SUPREME COURT OF NOVA SCOTIA
Citation: *Urquhart v. MacIsaac*, 2017 NSSC 313

Date: 20171206
Docket: Ant No. 421788
Registry: Antigonish

Between:

Richard Urquhart and Kerry Urquhart

Plaintiffs

v.

Daniel MacIsaac, DJMI Legal Services Limited
and Ronald MacIsaac

Defendants

Judge:	The Honourable Justice James L. Chipman
Heard:	October 23, 24, 25, 26, 27 and 31, 2017, in Antigonish, Nova Scotia
Counsel:	Bruce T. MacIntosh, Q.C. and Kyle Power, for the Plaintiffs Augustus M. Richardson, Q.C. for the Defendants, Daniel J. MacIsaac and DJMI Legal Services Limited Dennis J. James, Q.C. and Kimberley D. Pochini, for the Defendant, Ronald MacIsaac

By the Court:

Overview

[1] In early 2010 Richard Urquhart and Ronald MacIsaac shook hands on a deal. Their agreement meant the MacIsaacs would sell their 11 acre farm property to the Urquharts for $150,000. Both parties hired lawyer Daniel J. MacIsaac to represent them on the property conveyance.

[2] The closing took place in early May, 2010. For the next two and a half years there were no issues. This changed in late 2012 when the Urquharts learned that Ronald MacIsaac's son's company was asserting ownership over critical parts of the farm property.

[3] Lawyers were retained and ownership of portions of the property remained in issue. In November, 2013 the Plaintiffs filed the within lawsuit. The Action was filed under Rule 57 (claims under $100,000).

[4] Daniel J. MacIsaac and his corporation, DJMI Legal Services Limited, filed their Defence as did Ronald and (then Defendant) June MacIsaac. Ronald and June MacIsaac also crossclaimed against Daniel J. MacIsaac, whose Defence to Crossclaim was filed in mid February, 2014, closing the pleadings.

[5] On the eve of trial June MacIsaac became very ill and the parties agreed to an accommodation. Ms. MacIsaac would be dropped as a Defendant and would not give *viva voce* evidence on the understanding that her discovery transcript would be in evidence (as Exhibit 1).

[6] Rule 57 limits pre-trial and trial procedures in a defended action so that it will be more economical. Although this trial consumed five days of evidence and one day of oral argument and involved lengthy briefs and (now) a lengthy decision, I believe the spirit of the Rule was followed. In short, what may have been a much more protracted trial was accomplished relatively swiftly, within four years of the commencement of the lawsuit.

[7] Given that there are two parties and three witnesses who have the MacIsaac surname, throughout the decision I have referred to them as follows:

- Daniel J. MacIsaac – "Danny"

- Ronald MacIsaac – "Ron"
- June MacIsaac – "June"
- Boyd MacIsaac – "Boyd"
- Theresa MacIsaac – "Theresa"

Evidence Received

[8] At trial, 25 exhibits were entered by consent. The Plaintiffs called themselves and real estate agent, Kim Silver. The Defendants, Daniel J. MacIsaac and DJMI Legal Services Limited called Danny MacIsaac and Anne Marie Kavanagh. The Defendant, Ron MacIsaac called himself, Boyd and Theresa MacIsaac.

Background

Richard Urquhart

[9] Mr. Urquhart (d.o.b. November 18, 1965) and his family reside in Buckley, North Wales, United Kingdom. Mr. Urquhart grew up on a farm in Wales and graduated from high school. He attended an agriculture college, achieving a certificate in agricultural engineering.

[10] While in Wales, Mr. Urquhart worked as a supervising project manager. He started a company with his wife in the late 1990's which grew to 20 employees. Mr. Urquhart's work involved pricing contracts.

[11] Mr. Urquhart, his wife and three sons were living in the U.K. at the time of the 2008 global economic slow down. This prompted Mr. Urquhart and his wife to consider emigrating to Canada. Ultimately, they narrowed their choice to Antigonish County, Nova Scotia. Mr. Urquhart was hired by Boyd MacIsaac to work at R.J. MacIsaac Construction Limited (the "Company"). He began working for the Company in March, 2009 and soon thereafter, his wife and two youngest sons moved to be with him in Nova Scotia.

[12] The family initially rented a mini home in the Lower South River area of Antigonish County. Mr. Urquhart became aware of issues with the well water in the area. In particular, he noted water could be brackish and "hard". Additionally, he formed the view that, "wells tend to run dry in the hot summer months".

[13] Mr. Urquhart initially enjoyed his work as project manager for the Company. He got along with Boyd MacIsaac and Mr. MacIsaac completed a favourable labour market opinion form for him which was submitted as part of the process to become a Canadian citizen. Mr. Urquhart described it as, "a green light for me [and my family] to come to Canada". In particular, Mr. Urquhart qualified for the Nova Scotia Immigrant Nominee Program.

[14] By the summer of 2011, Mr. Urquhart's relationship with Boyd MacIsaac soured and in August of that year he was terminated from the Company. This left the Urquharts in a compromised financial position as they had little income and their savings were tied up in the property they purchased at 3933 West South River Road, Dunmore, Antigonish County, Nova Scotia (the "Property").

[15] The Urquharts owned one home during their lifetime in Wales. Mr. Urquhart described buying the home as, "pretty similar to the Canadian way". In describing the transaction, the only real difference pertained to the involvement of lawyers. In his words, "in Wales, we don't get involved in the paperwork aspect". On cross-examination he added, "we would instruct the solicitor, and he would sort out all the contracts". He only had one meeting with the solicitor on the day of the sale. Mr. Urquhart very much relied on his U.K. solicitor for what was a routine transaction.

[16] Mr. Urquhart testified that it took some time for the family's North Wales home to sell. On closing, he was left with a lump sum which would be put to use to purchase property in the Antigonish area.

Kerry Urquhart

[17] Ms. Urquhart is 45 years old. Nearly nine years ago, she and her husband decided on the "adventure" of a new life in Canada. On May 27, 2009, Ms. Urquhart and two of their sons joined Richard Urquhart in Antigonish County.

[18] Like her husband, Ms. Urquhart was born and raised in Wales. She has high school education and college certificates in hairdressing, beauty and business. Ms. Urquhart worked as a career advisor in the United Kingdom before moving to Canada. Upon arriving in Nova Scotia, she volunteered with the Canadian Red Cross and had a part-time job with the Career Resource Centre in Antigonish. She then secured a full-time job for 18 months assisting newcomers settling in Canada. The job ceased when government funding ended.

The Handshake Deal to Buy the Property

Richard Urquhart

[19] In the late summer of 2009 Mr. Urquhart spoke with Boyd MacIsaac, inquiring as to whether there might be hobby type farms for sale in the area. Mr. MacIsaac allowed that his parents were building a retirement home and thus looking to sell their farm. Boyd suggested that he go see his father, Ron MacIsaac, regarding his hobby farm. Mr. Urquhart contacted Ron MacIsaac in November or December 2009 and then attended at the Property. Ron MacIsaac's niece had been given first option on the Property but when this fell through, Mr. Urquhart met with Ron and June MacIsaac in their kitchen sometime in January, 2010.

[20] Mr. Urquhart recalled introducing himself and, "they welcomed me with open arms, they were lovely people". The meeting took place during the evening and he was shown around the inside of the house. Ron MacIsaac showed him a plan which depicted the farm house, a small garage, a barn and land compromising approximately 11 acres. Mr. MacIsaac took a pencil and, "outlined what would be mine". Mr. Urquhart confirmed this drawing to be Exhibit 2, tab 2, an 8"x10" plan of the Property with Ron MacIsaac's pencil markings.

[21] After Mr. Urquhart left the MacIsaac's home, it was agreed that he would return on the weekend to take a look at the Property during the daylight. On the following Saturday, he returned with his wife. Ron MacIsaac offered to take Mr. Urquhart in his pick-up truck to "go have a look" at the outside area. After initially showing Mr. Urquhart his nearby Christmas tree lot, Mr. MacIsaac drove back to the Property and the two men did a partial walkabout. Since the ground was wet and muddy they did not cover all of the area; however, Mr. Urquhart was given a general idea of the boundaries.

[22] Mr. Urquhart was shown a small lot to the east of the barn, referred to as the garden lot. As Mr. Urquhart and Ron MacIsaac did not have the plan with them during their walk, Mr. Urquhart asked Mr. MacIsaac if the garden lot was included in the Property. Mr. Urquhart said that he would like to have the area as it would be suitable as a small paddock for young and sick animals. According to Mr. Urquhart, Ron MacIsaac said the garden lot was not for sale on account of two reasons:

- his wife had an asparagus patch there which she wanted to keep
- Boyd MacIsaac ("at some point") wanted to drill a well in the area of the garden lot

[23] Mr. Urquhart advised he was "a bit disappointed" the garden lot was not for sale. Ron MacIsaac replied that it would not be a problem because as owner of the garden lot, he would permit Mr. Urquhart to use it as part of the sale of the Property.

[24] There was further discussion about the driveway on the Property. Mr. Urquhart was aware of Company employees driving up the roadway during early morning hours. Ron MacIsaac said this did not bother him and his wife but agreed it would be best to stop Company employees from using the driveway. Mr. MacIsaac suggested since Mr. Urquhart was the project manager, he should tell the employees not to use the driveway. In any event, Mr. Urquhart said that he and Ron MacIsaac agreed that the driveway would be shared between themselves.

[25] Mr. Urquhart said, when referring to ownership of the driveway, "we'll split it – we'll both own it". He elaborated, "Ron in discussions said he intended to give me the driveway to the barn and he would have access for June and at some point allow Boyd to use it. Ron said he would speak to his lawyer and get it arranged".

[26] Mr. Urquhart needed the driveway to get access to the barn. He expressed this concern and was reassured as Ron stated, "we'll make sure the road is divided so that June and I can get to the asparagus patch and you can use it too". It was Mr. Urquhart's understanding that each would have "some form of ownership over the road".

[27] On cross-examination, Mr. Urquhart was reminded of his May 11, 2015, discovery evidence where he acknowledged the driveway would also be shared with Boyd MacIsaac as he would need access if he was going to drill his well.

[28] Mr. Urquhart said that when they went on the walkabout, the men stood by the barn and looked north. From this vantage point, it was apparent that there was some Company equipment on the Property, so he spoke to Ron about this. He saw what looked to be old scrap iron and Ron told Mr. Urquhart that he would get Boyd to clean it up.

[29] After touring the Property, Mr. Urquhart walked around the house with his wife and they decided they wanted to purchase the Property. Accordingly, Mr. Urquhart asked Ron MacIsaac his price and was told $150,000. Mr. Urquhart had a "cheaper price in mind", but "Ron stuck to his guns" and he ultimately told Ron (referring to the $150,000) that it was a "fair offer". The men shook hands on the deal and agreed to close when the MacIsaacs were ready to move into their new premises.

[30] Mr. Urquhart agreed the handshake deal was for $150,000 on the condition that Ron MacIsaac would make certain repairs to the house. He anticipated that the encroaching equipment would be removed before the closing. The Urquharts would be entitled to use the garden lot for as long as they owned the farm and would have ownership of the driveway with Ron and June MacIsaac. Mr. Urquhart gave no thought as to what would become of the driveway if Mr. MacIsaac sold the garden lot.

[31] Soon after the agreement was reached, Mr. Urquhart recalled Boyd MacIsaac asking how things went. Mr. Urquhart responded and asked about a recommendation for a lawyer. Boyd MacIsaac suggested Danny MacIsaac whom he characterised as being "fair, he's good on his price".

[32] On cross-examination Mr. Urquhart agreed he would be getting lot 6 and part of lot 4BC shown on Exhibit 2, tab 2. He agreed he was not getting that portion of lot 4BC to the right of the barn. Mr. Urquhart said Ron MacIsaac left him with the impression that Boyd MacIsaac wanted to get water for the nearby Company property. Nothing was said by Ron MacIsaac about the garden lot being sold to anyone else. Mr. Urquhart said that Ron MacIsaac stated, "you can use it as your own for as long as you want".

[33] Mr. Urquhart denied that Ron MacIsaac told him that he was going to get a new survey. On cross-examination, Mr. Urquhart was taken to his discovery to show that he understood Ron was going to have a surveyor divide the property. Mr. Urquhart agreed that he did not ask Ron MacIsaac to provide him with a copy of the new survey. He explained that he was relying on Ron MacIsaac to carry out their agreement.

[34] Mr. Urquhart agreed that nothing was put in writing and that he relied on Ron. He stated on cross-examination, "I expected Ron to get all the legal aspects sorted out". Mr. Urquhart knew at the time of the purchase that Ron was selling other pieces of his land.

[35] On cross-examination Mr. Urquhart agreed that he did not provide any instructions to Danny MacIsaac regarding the various aspects of the agreement. He was relying on Ron MacIsaac to convey the information to Danny MacIsaac and he did not check to determine if all the terms were relayed by Ron MacIsaac to Danny MacIsaac. Mr. Urquhart said he thought he would receive an Agreement of Purchase and Sale ("APS") when he attended at Danny MacIsaac's office.

Ron MacIsaac

[36] Ron MacIsaac is 87 years of age. He is married to June MacIsaac and the couple had ten children. The Property is part of land that Ron MacIsaac has owned since 1952.

[37] With the aid of Exhibit 13, the survey plan, Ron MacIsaac explained the background leading to the subdivision. His son, Boyd MacIsaac, had purchased the Company and, "we decided we better get a survey of the land and assets going to Boyd".

[38] By 2010, the MacIsaacs decided to sell; "June and I were getting older and wanted to build a smaller place on one level". They sold parts of their land to neighbours and, ultimately, the homestead property to the Urquharts. There was a well on the land which was spring fed and offered an "ample supply of water".

[39] Ron MacIsaac recalled Boyd had built a log home across the road from the homestead. He said Boyd put a waterline from his house to the well along with a pump to create his water supply. He estimated that Boyd had used the well for about 20 years and there were never any issues.

[40] Ron MacIsaac traced the background leading to the sale of the Property to the Urquharts. He recalled Richard Urquhart coming to see him and that they both drove and walked around "some of what might be for sale". Mr. MacIsaac described this as the house, barn and about ten acres of land. He formed the impression that Mr. Urquhart was initially not very eager to have the barn included. As for the garden lot, when they did their walkabout, "I told Richard he was welcome to use the garden lot". He said there was never any discussion of selling the garden lot to the Urquharts or anyone else, "part of the garden lot was where June grew her asparagus, she wanted to keep it and they were aware of that".

[41] Ron MacIsaac was taken to Exhibit 2, tab 7, the February 17, 2010, Deed wherein he sold the garden lot to the Company. He agreed that he had discussed this with a surveyor, Stewart MacPhee. He said the Deed was prepared by Danny MacIsaac and confirmed that Danny MacIsaac had always done his legal work. Once he knew he was selling the Property to the Urquharts, he asked Danny MacIsaac to draw up the documents.

[42] Ron MacIsaac was shown Exhibit 2, tab 2, his pencil drawn lines on the plan of the Property. He said he and Richard Urquhart agreed to a price of $150,000. Mr.

MacIsaac added there was a roadway that went up to the shop and barn and, "it was a shared driveway for the Company to access the shop, the Urquharts' to access the barn and for us to use the garden lot".

[43] Ron MacIsaac did not think any house repairs were effected prior to the sale. As for the Company's equipment encroaching on the Property, Ron MacIsaac said Mr. Urquhart complained about this "long after the sale".

[44] Later on, after the handshake deal, Ron MacIsaac said Boyd approached him to inquire of Richard as to whether he would accept $5,000 for the land where the equipment was. When he approached Mr. Urquhart, "Richard said he was not willing to do any favours for Boyd".

[45] Ron MacIsaac agreed when they made their handshake deal, there was no discussion about the water easement for the Company. He agreed there were water problems in some areas of the Dunmore Road.

[46] On cross-examination, Ron MacIsaac agreed that it was Boyd who wanted the garden lot along with a water line for the Company shop. He agreed this was not discussed with Richard Urquhart prior to the closing.

[47] When he signed the Deed, Ron MacIsaac said he gave no thought to the driveway. He assumed it was shared. On further questioning, he clarified that the driveway could be used by him and his wife as well as the Company. He agreed he said that the early morning driving down the roadway would stop and that the Company could use the other end of the driveway. At this point, Ron MacIsaac's memory was refreshed by way of his May 13, 2013, discovery evidence. He agreed he gave testimony that the driveway would be part of the "package" sold to the Urquharts. He allowed that he never understood how the driveway got deeded to the Company. He agreed that when he signed the garden lot Deed he did not think it had anything to do with the driveway. Furthermore, he said that Danny MacIsaac and Boyd did not inform him otherwise. Ron MacIsaac said the first thing he knew about the driveway not being owned by the Urquharts was when Boyd put a steel beam across the driveway.

[48] Ron MacIsaac denied promising Boyd the driveway and barn prior to closing with the Urquhart's, "I certainly don't remember that".

[49] He said he was accustomed to making handshake deals and had proceeded without agreements of purchase and sale in the past. He said he thought the survey

would reflect what he agreed to sell Mr. Urquhart. Mr. MacIsaac expected Danny MacIsaac to work off the survey. In conversations with Danny MacIsaac and Ms. Kavanagh, Ron MacIsaac said he would not have referred to the Property as lot 6 but rather, the homestead property.

[50] Ron MacIsaac told Richard Urquhart that Danny did his legal work and that it might be a good idea for Danny MacIsaac to do both sides of the transaction, but that it would be up to him.

The Notion of an Earlier Agreement

Boyd MacIsaac

[51] Boyd MacIsaac and his wife, Theresa, presently have two homes; one at 28 Acadia Street, Antigonish, and the other at 93 Loch Harbour Road, Little Lake, Antigonish County. Following the sale of their house on the Dunmore Road in 2011, the couple moved into their Acadia Street property.

[52] Mr. MacIsaac is the owner/operator of the Company. He purchased the Company from his father in 1996. The Company is involved in various aspects of construction, specializing in marine construction.

[53] Boyd MacIsaac told of a meeting with his father in fall of 2009. He said that when they met, he understood Richard Urquhart was interested in buying the Property but that his meeting with his father was before their handshake. According to Boyd MacIsaac on the basis of their fall, 2009 meeting, he and his father agreed that the back lot would be conveyed to Boyd. He said his father's price was $5,000 and he agreed to this. Accordingly, he later became annoyed with his father at the back lot having been conveyed to the Urquharts as, "I had understood we owned it".

[54] Boyd MacIsaac added that the garden lot was part of the negotiation with his father in the fall of 2009. He elaborated, "Dad came with a set of plans to my door, his intention was to include the garden lot, the driveway and the back lot for $5,000".

[55] Cross-examined by Mr. Richardson, he said that during the meeting with his father, "I entered into an agreement with Dad regarding the garden lot and back lot. The line was a marked fence and Dad agreed to sell the two parcels".

[56] Boyd MacIsaac referred to a February 17, 2010, "walk about" with Richard Urquhart. He described this as an "information session of what I had done, I told

him the property had been purchased and the lines. I told him and he agreed on what I was doing, that I had to own access into our yard". Mr. MacIsaac estimated that the walkabout took about a half hour. Following this the two took a drive in his truck, "I told Richard he was welcome to use the driveway". He said the Urquharts used the driveway and it was "quite a bit later when I stopped them from using it". Boyd MacIsaac also said that he, "allowed Richard to use part of the lot for a garden".

[57] On cross-examination, it was put to Boyd MacIsaac that he was upset that his father sold the back lot to the Urquharts. Mr. MacIsaac denied this, saying it was "not correct, I was shocked that an error had been made but not upset…I was surprised that a professional surveyor would make an error".

[58] It was suggested that he became aware of the handshake deal back around the time it was made. Boyd MacIsaac denied this stating, "I stayed out of it, I was not around a lot". Mr. MacIsaac could not say how he found out about the deal but when he did, his response was, "Dad, what's going on?".

[59] Mr. MacIsaac said that when he found out that "we no longer owned the back lot, I went to my site supervisor to open up discussions with Richard". Mr. MacIsaac said that he learned Mr. Urquhart was not interested in doing him "any favours" by conveying the back lot to his Company.

[60] Boyd MacIsaac said that when he acquired the garden lot, he did not know his father had a deal with Mr. Urquhart. He added that his contact with Danny MacIsaac was over the water easement. He said he had nothing to do with the driveway but that, "Dad took it to Danny MacIsaac", adding, "when I took Richard by the hand and explained the deal I made with my father, he knew he was going to get a barn without a driveway. He had no adverse reaction to that, he accepted it all".

The Parties Dealings with DJMI Legal Services Limited

Ron MacIsaac

[61] Ron MacIsaac said that he and June went into Danny MacIsaac's office on April 28, 2010. He thought that Danny MacIsaac was in his office but, "I don't think he came out".

[62] Ron MacIsaac said that neither Danny MacIsaac or Anne Marie Kavanagh "ever went through and explained" the conflict of interest Authorization. Ron

MacIsaac said that he signed a number of papers with "sticky tabs where to sign". He agreed there was no discussion of the substance of anything that he and June signed. He added that he was not shown a plan of survey by Danny MacIsaac or Ms. Kavanagh.

[63] Asked whether on a disagreement, Danny MacIsaac would have to stop working for both sides, Ron MacIsaac responded, "I never really gave that much thought. I just sent the plan, I didn't specifically tell Anne Marie the roadway was to be shared".

[64] Ron MacIsaac said that Boyd wanted to have access to the water supply for his Company shop; the request had nothing to do with his house. Mr. MacIsaac did not ask Danny to prepare the water easement but "Boyd must have". He recalled meeting with Ms. Kavanagh to sign the property closing documents in Danny MacIsaac's office.

[65] On cross-examination, Ron MacIsaac agreed that Danny MacIsaac was familiar with the property. He estimated that Danny had attended at the property three or four times. He said that he signed all of the documents in the presence of Ms. Kavanagh and that Danny MacIsaac was not present. Ron MacIsaac said that he never spoke with Danny MacIsaac about the garden lot and that Boyd must have requested this Deed. In describing the office, he said, "it was cluttered up a bit". On cross-examination (referring to the water easement), "June and I didn't come up with the idea. Anne Marie called and said, 'you need to sign the water easement for Boyd'".

Richard Urquhart

[66] After the handshake deal Mr. Urquhart eventually called Mr. MacIsaac's office and spoke with Anne Marie Kavanagh. He recalled a brief conversation whereby Ms. Kavanagh said, "Richard, I've been waiting for your call, you're buying Ron's place". According to Mr. Urquhart, Ms. Kavanagh did not ask about their agreement. Further, nothing was said about a survey, an inspection, plot plan, location certificate, APS, or disclosure statement. Mr. Urquhart recalled Ms. Kavanagh commented on his accent and obtained the spelling of his surname and enquired regarding the mortgage financing with Bergengren Credit Union ("BCU").

[67] The Urquharts had no further communication with Ms. Kavanagh or Danny MacIsaac until the closing date of May 10, 2010. When asked about their expectations of Danny MacIsaac, Mr. Urquhart responded, "we imagined Mr. MacIsaac would be working in the background doing whatever he needed to do to get the paperwork".

[68] Mr. Urquhart was asked how he found out about the May 10, 2010 closing date. He received a call but the proposed closing date was during a time that he was away, so it was agreed it would take place on May 10. The purchase price was confirmed with $30,000 from the Urquharts' savings and $120,000 through their BCU mortgage. The Urquharts selected a ten year amortization as they were committed to paying down on the Property as soon as possible.

[69] Mr. Urquhart and his wife arrived at Danny MacIsaac's office about five minutes before their appointment time on May 10, 2010. While they were waiting, Boyd MacIsaac arrived at the office, "with a big folder under his arm". According to Mr. Urquhart the three exchanged pleasantries and then Boyd MacIsaac went into Danny MacIsaac's office, ahead of the Urquharts. After perhaps seven minutes, Mr. Urquhart said Boyd MacIsaac emerged, asking if the Urquharts were excited about buying the Property. After a brief conversation with Boyd MacIsaac, Mr. Urquhart recalls Ms. Kavanagh showing him and his wife into her office. Mr. Urquhart described Ms. Kavanagh's office as a small work space with, "mounds of files and paperwork everywhere, beside and on Anne Marie's desk". He continued, "Anne Marie was back behind her desk, there were no chairs and we were standing on the other side of the desk. She said, 'Okay, here's your paperwork, sign here'". Ms. Kavanagh presented the couple with a stack of papers with various "sign here" tabs affixed to certain of the pages. "She was whipping through the pages in files and I asked if I could at least read them through before I signed". Ms. Kavanagh had no objection to this request.

[70] Mr. Urquhart went through the papers and, "as I got to the back I saw this well easement, I noticed water so I said I am going to read this in-depth". He inquired of Ms. Kavanagh, "what's this?" and she responded, "a well easement". She explained that Ron MacIsaac had signed this over to Boyd and Theresa MacIsaac so they would be able to get water. Mr. Urquhart said he was unaware of this and that it was, "not on". He said he found this development, "really concerning" and told Ms. Kavanagh, "I'm not happy with this". At this point, Mr. Urquhart asked to see Danny MacIsaac and Ms. Kavanagh went to get him. Shortly thereafter, Danny MacIsaac appeared, asking the couple, "so, what's the problem?". Mr. Urquhart

expressed concern about the well easement, especially given his intention to run a farm with animals. Danny MacIsaac responded, "there's no problem because there is all kinds of water in that well". Mr. Urquhart again expressed his concerns, "I was alarmed" and Mr. Danny MacIsaac responded with, "look, I've told you" and "he spun on his heels and was gone". On cross-examination, he described this as "a short shrift answer". When he was with Danny MacIsaac, he said he was given no "real opportunity to ask questions".

[71] On cross-examination it was put to Mr. Urquhart that he could not have regarded the water easement as a surprise because he knew that Boyd and Theresa MacIsaac were drawing water from the well. Mr. Urquhart emphatically denied this, maintaining at no time did he have a discussion with either Theresa or Boyd MacIsaac about the well water. He said he was shocked about the water easement because Ron MacIsaac had said nothing about it when they made their handshake deal.

[72] Mr. Urquhart said that after Danny MacIsaac left, Ms., Kavanagh was, "very quiet, there was a bit of an atmosphere in the room".

[73] Asked whether Danny MacIsaac provided any legal advice during their brief encounter, Mr. Urquhart replied, "none whatsoever". Questioned about the notion that Mr. MacIsaac may have been present earlier when Ms. Kavanagh presented the documents, Mr. Urquhart replied, "that is a product of pure fantasy".

[74] Mr. Urquhart said that he and his wife were not shown a plan of the Property. Furthermore, he was emphatic that Ms. Kavanagh did not explain the mortgage or anything about conflict of interest. When asked whether he signed an Authorization dated April 28, 2010, he replied, "I have no idea, I don't remember signing on that day". Indeed, in the aftermath of their brief session with Danny MacIsaac, Mr. Urquhart said that the couple were in a state of shock. He went on to explain a feeling of helplessness as the family had left their rental accommodation and had already moved into the Property. He said they asked themselves, "what do we do now, if we don't sign, we don't own the house…what are we going to do, I guess we sign. Wherever she pointed to, we signed. We did not look at the documents, not a single document was explained to us".

[75] On cross-examination Mr. Urquhart disagreed the closing was "consistent with a convivial atmosphere". He reiterated, "it was a shocking experience to find all of the sudden the water easement was upon us. We were numb. We were speechless. We were staring at one another".

[76] When the couple left Mr. MacIsaac's office, Mr. Urquhart said they were given one piece of paper, a Statement of Adjustments.

[77] Mr. Urquhart said the couple had no further contact with Danny MacIsaac's office until Mr. Urquhart called approximately two and a half years later requesting his file. Upon making the request, Mr. Urquhart noted that Ms. Kavanagh expressed surprise that the office had not sent anything to the Urquharts in the days or weeks following May 10, 2010. Exhibit 8 was introduced, consisting of a page and a half of Mr. Urquhart's typed notes of his October 25, 2012, conversation with Ms. Kavanagh. The notes were made at the suggestion of Mr. Urquhart's counsel and they are supportive of his *viva voce* evidence.

[78] Mr. Urquhart was shown Ms. Kavanagh's August 4 and September 15, 2017, statements. Specifically asked about her conflicting versions of their interaction, Mr. Urquhart said he "one hundred percent disagreed with Ms. Kavanagh's will say statements".

[79] Mr. Urquhart was taken to Danny MacIsaac's December 7, 2012, letter addressed to his counsel (Exhibit 1, tab 1, p. 231 – 234). He took issue with numerous assertions made by Danny MacIsaac in his letter.

[80] Mr. Urquhart was shown tab 15 of Exhibit 2, the Company lawyer's December 20, 2012, letter addressed to his counsel. Until receipt of this letter, it was Mr. Urquhart's understanding that the Company had taken the position that there was uncertainty regarding title to the upper lot. With respect to the allegation that Mr. Urquhart trespassed by entering the Company's shop, Mr. Urquhart clarified that he attended there at Ron MacIsaac's invitation. He said he spent two or three days working on repairing the differential on Ron's tractor. In addition to refuting other assertions in the letter, Mr. Urquhart said that he was upset, "because someone was saying they owned our driveway and this was the first we had any idea of this". Mr. Urquhart said the idea that he did not own the driveway came as a shock.

[81] Mr. Urquhart agreed that it was not until Spring of 2015 (during the discoveries) that he learned that Ron and June MacIsaac had conveyed the garden lot. Having said this, he agreed that upon receipt of the file materials from Danny MacIsaac (Exhibit 1, tab 1), this could have been determined; however, "we were concentrating on the lane not the garden lot in 2012".

[82] Mr. Urquhart testified that he was not aware of the Nova Scotia practice which generally involves a property being inspected before an APS is finalized. Mr.

Urquhart knew nothing about the (standard) APS. As to the notion that Danny MacIsaac was doing subdivision work for Ron MacIsaac in the area, Mr. Urquhart testified he had "no idea".

Kerry Urquhart

[83] Ms. Urquhart provided her account of what took place at Danny MacIsaac's office. She recalled waiting with her husband in a "little annex part, when Boyd came in". He asked her if she was looking forward to purchasing the Property and she replied that she had some reservations.

[84] Ms. Kavanagh called the Urquharts into her office, "we were invited over to her desk, piled high with files". There was no space on the desk for writing and when they were given papers to sign they had to do so, "on top of mounds of paper".

[85] Ms. Urquhart said her husband asked if they could look at the paperwork, "he started to read and explain to me and then came to the point of the well easement. Anne Marie was there and Richard said, 'what is this' and she explained, a well easement for Boyd and Theresa to take water from our well as they saw fit". On hearing this, the Urquharts asked to speak with Danny MacIsaac.

[86] Ms. Kavanagh left to get Mr. MacIsaac. She returned about two minutes later, letting them know that Danny MacIsaac would be out to see them. After three or four minutes, "Danny came bustling in to ask what our problem was. He had a very abrupt manner. He asked what our problem was. Richard explained we spotted a well easement. We knew there was water issues and were really concerned. Danny's response was very flippant, "there's all sorts of water in that well, its never run dry". Ms. Urquhart continued by saying no legal options were provided and Mr. MacIsaac did not explain the easement. She stated, "he abruptly walked off. We had never met Danny MacIsaac before. He didn't introduce himself. He didn't discuss any other aspect with us. He said absolutely nothing regarding conflicts of interest". Ms. Urquhart also stated that Ms. Kavanagh provided them no information in these areas. She said, "I felt shocked, the rug had been pulled from under my feet. We just knew the well to our perfect home could be used by someone else as they saw fit. We had no alternative as we had given up our rental and had moved in, we had done a lot of work and fallen in love with the property. We had no option but to sign. We were given no legal advice or anything else".

[87] Ms. Urquhart said it would be obvious to Ms. Kavanagh that, "we had gone very quiet, our shoulders were slumped. We just went about signing documents that

Anne Marie put in front of us". Ms. Kavanagh did not explain anything they signed. They were not shown a survey at Danny MacIssac's office. The meeting began in a cordial fashion but "after the way we were treated by our lawyer, he did not give us the time of day, it was not cordial".

[88] Ms. Urquhart was asked about the possibility that her husband may have met with Boyd MacIsaac in February of 2010 regarding the driveway. In reply, Ms. Urquhart stated, "Richard never relayed any such conversation. We would not have gone ahead. We needed access to the barn".

Boyd MacIsaac

[89] Boyd MacIsaac admitted being present at Danny MacIsaac's office on May 10, 2010. He said he did not understand it to be the closing date and, "I was in Danny MacIsaac's office frequently". He recalled a conversation with Kerry, she was "a little worried" about buying the farmhouse to which he replied, "I'll buy it back". Boyd MacIsaac denied having a conversation with Danny MacIsaac about the Urquharts or the sale of the Property.

Daniel J. MacIsaac

[90] Mr. MacIsaac is 67 years of age. He was born and raised in Antigonish County. Mr. MacIsaac graduated from high school in 1967 and received a B.B.A. from St. Francis Xavier in 1970. He attended at Dalhousie Law School, graduating in 1973. Mr. MacIsaac was admitted to the Nova Scotia Bar on March 5, 1974. For the past 43.5 years he has practiced as a sole practitioner in the town of Antigonish. DJMI Legal Services Limited is Mr. MacIsaac's legal corporation and his offices are located at 30 Church Street, Antigonish.

[91] Mr. MacIsaac described an "evolving practice" which involved Provincial Court appearances when he was starting out. Over the years, he has done a "fair bit of civil litigation" and his practice has centered on property and estate work. Mr. MacIsaac has appeared at all levels of Nova Scotia courts. He describes his law practice as, "a country practice of a general practitioner, mostly property based".

[92] Mr. MacIsaac described with pride being voted as The Casket newspaper's best lawyer in Antigonish for the fourth consecutive year, "every year since they had it, people here trust me". He estimated carrying out 250 property transactions within the last year. With respect to 2010, "you might take off ten to twenty percent". Mr. MacIsaac stated, "for the past 43 years I have searched all of my properties". He

possesses an interest in history and enjoys his time spent in the Registry. Mr. MacIsaac affectionately referred to his office staff as "the girls" consisting of Ms. Kavanagh (for almost 40 years), his wife (34 years) and Betty King (the last 3 years). He described himself and his team as "very dedicated to our work".

[93] Mr. MacIsaac spoke in glowing terms of Ms. Kavanagh. He praised her and noted that she was first in her class at St. Francis Xavier University. He described their working relationship, "over the years the work was divided between her and I. I searched land titles and write the reports and turned it over to Ms. Kavanagh. Ms. Kavanagh would do all the legal documents and handle all the money. The closing would take place and Ms. Kavanagh would register the documents and attend on report letters".

[94] Mr. MacIsaac described the transaction between Ron and June MacIsaac and the Urquharts as, "the Lot 6 conveyance as part of a larger series of transactions". He explained how he would migrate the entire property and then, "the surveyor takes over".

[95] When Danny MacIsaac was asked to describe his relationship with Ron MacIsaac, it brought tears to his eyes. Mr. MacIsaac was under 25 years of age when he first met Ron. He has been Ron MacIsaac's lawyer, "all my legal life". When questioned about a personal relationship, Danny MacIsaac clarified that he had only been to Ron MacIsaac's home on three occasions. He described Ron MacIsaac as, "a paternalistic and caring individual…we operate in a pastural world of complete trust".

[96] Danny MacIsaac was referred to his title search on the Property, noting that it was completed on January 11, 2010. He noted the plan of subdivision was registered at the Registry of Deeds on March 30, 2010.

[97] With respect to how he was retained by the Plaintiffs, "we received word that Mr. and Mrs. Urquhart wanted to buy the property and that he was employed by Boyd. My secretary asked, would I act for both sides and I said yes, on the condition that the property is appraised. Ron and his family go back with me a long time but under no circumstances would I act if the property was not appraised".

[98] Mr. MacIsaac said, "I relied completely on the plan of subdivision". He added, "it's not my function to second guess the surveyor". As for the conveyance of the garden lot, Danny MacIsaac said, "I knew he [Ron MacIsaac] wanted it done and it was going to Boyd. We would have been told by Ron to do this". He said he

had “no recollection” why Ron MacIsaac was conveying the garden lot to the Company. He then stated, “we didn’t deal with Boyd at all regarding this subdivision or the lots. All of our dealings were with Ron. We got Ron in and he signed the Deed”. Mr. MacIsaac said he did not receive instructions from either Ron MacIsaac or Mr. Urquhart on the driveway. He added, “I missed the existence of the road at the time of the closing. I freely admit that”. Danny MacIsaac said there was no discussion with Ron MacIsaac or the Urquharts with respect to the encroachment of materials.

[99] Danny MacIsaac recalled the closing, “the Urquharts came in and Ms. Kavanagh reviewed the documents with them”. This was done in his office and, “that was when I first saw them”. He added, “it is common practice to bring clients into my office, I like to stay in control and demonstrate to clients I have knowledge of title”.

[100] Ms. Kavanagh remained present throughout his interaction with the Urquharts. Mr. MacIsaac estimated he spent 10 – 15 minutes reviewing the documents with the couple. Asked about the water easement, “I raised the water easement with them…look Boyd has water rights here…because I wanted him to know”. He said this advice was met with, “no argument and no dispute, it was completely cordial and harmonious”. Although he did not remember what the Urquharts said, Mr. MacIsaac remained steadfast that it was a “harmonious, uneventful closing”. He added, “I did not give them assurances regarding the quantity of water. That is something no lawyer would do. I didn’t know. A lawyer’s undertaking is a very serious matter”.

[101] Mr. MacIsaac did not know the Urquharts were living in the home prior to the closing. Asked about the lack of an APS, he responded, “if there wasn’t one, there was nothing to prevent Mr. Urquhart from getting up and walking out”. He added that he had been involved in many transactions over 43 years without an APS.

[102] Questioned about the Authorization, Mr. MacIsaac noted that Code of Ethics in place at the time stated that it is preferable to have parties agree in writing that a lawyer would be acting for both sides. He would have advised the parties that, “if there is a conflict, I wouldn’t be able to act for either side then”. He belatedly inserted the number 28 to reflect that the Authorization was first signed on April 28, 2010, by Ron and June MacIsaac, stating, “there is nothing illegal about filling in the date”. He said that he was present when the Urquharts signed the documentation and saw no indication of unhappiness. There was no dispute regarding the easement

and the Urquharts did not raise any questions about him acting for the MacIsaacs as well. He added there was no discussion regarding the Urquharts plans for the Property. Danny MacIsaac said it was, "incomprehensible to me that two years would go by" before he would learn of any trouble.

[103] Mr. MacIsaac was referred to Mr. MacIntosh's November 23, 2012, letter addressed to him outlining the Urquharts' concerns and his December 7, 2012, reply correspondence. Asked whether his letter could be construed as him taking sides, he responded, "I have been 43 years in and out of the Registry of Deeds. It is impossible to take sides when you go into the Registry of Deeds. Regardless of personal affection for in this case, Ron and June MacIsaac, in no way would this affect my professional judgement. When I need to act for both sides, I lay it out, the transaction has to be supported by an appraisal".

[104] On cross-examination, Mr. MacIsaac was taken through his letter in detail. He agreed he had a duty of candor and accuracy when acting for the Urquharts. He agreed he did not disclose his long-standing history of acting for Ron MacIsaac and Boyd MacIsaac. When pressed about the contents of his letter, Danny MacIsaac referred to the old lady who lives in a shoe nursery rhyme and said that the Urquharts were free to contact his office. He said it was not his function to "second guess the surveyor". Having said this, he agreed the survey plan was supposed to be a reflection of the clients' interests because his two clients each had their own interests.

[105] Danny MacIsaac agreed that he did not give the Urquharts any advice regarding the purchase. He acknowledged that he did not meet with the Urquharts until the closing date. He added, "the pith and substance is to make sure it's not a bad deal".

[106] Asked whether he felt that it was his duty to get to know new clients, Mr. MacIsaac responded, "that's too broad a question for me to answer". He continued by saying property work is a technical trade and, "I don't see that there is a duty to know and love my client".

[107] Danny MacIsaac has acted for BCU since becoming a lawyer in 1974. He agreed the BCU standard instructions refer to the presence of an APS. On cross-examination, Mr. MacIsaac agreed it was not appropriate to assume BCU had an APS, "there's a deficit in our instructions". Mr. MacIsaac was pressed on cross-examination as to how he could close a transaction when he believed there was an

APS, yet he had not seen the terms. He responded that he had a purchase price, survey, completed a title search and had an easement, "that was it".

[108] Mr. MacIsaac agreed he should have inquired of the Urquharts whether they had an APS. He agreed there was an absence of a property disclosure statement and, "it would have been helpful". Mr. MacIsaac said he was not aware of the equipment on the Property. As for the water easement he acknowledged it would have been better to tell the Urquharts perhaps a month in advance rather than the 10 – 15 minutes prior to signing the closing documents.

[109] Questioned about the Urquharts reviewing the documents, Danny MacIsaac stated, "in 44 years, I have never seen a client sit down and read all of the documents". As to who reviewed the documents with the Urquharts, he responded, "I was there. I would have been in control. She would have shown the boundaries". Mr. MacIsaac then stated, "I was only involved with the water easement…I may have talked about other documents as well".

[110] Ms. Kavanagh had the package of documents and they went through them together. Having said this, he said he was not "exactly sure" how the Authorization was explained to the Urquharts. He said, "the documents would have been presented by Anne Marie, I can't recall if we would have elaborated or not…after 40 years together it's difficult to draw the line between what one and the other does. I take full responsibility for what went on".

[111] Asked about the swearing of the documents, "I didn't take out a Bible and formally swear them. I watch them sign and then affixed my signature. I would have signed within hours".

[112] Danny MacIsaac described the water easement as, "just a general easement". He was then taken to an April, 1999, water easement in his file, Exhibit 21. He agreed that the "protective measures" afforded to the purchaser in the April, 1999 water easement were not provided to the Urquharts.

[113] Mr. MacIsaac agreed he, "spent very little time reviewing the survey plan with the Urquharts". Furthermore, he did not have a copy of the pencil drawn sketch Ron MacIsaac had prepared. Mr. MacIsaac admitted, "I had no knowledge of what they agreed to". Mr. MacIsaac said he did not agree that he had an obligation to advise the Urquharts once he learned the garden lot was extracted from the conveyance. As for the barn, "I didn't direct my mind to a barn, I just missed it". As for the situation with the driveway, "I did not direct my mind to the driveway. At the time of the

closing I was not aware the roadway encroached over on parcel C". He said he did not think it was a relevant issue but later acknowledged, "clearly it was relevant". He had no discussion with the Urquharts as to whether they should have had a survey or plot plan completed. Mr. MacIsaac questioned whether he could, "seriously recommend" a client spending money on these steps. He did not feel a duty to inform his clients of the option of taking these steps.

[114] Mr. MacIsaac confirmed that he had no discussions with the MacIsaacs regarding ownership and placement of the driveway on the garden lot. He agreed that he did not pick up the file and go through it page by page. Further, if he did a file review he did not note an APS.

[115] Mr. MacIsaac was directed to Exhibit 22, the Nova Scotia Barristers' Society Legal Ethics Handbook, chapters 2 and 6. It was his view that he complied with these provisions and, "it's all about them providing informed consent". With specific reference to the water easement, it was put to Mr. MacIsaac that he informed the Urquharts but gave them no option to agree or disagree. Further, he agreed that both the MacIsaacs and the Urquharts did not intend for the driveway to go with the garden lot (which was conveyed to the Company).

[116] Mr. MacIsaac reported back to BCU within five and half months of the transaction, whereas the Urquharts received their information two and a half years later. Questioned as to whether this could be a double standard, he replied, "I think not". He then agreed that the inordinate delay was a "deficiency". He elaborated that at the time of the closing, Anne Marie's usual words were to the effect that the clients would have their documents within two weeks, adding, "I have no specific recall of this one".

[117] There was no retainer letter. Apart from the succinct title searches, there are no file notes pertaining to the transaction. Indeed, the file is void of notes but for a few of Ms. Kavanagh's entries on the file folder.

[118] On cross-examination, Danny MacIsaac was questioned about the use of the garden lot. He responded, "this would be about the worst thing you could put in an agreement. It would only work if it was harmonious. With a change of circumstances acrimony would break out. I would have very forcefully recommended against that…such a monster".

[119] During cross-examination by Mr. James, Mr. MacIsaac agreed he did not advise the parties that he represented BCU. Further, he did not send copies of the

documents to all three parties. He agreed he was never asked by the MacIsaacs to withhold any information from the Urquharts.

Anne Marie Kavanagh

[120] In December of this year, Ms. Kavanagh will have worked forty years for Danny MacIsaac. Ms. Kavanagh achieved her Bachelor of Secretarial Arts degree from St. Francis Xavier University in May, 1977. She described her role at DJMI Legal Services Limited as having a "main focus on real estate transactions". Over the years, Ms. Kavanagh said the office became "much busier" than when she started in 1977. The past year, she estimated handling about 200 real estate files, an amount somewhat higher than in 2010.

[121] Ms. Kavanagh described the general routine for vendors and purchasers in real estate transactions. She described her role as doing most of the work with Danny MacIsaac, "always searching the titles". Ms. Kavanagh explained that in 2010 the office used an Authorization form when acting for both sides but this has changed and they now use what she referred to as a "Retainer".

[122] Ms. Kavanagh spoke to screenshots of Lot 6 entered as Exhibits 14 and 15. Ron MacIsaac told her that he hired surveyor, Stewart MacPhee, to do a subdivision plan for his property in Antigonish County. She was shown another screenshot, Exhibit 16, featuring a clickable icon stating "view plan". Ms. Kavanagh was then taken to Exhibit 17, the subdivision plan (resulting from clicking on the icon). She said she "definitely" would have looked at the plan, what she described as the "all important document". Further, "we printed it off in an 11" x 17" tabloid size paper from this icon".

[123] During cross-examination Ms. Kavanagh agreed that she could have provided the Urquharts more than she demonstrated through Exhibits 14, 15 and 16. With reference to Exhibit 16, Ms. Kavanagh maintained that she printed off the survey and reviewed it with Urquharts. Of the two surveys depicted on Exhibit 17, Ms. Kavanagh said she enlarged the "lower version" and agreed it did not show the garden lot measurements. Further, she acknowledged measurements were only depicted on the upper drawing (which she did not provide to the Urquharts). Ms. Kavanagh agreed that the circular driveway shown on the plan overlaps with the lineal line. Ms. Kavanagh later acknowledged, "we had no instructions regarding the driveway going with the buyers or sellers". She agreed that the plans at pp. 19 and 20 of Exhibit 2 (part of Mr. MacIsaac's file) were small such that one would

need a magnifying glass to properly read them. It was pointed out that the plan on p. 19 was not included in the file provided to the Urquharts. Ms. Kavanagh said this could have been missed but that "they did see it in the beginning".

[124] Ms. Kavanagh stated that Ron MacIsaac attended at the office and spoke with Danny MacIsaac. It was her understanding that he wanted to subdivide and sell his Antigonish County property to various individuals. She said there had been a preliminary plan and then a revised plan. Ms. Kavanagh was aware that Ron MacIsaac was selling his house to the Urquharts for a purchase price of a $150,000. According to Ms. Kavanagh, Ron MacIsaac thought the Urquharts were going to also retain Danny MacIsaac. She asked Danny MacIsaac if he would act for both parties on the transaction. He replied that provided there was an appraisal, he would be prepared to act for both sides.

[125] Ms. Kavanagh and Mr. MacIsaac looked at the Plan and received a package of mortgage documents from the BCU, "which advised we would be acting for the Urquharts". Accordingly, Ms. Kavanagh contacted Mr. Urquhart and he confirmed this to be the case. Ms. Kavanagh stated, "I would have gone over the purchase price and the mortgage and that Danny would be acting for both sides". Asked about other conversations prior to the closing, Ms. Kavanagh replied, "I think I spoke with them several times". She thought she would have discussed the following:

- fire insurance
- setting the closing date of May 10
- mortgage for $120,000
- that they would have to bring in the down payment and closing cost money
- no deposit would be tendered prior to the transaction

[126] On cross-examination, Ms. Kavanagh said she initially called Mr. Urquhart. She would have confirmed the price of $150,000 but could not remember anything about the survey plan. She added, "I'm sure that I told him that we represented Ron as well and would that be okay, I always say this". She said that she did not have training regarding conflicts of interest but this came from her experience.

[127] Asked why May 10 was chosen, Ms. Kavanagh thought it might have had something to do with waiting on a water test. She said that Ron MacIsaac had come

in earlier to sign the Deed and confirmed there was no APS. She said she had no concerns about this at the time, "it seemed Ron and the Urquharts had the plan done and discussed. There were no issues, everything was going to go through smooth. Normally, Bergengren needs an APS…Mr. MacIsaac and I just assumed they had one".

[128] Ms. Kavanagh was taken to the May 10 day of closing. She said, "I typed up the easement, Mr. MacIsaac would have dictated it. Danny and Ron must have discussed this and then I was asked to prepare". She described having a "standard package" for the Urquharts including:

- Authorization to act for both sides
- Mortgage appraisal and Disclosure Statement
- Mortgage
- Closing Account
- Survey Plan

[129] The Urquharts arrived and were seated in the waiting room. Ms. Kavanagh stated, "I believe I gave them the package to review and then they went into Mr. MacIsaac's office. I asked them to read over the documents, if they had any questions or concerns to bring up. I went over the statement of account and the mortgage terms and payments. I described it as a lien on the land. I would have said if there was no payments, they foreclose. I probably would say the Authorization is because Danny would be acting for both parties".

[130] Asked whether Boyd MacIsaac came into the office just prior to the closing, she said she could not recall. Ms. Kavanagh stated, "if Boyd was in, it had nothing to do with the transaction. He was in and out of the office all of the time signing Statutory Declarations".

[131] Ms. Kavanagh was referred to Exhibit 2, tab 1, p. 62 the Authorization signed by the parties. She said the Urquharts were brought in to Danny MacIsaac's office to sign the papers, "I like him to meet clients so if they have any questions they can ask him". Ms. Kavanagh could not recall the Urquharts asking any questions and that they "seemed fine". The couple reviewed the survey plan and mortgage and then there were some questions about the well easement. They wanted "a little bit

of an explanation… he explained the well on this property would serve Boyd and Theresa's property across the road which was not new. It was just never put on paper". Given this explanation, "I have no recall whether Mr. Urquhart was upset…I have no recall of shock. I thought the tone was fine and that they had no concern, there was no hesitation on the part of signing documents". Ms. Kavanagh said she collected the funds from the Urquharts and they left with the understanding that the office would contact Ron MacIsaac and prepare the cheque for delivery to him.

[132] On cross-examination Ms. Kavanagh said, "I believe Mr. MacIsaac may have told them a burden was on the land". She allowed the Urquharts may have been "a little" surprised.

[133] Ms. Kavanagh was challenged regarding whether or not she showed the driveway to the Urquharts. She agreed that nothing on the plan says "driveway" and what is depicted could be a pathway or lane. Asked whether she observed the driveway was in the garden lot and not in Lot 6, Ms. Kavanagh replied, "nobody brought this up", adding, "Ron never mentioned that the driveway was supposed to be going with Lot 6"; i.e., the Property.

[134] Ms. Kavanagh said the first time "we heard any issues" was when Mr. MacIntosh wrote Mr. MacIsaac on November 23, 2012. She recalled Mr. Urquhart phoning the office (she did not think she took the call) much later to request the file.

[135] Ms. Kavanagh was asked about her memory of specific transactions. While acknowledging it had been over seven years since this transaction and she had been involved with hundreds since, Ms. Kavanagh nevertheless said that she remembered "most of this one". She added, "I do remember closings that are upsetting, acrimonious when people storm out, not this one … if they were upset, I had no idea, there were no raised voices, there was no hesitation to sign those documents".

[136] Ms. Kavanagh agreed the legal description is always contained in the mortgage. Ms. Kavanagh described this mortgage as containing a "short form" description.

[137] Ms. Kavanagh was asked about the process for swearing documents. She said that Danny MacIsaac saw the Urquharts sign documents and like all clients, "we tell them, you are swearing that this is correct".

[138] Ms. Kavanagh did not advise the Urquharts that Danny MacIsaac routinely acts for the BCU. She thought that she must have provided the Urquharts a form

advising Danny MacIsaac also acts for BCU; however, she added, "I haven't found it yet".

[139] It was noted that there was nothing in Mr. MacIsaac's file regarding an APS. Ms. Kavanagh agreed that she could have asked the parties or called the BCU about an APS but did not. Asked whether the file cover notation of "no deposit" was a red flag regarding the lack of an APS, Ms. Kavanagh said that not every such agreement involves a deposit. She was not aware that an APS was not enforceable without a deposit.

[140] Ms. Kavanagh was asked how the deal could be closed if nothing was obtained regarding the terms of the agreement. She responded saying both parties had advised of the $150,000 purchase price and, "it seemed a straight forward deal".

[141] On cross-examination, Ms. Kavanagh was referred to Exhibit 13, the large subdivision plan. She agreed, "you need the big one (survey) to see all of the property distances". She agreed that the enlargement provided to the Urquharts made mention of the garden lot. As to what the Urquharts said in regard to the survey plan, wherein the driveway "disappears", Ms. Kavanagh responded, "they said nothing". She agreed the garden lot had been conveyed in February but that she did not provide a copy of the Deed to the Urquharts.

[142] Ms. Kavanagh confirmed that just over $3,000 in fees were charged to Ron MacIsaac and she characterized the work performed for him as pertaining to, "a large project".

[143] She agreed she did not explain the difference between the September, 2009 and February, 2010 surveys to the Urquharts. Ms. Kavanagh agreed the plan with Ron MacIsaac's pencil markings on it was not in the file and that she had never seen it before. She said she did not know who give the instructions to subdivide the garden lot. As to whether she called the Urquharts to advise them the garden lot was being cut out, she replied, "no, I wasn't sure they were buying that property then".

[144] Ms. Kavanagh agreed that Ron and June MacIsaac would have been in the office on at least three occasions to sign documents referable to the garden lot, well easement and Warranty Deed. She agreed that the two survey plans are different as the garden lot was only created in the latter plan.

[145] Ms. Kavanagh agreed the Authorization was not dated when it was signed. She stated that approximately two and one half years later [April 28, 2010], "we went back and dated the day when Ron and June signed, they were the first to sign".

[146] Ms. Kavanagh said, "from what I remember, the Urquharts were asked to sign the documents in Mr. MacIsaac's office". As to whether she could be mistaken, Ms. Kavanagh allowed, "sometimes clients sign documents on clipboards on the front of my desk". Asked who instructed her to prepare the well easement she replied, "I believe Ron would have".

[147] Ms. Kavanagh acknowledged Danny MacIsaac had familiarity with properties on the Dunmore Road. She said, "he had a lot of dealings with Ron and June going back years, to the 70s". She agreed with the characterization of both Ron MacIsaac and Boyd MacIsaac as long-term, solid clients and that this was not disclosed to the Urquharts.

[148] Ms. Kavanagh agreed that she was assigned to explain documents and, "I think that happens in a lot of law offices, I know in fact". She agreed there were certain symbols on the survey that she was unable to explain.

[149] Ms. Kavanagh was referred to Exhibit 2, tab 1, p. 56 and the Deed Transfer – Affidavit of Value wherein she signed as Agent of the Grantee. She agreed that she did not seek permission to sign in this capacity. She reviewed all of the documents placed in front of the Urquharts with the exception of the water easement and survey plan. She agreed, "very little time was spent on the survey plan".

[150] Ms. Kavanagh said no formal retainer letter was sent to either of the parties.

[151] During Mr. James' cross-examination, Ms. Kavanagh agreed she was not the lawyer and, "just the little old secretary". She agreed she was not asked by Ron and June MacIsaac to withhold any information from the Urquharts. With respect to the Authorization, "that's all we ever discussed back then, I just read the short authorization but we usually clear an area, I may have had a clipboard".

The Question of Whether the Urquharts Knew of the Well Easement Prior to the Closing

<u>Richard Urquhart</u>

[152] Mr. Urquhart was emphatic that in the time before he bought the Property, he knew nothing of a well easement. He said this was not discussed with anyone prior to the closing. The only reference to the well was in relation to Ron's promise to install a new pump. Mr. Urquhart remembered a backhoe driver (Francis) plugging cement and feeding an electric cable out of the side of the well. There was no discussion of a separate line going to Boyd MacIsaac's home. Furthermore, Mr. Urquhart was firm that Boyd MacIsaac was not present when the new jet pump was installed. Mr. Urquhart said that when he observed the well it was muddy and there was no discussion of a line going to Boyd's house. As to the allegation that Boyd talked to Mr. Urquhart about the easement prior to the closing, Mr. Urquhart denied this and noted that Boyd MacIsaac was living in Loch Harbour at the time.

[153] Mr. Urquhart said he was advised by BCU that the Property's well had to pass a water test. The first sample failed because Mr. Urquhart did not shock the well. He was unfamiliar with the Nova Scotia custom of using Javex or the like to assist with cleansing the water. After learning of this from co-workers, Mr. Urquhart recalled shocking the well during the time his family was living in the house, prior to closing. With the permission of Ron and June MacIsaac, the Urquharts had moved into the Property, by Mr. Urquhart's estimate, some four – five weeks prior to closing.

Kerry Urquhart

[154] Ms. Urquhart was asked about her recollection about the shocking of the well. She said that Boyd and Theresa MacIsaac were not present during this time because they were living at their Loch Harbour home. She said that she did not see Boyd or Theresa MacIsaac spend any time at the home across the street which she described as a log cabin.

Ron MacIsaac

[155] Ron MacIsaac said that he told Richard Urquhart he was going to put in a new pump, and after their handshake, installed a deep well submersible pump. Mr. MacIsaac said Richard Urquhart was present when the installation occurred. He also recalled a discussion with Mr. Urquhart concerning the shocking of the well. Mr. MacIsaac thought that Boyd was present because he wanted to be informed when the shocking would take place as it would affect their water supply.

[156] On cross-examination Ron MacIsaac said that Richard Urquhart popped by when he was having the new pump installed. He agreed that the shocking of the well came at some point after this.

Theresa MacIsaac

[157] Theresa MacIsaac is married to Boyd MacIsaac and the daughter-in-law of Ron MacIsaac. She testified that in 2010 she and her family lived next to the Urquharts and in Loch Harbour, "we were always back and forth".

[158] Ms. MacIsaac spoke with Richard Urquhart about the water on the Property. He was concerned about the water and she reassured him there were no problems. She said that before his purchase of her in-laws' property, she asked him to tell her when he was going to shock the well. She could not recall if Kerry Urquhart was involved in the conversation. Ms. MacIsaac could not recall if Mr. Urquhart told her he had shocked the well.

[159] On cross-examination, Theresa MacIsaac agreed that her Loch Harbour home is fully winterized and is assessed at $365,000 and likely has a higher market value. She agreed their house on the Dunmore Road to be a three bedroom, log home consisting of a story and a half over a basement. On further questioning, it emerged that she and her family spent a considerable amount of time at the Loch Harbour home in 2010.

[160] Theresa MacIsaac agreed that there is a water line that goes from what was her in-laws' home to her property on the Dunmore Road. She did not explain the situation in those words when she spoke with Richard Urquhart; however, she recalled telling him that she did not want the Javex to damage her laundry. She initially said this discussion took place before the Urquharts moved in but then said they had a conversation after they moved in.

Boyd MacIsaac

Boyd MacIsaac said that the well on the Property had high iron content and Richard Urquhart, "asked a lot of questions about the well because he was concerned about the volume of water. I told him there was no concern with the water supply. I said to Richard, "make sure you let us know" when you shock the well". Mr. MacIsaac stated "there were three specific times for sure he contacted me" about shocking the well. On cross-examination he stated, "through conversation I knew he did it three

times"… I had three conversations with Richard over the phone and I have very vivid memories of it".

The Company Encroachment

Richard Urquhart

[161] Mr. Urquhart was asked about the presence of the Company debris on the Property, post closing. He recalled discussing this with Ron who responded, "Boyd is working on it". Further, Mr. Urquhart said Boyd MacIsaac raised the issue with him, stating "he shouldn't be in a rush" to remove the equipment. Mr. Urquhart responded by raising the prospect of the Company paying to store the equipment. This was met with, "rent, that's a funny way of pissing your boss off". Going forward Mr. Urquhart said that he relied on Ron, who he thought had it in hand, as he did not want to bother his (then) boss.

[162] On cross-examination he was taken to his May 11, 2015, discovery evidence stating that it would be, "very foolish to demand that his boss remove the equipment".

[163] Mr. Urquhart was taken to a Seller Brokerage Agreement he and his wife signed with Remax's Kim Silver in April, 2012. At this point, the Urquharts had decided to list the Property and included with the agreement was a Property Condition Disclosure Statement. Mr. Urquhart said they signed this document "truthfully" because they had no knowledge of contamination on the Property which they became aware of in the fall of 2012.

[164] Mr. Urquhart recalled a September 2012 visit from Ron MacIsaac which he characterized as "quite strange". Ron MacIsaac told him that he had made a mistake when he conveyed the back lot of the Property to the Urquharts. He told Mr. Urquhart that Boyd was angry with him and asked whether Mr. Urquhart would sell him the back lot. Mr. Urquhart replied that he would have to speak with his legal counsel. He next met with Ron MacIsaac on October 17, 2012, and referred to a diary note which included this statement, "he asked if I had come up with a figure for them to buy the land that is being occupied by R.J. MacIsaac Construction. I told Ron that no I didn't I have a figure in mind and that I had spoken to my lawyers and they would be in contact in due course". Rather than agreeing to sell the land back to Ron MacIsaac, Mr. Urquhart submitted a compliant to the Nova Scotia Department of Environment ("DOE) with respect to the Company, "overbearing on the land".

[165] On January 7, 2013, Mr. Urquhart made a formal complaint to the DOE. On May 7, 2013, DOE issued a clean up order and on May 23, Mr. Urquhart testified a Company crew arrived with machinery including a large excavator and bulldozer. In addition to removing the debris, Mr. Urquhart said they, "ripped up trees and the lawn by our house, I was freaked out and asked what was going on". He had a discussion with Company foreman, Mr. Tisdale, advising him, "I don't want an eyesore as my house is up for sale". Later that day, Mr. Urquhart was visited by Ron MacIsaac; "he had his head down and he said he was so sorry but Boyd was going to put the gear on the side lot". Ron said that he would speak with Boyd and try to broker a deal; however, Mr. Urquhart heard nothing further.

[166] On August 19, 2013, the DOE confirmed their investigation was complete. Less than two months later on October 15, 2013, Mr. Urquhart woke up to find "a huge steel beam across the bottom of the driveway leading to the house". On November 3, 2013, the Urquharts made the decision to re-list the Property. By this point, DOE had given the "green light" regarding the clean up and the Urquharts were able to confirm the Property was not contaminated.

Ron MacIsaac

[167] Ron MacIsaac could not remember any discussion about the encroaching equipment prior to the closing date. On cross-examination, he said there wasn't much material there, perhaps "lumber, pipe and rebar – it wouldn't have been a big deal to clean up". Rather than removing the material, Ron agreed that Boyd put more debris on the Property. With the aid of his discovery transcript Ron MacIsaac testified he did not agree with Boyd putting the contamination on the Urquharts' land.

Boyd MacIsaac

[168] With respect to the alleged contamination, Boyd MacIsaac said, "the Department of Environment report speaks for itself", referring to the May 7, 2013 litter abatement order. He denied that Company bulldozers filled in portions of the land or that there was any oil on the Property. He later had Company employees put the equipment next to the Urquharts' property because, "we were out of land".

[169] Mr. MacIsaac said that the bulldozer operator told him that Richard Urquhart had been cleaning out his barn and placed old equipment on the lot. Mr. MacIsaac denied the in-filling was "intentional" and described the area of encroachment as

"very marginal". Later, Boyd MacIsaac was shown a DOE note indicating that he suggested Richard Urquhart "may have done it". He denied pointing a finger at Mr. Urquhart stating, "I gave them a full history, I didn't place the blame on anyone".

Credibility and Reliability

[170] When embarking on my credibility analysis, I am guided by several cases including; *Novak Estate (R.E.),* 2008 N.S.S.C. 283, at paras. 36 and 37 (per Justice Warner), *Larkin v. Larkin*, 2012 N.S.S.C. 439, at para. 6 (per Justice MacAdam) and *Mi'kmaw Family and Children Services v. H.F.*, 2013 NSSC 310, at paras. 29 and 30 (per Justice Forgeron). This case features diametrically opposed versions of the events of May 10, 2010. The Urquharts testimony cannot be reconciled with the testimony of Danny MacIsaac or Anne Marie Kavanagh. Having observed the witnesses and most importantly, scrutinized their evidence, I am of the overwhelming view that the Urquharts were far more credible than Mr. MacIsaac and his legal secretary. In this regard, I found both Mr. and Mrs. Urquhart gave their evidence in a straight forward, honest manner. Neither were overly rehearsed and their evidence flowed in a routine, albeit compelling manner. I absolutely accept their consistent recounting of what took place at Danny MacIsaac's office on May 10, 2010. Indeed, I am of the view that when they went to see their lawyer about the purchase of their new Canadian home it was a momentous event in the Urquharts' lives. As such, I am not surprised with their level of detail when explaining the events. The Plaintiffs' evidence on the routine at Danny MacIsaac's office was buttressed by Ron MacIsaac's evidence of what happened when he attended there, certainly with respect to the perfunctory manner in which Ms. Kavanagh went through the documents.

[171] Additionally, I accept the Urquharts' evidence of the cavalier way of Danny MacIsaac. In this regard they spoke with conviction and clarity about how he treated them. This evidence is to be contrasted with Danny MacIsaac's shaky recall of what happened. Indeed, I have great difficulty accepting how Mr. MacIsaac can say he recalls he brought the well easement to Richard Urquhart's attention when he cannot recall much else of what transpired on May 10, 2010.

[172] The Plaintiffs' specific evidence in this area is to be contrasted with the theme of Ms. Kavanagh's evidence which was often prefaced with, "we would…". Although Ms. Kavanagh said she had a precise memory of her interactions with the Urquharts, this did not hold up when specifics were put to her on cross-examination. As for Danny MacIsaac, the cross-examination exposed inconsistencies between his

evidence and Ms. Kavanagh's testimony. Furthermore, I found Mr. MacIsaac less than certain in critical areas such as the issue of the driveway. On balance, I did not find his characterization of his session with the Urquharts (routine and cordial) to be consistent with having a distinct memory of telling the couple about the water easement. My view becomes more skeptical when I consider the fact that Mr. MacIsaac has been involved in hundreds of property transactions in the seven and a half years since this one.

[173] While on the topic of credibility, I have to say that I found Boyd MacIsaac to be uncredible during large parts of his evidence. He presented as a very feisty witness who, although not a party, was hardly dispassionate. He was prone to overstatement and parts of his evidence were at complete odds with not only the Urquharts but his father, Ron MacIsaac. For example, Boyd MacIsaac told of a critical meeting with his father in the fall of 2009, whereby he was promised portions of the land ultimately conveyed to the Urquharts. Not only did Ron MacIsaac deny such a meeting ever took place, there is not a shred of evidence to back it up. In this regard, no other witness spoke of having heard of such a meeting nor where there any documents whatsoever to support it having occurred.

[174] With respect to Theresa MacIsaac, she presented as being a most uncomfortable witness. Indeed, I formed the impression she would rather be anywhere else than giving testimony in court. She appeared to be intent on stating Richard Urquhart told her he was going to shock the well; however, she could not be specific about the circumstances and waivered on whether she was even living at her Dunmore Road property at the material time.

[175] As for Ron MacIsaac, he presented as an honest witness but I have reliability concerns. Mr. MacIsaac's advanced age may well have been a factor; during portions of his cross-examination he seemed prepared to agree to anything put to him. Although June MacIsaac did not provide *viva voce* evidence, I carefully reviewed her transcript (Exhibit 1). Even through the printed page it is clear she (rather like her son Boyd) was a feisty witness. In addition she was unable to remember critical details and overall, I have reliability concerns regarding her evidence.

Liability of Ron MacIsaac

[176] It is my determination that a reasonable objective observer would conclude that Mr. Urquhart and Ron MacIsaac reached an agreement at their January 2010

meeting. Further, I regard their handshake agreement as an enforceable agreement. It is well settled that an agreement need not be in writing to be enforceable (see *United Golf Development Ltd. v. Iskandar*, 2008 NSCA 71, at paras. 75 – 76; *Jeffrie v. Hendriksen*, 2015 NSCA 49 at para. 17).

[177] I find that Ron MacIsaac, as vendor and grantor of the Property, breached his agreement with Mr. Urquhart. He failed to exercise due diligence to verify the agreed upon boundaries of the Property. In particular, Ron MacIsaac breached his agreement with the Urquharts by granting a well easement to the Company. Up until the time of the execution of the well easement in April, 2010, Boyd MacIsaac's water line was with the consent of his parents. This vital information was never provided to the Urquharts. Indeed, I find the Urquharts first found out about the well easement on the closing day when Richard Urquhart reviewed the Deed for the first time.

[178] Ron MacIsaac also breached the handshake agreement by failing to have inserted in the Deed a provision that provided the Urquharts with their promised rights of use and occupancy to the garden lot. Furthermore, rather than ensuring the Deed provided ownership of the driveway between Ron and June MacIsaac and the Urquharts, by conveying the garden lot to the Company, Ron MacIsaac allowed the driveway to be exclusively owned by another party. Finally, not only did he fail to have his son remove the encroaching equipment off the Property, he stood by as the Company added debris and contamination to the Property.

[179] I find that after he made the handshake deal, Ron MacIsaac was pressured by his son, Boyd MacIsaac, to convey the water easement, garden lot and driveway to the Company. Ron MacIsaac carried out his son's wishes, thus breaching the handshake deal with Mr. Urquhart.

[180] I do not accept Boyd MacIsaac's evidence that he struck a deal with his father in the fall of 2009 to obtain the water easement, garden lot and driveway (along with the upper lot) of the Property. Rather, it is my determination that Boyd MacIsaac became upset with his father when he learned of the handshake deal. I further find that Boyd MacIsaac asserted pressure on his father to covey the water easement, garden lot and driveway to his Company in the lead up to the May 10, 2010, closing. Ron MacIsaac succumbed to this pressure, such that he breached his agreement with Mr. Urquhart.

Liability of Daniel MacIsaac and DJMI Legal Services Limited

<u>Establishing Standard of Care Without Expert Opinion</u>

[181] When considering professional misconduct, the general rule is that the Court will require expert opinion evidence to establish the standard of care (see *Krawchuk v. Scherbak*, 2011 ONCA 352, at paras. 125-132). Nevertheless, there are exceptions to the general rule. For example, in *Krawchuk* the real estate agent acted for both sides on a transaction and the purchaser received a house with significant structural deficits. Justice Epstein found that there are two general exceptions where expert evidence is not needed; for non technical matters or those of which an ordinary person may be expected to have knowledge (paras. 133-135) and 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 (para. 135).

[182] In *Gilbert v. Marynowski*, 2017 NSSC 227, Justice Stewart considered allegations of negligence against a relator and lawyer who assisted in a failed residential transaction. She found that when the plaintiffs contemplated backing out of the closing, they were repeatedly told by their lawyer and relator that they would lose at least their deposit and likely more. The Marynowskis argued that they were not advised specifically how much more they were liable for, an inquiry they did not make of their advisors. While dismissing the negligence claims, Justice Stewart referenced at paras. 45 and 46, the two core exceptions outlined in *Krawchuk*.

[183] In *Poulain v. Iannetti*, 2015 NSSC 181, the trial judge found that Mr. Iannetti was negligent in failing to provide advice to Mr. Poulain regarding loss of income benefits under the Section B provisions of a standard automobile policy. The appeal was allowed as the Court of Appeal found the trial judge erred in determining that the negligence of Mr. Iannetti caused a loss to Mr. Poulain. Justice Farrar did not disturb Justice Rosinski's discussion of "when is expert evidence required to prove a lawyer is negligent?" (paras. 48 – 52). Given the circumstances of this lawsuit under Rule 57, I find my emphasized portion of the below quote from Justice Rosinski's decision at para. 52 to be applicable:

> In the present case, given the simple circumstances, which are such that I, and any judge of this court, could, and should, take judicial notice of the standard of care required by a lawyer, I am satisfied that expert opinion evidence is not necessary to assist the court in making its determinations, particularly in relation to the standard of care, and whether the settlement regarding the Section A claim hereunder was within the appropriate range of outcomes or not. That said, I am of the opinion that generally speaking the preferred practice should be for the parties to present expert evidence.

[Emphasis added]

Breach of Fiduciary Duty

[184] The Plaintiffs have plead that Danny MacIsaac was professionally negligent by failing to provide the minimal standards expected of a lawyer engaged in real estate practice. Further, they have plead Mr. MacIsaac breached his trust and fiduciary duties to the Plaintiffs by failing to protect their interests and by performing legal services contrary to their best interests.

[185] In *Perry v. Wagner*, 2014 NSSC 179, Justice Edwards had cause to consider what constitutes a breach of fiduciary duty by a lawyer in the context of a summary judgment application. Justice Edwards drew extensively on Supreme Court of Canada authority and his review of the law at paras. 23-28 is of application to this case.

[186] In *Perry*, the Court relied on *Canadian National Railway Co. v. McKercher LLP.*, 2013 SCC 39 where Chief Justice McLachlin reiterated the "bright line rule" at paras. 27 and 28:

> In *Neil*, this Court (*per* Binnie J.) stated that a lawyer may not represent a client in one matter while representing that client's adversary in another matter, unless both clients provide their informed consent. Binnie J. articulated the rule thus:
>
> > The bright line is provided by the general rule that a lawyer may not represent one client whose interests are directly adverse to the immediate interests of another current client -- even if the two mandates are unrelated -- unless both clients consent after receiving full disclosure (and preferably independent legal advice), and the lawyer reasonably believes that he or she is able to represent each client without adversely affecting the other. [Emphasis in original.]
> >
> > (*Neil*, at para. 29)
>
> The rule expressly applies to both related *and* unrelated matters. It is possible to argue that a blanket prohibition against concurrent representation is not warranted with respect to unrelated matters, where the concrete duties owed by the lawyer to each client may not actually enter into conflict. However, the rule provides a number of advantages. It is clear. It recognizes that it is difficult -- often impossible -- for a lawyer or law firm to neatly compartmentalize the interests of different clients when those interests are fundamentally adverse. Finally, it reflects the fact that the lawyer-client relationship is a relationship based on trust. The reality is that "the client's faith in the lawyer's loyalty to the client's interests will be severely tried whenever the lawyer must be loyal to another client whose interests are materially

adverse": *Restatement of the Law Third: The Law Governing Lawyers* (2000), vol. 2, s.. 128(2), at p. 339.

[187] In *Roth Estate v. Juschka*, 2016 ONCA 92 (CanLII) the Ontario Court of Appeal considered an appeal involving a respondent lawyer acting for both sides in a family share purchase transaction. In allowing the appeal and holding the lawyer liable for negligence and breach of fiduciary duty, Justice Feldman's analysis at paras. 31-33 have particular application to the within case:

> A solicitor acting for a client owes the client a fiduciary duty to act in the best interests of that client. The proposition comes from the House of Lords decision in *Boardman et al. v. Phipps*, [1966] 3 All E.R. 721 at 756, where the lawyer's conflict was between his duty to his client and his own self-interest. In this court's 1982 decision in *Davey v. Woolley* (1982), 1982 CanLII 1787 (ON CA), 35 O.R. (2d) 599, (leave to appeal to S.C.C. refused (1982) 37 O.R. (2d) 499n), Justice Bertha Wilson explained that the rule also applies where the conflicting interests are between clients. At p. 602 she stated:
>
> > A solicitor is in a fiduciary relationship to his client and must avoid situations where he has or potentially may develop a conflict of interests. This is not confined to situations where his client's interests and his own are in conflict although it of course covers that situation. It also precludes him from acting for two clients adverse in interest unless, having been fully informed of the conflict and understanding its implications, they have agreed in advance to his doing so. The underlying premise in both these situations is that, human nature being what it is, the solicitor cannot give his exclusive, undivided attention to the interests of his client if he is torn between his client's interests and his own or his client's interests and those of another client to whom he owes the self-same duty of loyalty, dedication and good faith. [Citation omitted.]
>
> In *Woolley*, the court addressed the argument that in rural areas, solicitors commonly act for both sides in real estate transactions where there is full disclosure and both parties consent. The court responded, at p. 602:
>
> > This may well be true although even in the case of a so-called "simple" real estate deal, I doubt that it is good practice. In any event the solicitor unquestionably assumes a dual role at his own risk, the onus being on him in any lawsuit that ensues to establish that the client has had "the best professional assistance which, if he had been engaged in a transaction with a third party, he could possibly have afforded": see *London Loan & Savings Co. of Canada et al. v. Brickenden*, 1933 CanLII 7 (SCC), [1933] S.C.R. 257 at 262

> [affirmed 1934 CanLII 280 (UK JCPC), [1934] 3 D.L.R. 465 (P.C.)].
>
> More recently, in *Waxman v. Waxman* (2004), 2004 CanLII 39040 (ON CA), 44 B.L.R. (3d) 165 (C.A), (leave to appeal refused [2005] 1 S.C.R. xvii (note)), this court held that "[o]rdinarily a lawyer should not act on both sides of a transaction where the interests of one client potentially conflict with the interests of the other. If there are some simple or routine transactions where a lawyer can act for both parties, the share sale is not one of them" (para. 646).
>
> [Emphasis added]

[188] In all of the circumstances, Danny MacIsaac should not have acted for the Urquharts, who can hardly be said to have received the "best professional assistance". In this regard, the evidence demonstrates that he clearly favoured his longstanding clients, Ron and June MacIsaac, over the Urquharts, whom he treated with inattention and disdain.

[189] Based on my review of the evidence and given my credibility determination of preferring the Urquharts' evidence over the evidence of Danny MacIsaac and Anne Marie Kavanagh, I find numerous examples of failings that must attract liability to Danny MacIsaac. In particular, I adopt the following advanced by the Plaintiffs through their counsel's pre-trial brief at pp. 42 – 44:

> 1. Failing to be competent to perform all legal services undertaken or that should have been undertaken on behalf of his clients, and failing to provide a quality of service at least equal to that which lawyers and clients generally expect of a competent lawyer in a like situation, including:
>
> a. Failing to meet with the Urquharts in a timely manner in advance of closing to review and document the proposed transaction, so as to provide them with advice regarding the Statute of Frauds, the advisability of an Agreement of Purchase & Sale, including an attached Property Condition Disclosure Statement and other protective terms of sale, including well related issues, environmental conditions and protective provisions with respect to delivery of possession and quiet enjoyment;
>
> b. Failing to even inquire as to all terms that had been agreed upon between the Vendors and the Purchasers;
>
> c. Failing to ensure that the Urquharts, who as recently landed immigrants were unfamiliar with conveyancing practices in Canada, understood the particulars of their sale and the best practices and legal obligations relating to the purchase of property in Nova Scotia;

d. Failing to advise the Urquharts of the benefits of obtaining a survey of the recently subdivided and unmarked property lines that adequately informed the Urquharts of the boundary locations;

e. Failing to discuss or recommend protective measures with respect to a non-conforming industrial workplace immediately adjacent to the subject residential farmhouse;

f. Failing to document in his working file any advice given or instructions received with respect to the sale of the property by the Vendors and the purchase of the property by the Purchasers;

g. Failing to exercise due diligence in overseeing the process of subdividing the lot which the Vendors and Purchasers had mutually agreed to perform, including a failure to identify and advise against a driveway that was severed from the barn and inadequately depicted on the March 30, 2010 plan, contrary to the intentions of both the Vendors and Purchasers;

h. Failing to provide the Urquharts with their closing documents in a timely manner;

i. Providing a purported Restricted Certificate of Title some 2 ½ years after closing, without the informed consent of his clients;

2. Failing to be candid when advising the Urquharts and failing to disclose relevant information to them, by:

a. In February 2010, agreeing to prepare and convey the garden lot to the Company without first determining whether the boundaries of such subdivision were with the consent of his existing clients the Urquharts and his clients Ron and June and subsequently failing to disclose such conveyance to the Urquharts in a candid, full and timely manner reasonably in advance of closing;

b. In April 2010, agreeing to prepare a well easement for Boyd *et ux* without first determining whether his clients the Urquharts consented thereto and subsequently failing to disclose this conveyance to the Urquharts in a candid, full and timely manner reasonably in advance of closing.

3. Contrary to both standards of practice and the *Legal Ethics Handbook*, acting for the Urquharts, [BCU] and Boyd and Ron and June and the Company in a manner where there was, or was likely to be, conflicting interests by:

> a. Failing to advise the Urquharts at the outset of the transaction that he had historically acted for Boyd, the Company and the Vendors and that he would be simultaneously representing the Vendors, Boyd and the Company in the Urquhart transaction and matters related thereto;
>
> b. Failing to obtain the Urquharts' timely and informed consent to act for them and other parties in the transaction and compelling the Urquharts to execute an Authorization and other related closing documents in a manner that deprived the Urquharts of their free and informed consent;
>
> c. Failing to meet the standards of practice and contractual directions of the Urquharts' mortgagee Bergengren Credit Union Limited, including directions with respect to conflict of interest by representing Bergengren and the provision of a mandatory Agreement of Purchase & Sale;
>
> d. Acting in a personally discourteous and disrespectful manner that breached generally accepted standards of civility and professionalism in the manner in which a lawyer is expected to communicate with clients.

[190] Given the above, although *Roth Estate* dealt with a share purchase, I find significant parallels between that case and this one and Justice Feldman's comments at paras. 53-55 are apposite:

> Had the Juschkas obtained independent legal advice, the lawyer would have exposed the pitfalls in the deal and suggested alternative responses that the Juschkas could have presented before they agreed to be bound. In my view, it was a palpable and overriding error for the trial judge to find that the Juschkas would have signed the documentation "whether they had gone to another lawyer or not". There was no evidence to support that conclusion.
>
> In my view it is clear that at the time of the 1992 transaction, there was a significant potential conflict of interest between the two sets of clients of the respondent which precluded him from acting for both. By doing so, he was in a clear conflict of interest and breached his fiduciary duty to the Juschkas to act in their best interests.
>
> The respondent was also required to bring reasonable care, skill and knowledge to the performance of the services he undertook to perform: *Central Trust Co. v. Rafuse*, 1986 CanLII 29 (SCC), [1986] 2 S.C.R. 147 at 208. In my view, the respondent also fell below the standard of care in the performance of his services for the Juschkas.
>
> [Emphasis added]

Breach of Contract and Negligence

[191] Having regard to Danny MacIsaac's litany of failings, he is also liable to the Urquharts for breach of contract and negligence. In this regard, I refer to Justice Bateman's comments in *MacCulloch v. McInnes Cooper & Robertson*, 2001 NSCA 8, at para. 39:

> The comments of the Supreme Court of Canada in *Central Trust Co. v. Rafuse* (1986), 1986 CanLII 29 (SCC), 75 N.S.R. (2d) 109 (S.C.C.), a case originating in the Supreme Court of Nova Scotia, are instructive. There, the principal issue was whether the liability of a solicitor could exist in both contract and in negligence. The Court confirmed that it could. In the course of that decision LeDain, J., for the Court, described a solicitor's duty of care in terms that are particularly relevant here:
>
> > [58] A solicitor is required to bring reasonable care, skill and knowledge to the performance of the professional service which he has undertaken. See *Hett v. Pun Pong* (1890), 1890 CanLII 35 (SCC), 18 S.C.R. 290, at p. 292. The requisite standard of care has been variously referred to as that of the reasonably competent solicitor, the ordinary competent solicitor and the ordinary prudent solicitor. See Mahoney, "*Lawyers Negligence Standard of Care*" (1985), 63 Can. Bar Rev. 221. Hallett J., in referring to the standard of care as that of the "ordinary reasonably competent" solicitor, stressed the distinction between the standard of care required of the reasonably competent general practitioner and that which may be expected of the specialist. . . .
>
> [Emphasis added]

Summary of Findings of Liability Against Danny MacIsaac

[192] When one reviews the evidence it becomes obvious Mr. MacIsaac fell below the standard of a real estate lawyer in Nova Scotia. His admissions alone demonstrate glaring inadequacies in his performance. Beyond the admissions, there is the matter of Mr. MacIsaac having acted for the purchaser, vendor, mortgagor and mortgagee in the transaction. Further, he acted for Boyd and Theresa MacIsaac as well as the Company, all of whom had interests in the Property. In doing so, he came into possession of information which I find, had it been disclosed to the Urquharts in a timely fashion, would have affected their decision to proceed with the transaction. I also find that Mr. MacIsaac did not disclose vital information to the Urquharts such that he was negligent and in breach of fiduciary duty.

[193] Mr. MacIsaac's duty was to take the proper steps which a reasonably competent solicitor would have taken to effect the transaction so that it would have been in keeping with the agreement. In this he failed. The manner in which he carried out the transaction resulted in problems with the Property. Mr. MacIsaac's breach of duty and standard of care caused the Urquhart's losses. In short, Mr. MacIsaac was negligent in proceeding with the transaction in the manner that he did without express instructions from his clients to do so, obtained after they had been properly advised.

[194] The source of Danny MacIsaac's fiduciary obligation stems from his solicitor-client relationship with the Urquharts. I find that Mr. MacIsaac breached his duty of loyalty and candour to the Urquharts. In this regard, the evidence makes it clear that he did not make full disclosure of all material facts within this knowledge to the Urquharts.

[195] The principle of undivided loyalty precludes a lawyer from acting for clients adverse in interests unless fully informed of the conflict and clearly understanding its implications, they have agreed in advance to him doing so. On a balance of probabilities I find the Urquharts have met their onus in demonstrating they did not provide informed consent. Accordingly, Danny MacIsaac did not adhere to the bright line rule.

[196] I would add that I am of the emphatic view that the Authorization signed by the parties to the transaction in no way absolves Mr. MacIsaac of liability. Indeed, when I scrutinize the manner in which the Authorization was presented to both the MacIsaacs and Urquharts, I find that the document was glaringly unsatisfactory as the potential consequences in Mr. MacIsaac acting for both sides was never properly explained by Ms. Kavanagh. Further, Ms. Kavanagh should not have been the one left to explain this important document and I find that Danny MacIsaac failed in his duty by not addressing the Authorization or touching on the concept of conflict of interest when he met with his clients.

[197] The Urquharts can hardly be said to have received the best professional assistance. On the contrary, they were let down by counsel whom, whether he realized it or not, through his actions on the transaction, favoured his longstanding clients, Ron and June MacIsaac. I find Danny MacIsaac also favoured Boyd and Theresa MacIsaac as well as the interests of the Company over the Urquharts' interests. This favouritism is all the more obvious when one considers the Urquharts were immigrants, not well versed in the customs of property transactions in Nova

Scotia. Indeed, I find Richard and Kerry Urquhart to have been vulnerable at all material times.

Damages

[198] Given my findings that Ron MacIsaac breached the handshake deal, it is my determination he is liable in breach of contract. As for Danny MacIsaac, I have found he was professionally negligent, in breach of contract and in breach of his trust and fiduciary duties to the Plaintiffs. Given my findings of liability against the Defendants, they are jointly and severally liable to the Plaintiffs for damages. Before I deal with specific headings and amounts, it is important to review the evidence in this area.

Richard Urquhart

[199] Prior to purchasing the Property Mr. Urquhart observed that the structure of the house, "looked very good but decoratively it was not upkept". He elaborated, citing these specifics:

- the front door needed changing
- the old pump in the basement was leaking and a new pump would be required (this was done by Ron MacIsaac prior to the closing)
- the rock wall of the basement under the kitchen was in poor shape

[200] When asked about the barn, Mr. Urquhart said he did not have a chance to look at in detail but there were holes in the barn floorboards and the support posts were imbedded in manure.

[201] Mr. Urquhart estimated spending $10,000 - $11,000 on a new heat pump and heating system. It was drawn from a $20,000 advance from the Credit Union. He spent approximately $2,000 - $4,000 on other upgrades. The labour was carried out by Mr. Urquhart with assistance from his wife and friends.

[202] Mr. Urquhart said they moved into the house early because the MacIsaacs had moved out. Specifically, the Urquharts moved in to begin to renovate the downstairs bathroom. Mr. Urquhart and a couple of his friends removed the (rotten) floor and

remodelled the bathroom. This involved new plumbing and, there was an electrical box inspection and upgrade.

[203] It was over the Easter weekend that Mr. Urquhart began to remodel the downstairs bathroom. At this point, the MacIsaacs had almost moved out. The Urquharts did not pay rent during the time that they occupied the home prior to the closing.

[204] Mr. Urquhart was shown the video contained at Exhibit 2, tab 17. The video was taken and narrated by Mr. Urquhart on October 10, 2012. Mr. Urquhart clarified that his references on the video to "he" refer to Boyd MacIsaac. The video shows debris (which Mr. Urquhart attributes to the Company) on the Property, including:

- abandoned machinery
- rusted tanks, cans, pipes and beams
- partially empty containers
- oil drums
- plastic containers
- an old Volvo car
- an excavator bucket
- old veranda rails
- pallets
- piles of milled wood
- logs
- old fencing

[205] In addition to the above, it was Mr. Urquhart's view (expressed in the video and on the witness stand) that there was contamination on his land. In particular, Mr. Urquhart cited the following:

- rainbow effects on the ground on the account of water mixing with oil
- presence of hydraulic oil on the ground from an excavator that had been positioned there
- the stench of diesel and oil emitting from the ground
- presence of fluid (other than water) in the black plastic containers, oil drums and other containers
- green foliage turning to yellow
- ground water with brown scum on the top
- excavator parked on land (even when not running, dripping oil)
- items soaked in diesel fuel

[206] Mr. Urquhart said that the debris was largely placed on swampy land and he expressed concerns about contamination getting into the ground water. He said this contamination could affect his family's drinking water.

[207] Mr. Urquhart was shown a number of photographs contained at Tab 18 of Exhibit 2. He noted the topography of the land around the barn; for example the brook under the tree near the road area which he described as a culvert. With the aid of the photographs he explained how the family kept livestock in a fenced off area around the barn. At one point he had a half dozen horses grazed in this area along with (for a limited time) chickens. Cattle were brought to the barn by way of pick up trucks (fifth wheel trailer attached to the back or full size tractor trailers). With the aid of the photographs he explained how these vehicles would come and go on the shared driveway. Mr. Urquhart testified it would be very costly to build another road to the left of the existing driveway. Such a road would become very steep and it would be a difficult proposition for loading and unloading cattle.

[208] From the time they moved into the Property until December, 2012, the Urquharts were never told any part of what they felt to be their land to be owned by anyone else. He said, "we were flabbergasted" when the Company's counsel wrote a letter in December, 2012, asserting that the entirety of the driveway was owned by the Company. Indeed, (with the aid of the photographs, showing fencing in place on the Property), Mr. Urquhart estimated that he fenced "98%" of the Property. He

referred to photographs showing gardens around the house and allowed, "the gardens were in impeccable order".

[209] Mr. Urquhart said that when they purchased the property there was no heat, lights or water in the barn. He ran these services from the house and engaged an electrician to do the final hook up. He also replaced several exterior wood planks on the barn. Mr. Urquhart recalled clearing three feet of cow manure from the inside of the barn. This revealed the ends of the barn posts which had rotted. In the result, the floor was jacked and new floor posts were installed.

[210] At the time of the listing, Mr. Urquhart said the following renovations had been carried out in the approximate three and a half years they owned the property:

- new back door
- new downstairs bathroom
- all hardwood floors refinished
- replacement of damaged siding
- caulking
- insulation and vapor barrier installed in the basement
- insulation generally placed throughout the house
- new heat pump
- new oil furnace
- repair of the basement drainage system involving the installation of new plastic pipe
- gyprock installed in the basement
- electrical upgrades, including placing power in the barn
- kitchen upgrades including tile floors and counters
- water and power to the barn

- trenching around the property improved
- new barn floor support posts
- fencing for all of the property with the exception of the upper portion that had the Company debris placed on it
- gravel loads placed on the driveway and raked
- pasture recovery involving de-weeding and bush hogging
- improvements to the exterior of the barn including installation of boards and repairing the doorway
- septic system pumped out and cleaned with a new lid installed
- number of small things within the home

[211] In late 2013, the Urquharts made the decision to leave Nova Scotia. They flew back to Wales on December 29. They sold most of their belongings and had no remaining savings. They rented in Wales and continued to pay on the Property mortgage. Ultimately, they reached an arrangement with BCU whereby the house would be sold and if the amount exceeded the outstanding mortgage, it would be spilt on an equal basis with BCU. The Property ultimately sold, with no excess funds to split.

[212] Mr. Urquhart described the entire experience as, "our world turned upside down". He was left feeling anger, upset and worried… "I feel guilty that I put my wife and kids through this". He said his wife has particularly suffered and that she experiences ongoing anxiety. Mr. Urquhart said that he felt the family would have been, "an asset to the country" and referring to officials with the Nova Scotia Immigrant Nominee Program, "we were just the sort of people they wanted".

Kerry Urquhart

[213] Ms. Urquhart said they knew they had to sell the Property when her husband's employment was terminated. She described "tight finances" and placing the house on the market with a "broken heart". She said they initially hoped to downsize and remain in Nova Scotia but ultimately had to move back to Wales. In addition to

finally selling the Property, Ms. Urquhart said they had to sell most all of their possessions in a "fire sale" manner.

[214] Ms. Urquhart described the impact of the entire experience as a "living nightmare". She said the dream of many years had turned into a nightmare and that her mental health took a toll beginning in August, 2013.

Kim Silver

[215] A lifetime resident of the town of Antigonish, Ms. Silver has been a realtor with Remax for more than 12 years. Ms. Silver spoke to the Remax file (Exhibit 2, tab 16) pertaining to the Plaintiffs and the Property. As well, Exhibit 4 was introduced through this witness, Ms. Silver's list of comparable properties in the area proximate to the Property.

[216] Ms. Silver testified the Urquharts, "had done a lot of extensive upgrades" to the property, recalling:

- installing running water to feed the livestock
- renewed the barn floor
- fenced the fields for livestock
- well and septic upgrades
- installing a heat pump
- electrical and plumbing upgrades

[217] On cross-examination, Ms. Silver said the Urquharts provided her with a list of upgrades. She said the Urquharts told her about the shared well and she took this into account when she recommended a price and the Urquharts agreed to a listing price of $219,000. The Seller/Broker Agreement with Remax was signed April 23, 2012. The Property did not sell and was eventually relisted on November 3, 2013. After a series of price reductions on July 7, 2014, the price was down to $150,000. Three conditional offers fell through. On April 28, 2015, the Urquharts executed a Quit Claim Deed in favour of BCU. Ms. Silver ultimately sold the property for BCU for $120,000, with a closing date of September 15, 2015.

[218] When she listed the property for the second time, Ms. Silver said prospective buyers had several concerns, including:

- lack of road access to the barn
- the well was to be shared with the across the street neighbour
- there was a salvage yard to the right of the home

[219] Ms. Silver noted that the Urquharts had moved out and the home had, "deteriorated faster with no one living in it". She recalled water damage to the home.

Quantification of Damages

[220] The Defendants are liable for damages flowing from their breaches of duties. *Granville Savings and Mortgage Corp. v. Slevin*, [1993] 4 SCR 279, involved an allegation of solicitor's negligence arising from a failure to advise. At p. 281 the Supreme Court of Canada held the respondents were liable "for damages flowing from the breach of their duty".

[221] In the Plaintiffs' pre-trial brief, they assert that the loss in the value of the Property is in excess of $100,000. By contrast, the Defendants Daniel J. MacIsaac and DJMI Legal Services Limited suggest these damages are in the range of $10,000 - $40,000.

[222] When I assess this claim, I am especially mindful of the *viva voce* evidence of the Plaintiffs and Kim Silver as well as the relevant Exhibits; including:

- Exhibit 2, tab 16, pp. 19-31, the June 27, 2014 Barkhouse Appraisal
- Exhibit 5, the July 14, 2014 Walsh Appraisal

[223] At the time of the purchase by the Urquharts, the Property had an appraised value of $155,000. The two subsequent appraisals were for $170,000 and $160,000, respectively. Further, there is Ms. Silver's evidence that the Property might have been initially listed by the Urquharts for $219,000. Ms. Silver was not called as an expert witness and I am dubious regarding her much higher estimate of the Property's value. Having said this, I have reflected on the voluminous capital upgrades and repairs carried out by the Urquharts, through their "sweat equity" and expenditures in the realm of $20,000.

[224] The fact that the Plaintiffs did not present expert evidence in this area should not deprive them of their entitlement to damages. Having said this, the Court's task is more difficult without expert assistance. In the circumstances I have bourne all of the evidence and arguments in mind in fashioning what I believe to be an appropriate special damages appraisal.

[225] As a starting point it is without debate that the Urquharts invested $30,000 in the Property as a downpayment. By the time they moved back to Wales, the funds were gone. In this regard, we know the Property ultimately sold for $120,000; $30,000 less than what the Urquharts paid for it.

[226] The Property had become devalued on account of the factors addressed by Ms. Silver. The lack of driveway access to the barn and presence of what essentially looked like a junkyard (Company debris stored on the garden lot) next door, would undoubtedly have deterred prospective purchasers and reduced the Property's value.

[227] I find the reduced value of the property to be the aforementioned $30,000. To this amount I would add that the Urquharts are entitled to their monetary "sweat equity" which prompted Ms. Silver to suggest a listing price of $219,000 in the spring of 2013. Once again, I am skeptical of this figure; however, on balance I am of the view that the Urquharts' significant Property improvements and beautification (see the various exhibited photographs) attract an additional damages figure of $45,000.

[228] In the result, I find the Defendants jointly and severally liable to the Plaintiffs for special damages of $75,000 ($30,000 plus $45,000) as a consequence of the decreased market value of the Property. In addition, I permit the claim for $5,000, the amount BCU charged the Urquharts as a repossession fee.

[229] The Plaintiffs sought additional damages from Daniel J. MacIsaac on account of his negligence, breach of contract and breach of fiduciary duty. As addressed in *Dhillon v. Jaffer*, 2014 BCCA 215, the court must be cautious in circumstances such as the Urquharts' claims for general damages for mental distress. At para. 52, the B.C. Court of Appeal refers to *Keirstead v. Piggott*, 1999 NSSC 3, a case extensively relied on by the Plaintiffs in their initial pitch that "cumulative" general and aggravated damages should be assessed at $70,000. Justice Newbury at para. 53, referring to the Supreme Court of Canada decision in *Mustapha v. Culligan of Canada Limited*, 2008 SCC 27, determines that in such cases as *Keirstead* (where mental distress, inconvenience and anxiety fall short of psychiatric injury) general damages should not be awarded. Indeed at para. 55, the B.C. Court of Appeal stated

in *obiter* that this threshold requirement of personal injury, "would seldom be met in cases of solicitor's negligence".

[230] The Supreme Court of Canada recently re-visited negligence claims for mental injury in *Saadati v. Moorehead*, 2017 SCC 28. Justice Brown's comments at para. 37 stand for the proposition that mere psychological upset or trivial annoyances, anxieties and fears are not compensable:

> None of this is to suggest that mental injury is always as readily demonstrable as physical injury. While allegations of injury to muscular tissue may sometimes pose challenges to triers of fact, many physical conditions such as lacerations and broken bones are objectively verifiable. Mental injury, however, will often not be as readily apparent. Further, and as *Mustapha* makes clear, mental *injury* is not proven by the existence of mere psychological *upset*. While, therefore, tort law protects persons from negligent interference with their mental health, there is no legally cognizable right to happiness. Claimants must, therefore, show much more — that the disturbance suffered by the claimant is "serious and prolonged and rise[s] above the ordinary annoyances, anxieties and fears" that come with living in civil society (*Mustapha*, at para. 9). To be clear, this does not denote distinct legal treatment of mental injury relative to physical injury; rather, it goes to the prior legal question of what constitutes "mental injury". Ultimately, the claimant's task in establishing a mental injury is to show the requisite degree of disturbance (although not, as the respondents say, to show its classification as a recognized psychiatric illness).
>
> [Emphasis added]

[231] Given the evidence marshaled in this case, I am not satisfied the Urquharts qualify for general damages for mental injury. In this regard, their evidence was limited with no documentary support or expert opinion. Nevertheless, this does not end the matter. In this regard, I return to my finding of breach of fiduciary duty. In *Strother v. 3464920 Canada Inc.*, 2007 SCC 24, Justice Binnie noted at para. 74:

> This Court has repeatedly stated that "[e]quitable remedies are always subject to the discretion of the court". See, e.g., *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245, 2002 SCC 79 (CanLII), at para. 107; *Hodgkinson v. Simms*, 1994 CanLII 70 (SCC), [1994] 3 S.C.R. 377, at p. 444; *Canson Enterprises Ltd. v. Boughton & Co.*, 1991 CanLII 52 (SCC), [1991] 3 S.C.R. 534, at pp. 587-89, and *Côté*, at paras. 9-14. In *Neil*, the Court stated emphatically: "It is one thing to demonstrate a breach of loyalty. It is quite another to arrive at an appropriate remedy" (para. 36).

[232] It is well settled that the proper approach to equitable damages for breach of fiduciary duties is restitutionary. Having said this, as pointed out in *Martin v. Goldfarb* (1998), 163 D.L. R. (4th) 639 (Ont. C.A.), at para. 34:

> The trial judge made a full analysis of three decisions of the Supreme Court of Canada: Air Canada v. M & L Travel Ltd., [1993] 3 S.C.R. 787, Canson Enterprises Ltd. v. Boughton & Co., [1991] 3 S.C.R. 534 and Hodgkinson v. Simms, [1994] 3 S.C.R. 377. I agree with his analysis and adopt his final reconciliation of the opinions expressed by the members of the Supreme Court when he said:
>
> > Regardless of the doctrinal underpinning, plaintiffs should not be able to recover higher damage awards merely because their claim is characterized as breach of fiduciary duty, as opposed to breach of contract or tort. The objective of the expansion of the concept of fiduciary relationship was not to provide plaintiffs with the means to exact higher damages than were already available to them under contract or tort law.
> >
> > [Emphasis added]

[233] Punitive damages are designed to address the purposes of retribution, deterrence and denunciation (see *Whiten v. Pilot Insurance Co*., 2002 SCC 18, at para. 43). Punitive damages focus on the defendant's misconduct, not the plaintiff's loss (*Whiten*, para. 73). These are exceptional damages awarded only if there has been highly reprehensible conduct. They are awarded only if compensatory damages do not adequately achieve the objects of restitution, deterrence and denunciation.

[234] Despite Danny MacIsaac's lapses and what I have described as a litany of failures, I am unable to find that his conduct was so malicious, oppressive or high handed to offend the Court's sense of decency. In the result, I am not prepared to punish Mr. MacIsaac by awarding the Urquharts punitive damages. Rather, I am of the view that the within special damages coupled with an appropriate costs award will ultimately provide the Plaintiffs suitable relief.

[235] Given all of the circumstances, I decline to order punitive damages; however, I am awarding additional special damages of $904 representing reimbursement of the legal fees and disbursements paid by the Urquharts to Mr. MacIsaac.

[236] In the result, the Urquharts shall have judgment jointly and severally against the Defendants for $80,000. Further, they shall have judgment against Daniel J. MacIsaac and DJMI Legal Services for an additional $904. I also award the

Plaintiffs prejudgment interest and costs, with the latter subject to my comments above in respect of Daniel J. MacIsaac and DJMI Legal Services Limited. If the parties cannot agree on costs amounts, I will receive written submissions within 30 days of this decision.

Chipman, J.