CONTRACTS §3, p. 5 (1913); *Barnes v. Eastern and Western Lumber Co.*, 205 Ore. 553 at 597, 287 P. (2d) 929 (1955).

¹² WOODWARD, QUASI-CONTRACTS §274, p. 442 (1913); KEENER, QUASI-CONTRACTS 163 (1893); RESTITUTION RESTATEMENT §1, comment *e* (1937). But see *Federal Sugar Refin. Co. v. United States Sugar Equalization Board*, (S.D. N.Y. 1920) 268 F. 575 at 582; comment, 33 MICH. L. REV. 420 at 424 (1934). Sec. 2224 of the Cal. Civ. Code (Deering, 1949), on which the court in the principal case based its decision, provides that "One who gains a thing by fraud . . . , or other wrongful act, is . . . an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it." Thus this provision retains the requirement that the defendant's enrichment must be at the expense of the plaintiff.

¹³ *Monach v. Koslowski*, 322 Mass. 466, 78 N.E. (2d) 4 (1948); *Brazil v. Silva*, 181 Cal. 490, 185 P. 174 (1919); RESTITUTION RESTATEMENT §184 (1937).

profits of his chicanery would be to give an implicit sanction to dishonesty. It is clear that no party other than the plaintiff is entitled to these profits.¹⁴ Thus, permitting an award of defendant's profits to the plaintiff is justifiable from the standpoint of public policy¹⁵ and is within the broad outlines of restitutionary theory.

John W. Simpson

¹⁴ Principal case at 324. Compare *Harper v. Adametz*, note 7 *supra*, where in a similar situation the court allowed restitutionary relief even though it appeared that the defendant was the agent of the owner, who also might have had a claim against the defendant. See also *Gilfillen v. Moorhead*, 73 Conn. 710, 49 A. 196 (1901); note, 54 *MICH. L. REV.* 714 (1956).

¹⁵ See *Judd v. Walker*, 215 Mo. 312 at 338, 114 S.W. 979 (1908). A real estate broker's licensing statute has been held to impose upon the broker the duty to deal in good faith. *Zichlin v. Dill*, 157 Fla. 96, 25 S. (2d) 4 (1946); *Flugel v. Meek*, 98 Ohio App. 218 at 223-224, 128 N.E. (2d) 828 (1954).