

[3] I dismiss Mr. Khouri's Application. His case is based on an incorrect interpretation of the agreements that he entered into. Further, the Split Agreement does not operate as a restraint of trade and did not lack consideration.

A. FACTUAL BACKGROUND

1. The protagonists

[4] Mr. Khouri is a real estate agent. He is currently a registered salesperson of The Brokerage Inc., a real estate brokerage operating in Oakville, Ontario.

[5] Mr. Torkan is a director and managing partner of 11802119 Canada Inc., carrying on business as The Agency, Toronto ("**Agency Toronto**"). The Agency Toronto was incorporated in December 2019. It is a full-service real estate brokerage in Toronto. Mr. Torkan operates the Agency Toronto with his spouse, Atefeh (Paige) Torkan. Ms. Torkan is a director and managing partner of the Agency Toronto, and the broker of record.

[6] Mr. Khouri worked as an independent contractor salesperson for the Agency Toronto from May 25, 2020 to January 7, 2022.

2. Independent Contractor Agreement

[7] On May 24, 2020, Mr. Khouri and The Agency Brokerage Inc. entered into an Independent Contractor Agreement. Ms. Torkan signed the agreement on behalf of The Agency Brokerage Inc.

[8] The Independent Contractor Agreement provides, in part:

3. REAL ESTATE LISTINGS

The Contractor [Mr. Khouri] agrees that, during the currency of this agreement, all listings obtained by the Contractor shall be taken in the name of the Corporation [The Agency Brokerage Inc.] and immediately turned over to the Corporation. The Contractor further agrees that all real estate transactions in which he or she has any interest, directly or indirectly, will be reported to and processed through the Corporation on a timely basis. Further, the Contractor agrees to make written disclosure of such interests to the other parties to the transaction as and when required by the Act [*Real Estate and Business Brokers Act, 2002*, S.O. 2002, c. 30, Sched. C ("**Act**")] or any applicable Code of Ethics.

The Contractor agrees to deliver to the Corporation at the earliest opportunity the original copy of each listing obtained by the Contractor, including all listings received on an exclusive basis. The Contractor acknowledges that no listing shall be exclusive to the Contractor but that all must be shared with salespersons and brokers retained by the Corporation.

All cash or cheques received by the Contractor relating to any listing secured by the Contractor shall immediately be turned over and delivered to the Corporation for deposit in its trust account and the Contractor shall in no circumstances endorse or negotiate on behalf of the Corporation any cheque or other instrument representing monies payable to the Corporation.

[...]

6. COMMISSIONS

- a. The commission payable in respect of each listing secured by the Contractor or in respect of any property sold, leased or referred by the Contractor shall be fixed by the Contractor. When any property listed with the Corporation is sold or leased as a result of the Contractor's negotiations, the Contractor will be paid the real estate commission paid to and received by the Corporation in respect of such sale or lease subject only to the obligation of the Corporation to divide such commission between listing and selling Contractors or otherwise in accordance with the custom of the trade at the applicable time and subject to subsection (b) hereof. The Corporation's share of said real estate commissions are outlined in Schedule A to this agreement.
- b. Each of the Corporation and Contractor acknowledges that the commissions from time to time payable to the Contractor will be received and held in trust for the Contractor and the Corporation by the Corporation, according to their respective interests as herein referred to. Any and all amounts owing to the Corporation by the Contractor pursuant to this agreement or otherwise, including without limitations all fees, late charges, interest and expenses and other loss, cost and expense of any nature or kind ("indebtedness") shall be deducted from such commissions prior to distribution to the Contractor, it being agreed that, to the extent of such indebtedness the commissions from time to time payable to the Contractor are held in trust for the Corporation and may be retained by it as its property absolutely.
- c. The Contractor shall devote such portions of his time and energy as Contractor deems appropriate to furtherance of the Contractor's business. Such business shall however be conducted subject to the law applicable to the business, including the Act.

[9] The Independent Contractor Agreement contains two Schedules A. The first one was not completed and is unsigned. This unsigned Schedule A is a "Fee & Commission Split Agreement" for "Peter and Paige Torkan Team". Among other things, it refers to various fees to be paid and states: "50/50 on ALL deals regardless of type or source."

[10] The second Schedule A is signed by Mr. Khouri and Ms. Torkan, and Mr. Khouri's name was typed at the beginning of the document on the line after the word "TO:". The second Schedule A is also a "Fee & Commission Split Agreement", but it is for "The Agency Single Agent". This Schedule A sets out various rules and various fees, including membership and marketing fees. It also states the following:

- 85/15 on all transactions for those with at least two years experience in the industry and a proven track record of production
- 75/25 on all transactions for those with less than two years experience in the industry

[11] During his cross-examination, Mr. Torkan explained that The Agency Brokerage Inc. was a name that was considered at the time that the Agency Toronto was incorporated. However, this is not the name that was ultimately registered and the use of this name in the Independent Contractor Agreement was a mistake. There is no evidence before me as to what The Agency Brokerage Inc. is and whether such a corporate entity exists. There is also no evidence that Ms. Torkan had any authority to sign any document on behalf of an entity called The Agency Brokerage Inc.

[12] While the wrong corporate name was used on the Independent Contractor Agreement, there is no separate agreement between Mr. Khouri and the Agency Toronto. The evidence shows that the Independent Contractor Agreement governed the relationship between the Agency Toronto and Mr. Khouri, and I so conclude,

3. Split Agreement

[13] On January 25, 2021, Mr. Torkan sent the following e-mail to Mr. Khouri and three other salespeople at the Agency Toronto:

Hi Guys

As we're going to get only busier and busier, I needed to be clear on how I have been practicing for my team and listings. If you wish to be part of this, please initial and send back a copy. If you have any questions, please feel free to reach out to me and if you don't wish to be second on my listings it's all good too 😊
Lets crush 2021

[14] The Split Agreement was attached to Mr. Torkan's e-mail. Mr. Torkan's evidence is that he prepared the Split Agreement in approximately December 2020.

[15] The Split Agreement reads as follows:

Splits for Block/Street Cold Canvass in York Mills	Team member Split	Peter Torkan Home Split	Marketing Expenses
Using just Peter Torkan Materials PT not showing up for listing and service	55%	45%	As per split
If Peter Torkan presents and attends listing presentation	45%	55%	
If Peter Torkan attends listing present has to follow up two or more times and negotiate offers and do second showings	35%	65%	

Splits for Open Houses on Peter Torkan Listings	Team Member Split	Peter Torkan Split	Marketing Expenses
If buyer buys the house through the team member	25%-45% on selling side	55%	
If buyer buys another house outside of York Mills	60%	40%	
If seller comes asking for listing appointment outside of York Mills	55%	45%	
If seller asking for list appointment in York Mills	45%	55%	

Split for servicing Peter Torkan Listings/Buys as second Rep and doing all related showings, under rider name tag and feed back etc	Team Member Split	Peter Torkan Split	Marketing Expenses

Listing Service Fee	15%	85%	
Seller turns into Buyer on different property	25%-45% at PT discretion	55%	
Double ending the listing- Total comm split with 50% allocation to listing and 50% to selling side	25%-50% on selling side and 15% list side if serviced by team member	50%	
If seller asking for listing app in York Mills via PT listing	45%	55%	
If seller comes asking for listing app outside YM	55%	45%	
If buying in YM for any buyer and no prior relationship with PT	65%	35%	

In House Sales: Split is deemed to be 50/50 between list and sell

Savings Guarantee: The Team Member acknowledges that Peter Torkan routinely offers Sellers a Commission Savings Guarantee certificate reducing the total listing commission by 1% if the Listing Agent represents both the Buyer and the Seller.

Peter Torkan Past Client Leads: 10%-35% at Peter Torkan's discretion

Advertising Including and not limited to social media for Peter Torkan's listings: Peter Torkan's name will always appear first on any online/offline marketing pieces, second listing rep will have their name as under rider installed with main sign of Peter Torkan.

[16] A logo of "The Agency" was included in the upper left corner of the Split Agreement. The same logo was included in the Independent Contractor Agreement. Mr. Torkan's evidence is that this is the logo of the Agency Toronto's franchisor, which is located in the United States.

The logo was trademarked by the franchisor. Mr. Torkan stated that he used the logo on various documents, including letters to sellers and buyers and marketing materials.

[17] Mr. Khouri signed the Split Agreement and sent it back to Mr. Torkan on the same day he received it, i.e., on January 25, 2021. Mr. Torkan did not formally sign the Split Agreement.¹ The other three salespeople who received Mr. Torkan's January 25, 2021 e-mail also signed separate copies of the Split Agreement.

[18] Mr. Khouri's evidence is that he saw the Split Agreement for the first time on January 25, 2021. He stated that he believed that the proposed commission split agreement was compulsory and that, if he did not agree to it, he would not acquire the Agency Toronto's listings in the region of York Mills and, in certain circumstances, outside of the region of York Mills.

[19] Mr. Khouri did not receive any additional compensation in return for executing the Split Agreement.

[20] Mr. Torkan's evidence is that Mr. Khouri agreed to the terms of the Split Agreement before January 4, 2021. He states the following in his affidavit:

In or around mid to late December, I had a phone conversation with Mr. Khouri to propose an arrangement for him to act as a second agent on my listings, as this would assist me with my busy schedule and provide him with the opportunity to work on high value luxury listings. Prior to joining the Agency, Mr. Khouri's experience was limited to leasing and, while at the Agency, he had not had the opportunity to work on any properties valued at over \$2 million. I offered Mr. Khouri the opportunity to share in my luxury listings, make connections with high value clients with whom I had developed relationships, and split the commission on significant transactions. Mr. Khouri and I discussed the terms of the agreement and how the commissions for each listing would be shared.

Prior to adding Mr. Khouri to one of my personal listings on January 4, 2021 [...], I had another phone conversation with Mr. Khouri to confirm his agreement to the terms of the Split Agreement. During this discussion, I made it clear to Mr. Khouri that this was a new arrangement with me, separate from his Independent Contractor Agreement with the Agency. I advised that I would circulate the Split Agreement later for signature. Mr. Khouri verbally agreed to the terms of the Split Agreement, though the agreement was not signed until January 25, 2021.

¹ Mr. Khouri appears to give significance to the fact that Mr. Torkan did not personally sign the Split Agreement. In my view, this was not necessary in light of Mr. Torkan's e-mail dated January 25, 2021 to which the Split Agreement was attached. Mr. Torkan made a clear offer and Mr. Khouri accepted it and communicated his acceptance by signing the Split Agreement and returning it to Mr. Torkan.

[21] The Split Agreement was applied to at least two properties involving Mr. Torkan and Mr. Khouri. These properties are discussed below.

4. Two properties in issue

a. Montessor Property

[22] On January 4, 2021, Mr. Khouri was brought on as a co-listing agent with Mr. Torkan for a property located on Montessor Drive in North York, Ontario (“**Montessor Property**”). Mr. Torkan’s evidence is that he covered all costs associated with this listing, including staging and advertising.

[23] The evidence before me shows that the Agency Toronto entered into at least ten listing agreements with respect to the Montessor Property. In addition to the listing agreement dated January 4, 2021 in which Mr. Khouri was added as a co-listing agent, there were three listing agreements before January 4, 2021 and at least six after, including one on September 7, 2021. According to Mr. Torkan, listing agreements were terminated in order to be able to relist the Montessor Property, “bring it fresh to the market” and get more attention and momentum.

[24] The Montessor Property ultimately sold for \$5,250,000. The Agreement of Purchase and Sale is dated October 2, 2021 and the sale closed on November 1, 2021.

[25] Of the 4% gross commission, 1.5% was allocated to Mr. Torkan and Mr. Khouri as co-listing agents, and the remaining 2.5% was allocated to a third-party buying agent. The listing agent’s 1.5% commission was shared between Mr. Torkan and Mr. Khouri as follows: Mr. Torkan – 80%, Mr. Khouri – 20%. Mr. Torkan’s evidence is that he gave Mr. Khouri 5% more commission than the 15% that Mr. Khouri had agreed to accept under the Split Agreement. Ultimately, Mr. Khouri received \$15,750.00 commission for the Montessor Property, and Mr. Torkan received \$63,000.00.

b. Cotswold Property

[26] Mr. Khouri acted as the buying agent for a client with respect to a property located on Cotswold Crescent in North York, Ontario (“**Cotswold Property**”), and Mr. Torkan acted as the listing agent for the vendor. According to Mr. Khouri, the buyer was the wife of an active client with whom he had a listing. Mr. Khouri stated that the buyer’s husband did all the negotiations and provided the funds.

[27] Mr. Torkan’s evidence is that a potential buyer showed up to his listing at the Montessor Property while Mr. Khouri was showing the property to another agent. The potential buyer was not interested in the Montessor Property, so Mr. Khouri asked Mr. Torkan if he had any other listings. According to Mr. Torkan, he then introduced the buyer to the Cotswold Property, which

was not yet on the market. The seller of the Cotswold Property was a long-standing client of Mr. Torkan.

[28] Mr. Torkan's evidence is that, as for the Montessoro Property, he covered all costs associated with this listing, including staging and advertising.

[29] The vendor and the buyer entered into an Agreement of Purchase and Sale for the Cotswold Property on January 18, 2021, with a purchase price of \$5,219,000. The sale closed on May 19, 2021.

[30] The Trade Information Form for the Cotswold Property lists Mr. Torkan as the listing agent, and Mr. Torkan and Mr. Khouri as buying agents. The total commission for both the listing agent and the buying agent was 3.5%. The Trade Information Form shows that: (a) Mr. Torkan received the listing agent's 1.75% commission in the amount of \$91,332.50; and (b) Mr. Khouri and Mr. Torkan shared the buying agent's 1.75% commission and each received 0.875% in the amount of \$45,666.25. Mr. Khouri's position is that he should have been the only buying agent and he should have received the entirety of the buying agent's 1.75% commission.

[31] For both the Montessoro Property and the Cotswold Property, the Agency Toronto deducted a 5% franchise fee and a 15% brokerage fee from Mr. Khouri's commission, pursuant to the Independent Contractor Agreement.

5. Mr. Khouri's complaints and resignation

[32] On October 15, 2021, Mr. Khouri sent the following e-mail to Mr. and Ms. Torkan regarding the commission split with respect to the Montessoro Property:

Hello Peter and Paige,

[...]

I wanted to reach out as I know you've always said the door is open to discuss anything!

Since we firmed up on 22 Montessoro I've felt relieved and happy that we were able to get it done!

However, when seeing the trade sheet for this sale I have to say I'm disappointed.

First and foremost I do appreciate and value asking me to be part of your listings and working with you & the brokerage is great!

I understand the York Mills Team Member Split I signed however this was after getting on the listing of 22 Montessoro Dr + doing more than just showing the property.

I have proven myself to being more than a “junior agent” with my continued sales, listings, work ethic and focus since joining The Agency Toronto, I know my value and no matter the transaction, I always give my all-150%.

Considering what I have brought forward with 22 Montessor Dr, making it a major priority since January, the time I have devoted, the cancellations I have made and appointments I missed to be available, not alone the offers I brought forward and negotiations I was part of, I’m shocked to see this 15% split.

My dedication and work ethic in general; especially on this property I’d expect something more.

The amount is less than selling 500k condos which comes with less headache, stress and challenges that Montessor has had!! I put aside other projects to attend to Montessor as a priority wanting to provide it my outmost attention.

If this is the deal between us then I’d prefer putting my energy and focus on my own listings! I’m an agent that keeps busy working with clients and always finding new clients and keeping a strong pipeline. Working on farming my own area as well!!

Furthermore as said by the buyer and buyer’s agent who purchased 22 Montessor, this deal happened because of providing a quick and thorough elevator quote, in 2 days during Covid, & me being part of negotiations to bringing both parties to an agreement!

Getting a 33% split of this listing is more than fair for the 10 months work I have put in to it!

Also, I’d like to know my split on 12 Thornbank as that hasn’t been discussed and it isn’t a York Mills property.

Looking forward to hearing from you and thank you for taking the time to discuss.

[33] Ms. Torkan sent the following e-mail in response on the same day:

Hi Adolphe

Hope you are well and congratulations on selling Montessor!!!

Truthfully I am a bit surprised by this email. No doubt that you worked so so hard on this listing and I thank you for that. But the sell of a property is about the system not the effort and length of time? Specially in luxury world things usually

move much slower. But let's say what if we had sold this property in 1 day? Do you think you would deserve less?

With our experience in the luxury world we have seen much worse cases[.] Properties that stayed in the market for 1.5, 2 years dealing with lots of showings, offers, negotiations and finally falling apart. Some of the owners of these big ticket items get frustrated and can even fire you which you are left with nothing. Which could happen in Montessor case but luckily the owner was a friend and trusted us.

Anyways there is more to discuss here but not over email. I know Peter is very busy today but feel free to call him and he can explain to you more.

Thank you and have a great day.

[34] There is no evidence that Mr. Khouri complained about his commission after the sale of the Cotswold Property.

[35] After receiving Mr. Khouri's e-mail, Mr. Torkan asked Mr. Khouri whether he no longer wanted to assist with Mr. Torkan's listings under the Split Agreement and whether Mr. Khouri wanted to be removed from Mr. Torkan's listing for a \$10 million property located at 12 Thornbank Road (which property is referred to in Mr. Khouri's October 15, 2021 e-mail). According to Mr. Torkan, Mr. Khouri confirmed that he wanted to remain on this listing and to continue with the Split Agreement. The property on Thornbank Road is not located in York Mills, but Mr. Torkan's view is that the Split Agreement applied to it.

[36] On January 7, 2022, Mr. Khouri sent to Ms. Torkan notice of his resignation from the Agency Toronto, with immediate effect.

[37] Mr. Khouri commenced this Application on March 10, 2022.

B. DISCUSSION

[38] Mr. Khouri makes the following submissions:

- a. The Split Agreement operates as a restraint of trade because it imposes a number of restrictive covenants on the Independent Contractor Agreement between Mr. Khouri and the Agency Toronto and Mr. Khouri's entitlement thereunder to a 50/50 commission split as co-listing agent and/or co-buying agent.
- b. The restrictive covenants in the Split Agreement are unreasonable and unenforceable as a restraint of trade.
- c. The Split Agreement is null and void for lack of consideration. The Split Agreement purports to change the express terms of the Independent Contractor

Agreement as it concerns commission splits, effectively penalizing Mr. Khouri and without providing any new consideration in exchange for the imposition of the penalties. Mr. Khouri did not receive any compensation or other benefit in exchange for executing the Split Agreement.

[39] I reject Mr. Khouri's submissions. Mr. Khouri's position is premised on an incorrect understanding and interpretation of the Independent Contractor Agreement and the Split Agreement. I also find that the Split Agreement does not amount to a restraint of trade and was supported by consideration.

1. **Interpretation of the Independent Contractor Agreement and the Split Agreement**

a. *Applicable legal principles*

[40] The Supreme Court of Canada set out the current approach to contractual interpretation in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 ("*Sattva*"). In a nutshell, courts are to read a contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. While the meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement, the surrounding circumstances must never be allowed to overwhelm the words of that agreement. Thus, even though the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement. Relevant surrounding circumstances consist only of objective evidence of the background facts at the time of the execution of the contract, that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting. See *Sattva* at paras. 47-48, 57-58 and *Corner Brook (City) v. Bailey*, 2021 SCC 29 at para. 20.

[41] Where an agreement is ambiguous, evidence of subsequent conduct may be admitted to determine the intent of the parties: see *Montreal Trust Co. of Canada v. Birmingham Lodge Ltd.*, 1995 CanLII 438 (Ont. C.A.) and *Simpson v. Canada (Attorney General)*, 2011 ONSC 5637 at para. 68.

[42] In light of the foregoing, what Mr. Khouri and Mr. Torkan subjectively thought about the Independent Contractor Agreement and the Split Agreement is irrelevant when interpreting these agreements.

b. *Interpretation of the Independent Contractor Agreement and the Split Agreement*

[43] Based on the factors set out in *Sattva* and the evidence before me, I find that the Independent Contractor Agreement was between Mr. Khouri and the Agency Toronto and governed their relationship. Mr. Torkan was not a party to the Independent Contractor Agreement. The Schedule A that applies to Mr. Khouri is the second one, that is, the one that was completed and signed by Mr. Khouri and Ms. Torkan on behalf of the Agency Toronto.

[44] With respect to the Split Agreement, I find that: (i) it was an agreement between Mr. Khouri and Mr. Torkan personally; (ii) it related to Mr. Torkan's personal listings and personal activities as a real estate agent, and not to Peter Torkan's role as a managing partner of the Agency Toronto; (iii) it was entered into on a voluntary basis and was not a requirement to work for the Agency Toronto; and (iv) the Agency Toronto was not a party to the Split Agreement.

[45] I make these findings based on the following:

- a. The words used in the Split Agreement, including the numerous references to Peter Torkan, Peter Torkan listings and team members. The fact that there was a logo of "The Agency" on the document that was the same as the logo on the Independent Contractor Agreement does not detract from the language used in the Split Agreement.
- b. Mr. Torkan's e-mail of January 25, 2021, including the references to Mr. Torkan's listings and the fact that the recipients did not have to participate if they did not wish to do so. The contents of Mr. Torkan's e-mail constitute objective evidence known to both parties at the time the Split Agreement was entered into.
- c. The practice in the industry of licensed salespersons having teams and engaging the services of other salespersons to assist them on their listings. This practice was acknowledged by both Mr. Khouri and Mr. Torkan during their cross-examinations.

[46] I also find that the Split Agreement was not intended to continue after a salesperson ceased to be an independent contractor of the Agency Toronto. The Split Agreement refers to the "team member" and does not address the situation of the team member ceasing to be a team member and/or leaving the Agency Toronto. However, the language used in the Split Agreement shows that the Split Agreement is premised on the team member participating in presentations and open houses by Mr. Torkan and servicing Mr. Torkan's listings, which is not something that the salesperson can do if they are no longer with the Agency Toronto.

[47] I agree with the Agency Toronto's submission that the Split Agreement is spent and has been fully performed in accordance with its terms. Mr. Torkan has not sought to keep the Split Agreement alive or to enforce any of its provisions after the departure of Mr. Khouri. It is Mr. Khouri who is attacking its validity, after his resignation from the Agency Toronto, and in an attempt to obtain higher commissions with respect to properties that were sold while he was still working for the Agency Toronto.

[48] The conclusion that the Split Agreement is spent is supported by section 31 of the *Act*.² Under this provision, a salesperson can only accept payment of commission from the brokerage that employs them. As a result, commission splitting is not possible if a “team member” is at a different brokerage. Given that the entire object of the Split Agreement is commission splitting, it could not have been intended that it would continue to apply after a team member joined a different brokerage.

[49] In light of the interpretive findings set out above, I do not accept Mr. Khouri’s position that he was entitled to a 50/50 split under the Independent Contractor Agreement and that the Split Agreement changed this entitlement. The Schedule A signed by Mr. Khouri does not refer to a 50/50 split. If the first Schedule A applied to Mr. Khouri, which I found it did not, then Mr. Khouri would have received only 50% of all the commissions he earned “on ALL deals regardless of type or source”. Based on the evidence before me, this did not take place. Further, Mr. Khouri’s position regarding an entitlement to a 50/50 split under the Independent Contractor Agreement is not consistent with Mr. Khouri’s evidence during his cross-examination. It is also inconsistent with Mr. Khouri’s e-mail dated October 15, 2021 in which Mr. Khouri requested a 33/77 split regarding the Montessoro Property, not a 50/50 split.

[50] I similarly reject Mr. Khouri’s position that there was “double-dipping” on the part of Mr. Torkan, i.e., that he received commission payments under both the Split Agreement and the Independent Contractor Agreement. The fees payable under the Independent Contractor Agreement were payable to the Agency Toronto, not to Mr. Torkan. These fees relate to the role of the Agency Toronto as a brokerage. The evidence shows that Mr. Torkan also paid a percentage of his commissions to the Agency Toronto, although it was a lower percentage than the one applicable to Mr. Khouri.

[51] While the commission split in the Independent Contractor Agreement relates to the role of the Agency Toronto as a brokerage, the commission splits set out in the Split Agreement relate to the manner in which the commissions earned on Mr. Torkan’s personal listings are to be

² Section 31 reads as follows:

Restrictions re: brokers and salespersons

31 (1) No broker or salesperson shall trade in real estate on behalf of any brokerage other than the brokerage which employs the broker or salesperson.

Same

(2) Except if the regulations provide otherwise and subject to the regulations, no broker or salesperson is entitled to or shall accept any remuneration for trading in real estate from any person except the brokerage which employs the broker or salesperson.

shared between the team member and Mr. Torkan personally. The Split Agreement is not related in any way to the activities and responsibilities of the Agency Toronto as a brokerage and the fees to which the Agency Toronto is entitled under the Independent Contractor Agreement.

[52] I now turn to the challenges to the Split Agreement raised by Mr. Khouri. These challenges must be considered based on the relevant agreements, but properly interpreted.

2. The Split Agreement Does Not Amount to a Restraint of Trade

[53] A restrictive covenant in a contract is referred to as a restraint of trade at common law. Restrictive covenants are frequently found in agreements for the purchase and sale of a business and in employment contracts. In an employment contract, a restrictive contract precludes the employee, upon leaving employment, from competing with the former employer. See *Shafroon v. KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6 at para. 15.

[54] The rules regarding restrictive covenants that apply to an employment relationship also apply to an independent contractor relationship. See *Craig v. CEO Global Network Inc.*, 2019 ONSC 3589 at para. 50.

[55] A clause in an employment contract (or independent contractor contract) is not in restraint of trade if it does not preclude the employee (or independent contractor) from going anywhere and doing anything they choose to. See *Inglis v. The Great West Life Assurance Co.*, 1941 CanLII 85 (Ont. C.A.) (“*Inglis*”). Despite the fact that *Inglis* was decided by the Court of Appeal many decades ago, it remains good law: see *Kechnie v. Sun Life Assurance Company of Canada*, 2016 ONCA 434 at paras. 36-37; *Levinsky v. The Toronto-Dominion Bank*, 2013 ONSC 5657 at para. 80; and *Amma v. Singh*, 2019 ONSC 3989 at paras. 58-60.

[56] The Split Agreement does not contain restrictive covenants. First, the Split Agreement does not contain any clause that applies upon the end of the independent contractor relationship or after Mr. Khouri ceases to be part of Mr Torkan’s team. As stated above, the Split Agreement is meant to apply when Mr. Khouri is a “team member”.

[57] Second, none of the Split Agreement’s terms preclude Mr. Khouri from going anywhere or doing anything. Mr. Khouri resigned from the Agency Toronto, ceased to be part of Mr. Torkan’s team and started working as an independent contractor for another brokerage without any issue. There is nothing in the Split Agreement that prevents Mr. Khouri from soliciting anyone or from competing with Mr. Torkan or anyone else. The Split Agreement merely states how commissions will be split in specified situations.

[58] Thus, I reject Mr. Khouri’s allegation that the Split Agreement operates as a restraint of trade.

3. The Split Agreement Was Supported by Consideration

[59] I disagree with Mr. Khouri's submission that the Split Agreement is null and void for lack of consideration. The Split Agreement was a bargain or exchange of promises between Mr. Torkan and Mr. Khouri. Mr. Torkan was to allow Mr. Khouri to be part of his real estate team, Mr. Khouri was to do work in relation to Mr. Torkan's listings, and Mr. Torkan was to share the commission on his listings with Mr. Khouri (based on specified percentages) in exchange for the work done. Mr. Khouri did in fact receive commissions pursuant to the Split Agreement.

[60] Mr. Khouri was not penalized by the Split Agreement. Before entering into the Split Agreement, Mr. Khouri had no entitlement to be included in Mr. Torkan's listings and to receive any commission or compensation in relation to such listings.

[61] Therefore, I conclude that the Split Agreement was supported by consideration.

4. Application of the Split Agreement to the Montessoro Property and Cotswold Property

[62] Whether or not the Split Agreement is valid, Mr. Khouri argues that the Split Agreement did not apply to the Montessoro Property and the Cotswold Property because he became a listing agent or a buying agent with respect to these properties before he signed the Split Agreement.

[63] I reject this argument with respect to the Montessoro Property. While Mr. Khouri was brought on as a co-listing agent with Mr. Torkan on January 4, 2021, this listing agreement was terminated and a number of new listing agreements were subsequently entered into. Mr. Khouri could have been dropped from any of the subsequent listing agreements. His role as a co-listing agent is therefore based on a listing agreement that was entered into after the Split Agreement was signed.

[64] I also reject Mr. Khouri's argument with respect to the Cotswold Property. I do not need to decide whether the Split Agreement applied to the Cotswold Property. I find that, even if the Split Agreement did not apply, Mr. Torkan and Mr. Khouri independently agreed that the buyer agent's commission would be split 50/50 with respect to the sale of that property. The sale of the Cotswold Property closed on May 19, 2021, and there is no evidence before me that Mr. Khouri raised any issue about the commission that he received at the relevant time or within a reasonable period thereafter. It would have been clear to Mr. Khouri when he received his commission payment that he did not receive 100% of the buyer agent's commission. I note that while Mr. Khouri complained about the commission that he received in relation to the Montessoro Property in October 2021, he did not complain about his commission for the Cotswold Property. Thus, I find that Mr. Khouri received what he was expecting.

[65] Further, there was a factual basis for the sharing of the buyer agent's commission, even if I accept Mr. Khouri's evidence that Mr. Torkan did not know the buyer and that the buyer was the wife of a client of Mr. Khouri. Mr. Torkan's evidence, which was uncontradicted on this point, was that the buyer met Mr. Khouri at the Montessoro Property (i.e., one of Mr. Torkan's

listings), and it was Mr. Torkan, not Mr. Knouri, who introduced the buyer to the Cotswold Property, which was not yet on the market.

[66] Mr. Khouri's evidence regarding the Cotswold Property was very slim and he has not established on a balance of probabilities that he was entitled to a higher commission payment for this property.

C. CONCLUSION

[67] Accordingly, the Application is dismissed.

[68] The parties agreed at the hearing that the successful party should be entitled to its costs on a partial indemnity basis in the amount of \$25,000. I have reviewed the parties' respective costs outlines and I find that this is a fair and reasonable amount. Consequently, Mr. Khouri is ordered to pay costs to the Agency Toronto on a partial indemnity basis in the all-inclusive amount of \$25,000. The costs are to be paid within 30 days.

Vermette J.

Released: June 30, 2023

