SUPREME COURT OF NOVA SCOTIA
Citation: *Gilbert v. Marynowski*, 2017 NSSC 227

Date: 20170830
Docket: Hfx No. 429077
Registry: Halifax

Between:

Robin Gilbert and Dianne Gilbert

Applicants

and

Bohdan Marynowski and Emily Marynowski

First Respondents

and

Jan Malone, Bryant Realty Atlantic Inc.,
Patrick I. Cassidy, Q.C., and Cassidy Nearing Berryman

Second Respondents

Judge:	The Honourable Justice Margaret J. Stewart	
Heard:	July 26 and 27, 2016, in Halifax, Nova Scotia	
Final Written Submissions:	September 9, 21, 26, and 30, 2016	
Counsel:	Ezra B. van Gelder and Caitlin Regan-Cottreau	for the First Respondents
	Augustus Richardson, Q.C.	for the Second Respondents, Patrick I. Cassidy, Q.C. et al
	Ian R. Dunbar and Katie Archibald	for the Second Respondents Jan Malone et.al

By the Court:

Introduction

[1] This application arises out of a failed property sale. The first respondents, Bohdan and Emily Marynowski, agreed to buy a condominium from the applicants, Robin and Dianne Gilbert. The Marynowskis unilaterally terminated the agreement of purchase and sale (APS) prior to closing. They have admitted liability to the Gilberts. The admitted liability reflects the agreed difference between the contract price in the APS and the re-sale price of the condominium after the Marynowskis' breach, plus a $10,000 deposit. They claim, however, that fault for their failure to complete the agreement actually lies with their lawyer and real estate agent. The Marynowskis therefore seek contribution or indemnity from the second respondents: their lawyer, Patrick I. Cassidy, Q.C.; his firm, Cassidy Nearing Berryman (collectively, Cassidy); and their real estate agent, Jan Malone, and her Broker, Bryant Realty Atlantic Inc. (collectively, Malone).

Issues

[2] The issues can be reduced to the following: (1) Is expert evidence required to determine the professional standards of care for either or both of Malone or Cassidy? (2) If no expert evidence is required, was Malone negligent in advising the Marynowskis? (3) If no expert evidence is required, was Cassidy negligent in advising the Marynowskis? (4) If there was negligence by one of both of Malone or Cassidy, did that negligence cause any or all of the Marynowskis' damages? (5) If causation is established, did the Marynowskis fail to mitigate their damages?

Background

[3] In May 2013 Emily Marynowski retained her friend Jan Malone as real estate agent for herself and her former husband, Dr. Bohdan Marynowski in purchasing a condominium in Halifax. The Marynowskis had been separated but had recently reconciled, and their intention was that Dr. Marynowski would retire from his medical practice in Alberta and move to Halifax with Ms. Marynowski. Both Marynowskis had some experience buying and selling real estate. At the time Ms. Malone was retained, Ms. Marynowski owned a house in Halifax, and Dr. Marynowski owned a condominium in Edmonton.

[4] After viewing several condominiums, the Marynowskis decided to make an offer on the Gilberts' property. Ms. Marynowski asked Ms. Malone whether the offer could be made conditional on the sale of the Marynowskis' existing properties. Ms. Malone called Gail Morris, the Gilberts' agent, and inquired about including a "Sale of Buyer's Property" (SOBP) clause in the offer to purchase, which would permit the Marynowskis to withdraw from the transaction if their properties did not sell by a certain date. Ms. Morris indicated that the Gilberts would not agree to this. There is no dispute that the Marynowskis knew that there was no SOBP clause in the agreement of purchase and sale; in fact, the Marynowskis were present when Ms. Malone called Ms. Morris to inquire.

[5] After the Marynowskis discussed the situation, Ms. Marynowski informed Ms. Malone that they wished to proceed with the offer to purchase. Ms. Malone knew that the Marynowskis' intention was to fund the purchase out of the sale of one or both of their properties. She did not anticipate any difficulty with the sale of Ms. Marynowski's Halifax property. She did, however, include a financing clause in the offer, for the Marynowskis' protection, although she was aware that they did not intend to seek financing.

[6] The Marynowskis did not seek legal advice in Nova Scotia before concluding the APS. Dr. Marynowski did show the offer to his lawyer in Alberta, who advised him to see a lawyer in Nova Scotia. Ms. Malone was aware that he was showing the offer to his Alberta lawyer.

[7] The Marynowskis submitted an offer to purchase the Gilberts' condominium on May 14, 2013. The Gilberts made a counter-offer the next day, which the Marynowskis accepted. The sale price was $585,000, including a deposit of $10,000. The agreement did not contain an SOBP clause, but it did include the financing clause, allowing the Marynowskis to withdraw if they could not obtain suitable financing by May 24, 2013. Clause 1 stated, in part, "[i]t is understood and agreed that if the Buyer does not complete this Agreement in accordance with the terms thereof, the Buyer will forfeit the above deposit in addition to any other claim which the Seller may have against the Buyer for the Buyer's failure to complete." The closing date was August 29, 2013.

[8] Ms. Marynowski admitted that she read the APS, including the deposit clause, but she maintained that she did not read it carefully, and did not understand what the scale of potential damages (in addition to the deposit) might be if they breached the agreement. Dr. Marynowski's evidence was that he never read it.

That said, they did sign and initial the document as required, and indicated to Ms. Malone that they would review it. Moreover, Dr. Marynowski never told Ms. Malone that he had not, in fact, received any advice from his Alberta lawyer.

[9] On May 16, 2013, after accepting the Gilberts' counter-offer, the Marynowskis retained a real estate lawyer, Patrick Cassidy Q.C., on Ms. Malone's recommendation. On May 17, Ms. Malone reminded Ms. Marynowski about the need to move quickly to sell the Marynowskis' properties before the closing date, and recommended that she and Dr. Marynowski decide whether they were in a position to proceed prior to the expiry of the financing clause on May 24. Not having heard anything to the contrary, on May 24, Ms. Malone e-mailed Mr. Cassidy, with a cc to Ms. Marynowski, to confirm that "all is good" with the transaction. Mr. Cassidy took this to mean that all conditions precedent had been met, and answered "[e]verything is fine on my end."

[10] Ms. Malone encouraged Ms. Marynowski several times to act quickly to list her house for sale, but this did not occur until late June. Ms. Marynowski initially listed the house for $494,000, a price higher than the $469,000 to $479,000 advised by Ms. Malone. Within a week, after holding a viewing, Ms. Malone was told by other realtors that the price was too high; she informed Ms. Marynowski of this, but Ms. Marynowski did not agree to reduce the price until late July.

[11] In July 2013 Ms. Malone visited the Marynowskis at Dr. Marynowski's home in Edmonton. During that visit, Ms. Malone recalled, Ms. Marynowski was "speculating about what the consequences would be if they changed their minds about the purchase of the condominium." Ms. Malone advised them that if they backed out of the agreement they would lose their deposit "at least", and advised them to consult their lawyer about the potential legal consequences. According to Ms. Malone, Dr. Marynowski insisted that all they risked from failing to close was their deposit, and used the phrase "you can't get blood from a stone." Dr. Marynowski, on cross examination, only disagreed with Ms. Malone's description of his tone when insisting the only loss would be the deposit.

[12] On July 30, 2013, Ms. Marynowski asked Ms. Malone whether the Gilberts would agree to extend the closing date by a month. She retracted her request but not before Ms. Malone made the inquiry with the Gilberts' agent and informed Ms. Marynowski that this was unlikely. (It was confirmed on August 3 that the Gilberts were unwilling to push back the closing.) Ms. Malone also inquired with her broker, Ray Duncan, as to the potential legal repercussions of backing out of the

deal. He advised her that if the Marynowskis failed to complete the agreement, they would almost certainly lose more than their deposit. Ms. Malone conveyed this information to the Marynowskis.

[13] In early August 2013, Ms. Marynowski informed Ms. Malone by text message that she and Dr. Marynowski had changed their minds and did not intend to close the sale of the Gilberts' condominium, nor did they still intend to sell her Halifax home.

[14] Ms. Malone advised Ms. Marynowski to consult Mr. Cassidy. However, the Marynowskis simply arranged with Mr. Duncan to complete the paperwork terminating the sale on August 6, 2013. Dr. Marynowski spoke to Mr. Duncan, who advised him to seek legal advice. However, the Marynowskis terminated the agreement without consulting Mr. Cassidy.

[15] Mr. Cassidy learned that his clients had terminated the sale on August 9, 2013, when he was informed by the Gilberts' lawyer. He e-mailed the Marynowskis that day, stating the following:

> Emily, I wish you had contacted me before terminating the contract.
>
> At this point you are liable for any damages the Sellers have due to your breach of the contract. This is in addition to forfeiting your deposit.
>
> As I indicated below the Sellers' lawyer is certain that their damages will exceed the deposit. They will sue you to recover. You have no defence as all conditions have been met and you are in breach of the contract.
>
> It may be possible to avoid all of this if you agree to buy the unit as promised which will cure the breach and stop any possibility of a law suit. In order to protect you I need to know if this is a possibility or if you are prepared to let the termination stand.

[16] Mr. Cassidy's evidence was that he spoke to both Marynowskis that day. Ms. Marynowski told him that it was her husband's decision, and Dr. Marynowski was unconcerned about the consequences. At some point before terminating the call, Dr. Marynowski said, "you can't get blood from a stone." Like Ms. Malone during the July conversation in Calgary, Mr. Cassidy understood that Dr. Marynowski was unconcerned about any possible consequences of terminating the agreement.

[17] The Marynowskis' understanding of the potential consequences of terminating the agreement in the manner they did is the crucial aspect of their

claim. Their claim that Ms. Malone and Mr. Cassidy are liable to them in negligence rests entirely on the Marynowskis' assertion that they believed that they risked nothing more than the loss of their deposit, and that had they been properly advised, they would have known that this was incorrect and avoided the loss. Ms. Malone and Mr. Cassidy deny that the Marynowskis were as ignorant of the potential consequences as they claim. I am satisfied that the evidence establishes that the Marynowskis were aware that their risk was not limited to the deposit. I conclude that they were aware of this potential, but were indifferent to the details of the potential additional damages. Dr. Marynowski's cross-examination featured the following exchange:

> Q. Alright. Now, as I understood your evidence this morning, and in your Affidavit material, you have taken the position that when you entered into this agreement, you thought you would only be liable for the deposit. That was your initial position. Yes?
>
> A. Correct.
>
> Q. And then I think you acknowledge that while the deposit clause says deposit and something else. Correct?
>
> A. Yes.
>
> Q. You just didn't know what that something else was?
>
> A. Correct.
>
> Q. And a number of times you've said, well, I didn't know the magnitude. Right? You've used that word magnitude a couple of times. Yes?
>
> A. Yes.
>
> Q. And so I take it that when you use – when you say I didn't know the magnitude, what you're really talking about is you didn't know how much you could be potentially liable for. Right?
>
> A. Exactly.
>
> Q. You didn't know whether it was $10 or a $100,000. Yes?
>
> A. Or nothing.
>
> Q. Or nothing. But it could be nothing, it could be $5, it could be $100,000. Correct? That's what you mean by magnitude?
>
> A. Yes.
>
> Q. So you knew there was something, you just didn't know how much?
>
> A. Correct. [Emphasis added.]

[18] I do not accept the Marynowskis' claim that they believed that their damages would be limited to the loss of their deposit. Their own evidence, as is apparent from the above passage of Dr. Marynowski's cross-examination, demonstrates that they were aware when they entered the agreement of what it said about damages. They did not ask either Mr. Cassidy or Ms. Malone what additional damages might be required in the event of default. Beyond that, when it was specifically put to them that the damages from "changing their minds" would exceed the deposit, they either denied that this was the case, as Dr. Marynowski did in the Calgary discussion, or simply showed complete disinterest, as they did after receiving Mr. Cassidy's e-mail and phone calls in August.

[19] I am also satisfied that the Marynowskis never intended to seek financing. They acknowledged that their intention was to finance the purchase out of the sale of one or both of their properties. However, I conclude that they decided early in the process that they would not seek financing in any circumstances. I note the following passage from Ms. Marynowski's cross-examination:

> Q. And you were planning to sell your properties and that was the way you were going to pay for the purchase?
>
> A. Yes.
>
> Q. So if Ms. Malone had contacted you on May 24th, 2013 and said there's a financing clause, you would have told her we're not getting financing, we're selling our properties to pay for this. Isn't that correct?
>
> A. Yes.
>
> Q. And you hadn't even listed your property by May 24th, had you?
>
> A. No.
>
> Q. And Dr. Marynowski hadn't listed his property?
>
> A. Correct.
>
> Q. So neither one of you knew by May 24th that there was any issue or would be any issue selling those properties. Correct?
>
> A. Correct. [Emphasis added.]

[20] Similarly, Dr. Marynowski testified as follows:

> Q. But if you turn to Tab 5, the Agreement of Purchase and Sale that we looked at, flipping through the pages, you'd agree with me that there is no Schedule A, Resale of Buyer's Property in that agreement. Correct?
>
> A. That's correct.

Q. But in the course of making an offer to purchase the condominium, you did ask Ms. Malone if you could put one into the agreement. Correct? Put a schedule making the agreement subject to the sale of your properties?

A. Yes.

Q. You did that. And you understood that the purpose of that clause was to make the sale cancelable if you didn't sell your properties first. That was the point?

A. That was our point, yes.

Q. Alright. And you also recall Ms. Malone calling the vendor's real estate agent to ask whether they would agree to that clause?

A. Yes.

Q. She did that. And you were there when Jan told you I've spoken to the agent and the agent says, no, they won't agree. Correct?

A. Correct.

Q. Which meant that the purchase of the Summer Street condominium was not subject to the sale of your properties and you knew that at the time. Correct?

A. Correct.

Q. And is fair to say, Dr. Marynowski, that the reason you were prepared to go ahead with the purchase anyway is that you were confident your properties would sell first?

A. We were.

Q. Yeah, because your plan was to sell your condominium in Edmonton and have Ms. Emily Marynowski sell her house in Halifax and use the proceeds to buy the condominium. That was the plan?

A. That was our plan.

[21] Even if I accepted that the Marynowskis actually believed when they entered the agreement that the consequences of a default would be limited to the loss of their deposit, they were on notice that this was incorrect, at the very latest, when Ms. Malone advised them in July that a termination would result in damages of the loss of their deposit “at least”, and further advised them to speak to their lawyer. I accept her evidence that Dr. Marynowski aggressively denied this and insisted that they could only lose their deposit.

[22] The Marynowskis were put on notice once again after they gave the notice of termination and received Mr. Cassidy's e-mail advising them to proceed with the closing. (At this point it was not too late for them to close the deal). I note the following evidence from Ms. Marynowski's cross-examination:

> Q. And as I understand it, you understood certainly at that point on August the 9th that the extra, the plus you would be liable for would be difference between the contract price and what –- and the resale price when the Gilberts resold their condominium. You understood that. Correct.
>
> A. I would just have believed that it would have sold for the same amount.
>
> Q. But now you're getting ahead of yourself. Right. The claim that you're now exposed to, you understood on August the 9th that the claim would be for the difference between what you had agreed to pay for it and whatever they sold it for after the breach. Correct? Let me put it this way. You understood and if you didn't close the deal, the Gilberts would have to go out and sell it to somebody else?
>
> A. Correct.
>
> Q. Correct. And you understood that if there was as claim from them, it would be for the difference between the contract price and whatever they sold it to to somebody else?
>
> A. I understand that now. I ---
>
> Q. You understood that though in August of 2013 as well?
>
> A. I don't know that I understood it.
>
> Q. Well, you keep saying –- you've said a number of times, well, I thought they'd resell it for the same price?
>
> A. Correct.
>
> Q. But if they didn't sell it for same price –- and the reason, sorry, and the reason you thought that was because you thought it was a great condominium. Yes?
>
> A. Yes.
>
> Q. And a great spot?
>
> A. Yes.
>
> Q. Yeah?
>
> A. Yes.
>
> Q. And it hadn't been off the market for very long?
>
> A. Correct.
>
> Q. Right. And you didn't know anything about the market. You thought the market was the same. Right?

A. Correct.

Q. So you thought, well, they'll go ahead and sell it for the same price. Right?

A. Yes.

Q. And there won't be any claim because the price will be the same as what we offered to pay?

A. Yes.

Q. Right. So in other words, you understood that there was an importance between the contract price and the resale price. Right? That was a significant issue. Right?

A. I guess I just didn't think that it would be anything significant.

Q. And because you thought it would not be a significant difference, you thought it was okay to go ahead with the termination?

A. Correct.

Q. Because you thought the risk of this additional claim was very small?

A. Yes, I didn't think there would be any. [Emphasis added.]

[23] Similarly, when it was put to him on cross-examination that Mr. Cassidy's e-mail did not concern him because he thought the Gilberts "would be able to resell their condominium for a price close to the contract price", Dr. Marynowski agreed. Elsewhere on his cross-examination, the following exchange occurred:

Q. So it's a matter that's going to stick in your head. You're going to be concerned about it. Weren't you concerned about the fact that you're breaking your deal to buy this condominium?

A. Well, we just -– we really thought that our liability was the deposit.

Q. And the reason you thought the liability was just the deposit was because you thought that they'd be able to resell it for the –- for basically the same price, if not more. Right?

A. Even beyond that. We just -– we –- we're ignorant of the fact that we would lose more.

Q. And the reason you –- I mean, it was a beautiful condominium. Correct?

A. Yes.

Q. In a nice condominium building?

A. Yes.

Q. And so, you thought it was going to resell. Right?

A. Yes.

> Q. And you thought it would resell for basically the same price so that all you would be liable for would be the deposit?
>
> A. That's right. [Emphasis added.]

[24] The Marynowskis' determination to proceed with the termination regardless of advice was further made clear by Ms. Marynowski:

> Q. So against all of what I just mentioned to you, it's my understanding that you had had a discussion with Dr. Marynowski after Mr. Cassidy gave you advice about what you were going to do going forward. Is that correct?
>
> A. We would have discussed it, yes.
>
> Q. And what you discussed was specifically that you believed the condominium would resell and you wouldn't be on the hook for very much beyond the deposit. Is that right?
>
> A. Still just thinking the deposit, yes.
>
> Q. And that's -– but that's what you – after Mr. Cassidy told you what he told you in that email we looked at, the discussion you had with Dr. Marynowski was that the condominium will resell, we're not going to be on the hook for very much. Correct?
>
> A. Correct.
>
> Q. And you felt that it wasn't a very significant risk that you might be liable for more because the condominium was going to sell to somebody else. Is that right?
>
> A. I was hopeful it was going to sell to someone else, yes.
>
> Q. Okay. You didn't ask for any advice from Ms. Malone or Mr. Cassidy on the subject?
>
> A. No.

[25] At times, during the hearing, Dr. Marynowski testified that he did he not understand in either May or August that if the Marynowskis backed out of the deal they could be liable for any difference between the contract price and the resale price obtained by the Gilberts. At discovery, however, he agreed that he was aware of that risk. He also acknowledged and agreed with Ms. Marynowskis's discovery evidence that their potential exposure in addition to the deposit would be based on the differential in the resale price of the Gilberts' condominium, which she believed would not be a "significant amount" given the property's location and market conditions. In May and August, both of them were aware that they faced a differential claim, as one of the potential "other claims" in addition to the deposit if the deal did not close, and they knew the claim amount could be greater than

nothing while believing in a break-even amount based on assumptions. No correction of discovery evidence was filed. At the hearing, Dr. Marynowski stated that it was his belief when he gave the evidence at discovery that that was the truth, both in respect to his knowledge in May and August.

[26] Both Marynowskis' evidence rested on the self-serving theory that they were allowed to remain misinformed by the actions or omissions of their professional advisors. As will be clear from the discussion above, I do not accept their version of events, and specifically reject their claim that they were entirely ignorant of the fact that they risked more than their deposit. Except where otherwise indicated, where either of the Marynowskis' evidence conflicts with that of Ms. Malone or Mr. Cassidy, I accept the evidence of Ms. Malone or Mr. Cassidy. I also reject the suggestion that they would have acted any differently if they had received this information through a line-by-line review of the agreement. It is telling that they took no steps to salvage their position even after they were undeniably on notice that their damages would not necessarily be so limited. Most importantly, they never sought financing in an attempt to close the deal. I place no weight on the Marynowskis' own claims that this fact should be ignored because they personally believed they would not be able to obtain financing. In addition to unrebutted expert evidence suggesting the contrary, there is no credible evidence to support their subjective opinions as to their own ability to obtain financing.

[27] As late as October 2013, the Gilberts' solicitor advised the Marynowskis that the property had been relisted for sale, at a reduced price, and alerting them to potential pending legal action against them. When it was put to him on cross-examination that "[y]ou could have responded to this letter saying we'll buy it for the original price", Dr. Marynowski's response was "by then, we had changed our minds."

[28] Notably, the Marynowskis did not suggest at that time – or at any time before the scheduled closing date – that they had been led astray as to their potential scale of liability by either their real estate agent or their lawyer. That allegation only appeared in December 2014, when the Marynowskis commenced their application against their advisors, after the Gilberts had commenced their application against the Marynowskis the previous July. (The applications were subsequently consolidated, and the Marynowskis admitted liability to the Gilberts in May 2015).

Summary of the parties' positions

[29] The Marynowskis claim that they believed that the only liability they risked in failing to close under the APS was the loss of their deposit. They argue that neither Mr. Cassidy nor Ms. Malone met their professional obligations and that as a result they have incurred liability far in excess of what they believed they were risking in breaching the APS. Their claims against Mr. Cassidy and Ms. Malone arise from two key events: the passage of the date of May 24, 2013, following which the conditions of financing and lawyer's approval were deemed met under the APS; and the Marynowskis' unilateral termination of the APS in early August 2013, prior to the August 29 closing date.

[30] The Marynowskis say that had they known the scale of their potential liability for failing to close, they would not have entered the APS in the first place. They allege that their professional advisors failed to proactively identify potential concerns and to provide the information and advice necessary for them to make informed decisions and protect their interests.

[31] The Marynowskis say that as a real estate agent, Ms. Malone had a duty to explain to them the material terms and conditions of the APS. In their circumstances, they say, this meant pointing out the risk they ran by not having financing arranged with no SOBP clause, in the event their existing properties did not sell. Further, they say, if Ms. Malone did not know the full extent of that risk, she should have advised them to seek legal advice. Having failed to do so, they argue, she acted negligently.

[32] The Marynowskis maintain that Mr. Cassidy, as their lawyer, was required to ask them whether the conditions in the APS for their benefit had been met. If they were not, they say, he had a duty to advise them of potential consequences. They say Mr. Cassidy was obliged to confirm with them that they had met their finance condition, not to rely on Ms. Malone's email, and to advise them of the consequences. By failing to do so, they argue, he acted negligently.

[33] Mr. Cassidy and Ms. Malone both maintain that they did not breach their respective standards of care. Rather, they claim, Marynowskis knowingly risked liability for the damages they now admit that they owe to the Gilberts. They say the Marynowskis ignored advice and made no effort to avoid the loss, notwithstanding that they had the time, means and ability to close the deal. To the extent they owed a duty to their clients, they say they fulfilled it.

[34] Before deciding whether I am in a position to determine whether the Marynowskis have established that either Malone or Cassidy were negligent, however, I must first consider whether there is evidence that can establish their respective standards of care. More specifically, I must determine whether expert evidence is required to establish the professional standards of care at issue in this proceeding.

Expert evidence of standards of care

[35] There is ample authority for the principle that "as a general rule, it will not be possible to determine professional negligence in a given situation without the benefit of expert evidence": *Krawchuk v. Scherbak*, 2011 ONCA 352, [2011] O.J. No. 2064, at para. 132, leave to appeal refused, [2011] S.C.C.A. No. 319. The Nova Scotia Court of Appeal has similarly held that professional malpractice will normally require expert evidence on issues such as standard of care and causation: see *Szubielski v. Price*, 2013 NSCA 151, [2013] N.S.J. No. 685, at para. 12 (dealing with alleged dentist's malpractice).

[36] In *Krawchuk* the Ontario Court of Appeal identified two exceptions to the general rule that determining a professional standard of care requires expert evidence:

> 133 The first exception applies to cases in which it is possible to reliably determine the standard of care without the assistance of expert evidence. As explained by Southin J.A. at para. 44 of *Zink*, this will be the case only where the court is faced with "nontechnical matters or those of which an ordinary person may be expected to have knowledge."
>
> …
>
> 135 The second exception applies to cases in which the impugned actions of the defendant are so egregious that it is obvious that his or her conduct has fallen short of the standard of care, even without knowing precisely the parameters of that standard: see *Cosway v. Boorman's Investment Co.*, 2008 BCSC 1482, at para. 35. As can be seen, this second exception involves circumstances where negligence can be determined without first identifying the parameters of the standard of care rather than identifying a standard of care without the assistance of expert evidence.

[37] *Krawchuk* is instructive in the circumstances of this case. In that case, a real estate agent acted for both sides in a property transaction. The purchaser noted apparent structural defects before the purchase, but the agent assured her – based on information obtained from the vendor – that any structural defects had been

remedied. There was no condition for a property inspection in the offer to purchase. The purchaser subsequently encountered extensive structural and plumbing defects in the house. She sued, *inter alia*, the agent, alleging negligence and misrepresentation. The trial judge dismissed the claims against the agent. The Ontario Court of Appeal held that the trial judge erred in dismissing the claims without expert evidence going to the standard of care. Epstein J.A. said, for the court:

> 123 In my view, the difficulties associated with the trial judge's analysis of Ms. Krawchuk's claims against the real estate respondents started with the issue of the standard of care. His analysis of this issue is, with respect, faulty, for two reasons. First, the trial judge erred by holding that he could determine the standard of care without expert assistance: against this backdrop he refused to admit the only expert evidence tendered on this issue. Then, he erred by not identifying the standard of care. See *Fullowka v. Pinkerton's of Canada Ltd.*, [2010] 1 S.C.R. 132, at para. 80.
>
> 124 As will be seen, the error of primary importance for the purpose of my analysis is the trial judge's ruling that he could assess the various claims without having the benefit of expert evidence. I start with some general observations.
>
> 125 To avoid liability in negligence, a real estate agent must exercise the standard of care that would be expected of a reasonable and prudent agent in the same circumstances. This general standard, a question of law, will not vary between cases and there is no need for it to be established through the use of expert evidence. see *Wong v. 407527 Ontario Ltd.* (1999), 179 D.L.R. (4th) 38 (Ont. S.C.), at para. 23, *Fellowes, McNeil v. Kansa General International Insurance Co.* (2000), 138 O.A.C. 28 (C.A), at para. 11. The translation of that standard into a particular set of obligations owed by a defendant in a given case, however, is a question of fact (*Wong* at para. 23, *Fellowes* at para. 11). External indicators of reasonable conduct, such as custom, industry practice, and statutory or regulatory standard, may inform the standard. Where a debate arises as to how a reasonable agent would have conducted himself or herself, recourse should generally be made to expert evidence.
>
> 126 In Ontario, real estate brokers and salespersons are required to be registered under the *Real Estate and Business Brokers Act*, 2002, S.O. 2002, c. 30, Sch. C, in order to trade in real estate as an agent or broker. At the time of the transaction at issue in this case, the conduct of real estate agents and brokers in Ontario was governed by the Real Estate Council of Ontario's *Code of Ethics*, 1998 (the "Code").
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> 127 Counsel for Ms. Krawchuk tendered the Code into evidence to assist the trial judge in determining the standard of care by which Ms. Weddell's conduct should be measured. While the trial judge accepted this evidence, he refused to admit the expert evidence that Ms. Krawchuk's counsel sought to introduce in

> order to explain the duties of a real estate broker when acting under a dual agency agreement and the requirements of various documents, including the Code. The main basis for the trial judge's refusal to admit the evidence was his view that he did not need the assistance of an expert to determine whether Ms. Weddell met the requisite standard of care: the Code was before him and he was competent to determine, on his own, whether Ms. Weddell had complied with a particular provision.
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> 128 Unfortunately, however, the trial judge did not refer to the Code in his reasons. In fact, he did not address the standard of care that applied to Ms. Weddell's representation of Ms. Krawchuk at all, save for the reference at para. 67 of his reasons where he said that "there was no obligation on Ms. Weddell to inquire further or independently of [the Scherbaks] to discern what if any other structural defects might exist."
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> 129 In my opinion, in the particular circumstances of this case, the trial judge erred in concluding that he could identify the applicable standard of care without the benefit of expert evidence. This error was compounded by his failure to identify the standard of care that he thought was applicable and by his failure to address the import of the Code in relation to the question of the governing standard of care. [Emphasis added.]

[38] The Court of Appeal held that the agent had enough reasons to question the veracity of the vendor's claims about the state of the house that negligence would be found no matter what the standard (paras. 139-157).

[39] In this case the Marynowskis have put forward various industry and professional documents, such as the by-laws of the Nova Scotia Real Estate Commission and the Barristers' Society *Code of Professional Conduct*. They also cite various cases pre-dating the clear recent statements in cases such as *Szubielski* and *Krawchuk*: for instance, *Paul S. Starr & Co. Ltd. v. Watson et al.*, [1973] 1 O.R. 148 (Ont. C.A.); *Whitson v. Boorman Investment Co.* (1989), 6 R.P.R. (2d) 267, [1989] B.C.J. No. 1551 (B.C. Co. Ct.), varied, 15 R.P.R. (2d) 211 (B.C.C.A.); *Cuttell v. Bentz* (1986), 70 B.C.L.R. 85 (B.C.S.C.); *Shulist v. Hunt* (1987), 78 A.R. 188 (Alta. Q.B.); and *Idzan v. Broadfoot*, 2011 ABPC 208, [2011] A.J. No. 750.

[40] As Ms. Malone submits, none of these cases are of particular assistance on the facts of the present case. Arguably *Shulist* bears some similarity, but in that case expert evidence was led, establishing that where the clients had indicated they had no real estate experience, the agent was obliged to recommend a "subject to financing" clause. In the present case, this reasoning could support a duty to suggest an SOBP clause or a financing clause, both of which were in fact addressed.

[41] In respect of solicitor's negligence, the Marynowskis cite *Ingwersen v. Dykstra* (1983), 4 D.L.R. (4th) 355, [1983] B.C.J. No. 2035 (B.C.S.C.), where the plaintiffs learned after completing a purchase that the lot they had bought was not suitable for installing a septic tank, and therefore a house could not be built as they had intended. Their real estate agent had inserted a provision in the offer making the sale contingent on the plaintiffs obtaining septic approval. On inspecting the land, the agent commented that it appeared as if testing had been done. McLachlin J. (as she then was) dismissed a claim of negligent misrepresentation against the agent. She allowed a claim against the lawyer, however, who failed to inquire whether the agreement remained conditional before proceeding to close. McLachlin J. said:

> 13 I accept the contention of counsel for the plaintiffs that upon receipt of the interim agreement with the subject clause relating to septic approval not removed, the solicitor was under a duty to make inquiries as to whether the agreement had been finalized or whether it remained conditional. The subject clause had clearly been included for the benefit of the Ingwersens, his clients. As their solicitor, he had a duty to inquire of them whether the condition had been fulfilled. The answer to that inquiry would have been negative. At that point the solicitor would have been professionally obliged to advise the Ingwersens of the risk they were running if they wished to waive the condition and complete the transaction without obtaining septic approval. Mr. Burke did none of these things. [Emphasis added.]

[42] Similarly, the Marynowskis rely on *Major v. Buchanan et al.* (1975), 9 O.R. (2d) 491, [1975] O.J. No. 2425 (Ont. H. Ct. J.). In this case, an expert witness was called. Goodman J. said:

> 41 In the course of the trial, the plaintiff called as a witness, D.H. Lamont, Q.C., as an expert witness to give evidence as to the duties of a solicitor in acting on behalf of a vendor in a real estate transaction. I was satisfied that Mr. Lamont was well qualified to act as an expert witness in that regard. He indicated that a careful and prudent solicitor should do certain things, most of which would be self-evident to any solicitor having even a slight amount of experience in real estate transactions. I do not propose to deal with all the matters mentioned by him in his evidence but, rather, only with those that are significant to this case.
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> 42 He stated that if any agreement of purchase and sale is subject to the fulfilment of a condition, the solicitor should endeavour to ascertain as soon as possible from the appropriate source whether or not the condition has been fulfilled. If the condition has not been fulfilled, he would be expected to advise his client accordingly. To that, I would add that the solicitor would be expected to

> advise his client of the legal effect of the non-fulfilment of the condition. The defendant solicitor herein did not do so in this case.

[43] The Marynowskis assert that the relevant standards of care need not be established by expert evidence. They submit that their claim involves non-technical matters, and that Mr. Cassidy's and Ms. Malone's alleged acts or omissions are egregious enough to fall within the exceptions to the usual requirement for expert evidence of professional standards.

[44] Mr. Cassidy and Ms. Malone say the professional standards of care at issue here do not fall into either exception. Accordingly, they submit, the court has no standard on which to assess the alleged breaches of duty. I agree. I am not convinced that either exception described in *Krawchuk* has relevance here.

[45] As to the first exception, it is not obvious that a lawyer or a real estate agent has breached a standard of care by failing to anticipate a client's misapprehension of the extent of damages likely if the client deliberately backs out of an agreement of purchase and sale. The precise contours of those duties are not "nontechnical matters" or matters of which a layperson would be expected to draw a conclusion without expert evidence.

[46] As to the second exception, it is not at all clear how the acts and omissions complained of could be characterized as "egregious" conduct that would violate any standard of care. The Marynowskis itemize various alleged omissions by both advisors, and baldly assert that these must be sufficient to constitute egregious breaches of duties owed to them. I am not satisfied that it does. Given that the Marynowskis' entire legal position on this application rests on the claim that they misunderstood the precise magnitude of the damages they could incur if they withdrew from the APS, I am not prepared, in the absence of expert evidence, to attribute professional negligence on the grounds that either of their advisers was obliged to correct them on this very specific point. The question is not, as the Marynowskis' arguments imply, a wide-ranging inquiry into the general scope of agents' and solicitors' duties to clients. Rather, the question is how those duties translate into specific obligations in the specific circumstances.

[47] I am not convinced that there is any basis (absent expert evidence) to find that Mr. Cassidy had a duty in the circumstances to confirm with his clients directly that they actually met their financing condition. Relying on their agency relationship with their realtor, Mr. Cassidy received his clients' confirmation on the status of the financing clause via e-mail from Ms. Malone on the set condition

date. Her May 24, 2013, e-mail stated, "[j]ust want to confirm that all is good with the Marynowski deal." It was not a question of delegation of duty to Ms. Malone. This message, and Mr. Cassidy's own positive confirmation in reply, were copied to their mutual client, who remained silent. Indeed, the Marynowskis paid the deposit on May 24. The content was not a grammatical inquiry, but a positive confirmation of the deal, addressing the only outstanding condition not specific to Mr. Cassidy. His interpretation of Ms. Malone's e-mail, and the non-inquisitorial way it was written, was reasonable. It was confirmatory of the only condition outside of his knowledge. There was no reason for him to question the basis for his clients' agent's statement, or to second-guess the agent and seek direct instructions. There is no evidence to support a finding that Mr. Cassidy failed to meet any duty he may have had in the circumstances to confirm that the condition was met.

[48] As for whether Ms. Malone's conduct met a standard of reasonable skill and care for a real estate agent, and particularly whether she should be held liable for failing to "review" certain terms of the APS, she had no reason to assume that her sophisticated and well-educated clients had not read and understood the APS before they signed and initialled, having specifically agreed to do so. They admitted in their evidence that had they read it (and Ms. Marynowski admitted that she did read it, just not carefully), they would have understood that their liability was not limited to the deposit. Ms. Malone also had no reason to assume that Dr. Marynowski's Alberta lawyer did not review the APS, after Dr. Marynowski said he would show it to him. In view of the knowledge that they actually had, and their own attitude to the agreement, I am satisfied that Ms. Malone reviewing the deposit clause word-for-word with them on May 15 would have made no difference.

[49] The Marynowskis note the remark in *Shulist*, *supra,* that "a realtor ought to expressly discuss conditions with purchasers" (para. 10) as a clear, broad and non-technical description of a realtor's standard of care. *Shulist* is distinguishable in that unlike the purchasers in *Shulist*, the Marynowskis, in particular Dr. Marynowski, relied on "previous experience" with real estate; they appreciated the purpose of the SOBP clause and knew prior to executing the APS that they would not have the benefit of such a clause if their properties did not sell. Moreover, they do argue that their own knowledge (and, implicitly, expertise) should be a sufficient basis to find that they would not have qualified for financing. I do not accept that they actually believed that they would not qualify for financing, or that they believed they needed to sell to be able to complete the purchase. Rather, I conclude from the evidence that they wanted to be mortgage-free; they felt

comfortable with the markets being the source of their proceeds for the purchase; and, if they were unable to sell in time, they were confident the Gilberts' unit would resell in the vicinity of their purchase price. They did not explicitly tell Ms. Malone that their plan was to sell their properties, buy the condominium, and not have a mortgage; although she was aware in a general way that they intended to finance the purchase from the sale of their homes, she was not aware of the full details of what her clients intended, and they did not enlighten her. In particular, they did not inform her that they had no intention of seeking financing in any circumstances. She inserted a routine financing clause to allow them time to consider their ability to proceed without a SOBP clause, but she was aware at that point that they did not intend to seek financing. She assumed – reasonably in the circumstances of which she was aware – that if their confidence in the market was misplaced, financing could be found. She did not know it was never their intention to obtain financing if their properties did not sell. Absent expert evidence, I see no basis to consider this a basis for finding negligence in these circumstances.

[50] A further complication in this case is that two professional standards are involved, not one, and it would be necessary to consider the boundaries between the agent's duty and the lawyer's. As Ms. Malone points out, there is authority to the effect that realtors are not expected to give "what amounts to legal advice": *Johnstone v. Dame* (1995), 49 R.P.R. (2d) 279, [1995] B.C.J. No. 2637 (B.C.S.C.), at paras. 149-150. The question of the potential magnitude of damages the Marynowskis might face as a consequence of abandoning the agreement is essentially a legal question. This is further reason to require expert evidence; absent such evidence, it is not obvious that a lawyer, let alone a real estate agent, would be required to enter into what amounts to a damage quantification exercise in these circumstances.

[51] This is not a case where the court can simply guess at the applicable standards of care. The Marynowskis have led no evidence of custom or industry practice in law or real estate that would provide guidance as to the applicable standards of care. The bylaws of Nova Scotia Real Estate Commission, for instance, state that agents should exercise "reasonable skill and care" and that a realtor should "advise a buyer to obtain expert advice on matters of importance to the buyer." These phrases mean little without the assistance of expert evidence. The Marynowskis also cite various statements in the Barristers' Society *Code of Professional Conduct*. These are not definitive sources of standards of care to be applied by the courts. That would require expert evidence.

[52] As such, there is no standard of care available to the court on which the alleged negligence of either Ms. Malone or Mr. Cassidy could be established. However, even if there was negligence, I am satisfied that the Marynowskis have not established causation, as I will now discuss.

Causation

[53] The requirement for a claimant to establish causation was summarized in *Musgrave v. Ford*, 2016 NSSC 157, [2016] N.S.J. No. 253, where LeBlanc J. said:

> 38 Mr. Musgrave must show that he would not have sustained the damages in question but for the negligence of Mr. Ford. If he would have suffered the loss even if Ford had met the requisite standard of care, then the negligence did not cause the Mr. Musgrave's loss: see *Rice v. Condran*, 2012 NSSC 95; *BSA Investors Ltd v. Mosly*, 2007 BCCA 94 at para 29.

[54] A finding of breach of duty is a separate issue from causation. Causation cannot be assumed from a breach of duty. There must be proof that the breach of duty by the professional caused damage or loss to the client. A client who proves the existence of a duty, a beach of the standard of care, and damages will still be unsuccessful unless a causal link between the breach of the standard of care and the damages is established. In keeping with the traditional "but for" test for causation, the assertion of causation in this case rests on the assertion that the Marynowskis would have behaved differently – and specifically that they would not have entered into the APS – if only Ms. Malone had reviewed the terms and Mr. Cassidy had confirmed the financing condition. In that respect, Neilson J. (as she then was) commented in *Newton v. Marzban*, 2008 BCSC 328, [2008] B.C.J. No. 472, at para. 761:

> 761 In considering that issue, I am mindful that I must resist the tendency to view the plaintiff's decision to settle with "the acuity of vision given by hindsight": *Karpenko v. Paroian, Courey, Cohen and Houston* (1980), 117 D.L.R. (3d) 383 at 398 (Ont. H.C.J.). I adopt the view of Groberman J. in *Sports Pool Distributors Inc. v. Dangerfield*, 2008 BCSC 9 at para. 97, that in cases of professional negligence a bare assertion that a client would have behaved differently if he or she had received proper advice should be viewed with some scepticism. Like Mr. Justice Groberman, I endorse this observation of *Southin J.A. in Hong Kong Bank of Canada v. Touche Ross & Co.* (1989), 36 B.C.L.R. (2d) 381 at 392 (C.A.):
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> > It is always easy for a witness to say what he would have done and for a judge to say he accepts that assertion. But such evidence is, in truth, not

> evidence of a fact but evidence of opinion. It should be tested in the crucible of reason.

[55] It will be clear from my discussion of the facts above that I have concluded that the Marynowskis were the authors of their own misfortune. I have found that even if one or both of their professional advisors had specifically told them that their damages would not be limited to the loss of their deposit, they would not have proceeded any differently. (I have also found that they were in fact aware of this in any event.) They were confident that the sale of the properties would provide the financing, and therefore dismissed the possibility that they could face a larger damages claim if they changed their minds about the purchase, as they ultimately did. This is also why they did not seek financing. They would not have acted any differently had Ms. Malone or Mr. Cassidy told them what they were already aware of about the potential for damages.

[56] As discussed earlier, the Marynowskis ultimately terminated the agreement without seeking legal advice. In Calgary in July, Ms. Malone advised them to speak to a lawyer before terminating the agreement, and told them the damages would not necessarily be limited to the deposit, but neither of the Marynowskis did so. When they terminated, there were not yet any damages, and there was still time to seek financing or to accelerate attempts to sell their existing properties. The Marynowskis did neither of these things.

[57] Accordingly, causation is not established. But even if it were, I further conclude that the Marynowskis failed to reasonably mitigate their damages, for reasons I will now discuss.

Mitigation

[58] I have found that the Marynowskis have not established that any damages they suffered were caused by the other respondents. A similar course of reasoning leads me to conclude that they also failed to reasonably mitigate their damages. As noted earlier, even after they were unquestionably on notice as to the scale of potential damages, the Marynowskis made no effort to find a way to close the deal. Most obviously, they did not seek financing. They ask the court to accept that this was reasonable, based on their own opinion that they would not have qualified for financing. (There was expert evidence suggesting the contrary, to which the Marynowskis essentially respond that the terms would have been less favourable than they would have preferred.) I am satisfied that the refusal to seek financing in itself demonstrates a failure to reasonably mitigate; mitigation attempts might have

been established by evidence that the Marynowskis had in fact been unable to obtain financing. In addition to the failure to seek financing, reasonable mitigation in the circumstances of this case could have been demonstrated by efforts to accelerate the sale. It is clear from the evidence that it would have been open to the Marynowskis to complete the sale before the closing date, and this opportunity was available as late as the time of the re-listing of the Gilbert property.

[59] Having chosen to make no attempt to minimize or avoid the loss, the Marynowskis are in no position to claim full recovery of damages.

Conclusion

[60] Any losses the Marynowskis have incurred resulted from their own conduct. They cannot cast responsibility on to their professional advisors. Accordingly, their claim against the second respondents is dismissed. I will hear counsel by way of written submissions if the parties are unable to agree on costs.

Stewart, J.