CITATION: Farid v. Brunt, 2025 ONSC 2117
OSHAWA COURT FILE NO.: 92841/15
DATE: 20250404

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
Muhammad Farid and Naseem Farid	)	
	)	Muhammad Farid and Naseem Farid,
Plaintiffs	)	Plaintiffs, Acting in Person
	)	
– and –	)	
	)	
Gerald Byron Brunt also known as Gerald B. Brunt	)	
	)	Robert Macdonald and Alexander
Defendant	)	Evangelista, Counsel for the Defendant
	)	
	)	
	)	
	)	**HEARD:** May 13, 14, 15, 16, 17, 21, 22, 23,
	)	24, 27, 29, 30, 31, June 3, 4, 5. 6, 7 and 11,
	)	2024, followed by written submissions

REASONS FOR DECISION

S.E. FRASER J.:

I. Overview

[1] The purchase of a house is often the single most important transaction in a person's life. It can involve the investment of one's life savings. Purchasers depend on competent lawyers to advise them and protect their interests.

[2] This action is about a house purchase that failed to close and whether the Plaintiffs' former solicitor, the Defendant, Gerald Brunt, is responsible for the failure. If he is, I must assess the damages for the failed real estate transaction. This raises the question of how to assess damages for a house when a real estate deal fails to close, and a purchaser does not get the house that they want.

[3] The Plaintiffs, Muhammad and Naseem Farid, are married to each other. They wanted to buy a house. They had one house in mind. It was one that they thought would meet their family's spiritual, educational, business, nutritional, cultural, and other needs.

[4] Mr. Farid found a house that suited his purposes at 26 Garrard Road in Whitby, Ontario ("the property"). The house was not for sale. Mr. Farid approached the owner of the house,

Lynn Porteous, to see if she was willing to sell the house to him. The short version of that story is that when she would not sell the house to him on the terms that he wanted, he sued her ("the First Porteous Action").

[5] On September 3, 2013, Ms. Porteous' solicitor proposed a resolution. He proposed that Ms. Porteous would agree to sell the property to Mr. Farid and his wife on terms and appended an Agreement of Purchase and Sale (APS). One term was that the transaction would close on September 27, 2013.

[6] Mr. Farid agreed to resolve the litigation on these terms and eventually both Mr. and Mrs. Farid signed the APS. The agreed upon purchase price was $281,000.

[7] The Farids retained the Defendant, Gerald Brunt, to assist them with the transaction which was to close on September 27, 2013. The date of the retainer is in dispute.

[8] One of the terms of the APS was that the Farids acknowledged that there was no working furnace in the house. In the end, this became a barrier to obtaining financing and the transaction did not close, as the Farids did not have their financing in order by closing. They now blame their lawyer for that and allege that he did not act competently.

[9] Before suing Mr. Brunt, Mr. Farid sued Ms. Porteous for a second time. He sought specific performance ("the Second Porteous Action") but he was not successful. On November 28, 2014, Justice Edwards, as he then was, dismissed Mr. Farid's claim on a summary judgment motion finding that the transaction did not close because the Plaintiffs did not have the funds to close the transaction. He held at paras. 12-13:

> Mr. Farid during the course of argument, agreed with me that he did not put his solicitor in the necessary funds to close the transaction by 6 p.m. on the date scheduled for closing. Mr. Farid argued that if he had been given the opportunity, he had the ability to obtain the necessary funding through alternative sources, specifically by access to his various credit cards. The evidence filed by Mr. Farid however makes clear that in fact the certified funds that he needed to close the transaction were not available until two days after the scheduled closing date.
>
> Fundamentally, the agreement required that the closing take place on September 27, by no later than 6 p.m. The agreement required that the plaintiff's solicitor have in his trust account funds upon which he could draw a certified cheque to tender upon the defendant. The plaintiff could not close the transaction on the date scheduled for closing. Time was of the essence. Mr. Farid knew that time was of the essence. The defendant, given the earlier litigation between the parties, was well within her reason not to grant any extension of time for the closing of this transaction. See *Farid v. Porteous*, 2014 ONSC 6901, affirmed *Farid v. Porteous*, 2015 ONCA 413.

[10] After the action against Ms. Porteous was dismissed, the Plaintiffs commenced this action, blaming Mr. Brunt for the failed transaction and alleging other failures with respect to the Second Porteous Action. They assert that Mr. Brunt was negligent, that he breached his fiduciary duties to them, and that he breached a statutory duty under the *Solicitors Act*, R.S.O. 1990 c. S.15 for which he is liable. They seek damages in the amount of $4,852,457.

[11] This action was to proceed before a judge and jury. For reasons given previously, I ruled that it would proceed by judge alone.

[12] While the Plaintiffs allege negligence and breach of fiduciary duty on the part of the Defendant leading up to and on the day of closing, this case primarily turns on what happened on the day of closing. Why and how the purchase failed to close is at the heart of this case. I must decide whether I believe the Plaintiffs' version of events, or the Defendant's.

[13] I find that the action cannot succeed. Mr. Farid's testimony was inconsistent with prior sworn statements. It is undermined by documentary evidence. Because Mrs. Farid's evidence so closely mirrors Mr. Farid's evidence, this causes me to question Mrs. Farid's evidence. In the end, I believe Mr. Brunt's version of events and not the version advanced by the Farids.

[14] I also find that the Plaintiffs' position is not supported by an independent expert opinion. While the Plaintiffs retained a very qualified expert, I find that he did not give his evidence impartially or with an open mind such that I am unable to accept his opinion. It cannot be saved. I find neither negligence nor a breach of a fiduciary or statutory duty on the part of Mr. Brunt.

[15] The Plaintiffs blame Mr. Brunt for destroying their lives and placing them into poverty. I find that this is not so. Even if the Plaintiffs were successful, their damages would be limited to $1,400.00.

[16] I therefore dismiss the action for these reasons which I set out in more detail below.

II. Issues

[17] The Amended Amended Statement of Claim is 109 pages long and repetitive. The issues to be decided in this action can be summarized as follows:

a. What happened?

b. Was the Defendant negligent?

c. Did the Defendant breach his fiduciary duties to the Plaintiffs?

d. Did the Defendant breach a duty of good faith?

e. Did the Defendant breach a statutory duty for which he can be found liable?

f. If the Defendant was negligent or breached his duties, what are the damages?

[18] To analyze these issues, I first set out a brief chronology of the events and persons involved in the transaction. Then, I address the evidence and the credibility and reliability of the witnesses. I then turn to the legal principles and apply my findings to those principles.

III. Chronology

[19] I now set out a brief chronology. The dates and the following events are not in real dispute and will assist in understanding the parties' different accounts of what occurred.

[20] The Plaintiffs and the Defendant have two different versions of what happened between September 3 and September 18, 2013 and again from there to the closing date of September 27, 2013. I will address the differing accounts further along in these Reasons.

[21] In early August, 2013, Mr. Phillips and Mr. Farid were engaged in settlement discussions to resolve the First Porteous Action.

[22] On September 3, 2013, Bradley Phillips wrote to Mr. Farid offering to settle the First Porteous Action. Mr. Brunt was not involved in the First Porteous Action The settlement proposal was that Ms. Porteous would agree to sell her property to Mr. and Mrs. Farid if Mr. Farid would agree to withdraw his claim and other terms. The letter states that Mr. Phillips would send electronically 46 photographs showing the current condition of the property. The photographs were not put before me.

[23] The settlement proposal provided that if the terms were acceptable, Mr. Farid should sign back the settlement offer and sign the appended APS. It provided, among other things, that it would be irrevocable on the buyer until 5:00 p.m. on September 5, 2013.

[24] Mr. Farid signed back the offer and the Farids signed the APS on September 3, 2013, thereby making an offer to purchase Ms. Porteous' 26 Garrard Road property. The offer was irrevocable on the Farids until September 5, 2013 at 5:00 p.m.

[25] Ms. Porteous signed the APS on September 5, 2013. The parties agreed that the property was sold in "as is" condition and that the house was being sold without a hot water heater and that the furnace was not functioning. On that day, Mr. Phillips wrote to Mr. Farid enclosing the executed APS identifying that for the deal to be firmed up, the financing condition would need to be waived. He noted that Mr. Farid has listed Mr. Brunt as his lawyer. Mr. Phillips advised Mr. Farid that he was not representing him and encouraged him to obtain independent legal advice.

[26] Mr. Farid provided Mr. Phillips with the $5,000.00 deposit due under the APS on September 6, 2013 by dropping it at Mr. Phillips' office.

[27] On September 6, 2013, Mr. Farid applied for financing through Matthew McCluskey, a mortgage broker.

[28] On September 17, 2013, Mr. Phillips wrote to Mr. Brunt noting that he understood Mr. Brunt to be acting for the purchasers. He enclosed a copy of his September 5, 2013 letter to Mr. Farid, the unsigned waiver of the financing condition and the other enclosures. He advised that they had not received a signed copy of the documents.

[29] On September 18, 2013, by letter, Mr. Brunt wrote to Mr. and Mrs. Farid, acknowledging receipt of the APS and that he would be pleased to represent them. He enclosed a direction regarding title, verification of identity forms, requested confirmation of insurance. The letter advised the Farids that they would need to attend his office shortly before the closing date to sign the necessary documents and that they should arrange with Lindsay at his office approximately one week before the closing.

[30] Mr. Farid emailed Mr. Brunt asking him how much money he would need to close the deal, writing "(purchase price + taxes if any + all other costs inclusive)" to close the deal. He noted that this was his first home purchase. Mr. Brunt's office wrote back on September 18, 2013 advising of the expected amount of the land transfer tax, Mr. Brunt's fee and registration costs. The office also noted that they had been advised that the Farids had not signed the waiver of financing and to provide that as soon as possible.

[31] Mr. Brunt then undertook several steps in furtherance of the APS including writing to the Town of Whitby's tax department, the Region of Durham's water department, searching the title and for any writs on it, and other steps, as evidenced by Mr. Brunt's file materials.

[32] On September 19, 2013, Mr. Farid wrote to Mr. McCluskey, asking about the status of the mortgage approval asking him to conclude everything that day as he needed to know in firm terms whether he would have the funds for closing. He noted that if financing was not approved, he would need to take steps to pull funds from his own resources to meet his needs of $278,000 which was needed to close the deal. He needed three business days to cash out his children's RESP. This would not need to happen if financing was available.

[33] On September 19, 2013, Mr. McCluskey provided a commitment letter to the Farids from CMLS Financial approving the mortgage loan application.

[34] Mr. Farid requested changes to the commitment including the amount of the down payment and the mortgage amount as well as changes to the payment frequency, compounding frequency, and other conditions.

[35] Mr. McCluskey advised that he had sent the changes in and advised Mr. Farid that his lawyer would not need the money until later the following week and that he would need to see instructions from the lender first.

[36] The APS was conditional on financing provided that a waiver was to be provided within 15 business days stating that the condition had been fulfilled and waived, otherwise the APS would be null and void.

[37] On September 23, 2013, Mr. and Mrs. Farid signed the waiver of financing and provided it to Mr. Phillips. Mr. Farid provided the signed waiver to Mr. Brunt on September 24, 2013, the receipt of which was acknowledged by Mr. Brunt's office on the same day.

[38] Following receipt of the signed waiver, on September 25, 2013, Mr. Brunt sent a requisition letter to Mr. Phillips. He drafted closing documents.

[39] On September 25, 2013, at 1:48 p.m., Mr. Farid wrote to Mr. Brunt's office asking when they should come in. He provided windows of time that he and Mrs. Farid were available noting child care and religious obligations. At some point, they arranged to come in at noon on September 27, 2013, the day of closing.

[40] On September 26, 2013, Mr. Farid emailed Mr. McCluskey to ask whether the lender had sent closing instructions to Mr. Brunt and asked that it be done in a timely manner as it was stressing him out. Mr. McCluskey replied by email at 11:04 a.m. stating "I know buddy I am working on it".

[41] The Court heard that on the evening of September 26, 2013, Mr. McCluskey advised Mr. Farid that the lender was not going to advance funds because of the lack of a working furnace.

[42] Mortgage instructions were sent to Mr. Brunt either in the evening of September 26, 2013 or in the morning of September 27, 2013. Mr. Brunt's clerk testified that the instructions were not there when she left the office on September 26, 2013 but they were there on September 27, 2013.

[43] On September 27, 2013, the day of closing, at 7:43 a.m., Mr. Farid emailed Mr. Brunt and asked whether he had received closing instructions from the lender and that it was his wish to close the property that day, whatever it took. He advised that if he had not received instructions, or if there was difficulty closing, he would like to know right away. While it was his preference to use a mortgage, he was willing to pay the entire amount from his own pocket to close the deal.

[44] What happened next is in dispute, other than that the property did not close on September 27, 2013, the deal came to an end, and litigation ensued. For the Farids part, they say that Mr. Brunt said he would take care of getting access to the seller's property so that a broker condition could be satisfied. For Mr. Brunt's part, he states that he urged the Farids to bring in their funds to close the deal but that they preferred to wait to see if the financing came through.

IV. Evidence

[45] The evidence consists of admissions, documentary evidence, and *viva voce* evidence. The Plaintiffs served several requests to admit. The Defendant admitted many facts. For reasons given during the trial, I allowed the Defendant to withdraw some admissions that were admitted in error.

[46] I will not recount the evidence in detail except as is necessary to address the issues that are in dispute.

[47] I must assess the credibility and the reliability of the witnesses which are different but related concepts. A credible witness may not be a reliable witness. In *R. v. Sanichar*, 2012

ONCA 117, at paras. 69-70, Laskin J.A. explained the concepts which were later adopted by the Supreme Court of Canada (2013 SCC 4):

> I accept that reliability is not the same as credibility; that is well established. Credibility has to do with the honesty or veracity of a witness' testimony. Reliability has to do with the accuracy of a witness' testimony. Many cases of mistaken identification have shown that a credible witness may give unreliable evidence.
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> The reliability of a witness' testimony is often gauged by the witness's ability to observe, recall and recount the events at issue: see *R. v. H.C.*, 2009 ONCA 56, 241 C.C.C. (3d) 45, at para. 41. The passage of time may have an effect on the witness' ability to do so accurately. For this reason, my colleague suggests that in cases, such as this one of historical sexual abuse, "the idea that trial judges should consider the "need to self-instruct on the frailties of evidence concerning events from a distant past" is a sensible one". Perhaps it is, but the trial judge cannot be criticized for not expressly self-instructing along these lines.

[48] I note that inconsistencies do not necessarily render a witness' testimony not credible or unreliable. I must assess the witness' credibility in the context of the evidence as a whole. (See: *Calin v. Calin*, 2021 ONCA 5582, at para. 16.)

[49] I recognize that I can accept all, some or none of a witness's evidence.

[50] I instruct myself in accordance with the principles set out above.

V. Issue A: What Happened?

[51] Below I address the accounts of what happened and then make my findings.

A. Muhammad Farid

[52] Muhammad Farid testified. He is a well-educated man. He has devoted the last decade to the pursuing of this litigation. Had this deal closed, he states he would have been a successful business-person and would have had many opportunities. Instead, he has devoted his life to this litigation, by his own admission, at the expense of his children and family.

[53] Mr. Farid testified over the course three days. An engineer by education, in 2002 he formed his own company, Kaaftronics, which he stated began as repair for telecom equipment, but later evolved into participating in government tender where they would buy goods and sell them to the government at a profit.

[54] When he started the company, he lived in the basement of his brother's house. He returned to Pakistan in 2006 to marry the Plaintiff, Naseem Farid, who he said lived like a princess in Pakistan where the lifestyle is different. Most of the life in Pakistan is lived outside of

the house on walled grounds outside the home. Life was difficult for Mrs. Farid when she arrived in Canada as she hated the basement.

[55] Mr. Farid testified that he also wanted property so that he could be a Canadian Senator and that property is required for that position. He recounted how former Prime Minister Stephen Harper suggested to him that he apply for a Senate seat.

[56] He started looking for a property. Mr. Farid found a house that suited his purposes at 26 Garrard Road in Whitby, Ontario. He met with Ms. Porteous in December, 2012. He visited the property multiple times. He put in a written offer for the property himself, using a version he found on the internet. He said that they reached an agreement and then she refused to close which led to the First Porteous Action.

[57] Mr. Farid set out to buy this house because it met all his family's needs. It was within walking distance of the mosque, a Halal grocer, and the school. It was close to the Candlewood Plaza Shoppers Drug Mart, and a Dollarama. The house was close to a bus stop and Mrs. Farid wanted to upgrade and this would allow her to get to school. Mrs. Farid did not drive at the time and her English was limited. It had a unit that could be rented, and his brother and family could rent that unit. It had enough space for him to run his business and to accommodate their growing family.

[58] In September 2013, Mr. Farid was involved in five litigation matters. He had two in the Federal Court of Canada, two in the Superior Court of Justice and one in the State of Minnesota.

(i) The Retainer

[59] Mr. Farid testified that on September 3, 2013, he took the settlement proposal to Mr. Brunt's office and spoke with Lindsay Ridge, a clerk in Mr. Brunt's office.

[60] Mr. Farid said that he had met Mr. Brunt in 2010 when his brother was involved in a transaction and that he had met him again in 2012 when he had litigation on one of his government projects.

[61] While his visit was unscheduled, he said that Ms. Ridge promised to give it to Mr. Brunt, that he would look at it and that they would be happy to represent him as solicitor on the purchase of the property. Mr. Farid asked for a call back and Ms. Ridge took down his name and number. There is a post-it note which states "September 3/13 Muhammed 905-743-9496 Please review and call*" in Mr. Brunt's file.

[62] Mr. Farid testified that the documents were time sensitive and that they were the product of a litigation settlement.

[63] Even though Mr. Farid did not hear from Mr. Brunt, he and Mrs. Farid signed and faxed the APS back to Mr. Phillips. Mr. Farid states that he wrote on the APS that Mr. Brunt was their lawyer. He said that he never read the APS before sending it back to Mr. Phillips. He stated that Mr. Phillips slipped in the term at paragraph 5 of Schedule A that "The Purchaser

is aware that the Property is being sold without a Hot Water Tank and that the furnace is not functioning".

[64] Mr. Farid told the Court that he had attended at Mr. Brunt's office on September 4, 2013 for an unscheduled meeting and that at that time Mr. Brunt told him that the APS was not a standard document and that some of the terms were not normal. Mr. Farid said that he told Mr. Brunt that this was part of a litigation settlement and that Mr. Phillips had authored the agreement. He also told him that he needed the property to meet his specific needs and that he told Mr. Brunt "there was zero room for error" in closing the property and that Mr. Phillips was an unethical individual and was an "asshole".

[65] Mr. Farid testified that during this meeting he told Mr. Brunt to take all steps to close the property, that it should be registered to him and his wife 50/50 and that he should work with Mr. McCluskey for the mortgage and to let him know if there was any issue. He said that Mr. Brunt told him that he would take care of the transaction. By Mr. Farid's account, the retainer began and that after he met with Mr. Brunt, he met briefly with Ms. Ridge, and provided her with his wife's name and date of birth, that they were first time home buyers and how they would be taking title.

[66] Mr. Farid states that after Ms. Porteous accepted the offer, he delivered the fully signed APS to Mr. Brunt on the morning of September 9, 2013.

[67] Mr. Farid stated that he received a call from Mr. McCluskey at 6:45 p.m. on September 26, 2013. He was informed that the lender had linked funds to the furnace and that he would speak with the lender the next day. He said that Mr. McCluskey told him that this could be resolved by him talking with the lender and to see if perhaps their lender would withhold some funds. Or that they could get an HVAC professional on the property and the contractor could assess the furnace to see if it is functioning or whether it could be repaired. Mr. Farid said that he told him "I hope you are not doing any hanky panky" and Mr. McCluskey told him that he was doing his business.

[68] Mr. Farid authorized up to $10,000 for a repair. Mr. McCluskey told him to hold on as he was not certain which way it would go.

[69] Mr. Farid told the Court that he did not know about the clause in Schedule A of the APS and that there was no working furnace until 2014 when he was involved in the Second Porteous Action as he did not read the APS before he signed it. I did not believe this statement.

(ii) Closing Day

[70] Because Mrs. Farid had classes on Friday morning from 9:30 a.m. to 11:30 a.m., they arranged to go to Mr. Brunt's office at noon on closing day, September 27, 2013.

[71] Prior to leaving, Mr. McCluskey returned a call. Mr. McCluskey told him that the lender wanted an inspection done, and the lender was linking the advancing of the funds with inspection of the furnace.

[72] Mr. Farid told the Court that he did not tell Mr. Brunt what Mr. McCluskey said to him the day before because it was not even on his mind. He also said that Mr. McCluskey told him that that was just for his information and not to take another step.

[73] At 10:44 a.m., he received the approximate statement of purchase funds from Mr. Brunt's office. The statement provides: "Received mortgage advance from Computershare Trust Company of Canada". He went to the bank to get the funds that he needed for the transaction, the non-financed part as set out in the approximate statement of funds, and then picked up Mrs. Farid from school and returned home before departing for Mr. Brunt's office. Mr. Farid testified that he had dropped a $70,000 cheque off at Mr. Brunt's office on September 25, 2013, and that he provided a bank draft for $26, 592.48 on September 27, 2013.

[74] They attended at Mr. Brunt's with their three-year-old daughter.

[75] Mr. Farid testified that he told Mr. Brunt about the call from Mr. McCluskey and that he needed an inspection of the property. It was then that Mr. Brunt called Mr. McCluskey. According to Mr. Farid, Mr. McCluskey told him that he would be sending an HVAC inspector to the property and that Mr. Brunt responded that he should not be doing that as it was trespassing, and it would be a criminal act. Matt then told him that he will need access to the property and Mr. Brunt said, "I will take care of it".

[76] He said that at the meeting, Mr. Farid said he asked Mr. Brunt if he saw any problem with the lender advancing funds and that Mr. Brunt said "absolutely not", that whenever Matt [McCluskey] was involved, there was never a problem. Mr. Brunt assured them that they would receive the funds.

[77] When he was leaving, he told Mr. Brunt that he would be home and that if he needed anything, he should call.

[78] As they were leaving, Mr. Brunt came out and asked him if he could seek an extension to which Mr. Farid told him that he must take all steps to close the property that day. Mr. Farid states that at the meeting with Mr. Brunt, he instructed him to get access to the property and forbade him from getting an extension.

[79] He said this shocked him and that when he was outside the office, he was furious with Mr. Brunt. He was yelling and cursing about Mr. Brunt.

[80] They went home. It was a Friday. When he came home, he asked Mrs. Farid for green tea. She persuaded him to go to the mosque for a short Friday prayer which he did. This was at 1:58 p.m. He did not attend the sermon. It was done by the time that he arrived.

[81] When he returned home, he had tea. He said that around 3:30 p.m., he took a nap.

[82] Mr. Farid stated that at 4:45 p.m. Mr. McCluskey called him and he was angry. He said that he felt like an asshole because the property was closing as part of a litigation settlement and that he was just learning about it. Mr. Farid said that he told him that he did not get

access to the property because Mr. Brunt never called him. As set out further below, Mr. McCluskey did not confirm this when he testified.

[83] The records tendered reveal that at 5:07 p.m., Mr. Farid emailed Mr. McCluskey and he wrote:

> When you called me, I was sleeping. I have called you multiple times after your call but you are not picking up the telephone….Call me that I know exactly what it going on that I could help you …..
>
> Being upset will not help you to resolve any issue …..

[84] In my view, this email significantly undermines Mr. Farid's evidence about the call. If the call happened at 4:45 as alleged by Mr. Farid, this email would not have been written that way.

[85] Mr. Farid stated that he did not hear from Mr. Brunt from when he left his office until 5:14 p.m. when he called him and spoke with him. Mr. Brunt advised him that he had asked for an extension in the property closing, and it was not granted. He also mentioned that he had asked for access to the property, for inspection, and that the seller did not grant it. Mr. Brunt told him that Mr. Phillips had written holding them in anticipatory breach.

[86] He said that the funds had not been advanced. Mr. Farid told him that he could go to the bank and in minutes have the funds to him but Mr. Brunt told him that it was too late.

[87] According to Mr. Farid, Mr. Brunt said that it was after 5:00 p.m. The bank office had closed, and the registry office had closed. He was going home, and Mr. Phillips was gone. Because of the anticipatory breach, he could not do anything else to close the property. He had to sort out the anticipatory breach with Mr. Phillips on the coming Monday. He added that, at this point, unless the seller agrees to close the property, he would not be able to close the property.

[88] Mr. Farid stated that he never authorized a request for an extension and that Mr. Brunt did so without their consent.

[89] He blamed Mr. Brunt for the delay in the afternoon of September 27, 2013, asserting that Mr. Brunt wasted valuable time and that if properly advised, the Farids would have been able to withdraw money from the bank to close the deal.

[90] His brother heard him upset after the call and came to speak with him. He suggested that they go to the bank and get the money. Mr. Farid told him that Mr. Brunt had told him that it was too late.

[91] That weekend, they went to the bank to get the money to close the deal and they brought it to Mr. Brunt on Monday, September 30, 2013. However, over the weekend, Mrs. Farid, who was pregnant at the time, collapsed and was rushed to the hospital, which Mr. Farid believes was due to the stress of the failed deal.

[92] Thankfully, the baby was safe, and she was released from the hospital that evening.

[93] From there, Mr. Farid went on to recount how they attempted to close the failed transaction the following Monday. Mr. Farid said that Mr. Brunt advised him on the Second Porteous Action.

[94] However, Mr. Farid's evidence was significantly undermined by cross-examination.

[95] His statement that he did not know about the condition relating to the lack of a working furnace is undermined by documents relating to his negotiations with Mr. Phillips prior to September 3, 2013. In August 6, 2013, correspondence with Mr. Phillips included a similar term and Mr. Farid marked up the letter and the attached draft APS and wrote the word "redundant" next to it. He knew that the furnace was not functioning.

[96] I also find it difficult to believe that after his attempts to buy the property and that the litigation was resolving, that he would sign back the agreement without looking at it. In my view, Mr. Farid knew that the furnace was not working when he made the offer to purchase the property on September 3, 2013, and that if he did not know it was not the fault of Mr. Brunt.

[97] Mr. Farid accepted Ms. Porteous' offer without waiting for advice from Mr. Brunt and he cannot now blame him for that.

[98] Mr. Farid's evidence was further undermined by inconsistencies with prior sworn statements.

[99] In chief, Mr. Farid told the Court that he had provided Mr. Farid with a copy of the settlement proposal. However, this is contradicted by his Affidavit sworn April 11, 2014 in the Second Porteous Action where he testified that Mr. Brunt was never provided with the settlement proposal.

[100] Second, Mr. Farid's evidence that Mr. Brunt told him "I'll take care of it" is inconsistent with his evidence given at his examination for discovery in 2017.

[101] Last, in his 2014 Affidavit, Mr. Farid made no reference to Mr. Brunt asking for an extension as they were leaving the office. Rather, in the 2014 Affidavit, Mr. Farid deposed that Mr. Brunt asked Mr. Phillips for an extension in an early afternoon call with Mr. Phillips. This testimony is at odds with his trial testimony.

[102] The correspondence exchanged in 2013 also casts doubt on Mr. Farid's account.

[103] On September 29, 2013, Mr. Farid wrote to Mr. Brunt. With his letter, he delivered $182,625.00. That letter makes reference to CMLS funds and it provides that "if funds from CMLS Financial come while you are closing the property …". It makes no sense that if it was Mr. Brunt's job to get access to the property, the letter would be written that way. Rather, it seems like Mr. McCluskey and Mr. Farid were working on something without involving Mr. Brunt.

[104] I also found Mr. Farid's evidence hard to believe. On his evidence, Mr. Brunt, an experience real estate solicitor was prepared to just wait for the funds to come in. It does make sense that on a busy day with many closings that Mr. Brunt would then say either that he was confident that Mr. McCluskey would take care of it or that he would take care of it. He would have known that there was little time to put the seller in funds and that time was of the essence.

[105] I also note that many days before the closing he was asking Mr. McCluskey about the state of the financing and that he needed time to get his own funds if the timing did not come through.

[106] I also cannot fathom why Mr. Farid did not tell Mr. Brunt what the problem was rather than keeping Mr. Brunt in the dark that the lender was tying the release of funds to an operational furnace.

[107] Mr. Farid stated in his evidence that Mr. Brunt continued to work for him on October 9, 2013 and that he did not terminate the retainer with him. However, Mr. Farid's October 9, 2013 letter to Mr. Brunt clearly terminates the retainer. My interpretation is supported by Mr. Farid's October 11, 2013 letter to Mr. Phillips stating, "Mr. Brunt does not represent me anymore".

B. Naseem Farid

[108] Mrs. Farid told the Court that on September 27, 2013, she normally would have taken classes from 9:30 am. to 12:30 p.m. and then from 1:30 p.m. to 3:30 p.m. On that day, Mr. Farid came to pick her up to go to the lawyer's office.

[109] Before they left, she stated that her husband took a call from Matt. They got to the office around noon and Mr. Brunt was not immediately available. Her husband spoke to a staff member while she attended to their young daughter.

[110] When they were all together in Mr. Brunt's office, Mr. Brunt called Mr. McCluskey and then passed the phone to Mr. Farid. The lawyer gave them papers to sign – first to her husband then to her. She relied on her husband to tell her where to sign.

[111] She was comfortable having Mr. Farid guide her through the process and she was comfortable with Mr. Farid speaking with Mr. Brunt when she was not there.

[112] Once everything was done, she and her daughter came out before Mr. Farid and Mr. Farid and the lawyer continued speaking to each other. She stood beside car. When Mr. Farid returned to the car, he was angry.

[113] When they arrived home, he asked her for a green tea which she made and then he lay down on the couch. She encouraged him to go for prayers which he did, returning after 15 to 20 minutes. He then said that he had a severe headache. She made him a cup of tea. He lay down for a nap and no call was received.

[114] She stated that around 4:45 p.m. there was a call. She picked up the phone. It was Matt McCluskey and by that time her husband had woken up and Mr. Farid took the call in the basement office. Around 5:15 p.m., when he came out, he was angry that the lawyer could not close the property deal.

[115] She stated that when her husband came out around 5:15 p.m. after speaking with the lawyer that he was angry that the lawyer could not close the property deal. She became depressed. She was six months pregnant. She really wanted that house because she could not drive and it was near the Halal grocer, the school, grocery shopping, and the mosque. She realized that she would not be able to do all those things. She started to cry, was not feeling well, and then the house environment became tense.

[116] Mrs. Farid explained that since failed real estate deal, her husband has been unable to work because he devoted his time to this litigation.

[117] Mrs. Farid's evidence was delivered in a straightforward manner through the assistance of an interpreter. She did not appear rehearsed. She testified before Mr. Farid. Her evidence aligned with Mr. Farid's, but it was much more limited.

C. Matthew McCluskey

[118] Matthew McCluskey is a mortgage broker and worked for Benson mortgages. He knew Mr. Farid from when he arranged a mortgage for Mr. Farid's brother in 2010.

[119] He confirmed that as of 9:23 a.m. on September 26, 2013, Mr. Farid's lawyer did not have mortgage instructions from CMLS.

[120] Mr. McCluskey testified that he learned later on September 26, 2013, that the lender was not going to advance funds due to a lack of a working heat source. He conveyed this to Mr. Farid. He did not convey any of this to Mr. Brunt on September 26, 2013.

[121] He agreed that on September 26, 2013, Mr. Farid understood that if his mortgage financing was not coming through, or if it was questionable, that Mr. Farid would need to self-finance the purchase of his property.

[122] He stated that to proceed with the transaction, they needed access to the property. He spoke with Mr. Brunt once on September 27, 2013 and then did not speak with him again. In the conversation with Mr. Brunt, Mr. McCluskey advised Mr. Brunt that they needed access to the property in order to proceed.

[123] He agreed that he did not know whether the furnace needed to be repaired or replaced and that it was uncertain, even if he had been able to get access to the property, that CMLS would advance funds.

[124] It is important to note that Mr. McCluskey did not say that he was waiting for a call from Mr. Brunt letting him know that he had sought access to the property or that he directly asked Mr. Brunt to get access to the property. That is not evidence that was elicited from

him. He did not confirm that Mr. Brunt said "I'll take care of it" as asserted by Mr. Farid. He did speak about trying to find an internal solution.

D. Abdur Rashid

[125] Abdur Rashid is Mr. Farid's older brother. He testified to the living arrangement and the phone arrangements. He loaned money to the Farids for the transaction: just over $70,000 to form part of their down payment,

[126] He arrived home from work around 4:00 p.m. on September 27, 2013. He had spoken with Mr. Farid earlier in the afternoon at approximately 1:30 p.m. At about 5:10 p.m., he heard Mr. Farid shouting and yelling on the phone. He went down to the basement to speak with Mr. Farid and Mr. Farid told him that Mr. Brunt had failed to close the property that day.

[127] Mr. Rashid told the Court that he calmed his brother down and suggested that he go to the bank with the money. Mr. Rashid stated that Mr. Farid told him that the seller's lawyer declared that they had declared an anticipatory breach. He also told him that Mr. Farid's lawyer told him not to bring the draft to the office as he would be leaving shortly and that it is not fruitful to bring a draft at this time.

E. Bradley Phillips

[128] Mr. Phillips represented Ms. Porteous.

[129] He was summonsed to give evidence by the Farids.

[130] He testified that on the day of closing, his client was ready, willing and able to close the transaction. If he had been put in funds, Mr. Worboy was ready to register a discharge of the private mortgage. He provided a solicitor's undertaking to discharge the Manulife mortgage. While the undertaking is signed Strike and Strike, LLP, he intended to be bound personally by the undertaking and it was his signature upon it.

[131] He recalls that on September 27, 2013, he received two calls from Mr. Brunt's office. The first was a call that they were not yet in funds and that it was likely to be a late closing.

[132] Mr. Farid put the Defendant's discovery evidence to Mr. Phillips. Mr. Phillips stated that he did not recall saying what Mr. Brunt had attributed to him on closing on September 27, 2013. In cross-examination, he confirmed that he did not recall one way or another whether he said those things.

[133] Mr. Phillips stated that he believes that there were two calls with Mr. Brunt's office on the day of closing and he could not recall whether he made or received those calls. He stated that there would have been calls between staff about what was received and not received. One was towards the end of the day.

[134] Mr. Phillips was also taken to his sworn testimony on the motion for summary judgment in the Second Porteous Action. In that Affidavit sworn November 10, 2014, he testified that he received only one call from the Plaintiffs' solicitor advising that he was not in funds

which he treated as an anticipatory breach of contract. Mr. Phillips at trial deferred to his testimony in the sworn affidavit, acknowledging that his memory would have been better at the time with respect to the details of the call. He now thinks that the Affidavit was wrong in terms of the number of calls.

[135] He testified that he received a call in the morning which was that the buyers were not yet in funds and it would be a late closing.

[136] With respect to access to the property, Mr. Phillips did not have a specific recollection. However, he did say that in general terms, his instructions were not to permit anything that was outside of the agreement. No leeway (indulgences) were to be given.

[137] He states that no request was made to have an HVAC contractor attend the site and that given that no request was made, he could not speculate on what the response of his client would have been.

[138] He stated that his evidence of a declaration of anticipatory breach might have been premature, and he agreed that a request for more time is not on its own a repudiation of the agreement. He agreed that even at 5:02 p.m., it still would have been possible, although difficult, to tender. There were a number of ways in which closing funds could have been brought to his office.

[139] The land registration system closed at 5:00 p.m. so the transfer of title and mortgage discharges would not have been able to be registered until the following day but real estate closings can still happen after 5:00 p.m., primarily due to title. He explained the process for how that works but, in short, had everyone done what they were required to do by 6:00 p.m., the transaction would have closed on September 27, 2013.

[140] He stated that had the funds been provided by 6:00 p.m., the deal would have closed.

[141] It is a concern that Mr. Phillips added new detail to the information provided in his November 10, 2014 Affidavit. I am not confident relying on his testimony.

F. Ronald Worboy

[142] Ronald Worboy was a real estate solicitor. He represented Mr. Connelly who held the private mortgage. He had a discharge in hand ready to tender had his client been put in funds.

[143] I accept his evidence without reservation.

G. Gerald Brunt

[144] Mr. Brunt is an experienced real estate lawyer. He had a busy real estate practice with several closings on September 27, 2013.

[145] Mr. Brunt did not do a good job of documenting his work. There is a generic letter of engagement. There is no reporting or closing letter to the clients summarizing what

happened on the day of closing. Few emails were produced. There were no notes of telephone calls that he said he and his office had with Mr. Phillips' office or Mr. McClusky. I appreciate that he had a busy real estate practice given what transpired on September 27. 2013, but I was surprised to see no documentation of his advice given that day.

[146] The Plaintiffs assert that with no notes, no file memo and no record, the Defendant has a path for pathological lying and, as they assert, without these, the Defendant can say whatever it wants to say, when it wants to say, what suits it to say and how it wants to say. They argue that I should find his testimony unreliable.

[147] That is not how I approach the task. Certainly, it would have been easier had the file been well documented.

[148] The file documents the work done, but not the conversations had. It has opening information. It contained the engagement letter. Mr. Brunt sent a requisition letter, but he did not receive a response. This is evidence of his assessment of the issues. His office received documentation from Mr. Phillips' office in advance of closing to ensure the mortgages would be discharged. Mr. Phillips had a discharge statement from Manulife for that mortgage and he provided his undertaking to discharge it. He understood that Mr. Worboy was prepared with a discharge for the second mortgage ready for closing.

[149] Mr. Brunt reiterated that the discharges are not registered until the funds are ready for closing. In his view, the seller had provided the requisite deliveries and had the Farids placed him in funds, the deal would have closed.

[150] However, the file material reveals that on all essential points he took instructions. This includes on how the Plaintiffs wished to take title. His notes reveal that he conducted the necessary title search, signed the Farids up for title insurance, followed the necessary instructions from CMLS as soon as they were received.

[151] Mr. Brunt stated that he did not meet with Mr. Farid in early September, 2013. He said that he was aware that Mr. Farid had attended at the office and agreed in a request to admit that he received a copy of the APS dated September 5, 2013, in the second week of September, 2013 from the buyers. However, in his cross-examination, he clarified the admission by stating that that was the unsigned version. I accept that explanation.

[152] Mr. Brunt claims that the September 4 and 9, 2013 meetings never happened. He states that he only learned of the firm agreement between the Farids and Ms. Porteous when Mr. Phillips wrote to him on September 17, 2013 and that he sent out his letter of engagement the next day.

[153] He pointed to his records where he conducted a search of title, he prepared the title insurance documents and other documents to prepare the matter for closing.

[154] He did not appear to contact the Farids to tell them that the lack of a furnace could present problems with financing.

[155] With respect to the issue of financing, Mr. Brunt testified that he saw Mr. Farid's September 27, 2013 email stating that he had his own funds to close the property around 9:00 a.m. when he came into the office. He denied the Plaintiffs' assertion that he did not see the email.

[156] Mr. Brunt testified that he learned that morning from the lender that there was an unfulfilled broker condition that morning but that the lender would not tell him what it was for privacy reasons. This did not make sense to Mr. Brunt. When the Farids came in for the noon meeting, he got Mr. McCluskey on the phone and Mr. McCluskey would not tell him what it was, only that he was dealing with it. Mr. Brunt testified that neither Mr. nor Mrs. Farid told him that CMLS was linking the release of funds to the lack of heat source.

[157] On Mr. Brunt's version, on the morning of September 27, 2013, Mr. Brunt learned form CMLS that there was an outstanding broker condition and that meant funds were not going to be advanced until it was satisfied. CMLS would not tell him what it was for privacy reasons.

[158] The Farids attended at his office. They signed normal closing documents and provided him with two bank drafts. Mr. Brunt told the Farids what CMLS had told him. Mr. Farid did not tell him what the issue was and so with the Farids' permission and in their presence, they called Mr. McCluskey. Mr. McCluskey did not tell him what the issue was, only that he was attending it.

[159] Mr. Brunt had no recollection of the Farids bringing their three-year-old child with them to the meeting.

[160] He asked the Farids on September 27, 2013 whether the furnace was the outstanding issue.

[161] As it was then past noon, Mr. Brunt gave the Farids three options. It was questionable that they would get the funding given the time, but they could wait and see. They could provide their own funding. The third option was to seek an extension. Mr. Farid said that he wanted to wait and see if the financing came available.

[162] The Farids left and he instructed Ms. Ridge to call for updated information every 20 minutes. He did not have great confidence that CMLS was going to advance the funds. He called Bradley Phillips and asked him if anyone would be going to the property, as a way of trying to determine what the issue was, and Mr. Phillips told him that no one should be going to the property. He denied asking Mr. Phillips for access to the property because he did not know that access was needed.

[163] Ms. Ridge continued to contact the Farids. Mr. Brunt was able to reach Mr. Farid late in the day and wanted to know what Mr. Farid wanted to do. He testified that he told Mr. Farid that there was no way that CMLS would be advancing funds that day and even if they did they would not arrive in time to complete the closing. He told Mr. Farid that he needed their funds to close the deal and strongly encouraged him to bring in the money to close. He had not been able to reach Mr. Farid since he left the office at 1:00 p.m. At that stage, he needed Mr. Farid to understand that he needed his money to complete the closing.

[164] Mr. Farid asked whether and extension was still on the table. Mr. Brunt told him that it was late in the day and that he would really prefer to have the Farids' money. However, Mr. Farid instructed Mr. Brunt to seek an extension. After that call, they sought an extension of the closing by sending a letter at 4:17 p.m. to Mr. Phillips. After 20 minutes, he had received no response. He called Mr. Phillips asking him what was happening, and Mr. Phillips replied that he would be getting a letter. He tried again to reach Mr. Farid, he surmised that the letter would not be positive. He could not reach Mr. Farid until after 5:00 p.m.

[165] By return letter at 5:02 p.m., Mr. Phillips wrote that they would not extend the closing and declared an anticipatory breach of the contract. Mr. Brunt stated that he knew that they were not yet in breach as the contract called for a 6:00 p.m. closing.

[166] Mr. Brunt updated Mr. Farid by phone. He told Mr. Farid that if they were put in funds, they had until 6:00 p.m. to tender. However, Mr. Farid told him he could not get the money by 6:00 p.m.

[167] On Monday, September 30, 2013, Mr. Farid attended at this office with the balance of the closing funds, but the seller refused to close the detail. The seller was willing to retain only $1,000 out of the $5,000 deposit.

[168] Mr. Brunt stated that he was not retained to act for the Farids in their action against Ms. Porteous. He stated that he was not asked to deliver his complete file to Mr. Farid. He told the Court that he did refuse to provide an affidavit in the Second Porteous Action because the affidavit that Mr. Farid presented to him and told him to sign was not the truth.

[169] He charged the Farids only $400 for the transaction as he felt badly about the failed closing. He could not explain the lack of a closing report.

[170] He told the Court that he was aware that the agreement had been entered into as a result of a litigation settlement as that was apparent from Mr. Phillips' September 17, 2013 letter and that is why he was pressing the Farids to bring in their money so that he could close. He told them this at noon and Mr. Farid at 4:00 p.m.

[171] He also said that late Friday they received some information that the fact that the furnace was not working was what was holding up the funds.

[172] On Monday, September 30, 2013, the Farids brought in $182,625. At that time, Mr. Farid stated by letter that if funds came in through CMLS Financial, that Mr. Brunt should use the CMLS funds to close. The seller did not agree to close on that date. However, on October 7, 2013, Mr. Phillips wrote to Mr. Brunt stating that his client was willing to return the Farids' $5,000 deposit except for $1,000.00 to cover her expenses.

[173] Mr. Brunt denied that he agreed to represent the Farids in an action for specific performance because he is a real estate lawyer and not a litigator. He does not do litigation and never has. He did not see the Farids' claim for specific performance before it was issued.

[174] In response to an allegation by Mr. Farid that Mr. Brunt said he would lie in an affidavit, Mr. Brunt denied the allegation. Mr. Brunt stated that Mr. Farid arrived at his office without an appointment, put a document in front of him and asked him to sign it. Mr. Brunt told him he could not sign it because it was not true.

[175] He stated that he was not asked to provide a copy of his file to the Farids and although Mr. Farid did seek some correspondence that was sent on September 30 and October 1, 2013.

[176] Mr. Brunt was not impeached on cross-examination. He was challenged on the commencement of the retainer and explained that his September 18, 2013 letter was his engagement letter. He said that before he received the letter from Mr. Phillips on September 17, 2013, he did not have a signed version of the APS and there was no action to be taken. He outlined the processes in his firm relating to the receipt of correspondence and bank drafts that made sense and supported his timeline.

[177] Mr. Brunt denied that he had 19 closings on closing day.

[178] Mr. Farid challenged Mr. Brunt on the approximate statement of funds suggestion to Mr. Brunt that he had been misled by the line "Received from Computershare" in to thinking that the funds had already been received by Mr. Brunt. Mr. Brunt responded that this was explained at the noon meeting, and it was provided to the clients so that they would know what money was expected from CMLS. The document could not be read in isolation as it has to be understood that this was part of a discussion at the noon meeting.

[179] In cross-examination, Mr. Brunt was taken to an admission of his that on September 27 2013, he informed Mr. Phillips that the Plaintiffs lacked the funds to close the property. Mr. Brunt denied that that was the case. He stated that he never informed Mr. Phillips that he lacked the funds to close the property.

[180] Mr. Brunt testified in a straightforward manner. His answers made sense. He carefully laid out the decisions that he made on closing day. His recollections accorded with the documentary evidence. They made sense with the differing accounts. They were corroborated by Ms. Ridge.

H. Lindsay Ridge

[181] She testified in a straightforward way about the events. She worked for Mr. Brunt for approximately six years as a real estate law clerk. This would involve scheduling for him, paperwork, reviewing mortgage instructions and work on purchase and sale transactions. She left Mr. Brunt's employment after having a baby and moving further away.

[182] She did not recall speaking with Mr. Farid on September 3, 2013. She believes that they dropped of the agreement but could not recall the details.

[183] The firm used a software program. She would import the information in the program. She would correspond with the client and the other solicitor.

[184] She stated that the mortgage financing documents came on the date that the transaction was to close. She was concerned because it would be a rush to get the funds for closing. Normally they receive mortgage instructions one week before the closing. She believed that the Farids came to the office around noon on the day of the closing to sign the closing documents.

[185] While she does not recall any specific conversation with CMLS, she remembers that there was an unfulfilled broker condition on the Farids' financing. She believes that after the Farids left that Mr. Brunt would have told her to get the signed documents to CMLS so that they could fund the transaction, which she did.

[186] She testified that she made several attempts to reach Mr. Farid in the afternoon of September 27, 2013 as it did not appear that CMLS would be able to put them in funds on such short notice and they were trying to see if there were other options for funding so that it could close that day. She did not recall specifically but it would have been her normal practice to call every half hour. She also made attempts to reach Mr. McCluskey that afternoon without success because there was an unfulfilled broker condition, and it was his job to fulfill it. She could not get a hold of anybody.

[187] She was in the office when the closing funds were dropped off on September 30, 2013. She stated that there were several times when Mr. Farid came to the office.

[188] She stated that it was the practice in Mr. Brunt's office that when bank drafts were received at the law office that they would photocopy the draft to be recorded in the applicable file and then the draft would be deposited in the trust account typically that day.

[189] She believes that the Farids requested documents from Mr. Brunt but she could not remember.

[190] Ms. Ridge did not recall certain details. However, her evidence confirms Mr. Brunt's point that they did make attempts to reach the Farids but they were not successful until late in the day.

I. Findings on What Happened

[191] Having assessed the evidence, I conclude that I accept Mr. Brunt's version of evidence and on most points, reject the Farids'.

[192] I must also acknowledge that the issue of why the purchase did not close has been decided. It is because the Farids did not have the funds to close the transaction. I am mindful that I should not allow this action to be a collateral attack on the decisions of this Court and the Court of Appeal in the Second Porteous Action.

[193] On the issue of the retainer, the Plaintiffs argue that if there is a conflict between the account provided by the Plaintiffs and their solicitor, should I prefer the Plaintiffs' interpretation. They assert, all things being equal, a controversy between a lawyer and client about the terms of a retainer should be resolved in favour of the client. See *Morton v. Easton,* 1995 CanLII 1227 (BC SC), at para 34. However, I find that this applies only

where there is ambiguity in the terms. The cases relied upon by the Plaintiffs (*Morton, supra*, *Griffiths v. Evans*, [1953] 2 AII ER 1364, *ABN Amro Bank Canada v. Gowling, Strathy & Henderson*, 1994 CanLII 7334 (ONSC), *Kopp and Halford*, 2013 SKQB 128) do not stand for the proposition that I should simply believe the Plaintiffs. I must assess their credibility and they must prove their case.

[194] On the issue of the retainer, I find no ambiguity here. I find that Mr. Brunt was retained when Mr. Phillips sent him the signed version of the APS on September 17, 2013. His name had been placed on the agreement. He confirmed his engagement by letter. Before that date, he had received only the APS, and then signed only by the Farids. At that point in time, it was irrevocable on the buyers. There was no advice to give.

[195] He received the signed APS only on September 17, 2013 and then learned that the parties had reached an agreement.

[196] I find that Mr. Brunt's version makes sense. He was not impeached in cross-examination.

[197] I have set out above why I cannot accept Mr. Farid's evidence. It did not make sense. He has given different versions of the events under oath. As I have set out above, the documentary evidence undermines his position. Mr. McCluskey did not support his narrative.

[198] There is nothing about Mrs. Farid's evidence that would make me reject it. However, given her relationship with Mr. Farid, and that they have lived with this litigation for over a decade, I am not comfortable relying on it.

[199] Mr. Rashid's evidence relies in part on what Mr. Farid told him. On those aspects of his evidence, if Mr. Farid is not believable (i.e. that about what Mr. Brunt had told him), Mr. Rashid is also not reliable. He was not at the meeting with Mr. Brunt and not part of the telephone calls. I do not find value in his evidence.

[200] I find that Mr. Brunt knew the Farids had their own funds to close the transaction and encouraged them to bring in the money to close. I find that despite this advice, the Farids instructed him first to wait to see if the financing came through and after 4:00 p.m., instructed him to seek an extension despite his advice.

[201] Rather than going to the bank and putting their lawyer in funds, they went home, and Mr. Farid took a nap.

[202] I find that the Farids knew on September 27, 2013 that CMLS had not advanced the funds and that Mr. Brunt did not mislead them by providing them with an approximate statement of funds. At that time, Mr. Farid knew that CMLS was not advancing the funds. It was he who misled Mr. Brunt by not being upfront with him about the CMLS problem.

[203] At that stage, Mr. Farid already had a bank draft for $70,000. He went to the bank and drew as second one in the amount of $26,592.48.

[204] Even with the findings I have made about Mr. Farid's credibility, his story makes no sense. It makes no logical sense that a seasoned real estate solicitor would take on getting access to a property for an unknown purpose for what was an unfulfilled broker condition on the afternoon of a closing rather than telling his clients to bring in the money.

[205] I find that for reasons unknown, Mr. McCluskey and Mr. Farid withheld key information from Mr. Brunt about the unfulfilled broker condition. They knew on September 26, 2013 that the lender was tying the release of funds to the lack of a working heat source and yet no one told Mr. Brunt.

[206] When Mr. Farid emailed Mr. Brunt at 7:43 a.m., he chose not to tell Mr. Brunt that information. Instead, he wrote asking whether Mr. Brunt had received mortgage instructions without mentioning that he knew there was an issue with the lender. Mr. Farid knew that it would take time to get money from the bank. On September 19, 2013, he advised Mr. McCluskey he needed three days to arrange the funds. On September 27, 2013, he told Mr. Brunt that he needed three hours if he was using his own money.

[207] I find that the evidence does not support that Mr. Brunt took on the responsibility of getting access to the property. He was in the dark. The evidence does not support that he asked for an extension without instructions or that he told his clients to give up and not bother going to the bank.

[208] I also find that it would have been obvious to Mr. Phillips, whether Mr. Brunt told him or not, that there was some difficulty closing the property, the most obvious being financing not coming through. The deal had not closed. It would have been obvious by 4:00 p.m. to anyone that the Plaintiffs were having trouble closing.

[209] I also find that Mr. Brunt neither agreed to represent the Farids in the Second Porteous Action nor did he threaten to lie in an affidavit to the Court. The Farids made it clear as of October 13, 2013 that he was to take no steps on their behalf.

VI. Issue B: Was Mr. Brunt Negligent?

[210] I turn to the principles of solicitor's negligence.

A. Standard of Care

[211] The law requires that a lawyer act with "reasonable care, skill and knowledge to the performance of the professional service which he has undertaken." See *Central Trust v. Rafuse*, [1986] 2 S.C.R. 147, at para. 58. This standard is that of the reasonably competent solicitor.

B. Expert Evidence on Content of Standard of Care

[212] I must first examine the content of the standard of care. The general rule is that the content of the standard of care will require expect evidence. See *495793 Ontario Ltd. (Central Auto Paris) v. Barclay*, 2016 ONCA 656, at para 43; *Krawchuk v. Scherbak*, 2011 ONCA 352, at paras. 125, 130, leave to appeal to S.C.C. refused, [2011] S.C.C.A. No. 319

[213] There are exceptions. First, non-technical matters which are within the knowledge and experiences of the ordinary person. Second, where the impugned actions are so egregious defendant's conduct has fallen short of the standard of care without even precisely knowing the parameters of the standard of care. See *Krawchuk, supra,* at para. 135.

[214] The Plaintiffs called Robert Aaron to provide this evidence. The Defence called no expert evidence.

[215] As I have noted above, Mr. Robert Aaron is a certified specialist with the Law Society of Ontario and has decades of experience practising in real estate law. He graduated from law school in 1970 and has been practising real estate law since in all areas of real estate: residential, cottages, industrial, but primarily residential real estate. He is a frequent lecturer, author, and was elected as a Bencher of the Law Society of Ontario for four consecutive terms and then later became an honorary ex-officio bencher. He has previously been qualified to give opinion evidence in the Superior Court of Justice.

[216] Mr. Aaron signed an Expert's Acknowledgement of Duty as required under Rule 53 of the Rules of Civil Procedure His expertise and qualifications were not contested.

[217] The Farids set out questions for Mr. Aaron to answer and they provided him an outline of facts for Mr. Aaron to review through draft affidavit of Mr. Farid and a summary of facts. The summary of facts contained statements that Mr. Farid drew from Mr. Brunt's examination for discovery although he did not have the benefit of the transcript when he prepared the summary according to a note in the document.

[218] He based his opinion on the facts provided to him by the Farids. He did not speak with Mr. Brunt. He was provided with the transcript of the examination for discovery of Mr. Brunt.

[219] The opinion that he prepared tracks the facts closely with the Farids' versions of events.

[220] Mr. Aaron opined that Mr. Brunt's conduct fell below the requisite standard of care for the reasonably competent solicitor in many ways which included:

a. The seller did not have a discharge of the private mortgage available on the moment of closing such that they were not ready, willing and able to close as asserted. The failure to have a discharge of the private mortgage is a breach of the APS. He stated that the buyer is not under any circumstances obligated to accept an undertaking to discharge that mortgage. He said that every real estate lawyer should know this. Mr. Brunt could have objected to the seller's deliveries.

b. He did not receive an answer to his requisition letter.

c. He did not receive knowing instructions from Mrs. Farid as he allowed Mr. Farid to speak for her without verifying through English translation what her instructions were.

d. He did not adequately explain the closing procedures to his client and there was no evidence in the file materials that he did so.

e. He was of the view that as soon as Mr. Brunt received the settlement proposal on September 3, 2013, Mr. Brunt was retained. He stated that it appeared that Mr. Brunt did not understand that the settlement proposal deserved a swift response and that during this critical period, he left his clients to sign off on the settlement proposal without advice.

f. Mr. Brunt advised Mr. Farid that it was an unusual agreement, but he did not tell Mr. Farid or Mrs. Farid what was unusual about it or what they should do.

g. He did not appreciate the red flags with this agreement including that it was the product of a litigation settlement. The other red flag was that as there was no operative furnace, there was a strong likelihood that an institutional lender would not lend. Mr. Aaron stated that Mr. Brunt should have canvassed with them whether they were aware that the lender may not lend with an inoperative furnace and should have questioned them whether they had canvassed that with their mortgage broker.

h. He did not bring to the attention of the Farids and the other side that there was a serious title issue.

i. He should have told the Farids that last minute mortgage instructions are risky and that if he required them to have the money available to close so that he could show that they were ready, willing, and able to close the transaction.

j. Instead of telling his clients to bring in the money, he sought an extension.

k. Mr. Brunt admitted mid-afternoon to the other side that his clients did not have the money to close.

l. He could have told his clients, “get your money ready for closing, let’s be ready” and he did not.

m. Mr. Brunt made the request for an extension without instructions. He should have known the risk that a request for an extension came with given that the APS was the product of a litigation settlement.

n. Mr. Brunt did not appreciate that the deadline in the APS was 6:00 p.m.

o. Mr. Brunt forbade Mr. Farid from attending at his office with funds when there was still time to close the deal – they should have tendered at time in the face of the declaration of anticipatory breach.

p. Mr. Brunt called Mr. Phillips at 2:00 p.m. to ask for an extension, prior to sending the written request at 4:17 p.m., that too was a breach of his retainer, and it allowed Mr. Phillips to plot.

q. Mr. Brunt failed in his duty on many essential points including failing to keep his clients informed.

r. Mr. Brunt should have foreseen the damage that was likely to arise from his actions.

s. Mr. Brunt failed to follow instructions to do everything necessary to close by the contracted deadline. He stated that in fact a lot of his actions were the exact opposite. Mr. Aaron stated, "he seems to have done everything possible not to be ready to close, not to have the money ready, not to insist on clear title, not to insist on the proper undertakings or registrations".

[221] Mr. Brunt's version relies almost entirely on the facts alleged by the Farids. I have rejected their version of the facts such that there is no factual basis for Mr. Aaron's opinion.

[222] However, even if that were not the case, I am unable to accept Mr. Aaron's opinion because I find that he approached this opinion as an advocate for the Farids and not with an open mind. It is well-understood that those providing expert evidence at trial have a duty to be independent and impartial.

[223] His answers to three questions are stark examples of his partiality.

[224] First, in the opening questions of cross-examination, Mr. Aaron was asked by Mr. Brunt's counsel, whether to the extent that the material facts were incorrect, that would likely impact the conclusion set out in his report.

[225] Mr. Aaron answered "no". He stated that:

> .. even if a fraction of the facts in my report are disputed or incorrect, … Mr. Brunt made so many mistakes in handling this transaction that it would not have, it would not have changed my conclusion as to his negligence and liability. So, but I'm prepared [to] go through them with you, and listen to them all, but the answer is going to be, I anticipate, that it wouldn't change my opinion as to his negligence.

[226] He acknowledged that his obligation was to the Court and not to the Farids and that he was to approach the task with an open mind. Challenged on the fact that he stated he believed Mr. Brunt to be negligent regardless of where the facts lay, Mr. Aaron said this was a misunderstanding. He stated what he meant was regardless of the agreed statement of facts that he had been working seven years ago.

[227] However, the material presented to him was not an agreed statement of facts and his initial response to the question that if material facts changed that his opinion might also change, which he answered in the negative, undermined my confidence in him.

[228] Second, he criticized Mr. Brunt stating that he should have known that financing did not always come when expected and that there are hiccups. When Mr. Brunt's counsel asked, "wouldn't you think a 25-year real estate lawyer is aware of the fact that sometimes there's hiccups with financing on real estate deals?" Mr. Aaron replied: "If Mr. Brunt had as much experience as you might want to credit him with, he wouldn't have made all the mistakes that I outline in this".

[229] This statement demonstrated partiality.

[230] Last, one further exchange demonstrates that Mr. Aaron was not impartial. Defendant's counsel was asking questions about whether the seller had a registerable discharge. Mr. Aaron had concluded that the seller was not ready to close as a private mortgage could not be discharged with an undertaking.

[231] This is a true statement. A private mortgage cannot be discharged with an undertaking. However, Defendant's counsel asked, "you do not know one way or the other what the status of that discharge was as between Mr. Phillips and Mr. Worboy as of 5:59 p.m. on September 27, 2013 … if the Farids had tendered".

[232] Mr Aaron's answer eventually came that he believed that they did not have it ready. And then he stated, "I don't know what evidence they concocted after the fact. But based on the information I read in preparation for my report, they did not have it ready."

[233] Mr. Aaron came to this conclusion that it was not ready because that is what the Plaintiffs conveyed to him. There is no evidence of anyone concocting anything. Certainly, Mr. Aaron had no evidence of such. It was astonishing that Mr. Aaron would jump to that conclusion, in Court, without evidence, after telling the Court that he understood his duty to it. My belief that he could approach the task with an open mind vanished in that moment.

[234] I could not rely on his opinion both because he was an advocate and failed to approach the role with an open mind. Mr. Aaron's evidence can be given no weight because it does not meet one of the basic standards for admissibility: independence and impartiality. I acknowledge that I received this evidence. However, it became clear that the evidence did not meet the standard for opinion evidence due to Mr. Aaron's obvious partiality such that he could not carry out his primary obligation to the Court to provide fair, objective and non-partisan evidence. See: *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, at paras. 1, 2, 32, 45, 49.

[235] I am left without expert evidence on standard of care and this case does not fall within the exceptions set out in *Krawchuk v. Scherbak, supra*.

C. Damages

[236] I will later address the question of damages. However, for there to be actionable negligence, the Plaintiffs must suffer damages. It is not actionable to say that the Defendant created a risk if no harm was suffered. See *Clements v. Clements,* 2012 SCC 32, at para. 16 and *Atlantic Lottery Corp. Inc. v. Babstock,* 2020 SCC 19, at para. 33.

VII. Issue C: Breach of Fiduciary Duty

[237] A lawyer client relationship is a fiduciary one. A fiduciary is a person who is in a relationship with another person marked by loyalty, trust, confidence and reliance on skill and advice. See *Hodgkinson v. Simms,* [1994] 3 S.C.R. 377. A fiduciary has duties to the other party in the relationship. They are duties of loyalty, disclosure, and confidentiality.

[238] The Plaintiffs complain that the Defendant breached his obligations to them.

[239] First, they alleged that Mr. Brunt withheld documents from them causing their specific performance action to fail. Mr. Farid claims that the Defendant asked Mr. Farid for his entire file, and it was not provided. I find that the Plaintiffs have not proven this. Rather, the Plaintiffs did not request Mr. Brunt's file until March 14, 2016 as evidenced by their letter to Mr. Brunt on that date.

[240] The Farids argue that Mr. Brunt did not advise of Ms. Porteous' undertaking to discharge all mortgages on title after the closing when she had an obligation to discharge them no later that 6:00 p.m.. This, however, is a non-issue. I am satisfied that Ms. Porteous was able to close as I have accepted Mr. Worboy's evidence. Mr. Brunt did everything necessary to prepare for the closing.

[241] I do not accept that Mr. Brunt agreed to act for the Farids on an action for specific performance as alleged.

[242] I have rejected above the assertion that Mr. Brunt did not give a reason for failing to provide an affidavit to Mr. Farid in the motion for summary judgment in the Second Porteous Action. Mr. Brunt testified and I accept that he told Mr. Farid that he would not swear the affidavit because it was not true.

[243] The Plaintiffs assert that he never advised the Plaintiffs that he was in a conflict and that they should seek independent legal advice. The only basis for a conflict is if Mr. Brunt did something wrong in his advice and representation of the Plaintiffs and I find that he did not. The conflict arose after the termination of the retainer at the point where the Plaintiffs decided to place the blame on Mr. Brunt.

[244] I have not referenced all of the Plaintiffs' complaints here, but I have considered them. I find no breach of fiduciary duty.

VIII. Issue D: Breach of Duty of Good Faith

[245] The Plaintiffs assert that the Defendant breached his duty of good faith. Good faith requires a contract to be performed honestly and reasonably and not capriciously or arbitrarily. There are four doctrines which reflect the general principle although the duties are not closed. They are:

a. the duty of cooperation between the parties to achieve the objects of the contract;

b. the duty to exercise contractual discretion in good faith;

c. the duty not to evade contractual obligations in bad faith;

d. the duty of honest performance.

See: *2161907 Alberta Ltd v. 11180673 Canada Inc.*, 2021 ONCA 590, at para. 43, *Bhasin v. Hrynew*, 2014 SCC 71, at paras. 65-66.

[246] I have not been provided with cases that support the use of the doctrine in a lawyer client relationship. However, even if the doctrines were applicable, they have not been made out here. I have found that Mr. Brunt worked to close the deal and took all steps required by him to ready the matter for closing.

IX. Issue E: Solicitors Act

[247] There is no basis for s. 6(6) of the *Solicitors Act* to be actionable. This aspect of the claim fails.

X. Issue F: Damages

[248] Even if I was wrong about liability, I would not award damages as sought.

[249] When the deal did not close, the Plaintiffs lost two things. They lost their deposit which could have been limited to $1,000.00 if they accepted the offer of Ms. Porteous and moved on, and the $400 paid to the Defendant. As he discounted his fee, they paid him only his disbursements.

[250] Otherwise, the Plaintiffs were free to use their money to buy another house. The Plaintiffs have argued that this house met their religious, nutritional, educational, business and other needs. They assert that because no other house met those needs that they should be compensated for that. They eventually bought another house further along Garrard Road after the Second Porteous Action was dismissed. It was more expensive. Interest rates were higher. It was a further walk from the mosque and schools such that the children needed to be driven, rather than walking. This took away from time that could be spent working. They ask that all this be factored into an assessment of damages so that they can truly be put in the position that they would have been had the deal gone through. They seek:

a. additional $138,280 to buy an alternate property;

b. the interest rate differential as they had to pay a higher mortgage interest rate on the property that they eventually bought;

c. the loss of a rental property and the income therefrom for nine years;

d. the cost to live in an alterative place for two years;

e. additional land transfer tax;

f. 50% additional utilities cost for nine years;

g. the cost of the Second Porteous Action;

h. the cost to transport the children: to two schools because the distance from the house they eventually bought was not within walking distance;

i. damages for the collapse and hospitalization of Mrs. Farid on September 28, 2013 and endangering the life of Mrs. Farid and the unborn child;

j. loss of income;

k. destroying the Plaintiffs' family well-being, finances and quality of life;

l. and other losses and damages.

[251] The Plaintiffs called evidence to support those claims.

[252] The Plaintiffs assert entitlement flows both from compensation for breach of fiduciary duty and in negligence.

A. Damages under Breach of Fiduciary Duty

[253] In a breach of fiduciary duty, damages are those that flow from the breach of fiduciary duty. The Court must assess that which flows from the breach of the relevant equitable duty. While foreseeability does not factor into the calculation of compensation, there must be a link between the breach and the loss for which compensation is claimed. See *Canson Enterprises Ltd v. Boughton & Co,,* [1991] 3 S.C.R. 534, at pp. 550-556. The Supreme Court of Canada summarized as follows:

> In summary, compensation is an equitable monetary remedy which is available when the equitable remedies of restitution and account are not appropriate. By analogy with restitution, it attempts to restore to the plaintiff what has been lost as a result of the breach; i.e., the plaintiff's lost opportunity. The plaintiff's actual loss as a consequence of the breach is to be assessed with the full benefit of hindsight. Foreseeability is not a concern in assessing compensation, but it is essential that the losses made good are only those which, on a common sense view of causation, were caused by the breach. The plaintiff will not be required to mitigate, as the term is used in law, but losses resulting from clearly unreasonable behaviour on the part of the plaintiff will be adjudged to flow from that behaviour, and not from the breach. Where the trustee's breach permits the wrongful or negligent acts of third parties, thus establishing a direct link between the breach and the loss, the resulting loss will be recoverable. Where there is no such link, the loss must be recovered from the third parties.

[254] In this case, the only directly linked losses from the failed transaction is the loss of deposit and the lawyer's fee. The Plaintiffs lost their deposit of $5,000 and the $400.00 paid to Mr. Brunt. The loss of the $5,000 deposit could have been limited to $1,000 had the Plaintiffs accepted Ms. Porteous' offer. I would have limited the compensation to $1,400.00 if I had found a breach of fiduciary duty.

B. Damages in Negligence

[255] Damages should to the extent possible, restore the clients to the position that they would have been had the solicitor properly discharged his duty. This is the case whether the claim is for breach of contract or negligent performance of a professional service. See: *Toronto Industrial Leaseholds Limited v. Posesorski et al.*, (1994) 21 O.R. (3d) 1 [*TILCO*].

[256] In *TILCO*, the Court of Appeal for Ontario examined two different approaches to assessing damages. There, Justice Doherty reconciled two lines of authorities. If the error caused the client to lose an interest in a property he or she otherwise would have had, the approach set out in *Kienzle v. Stringer* (1981), 35 OR (2d) 85 applies. If the client entered into a transaction that he would not have otherwise entered then *Messineo v. Beale* (1978), 20 O.R. (2d) 49, 86 D.L.R. (3d) 713 applies.

[257] Neither approach is exactly on point. In both *Kienzle* and *Messineo*, the transactions proceeded, each with a different problem. In *TILCO*, had the Plaintiffs known about the problem, they would not have purchased the property. Here, the Plaintiffs did not get the property they wanted.

[258] Again, the Plaintiffs lost their deposit of $5,000 and the $400.00 paid to Mr. Brunt. The loss of the $5,000 deposit could have been limited to $1,000 had the Plaintiffs accepted Ms. Porteous' offer.

[259] Otherwise, the Plaintiffs could have been in hand with the money they put towards the property to purchase another property. Rather than so doing, they commenced the Second Porteous Action. By the time that was complete, interest rates and property rates had increased.

[260] In my view, the Defendant cannot be held to account for the choices made by the Plaintiffs. They waited to try to buy another property.

[261] In addition, I cannot find that the damages would have reasonably flowed from any negligence, had I found it. The Plaintiffs in my view seek damages for a loss of lifestyle that they connected to the house. In my view, those are not reasonably foreseeable.

[262] If I am wrong about this, there is no support for the damages as claimed by the Farids. Mr. Farid's loss of income claim is not supported. The statistics that he relies on for his level of education are not the best measure. His income tax returns for the years prior to the failed transaction show that he was not earning the level of income that he states he was capable of earning.

[263] The Plaintiffs' claim for renovations of the house that they eventually bought to make it the same as 26 Garrard is not supported by admissible evidence.

[264] I appreciate that the Plaintiffs feel that their life could have been different and Mr. Brunt destroyed their life and reduced them to poverty. However, they could have come out of this transaction relatively unscathed. If not for choices made by the Plaintiffs, they could have moved on from this deal. The seller was willing to refund $4,000 of the deposit for

all the trouble she went through. They would have lost $1,400 ($1,000 deposit and the $400 for disbursements in the failed transaction).

[265] I therefore assess the Plaintiffs' damages as $1,400.00.

XI. Disposition

[266] For the reasons given above, I dismiss this action.

[267] If the parties are unable to resolve costs, I will address them by way of written submissions. The Defendant shall serve and file his cost submissions within two weeks of these Reasons. The Plaintiffs shall file their written costs submissions with four weeks of these Reasons. They shall be filed through the portal and a copy sent to my Judicial Assistant Robyn Pope at Robyn.Pope@ontario.ca.

[268] I thank the parties for their helpful written and oral submissions.

Justice S.E. Fraser

Date: April 4, 2025

CITATION: Farid v. Brunt, 2025 ONSC 2117

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Muhammad Farid and Naseem Farid

Plaintiffs

– and –

Gerald Byron Brunt also known as Gerald B. Brunt

Defendant

REASONS FOR DECISION

Justice S.E. Fraser

Released: April 4, 2025