

CANADA / JUDGMENT

Engman v. Canfield

2023 BCCA 56

COURT

British Columbia Court of Appeal

DECIDED

8 February 2023

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2023 BCCA 56 Engman v. Canfield

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Engman v. Canfield,

2023 BCCA 56

Date: 20230208

Docket: CA48267

Between:

Howard H. Engman

Appellant

(Defendant)

And

Frances Jean Walbey Canfield

Respondent

(Plaintiff)

And:

Bronze Wines Ltd., Continental Appraisals Ltd.,

Air Touch Communications Ltd. and Scot Stewart

Respondents

(Defendants)

Before:

The Honourable Mr. Justice Willcock

The Honourable Madam Justice DeWitt-Van Oosten

The Honourable Mr. Justice Voith

On appeal from: An order of the Supreme Court of British Columbia, dated

April 5, 2022 (Canfield v. Bronze Wines Ltd., 2022 BCSC 546,

Nelson Registry Docket S18180).

Counsel for the Appellant,

Howard H. Engman:

C. Dennis, K.C.

R. Power

Counsel for the Respondent,

Frances Jean Walbey Canfield:

T.W. Pearkes

D.C. Crossley

Place and Date of Hearing:

Vancouver, British Columbia

December 8, 2022

Place and Date of Judgment:

Vancouver, British Columbia

February 8, 2023

Written Reasons by:

The Honourable Madam Justice DeWitt-Van Oosten

Concurred in by:

The Honourable Mr. Justice Willcock

The Honourable Mr. Justice Voith

Summary:

The appellant, a notary public, was found liable for professional negligence. He witnessed a signature on a document transferring a property under a purchase and sale agreement. Unbeknownst to him, the agreement represented an unconscionable bargain. The trial judge found that the appellant breached the standard of care expected of him as a notary public; in particular, he failed to confirm whether the transferor had obtained legal advice about the transfer, or had made an informed decision to proceed without advice. The appellant appealed the finding of liability on grounds that the trial judge erred in her analysis of the duty of care owed to the transferor, breach of the standard of care, and causation. HELD: appeal allowed. The liability finding is set aside and the action in negligence against the appellant is dismissed. The trial judge committed palpable and overriding error in finding factual causation. The record before her did not support causation and her finding to the contrary was speculative.

Reasons for Judgment of the Honourable Madam Justice DeWitt-Van Oosten:

Introduction

- [1] This appeal seeks to overturn a finding of professional negligence.
- [2] The appellant, Howard Engman, is an experienced notary public. In 2012, he witnessed the respondent, Frances Canfield's, signature on a Form A Freehold Transfer ("Form A"). The Form A transferred a 20-acre property that she owned in Grand Forks to a third party. This was the only task Mr. Engman performed for her. He was paid \$50 for his services.
- [3] Unbeknownst to Mr. Engman, the transfer formed part of an unconscionable purchase and sale agreement (the "Agreement"). Mrs. Canfield was situationally vulnerable when she signed the Agreement. She was elderly, had health problems and was feeling pressure to sell. She was deprived of important information when she agreed to the sale, including information about inherent risks flowing from the manner in which the sale was structured. The Agreement was the product of unequal bargaining power and reflected an improvident bargain.
- [4] When Mrs. Canfield was not paid for her property, she brought a civil action against various defendants. This included Mr. Engman (now retired), who was sued for negligence. Mr. Engman was held liable for \$465,000 in damages, representing the adjusted fair market value of the Grand Forks property at the time of the 2012 transfer.
- [5] The trial judge found that Mr. Engman owed Mrs. Canfield a duty to act with reasonable care when he witnessed her signature on the Form A. He breached the applicable standard of care by not inquiring into Mrs. Canfield's capacity to sign the document, the voluntariness of the transfer, or her understanding of the content and legal effect of the Form A. Critically, Mr. Engman did not confirm that Mrs. Canfield received independent legal advice about the transfer, or that she made an informed decision to proceed without advice.

- [6] The trial judge concluded that Mr. Engman's breach factually and legally caused the loss sustained by Mrs. Canfield. Had he refused to witness the Form A because Mrs. Canfield had not obtained legal advice, she could have arranged to have the Agreement rescinded. She could have then sold her property to another party at full market value and would not have sustained her loss.
- [7] Mr. Engman has appealed the liability finding. He says the trial judge erred in her findings about the scope of his duty of care, breach of the standard of care, and factual causation.
- [8] For the reasons that follow, I would allow the appeal and dismiss the action in negligence against Mr. Engman. In my view, the trial judge's finding of factual causation was speculative and not supported by the evidence. Mr. Engman has shown palpable and overriding error that justifies appellate intervention.

Background

- [9] Mr. Engman was not the only defendant sued by Mrs. Canfield. She also made a claim against Bronze Wines Ltd. (the purchaser of the Grand Forks property); Scot Stewart (the CEO and sole director of Bronze Wines Ltd.); and Continental Appraisals Ltd. and Air Touch Communications Ltd. (two private lenders who loaned money to Bronze Wines Ltd. after the transfer, registered mortgages against the Grand Forks property, and initiated foreclosure proceedings).
- [10] The individual who "brokered" the Agreement, Mrs. Canfield's son-in-law (Max Bottoni), was not named as a defendant. At the material time, he had an interest in Bronze Wines Ltd.
- [11] The Agreement was signed by Mrs. Canfield approximately one month before execution of the Form A. Under the terms of the Agreement, the property was sold to Bronze Wines Ltd. for \$465,000. No purchase payments were required until 24 months after the property was transferred. Interest would accrue from the time of the transfer. Mrs. Canfield retained the right to foreclose and to reclaim the property if Bronze Wines Ltd. missed three consecutive payments.
- [12] Mrs. Canfield and Air Touch Communications Ltd. settled prior to the trial. The remainder of the claims were tried together.
- [13] The trial judge found Mr. Engman liable in negligence. She also found liability against Bronze Wines Ltd. The claims against Scot Stewart and Continental Appraisals Ltd. were dismissed.
- [14] For purposes of this appeal, it is not necessary to set out the whole of the factual background surrounding the various claims. It is only the conclusions reached in relation to Mr. Engman that are under review.
- [15] The trial judge's reasons are indexed as 2022 BCSC 546. The analysis specific to liability against Mr. Engman is found at paras. 155-231.

[16] The trial judge made the following relevant findings of fact:

- Mrs. Canfield attended Mr. Engman's office to sign the Form A on February 27, 2012 (para. 169);
- She was not a "walk-in"; rather, an appointment had been made in her name (para. 222);
- Mrs. Canfield was with Mr. Stewart and Mr. Bottoni when she attended Mr. Engman's office (paras. 190, 222);
- Up to this point, she had not seen a copy of the Form A (para. 176);
- Nor had she received legal advice about the Agreement or the Form A (para. 198);
- She would have "required the assistance of at least one of her children, or her son-in-law, in order to arrange a visit to a lawyer's office in light of her circumstances at the time" (para. 197);
- Mrs. Canfield was using a walker when she attended Mr. Engman's office (para. 190);
- She "would have presented as an elderly woman with mobility issues" (para. 222);
- Mr. Stewart had the Form A in his possession (para. 190);
- Mr. Engman did not make any inquiries about the relationship between Mrs. Canfield, Mr. Stewart and Mr. Bottoni (para. 190);
- He did not inquire into the identity of the two men (para. 223);
- He did not review the contents of the Form A (para. 223);
- The interaction between Mr. Engman and Mrs. Canfield lasted no more than 10-15 minutes (para. 191);
- Mr. Stewart was not a party to the discussion between Mr. Engman and Mrs. Canfield (para. 191);
- Mr. Engman took no steps to "determine Mrs. Canfield's capacity, the voluntariness of the transfer, or her understanding of the content and legal effect of the instrument she was signing" (paras. 218, 194);
- Mr. Engman also "did not take steps to confirm that [Mrs. Canfield] had received independent legal advice on the transfer of the Property" (paras. 218, 223);
- At no point did Mrs. Canfield confirm to Mr. Engman that she had received legal advice before signing the Form A (para. 198);
- Mr. Engman made no contemporaneous notes to confirm what he said to Mrs. Canfield or what she said to him (para. 195);
- Mr. Stewart paid Mr. Engman \$50.00 for witnessing the signature (para. 176);
- Once the Form A had been signed and witnessed, Mr. Engman gave the original to Mr. Stewart, who took it with him when he left the office (paras. 176, 190);

- Mrs. Canfield did not retain a copy of the signed Form A (para. 176);
- At the time he witnessed the signature, Mr. Engman was subject to professional standards set by The Society of Notaries Public of British Columbia. He understood that these standards obliged him to "ensure that Mrs. Canfield had the capacity to sign the Form A, that her signature was voluntary, and that she understood the document she was signing" (paras. 211, 208);
- Mr. Engman knew from the use of the Form A that Mrs. Canfield was "transferring a fee simple interest" as a property owner (paras. 202, 222);
- The Form A was accepted for filing by the Land Title Office on March 6, 2012 (para. 34).

[17] Specific to factual causation, the trial judge found that:

- Had Mr. Engman made "even the most basic inquiries" of Mrs. Canfield, she "would have explained to Mr. Engman that she understood that the effect of her signature on the Form A would be to transfer her home to a company owned by one of the men [that] had accompanied her to Mr. Engman's office, without any immediate payment towards the purchase price" (para. 227);
- "More probably", she would have "told Mr. Engman that she was confused about the nature of the transaction and the reason for her attendance at a notary's office on that day. Either response would have alerted Mr. Engman to the importance of ensuring that Mrs. Canfield had independent legal advice" (para. 227);
- The fact that Mrs. Canfield had not received legal advice would "have stopped the execution of the Form A, even in the absence of other inquiries into Mrs. Canfield's understanding and voluntariness" (para. 228);
- If Mr. Engman had insisted that Mrs. Canfield receive legal advice before she signed the Form A, she would have had the opportunity to have the Agreement rescinded before the transfer occurred (para. 229);
- Mrs. Canfield could have then sold the Grand Forks property "in the ordinary course for its full market value" (para. 229).

Trial Judgment

- [18] At paras. 155-168 of her reasons, the trial judge instructed herself on the legal principles that governed the claim against Mr. Engman.
- [19] She noted that to prove negligence, Mrs. Canfield had to establish on a balance of probabilities that: (a) Mr. Engman owed her a duty of care; (b) his conduct breached the applicable standard of care; (c) Mrs. Canfield sustained damage; and (d) the damage was factually and legally caused by Mr. Engman's breach: at para. 155.

- [20] The fact that Mr. Engman owed a duty to Mrs. Canfield when he witnessed her signature was not in issue at the trial: at para. 199. Rather, it was the scope of the duty that had to be determined: at para. 200. In this regard, the trial judge instructed herself that in cases involving pure economic loss (the situation here), two factors will critically inform the analysis: the defendant's undertaking and the plaintiff's reliance. Where a defendant undertakes to provide a service in circumstances that invites the plaintiff's reasonable reliance, the defendant is obligated to take reasonable care and the plaintiff is entitled to rely on the defendant's undertaking to do so: at para. 159.
- [21] On the issue of standard of care, the trial judge held that a "notary public is subject to the same standard of care that would govern a lawyer doing the same work": at para. 162, citing *Normak Investments Ltd. v. Belciug*, 2015 BCSC 700 and *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147, 1986 CanLII 29 (S.C.C.). As a result, assuming that Mrs. Canfield established a duty of care owed by Mr. Engman, the question the trial judge had to ask herself was "what a reasonably competent notary or lawyer would have been expected to do in [Mr. Engman's] circumstances": at para. 164, citing *Esser v. Luoma*, 2004 BCCA 359.
- [22] The trial judge noted that expert evidence is generally required to establish the standard of care in a negligence claim against a solicitor (and, by analogy, a notary public); however, there may be circumstances in which the standard can be reliably determined without it. There may also be cases in which the conduct of a defendant amounts to "such a marked departure from any standard of reasonable conduct that it is unnecessary for the court to determine the precise parameters of that standard": at para. 165, citing *Odobas v. Yates*, 2021 BCSC 2320 and *Zink v. Adrian*, 2005 BCCA 93.
- [23] The trial judge accepted that rules of professional conduct governing a defendant's professional services, although not determinative, can "provide guidance" in determining the standard of care: at para. 166, citing *Galambos v. Perez*, 2009 SCC 48.
- [24] Finally, the trial judge instructed herself on causation. She noted that factual causation is "generally determined in accordance with the "but for" test": at para. 167. A plaintiff must establish factual causation on a balance of probabilities: at para. 167. The trial judge recognized that a plaintiff does not have to prove that the defendant's negligence was the sole cause of their injury; rather, they need only show that it was "a cause": at para. 167, citing *Athey v. Leonati*, [1996] 3 S.C.R. 458, 1996 CanLII 183 (S.C.C.). Legal causation is determined by asking whether a plaintiff's loss is too remote from the negligent conduct to be recoverable: at para. 168.
- [25] After reviewing these principles, the trial judge turned to her factual findings specific to Mr. Engman. I have set them out at paras. 16-17 of these reasons.
- [26] She then proceeded to analyze whether Mrs. Canfield proved her claim in negligence. This analysis begins at para. 199 of her judgment.

- [27] The trial judge found that Mr. Engman "owed a duty to Mrs. Canfield to act with reasonable care in carrying out his undertaking to witness her signature on the Form A freehold transfer": at para. 206, emphasis added.
- [28] Mr. Engman argued that the tasks he undertook to perform for Mrs. Canfield were restricted to "verifying the signature and identity of the transferor" on the Form A: at para. 212. The trial judge disagreed and found that Mr. Engman's duty was broader in scope: at para. 215.
- [29] She then concluded that he breached the standard of care expected of him. He "did not take steps to determine Mrs. Canfield's capacity, the voluntariness of the transfer, or her understanding of the content and legal effect of the instrument she was signing": at para. 218. Critically, he did not confirm that she had received legal advice on the transfer: at para. 218.
- [30] At the trial, Mr. Engman also argued that even if he did breach the standard expected of him (a fact he disputed), Mrs. Canfield did not prove causation. Assuming that he made all of the inquiries expected of him, there was no evidence that these inquiries would have led to a different outcome. To the contrary, the evidence, considered as a whole, suggested that Mrs. Canfield probably would have transferred her property to Bronze Wines Ltd. in any event, and still sustained her loss.
- [31] The trial judge rejected this proposition. She found that had Mr. Engman declined to witness the Form A because Mrs. Canfield had not obtained legal advice, she would have had an opportunity to have the Agreement rescinded before the transfer occurred: at para. 229. Mrs. Canfield's loss -- the value of the Grand Forks property at the time of the transfer -- was also not too remote to be recoverable: at para. 230. It was "reasonably foreseeable that if Mr. Engman failed in his duty Mrs. Canfield risked losing [the property] without adequate compensation": at para. 230.
- [32] The Grand Forks property resold in 2019 for \$410,000. The trial judge found Mr. Engman liable for damages in the amount of the adjusted fair market value of the property at the time of the 2012 transfer (\$465,000), less any funds received by Mrs. Canfield from the net proceeds of the 2019 sale.

Issues on Appeal

- [33] Mr. Engman contends that the trial judge: (a) erred in her duty of care analysis by failing to determine the scope of his undertaking to Mrs. Canfield; (b) made palpable and overriding errors of fact in finding one or more breaches of the standard of care; and (c) erred in concluding that breaching the standard of care factually caused Mrs. Canfield's loss.
- [34] He asks that the Court allow the appeal, set aside the finding of negligence, dismiss Mrs. Canfield's claim against him, and grant him costs of the appeal and of the trial.

Analysis

- a) Did the trial judge err in her duty of care analysis?

Analytical Context and Parties' Positions

- [35] As noted, Mr. Engman does not dispute that he owed a duty of care to Mrs. Canfield. Rather, in his factum, he alleges the trial judge erred in law "in failing to determine the limits of any such duty": emphasis added. He says she "never grappled with the limits and thus the reasonableness (or lack thereof) of [Mrs. Canfield's] reliance".
- [36] Whether a defendant owes a duty of care raises a question of law: 1688782 Ontario Inc. v. Maple Leaf Foods Inc., 2020 SCC 35 [Maple Leaf Foods] at para. 24. Accordingly, a correctness standard applies to this ground of appeal.
- [37] Mr. Engman submits that he witnessed the Form A exclusively as an "officer" under s. 43 of the Land Title Act, R.S.B.C. 1996, c. 250 [LTA]. In that role, he undertook two narrowly defined and statutorily prescribed responsibilities, namely, confirming: (a) that Mrs. Canfield appeared before him and acknowledged that she was the person named in the Form A as transferor; and (b) that the signature witnessed by Mr. Engman was the signature of Mrs. Canfield. He says that anything more than this fell outside the scope of his undertaking to provide a service, and, by logical extension, outside the permissible extent of Mrs. Canfield's reliance on him.
- [38] In advancing this argument, Mr. Engman relies heavily on Deloitte & Touche v. Livent Inc. (Receiver of), 2017 SCC 63 [Livent]. He says Livent makes it clear that in cases of pure economic loss, the "purpose" of a defendant's undertaking plays an integral role in the duty of care analysis and must receive meaningful consideration. It informs the scope of the duty owed, the reasonableness of a plaintiff's reliance, and the foreseeability of the claimed loss:
- [31] Rights, like duties, are, however, not limitless. Any reliance on the part of the plaintiff which falls outside of the scope of the defendant's undertaking of responsibility -- that is, of the purpose for which the representation was made or the service was undertaken -- necessarily falls outside the scope of the proximate relationship and, therefore, of the defendant's duty of care ...
- [34] in cases of negligent misrepresentation or performance of a service, the proximate relationship -- grounded in the defendant's undertaking and the plaintiff's reliance -- informs the foreseeability inquiry. Meaning, the purpose underlying that undertaking and that corresponding reliance limits the type of injury which could be reasonably foreseen to result from the defendant's negligence.

[35] a plaintiff has a right to rely on a defendant to act with reasonable care for the particular purpose of the defendant's undertaking, and his or her reliance on the defendant for that purpose is therefore both reasonable and reasonably foreseeable. But a plaintiff has no right to rely on a defendant for any other purpose, because such reliance would fall outside the scope of the defendant's undertaking. As such, any consequent injury could not have been reasonably foreseeable.

[Internal references omitted; emphasis added.]

[39] The majority judgment in *Maple Leaf Foods* makes this same point:

[32] In cases of negligent misrepresentation or performance of a service, two factors are determinative of whether proximity is established: the defendant's undertaking, and the plaintiff's reliance

[33] this Court has emphasized the requirement of proximity within the duty analysis, and has tied that requirement in cases of negligent misrepresentation or performance of a service to the defendant's undertaking of responsibility and its inducement of reasonable and detrimental reliance in the plaintiff. When a defendant undertakes to represent a state of affairs or to otherwise do something, it assumes the task of doing so reasonably, thereby manifesting an intention to induce the plaintiff's reliance upon the defendant's exercise of reasonable care in carrying out the task. And where the inducement has that intended effect -- that is, where the plaintiff reasonably relies, it alters its position, possibly foregoing alternative and more beneficial courses of action that were available at the time of the inducement. That is, the plaintiff may show that the defendant's inducement caused the plaintiff to relinquish its pre-reliance position and suffer economic detriment as a consequence.

[34] In other words, it is the intended effect of the defendant's undertaking upon the plaintiff's autonomy that brings the defendant into a relationship of proximity, and therefore of duty, with the plaintiff. Where that effect works to the plaintiff's detriment, it is a wrong to the plaintiff. Having deliberately solicited the plaintiff's reliance as a reasonable response, the defendant cannot in justice disclaim responsibility for any economic loss that the plaintiff can show was caused by such reliance. The plaintiff's pre-reliance circumstance has become "an entitlement that runs against the defendant"

[35] That entitlement, however, operates only so far as the undertaking goes. *Livent* makes clear that considerations of undertaking and reliance furnish not only a principled basis for drawing the line in cases of negligent misrepresentation or performance of a service between duty and no-duty, but also for delineating the scope of the duty in particular cases, based upon the purpose for which the defendant undertakes responsibility. Reliance that exceeds the purpose of the defendant's undertaking is not reasonable, and therefore not foreseeable ...

[Internal references omitted; italics in original, underlining added.]

See also *Charlesfort Developments Limited v. Ottawa (City)*, 2021 ONCA 410 at paras. 31-33, 43.

- [40] Mr. Engman says the trial judge failed to meaningfully consider the role of purpose in her duty of care analysis. Had she done so, she would have appreciated that as an "officer" under s. 43 of the LTA, the purpose (or intended effect) of Mr. Engman's undertaking was limited, Mrs. Canfield's reliance on him for anything beyond the prescribed areas of responsibility was not reasonable, and the type of injury sustained by her was not foreseeable.
- [41] Mr. Engman contends that as a service provider with two narrowly defined attestation responsibilities, he could not be expected to have foreseen that Bronze Wines Ltd. would not perform its obligations under the Agreement; mortgages registered against the Grand Forks property and related foreclosures would take priority over Mrs. Canfield's equitable interest; and Mrs. Canfield would lose the full (or a substantial part of the) value of her property. Nor could Mrs. Canfield reasonably rely on Mr. Engman to protect her from this loss. Mr. Engman did not receive or review a copy of the Agreement. He was not made aware of its terms. Mrs. Canfield did not ask him to provide advice in respect of the Agreement, explain it to her, or identify the risks. These responsibilities did not form any part of Mr. Engman's undertaking.
- [42] In response to this ground of appeal, Mrs. Canfield argues that Mr. Engman witnessed her signature as a notary public, not exclusively as an "officer" under the LTA. More importantly, and in any event, she says there is no substantive difference between these roles for the purpose of witnessing a Form A. Under either scenario, Mr. Engman's responsibilities were not restricted to confirming Mrs. Canfield's identity and confirming that the signature on the Form A was her signature. He also had a responsibility to inquire into whether Mrs. Canfield knew and understood the contents of the Form A, signed it voluntarily, had the legal capacity to execute the transfer, and intended to be bound by it.
- [43] Mrs. Canfield says these responsibilities arise from the combined effect of ss. 42 and 43 of the LTA. They also find form in the professional standards set by The Society of Notaries Public of British Columbia. In his trial testimony, Mr. Engman acknowledged that these standards applied to him at the time he witnessed Mrs. Canfield's signature.
- [44] At his examination-for-discovery, Mr. Engman described his role in witnessing Mrs. Canfield's signature as restricted to checking her identity, having her sign the Form A in his presence, and attesting (certifying) the signature. He was asked if he would have ascertained whether Mrs. Canfield understood the "significance of a Form A Transfer form and what they [were] doing by signing it". Mr. Engman said he would not have done that because he was not giving Mrs. Canfield legal advice. As such, he "wouldn't have gone into those details".
- [45] At the trial, however, he shifted his position (he now says he was mistaken in doing so), and testified to expanded responsibilities. He said it would have been his "normal procedure" in circumstances such as those involving Mrs. Canfield to inquire as to whether the individual signing the Form A as a transferor was "aware of what she was signing and understood it and

was comfortable making the signature or giving [him] her signature". And, he "would have reviewed the document to make sure that it was filled in and [he] would have taken her signature on it and gone through that process". Mr. Engman furthermore testified that it would have been part of his "normal practice" to ask Mrs. Canfield if she had received legal advice about the Form A.

[46] In cross-examination, Mr. Engman acknowledged the discrepancies between his trial testimony and what he said at his examination-for-discovery. He testified that as a result of "additional information", he had come to understand that he was "required to ensure that [Mrs. Canfield was] mentally competent and not being coerced". When asked to indicate the origin of this "additional information", he said the requirements arose from the "Notary Society's rules and regulations". Mr. Engman agreed that these "rules and regulations" applied to him when he witnessed Mrs. Canfield's signature.

[47] An April 2011 version of the Principles for Ethical & Professional Conduct Guideline published by The Society of Notaries Public of British Columbia (the "Guideline"), was marked as an exhibit at the trial. The Guideline delineated the following "Principles":

2-G6 Unrepresented Persons - A Member should not advise an unrepresented person in a transaction, but should urge such a person to obtain independent advice and, if the unrepresented person does not do so, the Member should take care to see that such person is not proceeding under the impression that his or her interests will be protected by the Member.

3. Preparation and Swearing of Documents

3-P1 Members should employ great care in the preparation of documents and should be meticulous and conscientious in the attesting of them.

Guidelines

3-G1 Signatories - Members should carefully screen the identity and voluntariness of each signatory and oath taker, and to observe that each appears to be aware of the significance of the transaction requiring a notarial act.

3-G2 Legal Requirements - Members should ensure that, before notarizing a document, they are aware of any legal requirements relating to the attestation of the document, such as those contained in the Land Title Act, RSBC 1996, c. 250 or those relating to documents from foreign jurisdictions.

Commentary

3.1 The most fundamental and material function of a Notary is the proper attestation and drafting of documents. Many legal documents require the seal of a Notary. It is essential to the proper functioning of our commercial and legal system that documents prepared by and attested by Notaries are acceptable without question to the appropriate registries and public offices in BC and elsewhere. This requires that Members be aware of and observe strictly the formal requirements for the drafting, attestation and signing of documents.

3.2 Absent a specific statutory requirement, the usual and generally accepted methods of identifying a deponent or grantor are:

- (a) the deponent is personally known to the member;
- (b) the deponent is properly identified by another person who is known to the member or produces acceptable identification;
- (c) the deponent produces a valid passport, citizenship card with photo, or other government issued photographic identification.

3.3 Where there is more than one grantor, each of them should be properly identified.

3.5 Members should distinguish between situations where notarial services are being sought and situations where a party merely requires that a person witness a signature. A Member should be cautious, in their capacity of as a Notary, when witnessing documents where no notarial services are being sought or appear to be required.

[Emphasis added.]

Discussion

[48] I do not agree with Mr. Engman that the trial judge erred in her duty of care analysis by failing to consider the purpose of his undertaking.

[49] The trial judge correctly instructed herself on *Livent* and *Maple Leaf Foods* (Mr. Engman does not suggest the contrary), and she understood that in finding and defining a duty of care, the "purpose of the defendant's undertaking [informs] the analysis of the foreseeability of injury": at para. 157, emphasis added. She also understood that "[a]ny reliance on the part of the plaintiff which falls outside the scope of the defendant's undertaking of responsibility necessarily falls outside the scope of the proximate relationship and, therefore, of the defendant's duty of care": at para. 160, citing *Livent* at para. 31 and *Maple Leaf Foods* at para. 35, emphasis added.

[50] It is also apparent to me that the trial judge properly applied the *Livent* and *Maple Leaf Foods* frameworks. In defining Mr. Engman's duty of care, she examined the purpose of his undertaking to perform a service for Mrs. Canfield, as well as its scope.

- [51] In doing so, the trial judge did not view Mr. Engman solely as an "officer" under the LTA. Rather, she found that he "[undertook] to provide his services as a notary in witnessing Mrs. Canfield's signature": at para. 204, emphasis added. See also paras. 213 and 215 of her reasons. This was the context in which the trial judge conducted her duty of care analysis. The analysis was informed by the statutorily prescribed responsibilities of an "officer" under the LTA and by the fact that Mr. Engman held himself out as a notary public in providing his services. He signed, certified and stamped the Form A as a "Notary Public".
- [52] Accordingly, the scope of the duty of care owed by an "officer" under the LTA who witnesses a signature exclusively in that capacity, and with no other attendant responsibilities, is not before us. The nature and the extent of the inquiries required of an "officer" acting solely in that role is best left for another day. Instead, this appeal is about the duty of care owed by Mr. Engman in his role as a notary public. In that role, Mr. Engman carried responsibilities that were delineated in the standards established for his profession and which he acknowledged governed his conduct when he witnessed Mrs. Canfield's signature. This included, specific to "unrepresented persons", urging them to obtain independent advice and, if they chose not to do so, "tak[ing] care to see" that they did not proceed under the impression that their interests would be protected by the notary public: Guideline, s. 2G-6.
- [53] The trial judge recognized that a notary public has statutory authority for "taking affidavits" in British Columbia (see s. 60 of the Evidence Act, R.S.B.C. 1996, c. 124), and, by virtue of that authority, is entitled to witness the "execution by a transferor of an instrument" under ss. 41-43 of the LTA: at para. 201.
- [54] Mrs. Canfield was a "transferor" within the meaning of the LTA: s. 41. As a result, her certified signature on the Form A would constitute proof in the absence of evidence to the contrary that she: (a) knew the contents of the Form A and signed it voluntarily; and (b) had the legal capacity to execute the Form A and intended to be bound by it: s. 42(4).
- [55] The trial judge found that Mr. Engman "knew from the use of the Form A that Mrs. Canfield was transferring a fee simple interest": at para. 202. Witnessing and certifying the execution of the Form A "operat[ed] to verify the signature and identity of the transferor", thereby enabling the transfer to occur: at para. 201. As a result, Mrs. Canfield's interests as the property owner were directly impacted by the service that Mr. Engman provided: at para. 202.
- [56] The trial judge also found that the purpose of witnessing and certifying a Form A is to "[protect] the integrity of British Columbia's land registration system": at paras. 201, 214. How so? By verifying the identity and signature of the transferor (LTA, ss. 43(a) and (b)), and by confirming that the transferor knows the contents of the Form A, has signed it voluntarily, has the legal capacity to execute the instrument, and intends to be bound by it: LTA, s. 42(4).

- [57] As I read the reasons for judgment, these are the attestation responsibilities that were found to fall within the scope of Mr. Engman's undertaking as a notary public, given the purpose for which he was asked to witness Mrs. Canfield's signature. Accordingly, Mrs. Canfield was entitled to rely on Mr. Engman in respect of them.
- [58] In my view, the trial judge correctly analyzed Mr. Engman's responsibilities as a notary public conducting a function under the LTA. Her findings are consistent with the comments of Groberman J.A., writing for the Court, in *R.A.D. v. Campbell*, 2015 BCCA 494 [R.A.D.]. That case focused on the validity of a mortgage that had been witnessed by a lawyer under Part 5 of the LTA.
- [59] In *R.A.D.*, Justice Groberman described the "purpose of the [LTA's] witnessing requirements" as being to:
- [10] protect the integrity of the system. The provisions envisage witnesses who are independent of the parties, and who are trained in the taking of solemn documents. Witnesses are required by s. 43 to satisfy themselves that the person named in an instrument has actually executed it, and to certify that fact by their signatures. They may also be called upon to provide evidence on matters for which the signed instrument provides prima facie proof under s. 42(4): the voluntariness of the mortgagor's grant of the mortgage, the mortgagor's knowledge of the instrument, and the mortgagor's capacity to enter into the mortgage agreement

See also *1233543 B.C. Ltd. v. Cao*, 2022 BCCA 343 at para. 30.

- [60] As I read this passage from *R.A.D.*, the voluntariness of a signature, the signatory's knowledge of what is being signed, and their capacity to execute the instrument, are critical to protecting the integrity of the land title system. This is why a lawyer or notary public who witnesses a signature under the LTA may be called upon to provide evidence on those matters (s. 42(4)). The only way to do that, and to give meaningful effect to s. 42(4), is for them to turn their mind to these issues at the time they witness the signature.
- [61] The fact that this forms part of a lawyer or notary public's attesting responsibilities finds added support in s. 47 of the LTA. Under the latter provision, certification of a signature from someone "who appears to the officer to be unable to read English or sign [their] name in English characters", constitutes proof that the signatory appeared in-person before the lawyer or notary public, acknowledged to them that the contents and effect of the instruction were "sufficiently communicated" to the signatory, and "that the individual fully understood the contents of the instrument". The underlying assumption, of course, is that these inquiries would have been made as part of the certification process.
- [62] On its face, the LTA clearly contemplates inquiries beyond the identity of the signatory and the fact that the signature on the Form A is their signature.

- [63] The Guideline does as well, which the trial judge also considered in defining the scope of Mr. Engman's duty of care in the circumstances of this case. The Guideline came into play because of Mr. Engman's status as a notary public and it was proper for the trial judge to take it into account. The Guideline provides that: "Members should carefully screen the identity and voluntariness of each signatory and oath taker, and to observe that each appears to be aware of the significance of the transaction requiring a notarial act (s. 3-G1). In my view, the trial judge was right to find, specific to a Form A, that this too "protects the integrity of the land registry at the same time as it protects the interests of the transferor who is in a relationship of proximity with the notary": at para. 214.
- [64] In addition to his LTA responsibilities, the Guideline imposed a responsibility on Mr. Engman to urge Mrs. Canfield, as a self-represented person, to obtain independent advice or, if she declined, to take care to see that she was not proceeding under the impression that her interests would be protected by Mr. Engman. Mrs. Canfield was entitled to rely on Mr. Engman to fulfill these responsibilities.
- [65] I do not see that the trial judge too broadly defined Mr. Engman's undertaking and duty of care. Mr. Engman's position in the appeal fails to account for the fact that the trial judge analyzed the duty of care in the context of Mr. Engman's role as a notary public, and that his responsibilities as an "officer" under the LTA were subsumed in that role, but not dispositive.
- [66] The trial judge understood that Mr. Engman's involvement with the Form A was "limited" and that "his undertaking [was] a relatively narrow one": at para. 221. However, she was of the view that to define the duty as narrowly as suggested by Mr. Engman would mean that "it would be appropriate for a notary to witness the execution of a Form A even in the face of blatant and egregious circumstances of apparent lack of capacity and/or voluntariness on the part of the transferor": at para. 221.
- [67] The trial judge was not prepared to define Mr. Engman's areas of responsibility in a manner that allowed this to occur. In my view, she was correct in her determination.
- b) Did the trial judge err in finding a breach of the standard of care?

Analytical Context and Parties' Positions

- [68] The trial judge found that the standard of care expected of a "reasonable and prudent" notary public when witnessing a signature on a Form A includes: (1) confirming the transferor's identity; (2) advising them that the notary public is not providing legal advice on the transaction; (3) confirming that the transferor has received independent legal advice, or at least has made an informed decision to not seek advice; (4) satisfying themselves that the transferor has the capacity to sign the Form A; and (5) satisfying themselves that the transferor understands the content and legal effect of the Form A and is signing it voluntarily: at para. 215.

- [69] Mr. Engman alleges that the trial judge made two palpable and overriding errors of fact in finding one or more breaches of this standard. Because he is challenging factual findings, Mr. Engman faces a deferential standard of review: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 10.
- [70] First, Mr. Engman says the trial judge misapprehended his testimony when she found that he "agreed in his evidence that the standards set out in the Notaries Guideline governed him in the exercise of his professional duties": at para. 208. Mr. Engman says he did not make this concession.
- [71] The second alleged error of fact involves the trial judge's finding that when Mrs. Canfield spoke with Mr. Engman at his office on February 27, 2012, she did not confirm that she had received legal advice, or, alternatively, that she did not need legal advice: at para. 198.
- [72] Mr. Engman says the latter finding is without evidentiary support. In her testimony, Mrs. Canfield agreed that she "probably did" tell Mr. Engman that she had received legal advice. Moreover, Mr. Engman testified that he would not have witnessed her signature unless she confirmed that she had received advice. Given the cumulative effect of this evidence, Mr. Engman contends there was no basis from which the trial judge could then find that Mrs. Canfield did not speak with Mr. Engman about whether she had received legal advice.
- [73] Mrs. Canfield says the findings of breach were reasonably open to the trial judge on the whole of the evidence. Moreover, they were not limited to a failure to confirm whether Mrs. Canfield had received legal advice. The trial judge also found that Mr. Engman took no steps to inquire into Mrs. Canfield's capacity to sign the Form A, the voluntariness of the transfer, or her understanding of the Form A's contents and its legal effects: para. 218. As such, even without a factual finding specific to the issue of legal advice, Mr. Engman would have been in breach.

Discussion

- [74] In my view, the factual challenges to the trial judge's conclusions on this aspect of her negligence analysis are without merit. Mr. Engman has not persuaded me of palpable and overriding error.
- [75] Specific to the first alleged error, Mr. Engman did accept in his testimony that the "Notary Society rules and regulations" applied to him when he witnessed Mrs. Canfield's signature. The requirements he referred to when addressing this issue, namely, ensuring that Mrs. Canfield was "mentally competent" and "not being coerced", are explicitly delineated as "Principles" in the then-in place Guideline, cited by the trial judge at paras. 209-210 of her reasons (s. 3-G1). Mr. Engman also testified that it would have been part of his "normal practice" to ask Mrs. Canfield if she had received legal advice about the Form A. This too is a "Principle" set out in the Guideline (s. 2-G6).

- [76] The portions of Mr. Engman's evidence that he says undermine the trial judge's finding on this point are from his examination-for-discovery. The trial judge found that Mr. Engman's testimony at the trial was "markedly different" from his evidence at his examination-for-discovery: at para. 184. At the trial, Mr. Engman expanded the scope of responsibilities that he understood to attach to him as an attesting notary public.
- [77] In response to the second alleged error, Mr. Engman did not have an independent recollection of dealing with Mrs. Canfield. His testimony about what he would or would not have done or said when he witnessed the Form A was based on his standard practice. In this regard, the trial judge found him to be an "unreliable witness": at para. 193. His evidence about the content of his "standard practice changed over time": at para. 193. It was up to the trial judge to assess the reliability of Mr. Engman's testimony, in the context of the evidence as a whole.
- [78] Mrs. Canfield testified that she "probably did" tell Mr. Engman that she did not need legal advice. However, in giving this evidence, she simply agreed with a proposition put to her by Mr. Engman's lawyer, and the trial judge found that Mrs. Canfield was "[receptive] to suggestion as a method of filling her memory gaps": at para. 174. See also para. 192. Again, it was up to the trial judge to assess the reliability of Mrs. Canfield's evidence. She was entitled to accept all, none or only part of it.
- [79] As it turned out, neither Mr. Engman's nor Mrs. Canfield's evidence was of assistance to the trial judge on the issue of whether Mrs. Canfield communicated that she received legal advice (or, that she made an informed decision to forego advice). Mr. Stewart, who was in Mr. Engman's office when the Form A was signed, similarly provided no assistance on this point. He could not say whether Mr. Engman broached the subject of legal advice with Mrs. Canfield. Finally, Mr. Engman did not make any notes contemporaneous with his interaction with Mrs. Canfield. Accordingly, there was no independent confirmation of an inquiry into this issue.
- [80] However, the trial judge was satisfied that Mrs. Canfield had not, in fact, received legal advice specific to the Form A. In these circumstances, she concluded that it was "implausible" Mrs. Canfield would have confirmed the contrary to Mr. Engman: at para. 198. In my view, there was evidentiary support for this finding.
- [81] In her direct examination, Mrs. Canfield said she did not "see a lawyer" about the transfer of the Grand Forks property to Bronze Wines Ltd. Mr. Stewart testified that the Agreement was negotiated on the understanding that no lawyer would be involved unless he covered the cost. In fact, a term to this effect was expressly included in the Agreement, which was signed by Mrs. Canfield. There was evidence that Mrs. Canfield was encouraged by her son-in-law to seek legal advice in early March 2012, but not until after the Form A had been executed, which suggests that up to that point in time, she had not done so. Otherwise, raising the issue with her would have been unnecessary.

- [82] This evidence, considered as a whole, provided a foundation from which the trial judge could reject Mr. Engman's testimony about confirming the receipt of legal advice with Mrs. Canfield, and, instead, infer that Mrs. Canfield made no such statement. In my view, this inference was not conjectural. Rather, it found inferential support in the evidence surrounding the negotiation and execution of the Agreement, Mrs. Canfield's evidence about not having spoken with a lawyer, and events that occurred after the signing of the Form A.
- c) Did the trial judge err in finding causation?
- [83] This is Mr. Engman's strongest ground of appeal and the one that persuades me appellate intervention with the liability finding is warranted.

Analytical Context and Parties' Positions

- [84] In her causation analysis, the trial judge focused primarily on Mr. Engman's failure to confirm with Mrs. Canfield that she received legal advice about the Form A, or, "at least that she had made an informed decision not to seek legal advice": at paras. 215, 227. On a fair reading of the reasons, this was the breach that most grounded the finding of a nexus between Mr. Engman's negligent conduct and Mrs. Canfield's loss. The trial judge understood Mr. Engman to testify that had he been told Mrs. Canfield had not received legal advice, he would have "stopped the execution of the Form A, even in the absence of other inquiries into Mrs. Canfield's understanding and voluntariness": at para. 228, emphasis added.
- [85] The trial judge found that had Mr. Engman insisted that Mrs. Canfield receive legal advice before he witnessed the Form A, Mrs. Canfield "would have had the opportunity to have the unconscionable Agreement rescinded before the transfer of the Property had occurred": at para. 229. "But for" his breach of duty, she "would have avoided the loss of her Property to Bronze Wines [Ltd.] [and] could have sold it in the ordinary course for its full market value": at para. 229, emphasis added.
- [86] The trial judge also found that the loss for which Mrs. Canfield sought compensation -- the value of the Grand Forks property at the time it was transferred -- was not too remote to be recoverable. She found it was reasonably foreseeable that if Mr. Engman failed to satisfy himself the transfer was voluntary, Mrs. Canfield understood its effect, and she had received legal advice about the transaction, "Mrs. Canfield risked losing the Property without adequate compensation": at para. 230.
- [87] Citing authorities such as *Borgfjord v. Boizard*, 2016 BCCA 317, leave to appeal to SCC ref'd, 37210 (9 February 2017), [Borgfjord], Mr. Engman accepts that a plaintiff is not required to adduce "scientific proof" of causation and that a causal link between negligent conduct and a claimed loss can be inferred. However, he emphasizes that any such "inferences must be based on proven facts and cannot be simply guesswork or conjecture": *Borgfjord* at paras. 55, 67. See also the discussion in *Tellini v. Bell Alliance*, 2022 BCCA 106 at paras. 44-45.

- [88] Mr. Engman contends that the trial judge's finding of factual causation was conjectural, especially in light of competing evidence that suggested the loss suffered by Mrs. Canfield would probably have happened in any event. From his perspective, the only thing that could reasonably be inferred from the evidence surrounding Mr. Engman's interaction with Mrs. Canfield is that had he declined to witness the Form A, the transfer document would not have been signed on February 27, 2012. Mrs. Canfield led no evidence of what would have occurred after that point in time to prevent Bronze Wines Ltd. from nonetheless obtaining the property under the Agreement.
- [89] Mrs. Canfield was not asked in direct examination whether she would have sought legal advice about the Agreement or the Form A, sought to rescind the Agreement, or otherwise refrained from transferring the Grand Forks property to Bronze Wines Ltd., had Mr. Engman refused to witness her signature. Nor was this question asked of her in cross-examination.
- [90] Mrs. Canfield did not call any other evidence specific to causation. Instead, it appears that she invited the trial judge to infer factual causation from the mere fact that the Form A signed by Mr. Engman was the document that ultimately effected a transfer and removed Mrs. Canfield from title.
- [91] In her factum, Mrs. Canfield takes this same position. She says the fact that the Form A effected a transfer was sufficient to establish factual causation. Mrs. Canfield's damages arose from the registration of her property in the name of Bronze Wines Ltd. With that registration, she lost title to the land.
- [92] In her factum, Mrs. Canfield says Mr. Engman was the "cause in fact of that damage": emphasis added. Had he lived up to the standard of care expected of him, it is unlikely Mr. Stewart would have left the office with a completed Form A. Mrs. Canfield could have then avoided her loss by having the Agreement rescinded before a transfer took place, or, at the very least, she could have demanded of Bronze Wines Ltd. a vendor's right to foreclose with a mortgage. At that point, the would-be purchaser would likely have abandoned its intention to buy.

Discussion

- [93] As reiterated by the Supreme Court in *Nelson (City) v. Marchi*, 2021 SCC 41 [Nelson], it is "well established that a defendant is not liable in negligence unless their breach caused the plaintiff's loss": at para. 96. The trial judge correctly noted that the causation analysis involves two distinct inquiries. The plaintiff must establish factual causation by proving "on a balance of probabilities that the harm would not have occurred but for the defendant's negligent act": at para. 167, citing *Nelson* at para. 96, emphasis added. The plaintiff must also establish legal causation. The actual injury sustained by the plaintiff must have been a reasonably foreseeable result of the defendant's negligent conduct: *Nelson* at para. 97.

- [94] Where factual causation is sought to be established by inference, any such inferences "must be based on proven facts and cannot be simply guesswork or conjecture": Borgford at paras. 55, 67. It is also open to a defendant to argue or to call evidence that the injury sustained by the plaintiff would have happened in any event: *Clements v. Clements*, 2012 SCC 32 at para. 11.
- [95] The decision of this Court in *B.S.A. Investors Ltd. v. D.S.B.*, 2007 BCCA 94, leave to appeal ref'd, [2007] S.C.C.A. No. 357 (S.C.C.) [B.S.A.], emphasizes the importance of causation inferences finding support in the evidence.
- [96] In *B.S.A.*, a trial judge found a defendant law firm liable for professional negligence and awarded damages on the basis that the negligence materially contributed to loss sustained by two of the plaintiffs. A lawyer with the firm assisted with the execution of mortgage documents that did not comply with one of the plaintiff company's articles of incorporation. The individual who gave instructions for completion of the documents knew that they were non-compliant and deliberately misrepresented the surrounding facts. The mortgage facilitated the transfer of \$550,000, which was then improperly used by that same individual for personal gain. The lender brought foreclosure proceedings and the plaintiffs' president had to pay \$550,000 to have the mortgage discharged. The law firm admitted negligence; however, it argued that the plaintiffs did not prove causation.
- [97] The trial judge in *B.S.A.* found factual causation. The evidence did not show what the fraudster would have done had the lawyer insisted on compliance with the articles of incorporation: at para. 23. The fraudster did not testify and explain how he would have responded. The trial judge held that in these circumstances, he could draw an inference adverse to the law firm on causation and infer that the improper execution of the mortgage documents, which factually resulted in a transfer of funds, materially contributed to the respondents' loss: at para. 24.
- [98] On appeal, this Court held that the trial judge erred in proceeding as he did. He drew an inference that found no support in the evidence. It is only in "rare circumstances" that a court is entitled to draw an inference of causation "from no relevant evidence at all", and that is when a defendant's negligence prevents the plaintiff from positively proving the cause of their injuries: at paras. 35, 38 and 43.
- [99] *B.S.A.* was not one of those cases. Instead, it was the plaintiffs' burden to show that had the lawyer insisted that the mortgage documents be executed in a manner consistent with the articles of incorporation, "it would have put a stop to [the] fraud": at para. 48, emphasis added. The plaintiffs were "not required to lead evidence negating every possible hypothetical situation": at para. 48. However, there was a "sizeable body of evidence going to [the fraudster's] dishonesty, which was accepted by the trial judge": at para. 48. "Consequently, the plaintiffs' burden as to causation included the requirement to show, on a balance of probabilities, that had [the lawyer] performed his duty [the fraudster] would have been stopped": at para. 48, emphasis added. As causation had not been proved, the finding

of liability against the law firm was set aside and the claim against it was dismissed.

- [100] In this case, Mr. Engman argues there was no evidence indicating that Mrs. Canfield would have sought legal advice subsequent to February 27, 2012; would have reconsidered her decision to sell the property to Bronze Wines Ltd. and declined to proceed with the sale; would have taken steps to rescind the Agreement or insist on different and better-protective terms; or would have refrained from signing the Form A at some other time, in front of some other witness. Her evidence did not speak to any of these issues. She was the plaintiff and she bore the onus of proving factual causation.
- [101] Mr. Engman contends that, in fact, the evidence before the trial judge suggested the contrary, namely, that Mrs. Canfield likely would have proceeded with the Agreement and the transfer to Bronze Wines Ltd. in any event, and without legal advice.
- [102] Mr. Engman says it is important to keep in mind for purposes of the causation analysis that the trial judge did not find Mrs. Canfield was without the cognitive "capacity" to sign the Form A. In fact, she found that "all of the evidence [was] to the contrary": at para. 226.
- [103] As noted at para. 14 of the reasons for judgment, there was evidence that Mrs. Canfield had been an "equal [partner]" with her husband in purchasing investment properties during their marriage. By 2012, she had considerable experience in assessing the value of properties, as well as "experience in attending the offices of lawyers and notaries for the purpose of completing the property sales": at para. 14. In other words, she was not a neophyte in the purchase and sale of land or the legal consequences of transferring property.
- [104] Prior to signing the Agreement, Mrs. Canfield had (unsuccessfully) applied for permission from the Agricultural Land Commission to subdivide the Grand Forks property. She had also listed the property for sale in both 2010 and 2011: at paras. 19-20. She was fully engaged with selling the property in 2011 and an active participant in that endeavour. The realtor who listed the property in 2011 testified that she had no concerns about Mrs. Canfield's capacity when the latter signed the listing agreement.
- [105] Mrs. Canfield gave evidence that she did not "see a lawyer" about the sale of the property to Bronze Wines Ltd. The trial judge accepted this testimony: at para. 198.
- [106] Mr. Stewart said that when negotiating the Agreement through Mr. Bottoni, he understood there would be no lawyer involved unless he covered the cost. Consistent with this perception, it was an express term of the Agreement that "[f]ees to draw up the agreement and have it notarized [would] be assumed by the Purchaser". The Agreement was signed by Mrs. Canfield. She agreed to this term. Mr. Stewart testified (and the trial judge accepted), that Mrs. Canfield did not propose any changes to the Agreement and did not ask any questions about its terms before signing: at paras. 30, 87.

- [107] One of Mrs. Canfield's daughters gave evidence at the trial. It was her evidence that her mother did not ask her for advice about the potential transfer of the property. Nor did she raise any concerns about the Agreement until "a couple of years after the fact".
- [108] Mrs. Canfield's daughter also testified that on March 3 or March 4, 2012, she participated in a Skype call with her mother and Mr. Bottoni. During that call, Mr. Bottoni suggested to Mrs. Canfield that she speak with a real estate lawyer about the transfer of the Grand Forks property. This suggestion was made after the Form A had been signed, but before it was registered with the Land Title Office. The daughter subsequently looked up the name of a property or real estate lawyer for her mother, obtained a contact number, and, at some point, she provided this information to Mrs. Canfield. There is no indication that Mrs. Canfield followed through on Mr. Bottoni's suggestion, or, importantly, her daughter's information, and contacted a lawyer. Indeed, her evidence was to the contrary. She said she did not speak to a lawyer about the transaction.
- [109] In light of this evidence, Mr. Engman says it was speculative for the trial judge to find that had he made "even the most basic inquiries" of Mrs. Canfield, she "would have explained to Mr. Engman that she understood that the effect of her signature on the Form A would be to transfer her home to a company owned by one of the men [that] had accompanied her to Mr. Engman's office, without any immediate payment towards the purchase price": at para. 227, emphasis added. Or, "more probably, she would have told Mr. Engman that she was confused about the nature of the transaction and the reason for her attendance at a notary's office on that day": at para. 227, emphasis added.
- [110] Mr. Engman contends that the latter of these inferences is inconsistent with the uncontradicted evidence of events leading up to Mrs. Canfield's attendance at his office, and her participation in them.
- [111] He also says it was insufficient to find factual causation on the mere basis that had Mr. Engman "insisted that Mrs. Canfield receive independent legal advice before he witnessed her signature on the Form A she would have had the opportunity to have the unconscionable Agreement rescinded before the transfer of the Property had occurred", and speculative to find that she could have "sold [the property] in the ordinary course for its full market value": at para. 229.
- [112] According to the evidence, at the time of the 2012 transfer, Mrs. Canfield was content to proceed with a sale to Bronze Wines Ltd. No one testified that Mrs. Canfield was expressing concerns or confusion to them about the Agreement, its terms, the transfer of her property, the reason for her attendance at Mr. Engman's office, or, importantly, displaying an interest in receiving legal advice about the transaction. In this context, it is difficult to understand the basis for the trial judge's finding that if asked, Mrs. Canfield would have laid out the terms of the Agreement for Mr. Engman in the manner suggested, or expressed confusion about the transfer or the reason for her attendance at his office.

- [113] Mrs. Canfield was 82 when she gave her evidence and she expressed confusion at the time of trial about the circumstances surrounding the Agreement and her attendance at Mr. Engman's office. Some of her responses to questions that were put to her are difficult to follow. For example, it was suggested to her in cross-examination that when she signed the Agreement, she knew she was agreeing to its terms. She answered: "Correct. But I am quite sure that I was not in myself agreeing to it, but my pen was". She was asked whether she "carefully reviewed [the Agreement] before [she] signed it". She answered: "I suppose I did, but that doesn't mean to say that I personally felt that I was doing that".
- [114] However, her attendance at Mr. Engman's office occurred nine years earlier and, as noted, the trial judge found that at that time, Mrs. Canfield had the cognitive capacity to contract and to sign a Form A. I take this to mean that she had the capacity to review the Agreement, to understand its terms, and to make a voluntary choice to accept those terms. The Agreement was found to have been unconscionable, but not because Mrs. Canfield "lacked [the] capacity to contract" (at para. 92), was forced to sign the Agreement without her consent, or her will was otherwise overborne. As I understand the trial judge's reasons, the unconscionability arose from the fact that Mrs. Canfield was situationally vulnerable, deprived of critical information when she agreed to sell her property to Bronze Wines Ltd., and that the terms of the Agreement were substantively improvident.
- [115] Mr. Engman accepts that had the Form A not been signed on February 27, 2012, Mrs. Canfield would have had the "opportunity" to rescind. However, this is not the same thing as finding that, in fact, she would have availed herself of that opportunity and taken steps to rescind. To the contrary, the evidence was that Mrs. Canfield wanted to sell the Grand Forks property; viewed a sale as necessary because she could not physically manage the upkeep; and was not concerned about seeking legal advice.
- [116] There was also evidence from the realtor who listed the Grand Forks property in 2011 (a second listing), that the property was "more difficult to sell because there was only a niche market for this type of land". The evidence established that Mrs. Canfield had attempted to sell in 2010, but was unsuccessful. She tried to sell again in 2011, eventually reducing the listing price by \$63,000 (from \$548,000 to \$485,000). Still, the property did not sell. In the context of this evidence, Mr. Engman says the trial judge could not reasonably infer that if the Agreement had been rescinded, the property could have then sold for its "full market value".
- [117] Causation inquiries are factual in nature, and, therefore, reviewable only for palpable and overriding error: *Ediger v. Johnston*, 2013 SCC 18 at para. 29. I appreciate that this Court should not lightly interfere with a trial judge's determination of this issue. There is good reason for the palpable and overriding error standard.
- [118] However, having reviewed the salient portions of the record in this case, Mr. Engman has persuaded me that the evidence did not support a finding of factual causation and that the inferences drawn by the trial judge in concluding to the contrary were speculative. Similar

to the situation in Borgford, there were "simply too many unknowns" to conclude based on inferential reasoning, or otherwise, that but for Mr. Engman's failure to make specific inquiries of Mrs. Canfield on February 27, 2012, she would have done something other than transfer the Grand Forks property to Bronze Wines Ltd. under the Agreement, or on the same terms, thereby avoiding her loss when the company failed to meet its payment obligations: at para. 72.

- [119] This is the test Mrs. Canfield had to meet. Her claim for damages was predicated on the assertion that before witnessing her signature on the Form A, Mr. Engman was duty-bound to confirm with her that she had received legal advice about the transfer, or had made an informed decision to proceed without it. To prove that his failure to make this or other inquiries caused the loss of her property to Bronze Wines Ltd. "without adequate compensation" (which is what the trial judge found at para. 230), she had to establish on a balance of probabilities that had Mr. Engman made the inquiries and declined to sign the Form A because of the responses, she "would have acted in a different manner": *Froese v. Sharif*, 2020 BCSC 1914 at para. 199, emphasis added.
- [120] In my view, she failed to do so and I agree with Mr. Engman that it was speculative for the trial judge to find to the contrary.
- [121] Mrs. Canfield testified at the trial, but did not say what she would have done had Mr. Engman made the requisite inquiries of her or declined to witness the Form A. Moreover, there was a "sizeable body of evidence" showing that Mrs. Canfield had the capacity to contract in 2012, was content with the sale of her property to Bronze Wines Ltd. and the terms of the Agreement, was not interested in seeking legal advice about the inherent risks, and that she did not complain about the Agreement to a third party until well after it had been executed and the property had been transferred. In deciding causation, the trial judge did not grapple with this evidence in any meaningful way and ask about its impact on Mrs. Canfield's burden of proof. She considered and rationalized this evidence in deciding the existence of an unconscionable bargain (at para. 94), but not on the issue of causation.
- [122] To claim damages as against Mr. Engman, Mrs. Canfield was required to show, on a balance of probabilities, that had he met the standard of care expected of him, the sale and transfer of the Grand Forks property to Bronze Wines Ltd. "would have been stopped" (B.S.A. at para. 48), either in its entirety or on the terms set out in the Agreement. Mrs. Canfield bore the burden of establishing the actions that were available to her had Mr. Engman not signed the Form A; that she would have taken one or more of those actions; and, that if she had done so, she would not have suffered her loss: *Haag v. Marshall*, 1989 CarswellBC 160, 39 B.C.L.R. (2d) 205 at para. 32 (B.C.C.A.).

- [123] I appreciate that at the trial, Mrs. Canfield presented as a vulnerable plaintiff who expressed considerable present-day confusion about the transaction involving Bronze Wines Ltd. and the legal effect and implications of transferring the Grand Forks property on the terms set out in the Agreement. There is also no doubt, in hindsight, that had she chosen to seek legal advice in 2012, she likely would have benefitted from that advice given the improvident nature of the bargain.
- [124] However, that was not the question before the trial judge in assessing the existence and, importantly, the strength of a factually causal nexus between Mr. Engman's negligent conduct and Mrs. Canfield's loss. That question had to be determined based on the evidence surrounding Mrs. Canfield's involvement in the transaction at the material time, and what she would have done differently if Mr. Engman had made certain inquiries of her or declined to witness the Form A. Respectfully, the evidence before the trial judge did not answer that question and, regrettably, it was fatal to the factual causation analysis.

Disposition

- [125] For these reasons, I would allow the appeal and dismiss the action in negligence against Mr. Engman. Without an evidentiary record capable of proving factual causation on a balance of probabilities, there could be no liability finding against Mr. Engman.
- [126] Unless a different agreement is reached by the parties, Mr. Engman is entitled to his costs at the trial and in the appeal.

"The Honourable Madam Justice DeWitt-Van Oosten"

I AGREE:

"The Honourable Mr. Justice Willcock"

I AGREE:

"The Honourable Mr. Justice Voith"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/ca/23/00/2023BCCA0056.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/engman-v-canfield-2023>

Prepared on 29 October 2026 · Esheria