

CANADA / JUDGMENT

Froese v. Sharif

2020 BCSC 1914

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1914 Froese v. Sharif

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Froese v. Sharif,

2020 BCSC 1914

Date: 20201204

Docket: S115983

Registry: Vancouver

Between:

Willie Froese and Laurie Anne Froese

Plaintiffs

And

Omar Sharif also known as Omar Mohammad Sharif also known as Omar M. Sharif, also known as Mohammed Sharif also known as Mohammad Sharif also known as Mohammad Sharif Safi also known as Omar Mohammed Sharif also known as Omar Shariff also known as Alem Mohamed also known as Mohammad Salim Azami, Regency Investments Ltd., Susan Ann Tong and Susan Ann Tong Notary Corporation

Defendants

And

Docket: S130738

Registry: Vancouver

Between:

Omar Mohammad Sharif

Plaintiff

And

Laurie Froese and Willie Froese

Defendants

And

Regency Investments Ltd., Susan Ann Tong and Susan Ann Tong Notary Corporation

Defendants by Way of Counterclaim

Before: The Honourable Mr. Justice N. Smith

Reasons for Judgment

Counsel for Plaintiffs:

A. Winstanley

Appearing on his own behalf:

Omar Sharif

Counsel for Susan Ann Tong and Susan Ann Tong Notary Corporation:

Q. Duong

E. Dvorak

Place and Date of Trial:

Vancouver, B.C.

October 16-18, 21-25, and 28-31, 2019, November 1, 4-6, 2019,

June 8-12, 15-19, 23-26, 2020 and July 15-20, 2020

Place and Date of Judgment:

Vancouver, B.C.

December 4, 2020

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I. Introduction

- [1] The Plaintiffs, Willie and Laurie Anne Froese, bought a house from the defendant Omar Sharif, who took back second and third mortgages on the property. The defendant Susan Ann Tong is a notary who acted for the Plaintiffs in completing the purchase. Each party now says they were deceived or misled by the other two.
- [2] The Plaintiffs say they relied on Mr. Sharif as their realtor and real estate investment advisor, but he misrepresented the rental income they could earn from the property, persuaded them to pay an inflated price, and induced them to give him the mortgages. They seek damages from him for fraudulent or negligent misrepresentation. They say Ms. Tong was in a conflict of interest when she acted for them and seek damages from her for negligence and breach of fiduciary duty.

- [3] Mr. Sharif says the Plaintiffs defrauded him by obtaining loans secured by mortgages they never intended to repay. In a separate action that began as a foreclosure petition, he claims the amounts owing under those mortgages. He says Ms. Tong knowingly or unknowingly assisted the Plaintiffs in their plan to take his property and money, but he has not made a third-party claim against her.
- [4] Ms. Tong alleges that the Plaintiffs and Mr. Sharif were working together to deceive the Plaintiffs' first mortgage lender and hid their scheme from her. She says she provided notarial services in accordance with professional standards, based on the information and instructions she received at the time.
- [5] There are multiple differing versions of the contract of purchase and sale for the property. The Plaintiffs and Mr. Sharif do not agree on which document is the "real" contract. One version includes a crucial term that the Plaintiffs allege Mr. Sharif added to his copy only after litigation began.
- [6] The transaction at issue took place in June 2010. Several factors appear to have contributed to the inordinate delay that occurred before the case came to trial.
- [7] The Plaintiffs filed their original notice of civil claim against Mr. Sharif in September 2011 and he filed his foreclosure petition in January 2013. A trial set for March 2014 did not proceed. Ms. Tong was not added as a defendant until March 2015.
- [8] There have been multiple changes of counsel. The Plaintiffs' counsel at trial is the fourth to have acted for them. Mr. Sharif was self-represented at trial but was previously represented at various times by three different counsel. There have also been extensive amendments to the pleadings. The trial was conducted on the basis of the Plaintiffs' sixth amended notice of civil claim.

II. The Parties

- [9] The plaintiff Willie Froese is a carpenter who operates a contracting business as a sole proprietor. His wife, the plaintiff Laurie Anne Froese, is a homemaker. In 2004, they moved to the Greater Vancouver area from Trail, B.C., where they owned both a family home and a rental property. After moving, they rented out both Trail properties for some years before selling them.
- [10] The defendant Omar Sharif became a licensed realtor in 1989, but the Real Estate Council of British Columbia suspended his licence on June 9, 2009. That suspension was still in effect at the time of the transaction at issue. He renewed his licence in 2012 and practiced as a realtor until 2015.
- [11] The defendant Regency Investments Ltd. is a private company of which Mr. Sharif is the sole director and shareholder. Although named as a defendant, the company does not appear to have had any direct involvement in this transaction. It never filed a response to civil claim.

- [12] The defendant Susan Ann Tong was commissioned as a notary public in British Columbia in 1993 and has practiced as a notary public in Vancouver since that time. She carries on practice through her personal company, the defendant Susan Ann Tong Notary Corporation. She is currently a director of the Society of Notaries and has been a director for a total of 13 years at various times throughout her career.

III. The Property

- [13] The property at issue is located at 5320 Knight Street in Vancouver and was purchased by Mr. Sharif in 2002. In 2010, it was being operated as a rooming house with eight tenants, under the management of Phulmati (Flora) Prasad.
- [14] Ms. Prasad testified that it was one of two properties she rented from Mr. Sharif and that she in turn rented individual rooms to other tenants. She said she rented each room for \$400 or \$500 a month while paying Mr. Sharif \$300 a month per room and paying utilities. In some documents, it appears that Mr. Sharif referred to her as the "caretaker" of his property.
- [15] The property was zoned for single family residential use under the City of Vancouver's zoning bylaw. Mr. Sharif knew that the rooming house operation was not permitted under that zoning. He testified that, in his experience, the City did not strictly enforce that prohibition, at least as long as the owner was also living in the property.
- [16] City records indicate that the City had conducted an inspection following a complaint of illegal suites in 2004, but Mr. Sharif told the inspector that a new tenant would be moving in and the property would be brought back into compliance as a one-family dwelling. If that ever happened, it was clearly no longer the case by 2010.
- [17] Sydney Kelland, who was a property use inspector for the City in 2010, confirmed that unauthorized accommodation was common in single family areas and the City only acted in response to complaints. When a complaint was received and a violation found, he said the City tried to encourage compliance and advise owners what they could do to bring the property into compliance, rather than moving immediately to other enforcement measures.
- [18] City records show that on June 16, 2010, shortly before the Plaintiffs completed their purchase of the property, there was a complaint that seven unrelated people were living in the house. Mr. Kelland testified that single family zoning allows up to two unrelated boarders or lodgers, provided that the owner also lives in the house. Mr. Kelland inspected the property on June 23 and 24, 2010, but apparently did not speak to Mr. Sharif at the time. The records do not indicate any further City involvement until after title had transferred to the Plaintiffs.
- [19] In 2010, the City had recently changed its zoning bylaw to allow construction of additional "laneway houses" on single family-zoned properties that met certain other criteria. Mr. Sharif testified that he determined the property, unlike many neighboring ones, met those other criteria and the potential for a laneway house would likely increase its value.

- [20] In February 2008, Mr. Sharif had listed the property for sale at a price of \$719,000. It remained on the market until September 30, 2009, when the listing expired. A few days later, he listed it with a different realtor for a price of \$649,000, but it was taken off the market again at the end of November 2009. Both of those listings disclosed that the property "contains unauthorized accommodation."
- [21] On April 7, 2010, Mr. Sharif put the property back on the market with yet another realtor, Winnie Chung, at a price of \$729,000. However, the listing was to be for only a short period, expiring May 13, 2010. Mr. Sharif ended the listing two days before that, on May 11, 2010, when Ms. Chung signed a form releasing him from the terms of their listing contract.
- [22] The listing with Ms. Chung does not contain a reference to unauthorized accommodation. Mr. Sharif signed a property disclosure statement dated April 7, 2010. This is a standard form in which the seller is asked to answer "yes," "no," or "don't know" to a series of printed questions about the property. One of those questions is: "Do the premises contain unauthorized accommodation?" In signing the property disclosure statement, Mr. Sharif drew a line through all of the spaces for answers, indicating he was not warranting anything or making any representations about the property.

IV. The Property Purchase

1. Mr. Sharif's Real Estate Practice and Suspension

- [23] Mr. Sharif testified that, as a realtor, he developed a concept to assist lower income clients in buying residential property. He said he would find run-down houses that the clients could buy and live in while renting rooms to students or other low income tenants. The clients would also renovate the properties, after which Mr. Sharif would sell them at a profit for the clients. He frequently provided secondary mortgage financing to assist the clients with the purchase or renovations, but says he would often not register those mortgages if payments were being made. He testified that he provided that financing to more than 100 buyers over the years.
- [24] The suspension of Mr. Sharif's real estate licence on June 9, 2009 was for three years, but was made retroactive to July 2008. According to a consent order and a statement of facts that Mr. Sharif agreed to, he was found to have been in a conflict of interest by acting for a buyer of property and agreeing to help finance the purchase while he also held a second mortgage from the seller. The Council also said he had failed to advise the buyer of the property's recent transactional history. In addition to that transaction, the Council said:

[I]n a number of trades, [Mr. Sharif] failed to avoid a conflict of interest and offered agency representation to the buyer when it was inappropriate to do so as he was, variously, the seller and a principal in his own right; holding the sellers' second mortgage; and, acting as the buyer's second mortgagee;

- [25] Mr. Sharif denies he was acting or purporting to act as a realtor in regard to the transaction at issue. If he had been, he would clearly have been in the same kind of conflict of interest that led to the suspension of his licence.
- [26] Shortly before the transaction at issue, the Court of Appeal upheld a judgment against Mr. Sharif in *DeJesus v. Sharif*, 2008 BCSC 1100, aff'd 2010 BCCA 121. The Court in that case found that Mr. Sharif, while acting as a realtor, sold his own property to a client for a price in excess of fair market value. The Plaintiffs' original counsel in this matter had been counsel for the plaintiffs in *DeJesus*.
2. The First Meetings Between the Plaintiffs and Mr. Sharif
- [27] The Plaintiffs first met Mr. Sharif in 2004, shortly after they moved to the Vancouver area. Mr. Froese said they saw an advertisement somewhere that referred to a creative method of property financing. He said they met Mr. Sharif at his home and he gave them business cards identifying himself as a realtor, which he was at the time.
- [28] According to Mr. Froese, Mr. Sharif explained that he acquired older homes, divided them into units that were rented to foreign students, then sold the properties as investment opportunities. An assistant to Mr. Sharif showed the Plaintiffs two such properties, but nothing came of it at the time. The Plaintiffs say they were not interested because they understood they would have to live in the property and did not want their young daughter living in a rooming house.
- [29] On March 29, 2010, the Plaintiffs entered into a contract, subject to financing, for the purchase of a rental property on Willingdon Avenue in Burnaby for \$530,000. By April 14, 2010, they had received pre-approval for a first mortgage of \$484,000. However, Mr. Froese testified that they needed additional money for renovations. He said they still had Mr. Sharif's card from their meeting six years earlier and approached him about additional financing.
- [30] According to Mr. Froese, Mr. Sharif told them he did not invest in suburban properties, but persuaded them that his Knight Street house was a better opportunity. The Plaintiffs say they decided to proceed with a purchase of the Knight Street property and did not complete on the Willingdon property.
- [31] Mr. Sharif says he had no discussions with the Plaintiffs until they approached him on or about April 11, 2010 with an offer to purchase the Knight Street property. He says he knew nothing about their previous offer to buy the Willingdon Avenue property and did nothing to dissuade them from that purchase.
- [32] I find the Plaintiffs' version of events--that Mr. Sharif raised the subject of Knight Street when they approached him about additional financing for their planned purchase on Willingdon Avenue--to be the more likely. Mr. Sharif's evidence to the effect that the Plaintiffs approached him with an unsolicited offer is simply not consistent with the presence of a listing realtor. A "For Sale" sign in front of the house showed Ms. Chung's

name. A potential buyer who simply saw that sign or an advertisement for the property would not know who owned it.

- [33] The Plaintiffs and Mr. Sharif agree that the Knight Street property's potential for development of a laneway house was the major focus of their discussions. Mr. Froese said he visited Vancouver City Hall to confirm that the property qualified for a laneway house. Mr. Sharif agreed to assist the Plaintiffs in obtaining the necessary permits and to introduce them to designers and others who could work on the project. Mr. Froese also agreed to complete deficiencies on a new family home that Mr. Sharif was building at the time and to do that work at a discounted rate.
- [34] Although Mr. Froese made inquiries at Vancouver City Hall about the property's eligibility for a laneway house, he did not inquire about the applicable zoning regulations. Asked on cross-examination if he understood the house was a single family dwelling, Mr. Froese said he had no knowledge of or experience with zoning and simply considered the property to be "a stand alone house with rental in it." He said Mr. Sharif assured them "at every turn" that "everything was legal about what he did."
- [35] The Plaintiffs inspected the interior of the house, saw that it was being operated as an 8-room rooming house, and met Ms. Prasad, who they understood to be a manager employed by Mr. Sharif. Both Plaintiffs said Mr. Sharif told them the property was generating \$4,000 a month in rental income but they took no steps to verify that amount or to ask for details about the rental agreements. Although the property was in fact generating \$4,000 a month in rental income, that included the amounts retained by Ms. Prasad. The Plaintiffs do not appear to have considered or made inquiries about Ms. Prasad's share of the rental income.
- [36] According to Mr. Froese, Mr. Sharif agreed to continue to manage the rental operation through Ms. Prasad so that Mr. Froese could focus on the laneway house project.
- [37] Although the Plaintiffs were focussed on the potential profits to be gained from building a laneway house and paid little attention to the details of the rental income, I find that they clearly needed some rental income in order to make payments on any mortgage. Their income tax returns for 2009, the year immediately preceding the purchase, show combined annual income of a little more than \$50,000. They did not intend to live in the Knight Street house and would continue to incur housing costs elsewhere.
- [38] The Plaintiffs testified they believed, based on their earlier meeting, that Mr. Sharif was a licensed realtor. They also say that Mr. Sharif agreed to teach them about real estate investing, including how to prepare contracts of purchase and sale.

- [39] There is no evidence that Mr. Sharif explicitly represented to the Plaintiffs at any time before they agreed to buy the property that he was still a practicing realtor (although it is arguable that some later documents amount to such a representation). Mr. Sharif certainly never disclosed to them that his real estate licence was suspended. He says that information was irrelevant because the Plaintiffs did not ask him to act as their realtor and he was not acting or purporting to act in any capacity other than an arms-length vendor.
- [40] It is true that the Plaintiffs initially approached Mr. Sharif because they were seeking a lender, not a realtor, and ultimately knew they were buying his property. But as their dealings evolved, I find that Mr. Sharif knew or ought to have known that the Plaintiffs understood him to be a professional realtor, with the expertise that that implies.
- [41] Mr. Froese purchased a compact disc of real estate forms published by the Self-Counsel Press. The disc provided standard forms, including a standard form contract of purchase and sale, with blanks to be filled in for the details of a specific transaction. He said purchasing the Knight Street property gave him a chance to practice filling out these forms with Mr. Sharif's help and guidance. A sales receipt indicates that he bought the disc on May 10, 2010.

3. The First Contract

- [42] One of the many difficulties in this case is that there were two contracts of purchase and sale, with differing copies of each. It appears that, as the agreement was revised, changes were sometimes made by replacing individual pages in a previously signed document rather than by creating addenda that explicitly amended the agreement. There are also allegations of pages being replaced or changed without the knowledge or consent of the other party.
- [43] The first contract of purchase and sale states a price of \$689,000. The Plaintiffs did not know that the property had been on the market in November 2009 for a price \$40,000 lower than that.
- [44] The contract is dated April 11, 2010. Mr. Sharif says that was the date the Plaintiffs approached him with an offer that he accepted, but all of the evidence shows that the contract was actually prepared and signed a month later.
- [45] The document is on a form generated from Mr. Froese's Self-Counsel Press disc, which he did not purchase until May 10, 2010. It refers to the purchaser having inspected the property on May 11, 2010, and to an amount of \$5,000 as the first portion of a \$20,000 deposit. There is a \$5,000 cheque, payable to Mr. Sharif, dated May 11, 2010, which is also the date Mr. Sharif ended his listing agreement with Ms. Chung. I find May 11, 2010, to be the likely date the contract was signed, although many of its terms had likely been the subject of earlier verbal agreement.

- [46] Some of the blanks on the contract form, including the purchase price, are filled out in type, indicating they were added when Mr. Froese generated the form on his computer. Others, including the deposit amount and a June 16, 2010 completion date, are filled out by hand, likely indicating matters that were finalized when the parties met.
- [47] The third page of the contract includes a standard "Included Items" clause, in which the parties are to specify fixtures and attachments that are included in the purchase price. On the copy of the contract produced by the Plaintiffs, the blanks where that information is to be added contain only the handwritten words "as is." This is a key page because that is where a much longer statement appears in the version of the contract Mr. Sharif relies on.
- [48] A copy of the first contract that was disclosed on Mr. Sharif's own list of documents is missing that critical third page. Although it was his own document, Mr. Sharif disputed its authenticity at trial, suggesting the page was removed by someone else after he produced it in this litigation.
- [49] The second page of the contract includes a "Possession" clause, where parties are to fill out the date the purchaser is to have possession and whether the possession will be subject to existing tenancies. If there are existing tenancies, they are to be identified. The box indicating there are "existing tenancies" was checked, but the only information provided about those tenancies was another handwritten note stating "as is."
- [50] The contract also states that a property disclosure statement dated May 11, 2010, was attached to and incorporated into the contract. No such statement was attached to the first contract or to any subsequent version. The only property disclosure statement in evidence is the one produced for the realtor, Ms. Chung, on April 7, 2010, and there is no evidence the Plaintiffs ever saw it.
- [51] On the copy of the contract produced by Mr. Sharif, a signature of a witness appears next to the Plaintiffs' signatures. Mr. Sharif says his wife witnessed the signatures when the contract was signed at his home. No witness signature appears on the Plaintiffs' copy of the document.
- [52] In a portion of the document where conveyancing information is to be provided, Ms. Tong is identified as the vendor's lawyer/notary. No lawyer or notary is identified for the purchasers.
- [53] When the Plaintiffs first visited the property, they had seen the sign showing Ms. Chung as the listing realtor, but say they never spoke to her. Her listing expired immediately after the contract was signed. The Plaintiffs therefore signed the contract without the involvement of any realtor, other than Mr. Sharif who they did not know had been suspended. That provides some support for the Plaintiffs' evidence that they were relying on Mr. Sharif's advice.

4. The Side Agreement and the Appraisal

- [54] The Plaintiffs contacted a mortgage broker--Dominion Lending Centres-Casa Mortgage Inc. ("Dominion Lending")--in order to obtain mortgage financing. Dominion Lending ultimately placed a first mortgage with First National Financial LP ("First National"). Dominion Lending was also the broker that provided the mortgage pre-approval when the Plaintiffs were considering the Willingdon property and First National, through a different broker, had previously refinanced one of the Plaintiffs' Trail properties in 2008.
- [55] Mr. Froese testified that he understood that any potential lender would want an appraisal of the Knight Street property. He said Mr. Sharif called him on or about May 25, 2010, to say that a "bank" appraisal would be valuing the property at only \$620,000. Both Plaintiffs met Mr. Sharif at Van Dusen Gardens in Vancouver on that date. They say Mr. Sharif insisted on receiving the full price of \$689,000, telling them that banks do not know how to value rental property. In order to deal with the appraisal, they say Mr. Sharif suggested an arrangement under which a new contract of purchase and sale would show a price of only \$620,000, with the \$69,000 balance to be paid separately.
- [56] Mr. Sharif agrees there was a meeting at Van Dusen Gardens, but says it was the Plaintiffs who approached him with information about the appraisal. He says he told them he was not willing to sell for anything less than the full price that had been agreed to, regardless of what any appraisal said.
- [57] On that point, I find Mr. Sharif's version of events to be more likely. If the Plaintiffs' mortgage broker or lender had obtained an appraisal by May 25, one would expect them to communicate the results to their own clients, not to the vendor. Barry Chisholm, the Dominion Lending broker who dealt with the Plaintiffs, testified that neither he nor anyone else in the company would have given information to Mr. Sharif in those circumstances and said he had never met Mr. Sharif until he was subpoenaed to testify at trial.
- [58] At their meeting, Mr. Sharif prepared a handwritten document (the "Side Agreement") dated May 25, 2010, and signed by him and both Plaintiffs. It reads:

Both Buyer and (sic) agree to the following:

The terms and conditions of the contract dated May 11th, 2010 to be fully honoured by both parties. It is buyers idea to change price to \$620,000 only for bank purposes and paper work purposes while the bank appraised the property only \$620,000.

Purchaser agree to pay the Balance of \$69,000 separately to make it to the sale's price of \$689,000.

Although the appraised value is \$620,000 the Buyer still like to proceed with sale's price of \$689,000.

- [59] The Side Agreement is silent about how the Plaintiffs would pay the \$69,000 difference between the two prices, but Mr. Froese testified it was understood there would be a second mortgage in favour of Mr. Sharif. Mr. Froese said he and his wife signed the Side Agreement under Mr. Sharif's "guidance" as part of a "package" arrangement that included Mr. Sharif's help with the laneway house and his teaching about real estate investment.
- [60] Although the Side Agreement purports to be the result of an appraisal, there is in fact no evidence that any appraisal had been done by May 25, 2010. The only appraisal in evidence is dated June 1, 2010--a week after the Side Agreement--and is stated to be based on a property inspection that took place on May 31. It does indeed value the property at \$620,000, but states:
- Reportedly there is a current and accepted offer to purchase the subject property for \$620,000.
- [61] So rather than the Side Agreement being the result of the appraisal, the appraisal appears to have been prepared with knowledge of the new contract that followed the Side Agreement.
- [62] During argument, some speculative possibilities were advanced to explain this inconsistency. There may have been an earlier appraisal that is not in evidence or an informal preliminary opinion that was verbally communicated to someone. Alternatively, \$620,000 may have been the maximum purchase price a mortgage lender would fund, based on the Plaintiffs' financial qualification. None of these theories are supported by any evidence.
- [63] Counsel for the Plaintiffs suggests that the answer might be found in Dominion Lending's files. That may be, but there appears to have been no effort to obtain those files. Mr. Chisholm was subpoenaed by Mr. Sharif and asked to bring his file, but testified that files more than seven years old are kept on a secure server to which he has no access. He apparently made no effort to obtain the file through whoever within the company may have such access.
- [64] Under Rule 7-1(18) of the Supreme Court Civil Rules, a party to litigation may apply to the court for an order for production of documents in the possession of a non-party. In the near decade that elapsed between the commencement of this action and the trial, any party could have applied for production of Dominion Lending's documents. It appears that none did.
- [65] The onus of proof is on the Plaintiffs and they must suffer any consequences that flow from this gap in evidence. I find they have failed to prove that Mr. Sharif made any representation about an appraisal that resulted in the Side Agreement.
- [66] Even on the Plaintiffs' version of events, the circumstances should have suggested some need for caution on their part. Although they were relying on Mr. Sharif's real estate expertise, his refusal to reconsider the purchase price in the face of a purported professional opinion should have reminded the Plaintiffs that their interests and his were not identical. In any negotiated transaction, there is a fundamental tension between the vendor, seeking the best possible price, and the purchaser, hoping to pay as little as

possible. I do not believe that the Plaintiffs were ever so naïve or unsophisticated that they did not understand this basic fact.

- [67] As for Mr. Sharif, he signed the Side Agreement knowing, based on his real estate experience, that it constituted an agreement to misrepresent the transaction to the mortgage lender. Even if, as he suggests, it was the Plaintiffs' idea, he should have known better.

5. The Second Contract

- [68] After the parties entered into the Side Agreement, they entered into a second contract of purchase and sale. There are differing versions of that contract, all generated from the Self-Counsel press disc.
- [69] The first version appears to have involved a hurried alteration to the earlier contract. The purchase price on the first page is stated numerically as "\$620,000" but is written out as "six hundred and eighty-nine thousand." The fact that both entries are typed is consistent with the document having been prepared by Mr. Froese and brought to the meeting at Van Dusen Gardens.
- [70] Other items that were handwritten in the first contract are typed in the second, including the phrase "as is," which is still all that appears under the Included Items clause. However, the date on the first version of the second contract is changed by hand from April 11 to May 25, 2010. There is also an addition of the name of a Jacqueline Kinsey as lawyer/notary for the purchasers. Ms. Tong's name still appears as the vendor's lawyer/notary. The document refers this time to a property disclosure stated May 25, 2010, which did not exist. None of the signatures are witnessed.
- [71] A second version of the second contract corrects the inconsistency in the purchase price and changes the date to May 11, but is not signed by either the Plaintiffs or Mr. Sharif.
- [72] A third version of the second contract is what the Plaintiffs provided to Mr. Chisholm and, through him, First National. Ms. Froese received that document when she contacted First National in 2016 to obtain the contract in its file. It is identical to the second version except for the last page, where signatures appear. The signed page from the first version appears to have been substituted for the unsigned page in the second version.
- [73] On June 17, 2010, Mr. Sharif faxed what he said was the contract to Ms. Tong. The document attached to the fax in Ms. Tong's file appears to be a collection of pages from various versions of the contract.
- [74] The first page appears identical to the copy of the second contract that was sent to First National, but the second and fourth pages appear to have been taken from the first contract for \$689,000. The blanks on those pages are filled in by hand, while that information is typed on all versions of the second contract. The signature page also appears to be from the first contract as it lacks the identification of Ms. Kinsey as the purchasers' lawyer or notary. However, it is identical to that in the first contract as produced by the Plaintiffs in that the

signatures are not witnessed.

- [75] Most important, the third page of the contract containing the included items clause is missing entirely. Mr. Sharif says he sent the complete contract to Ms. Tong and suggests she or someone else must have removed that critical page.

6. The Questioned Contract

- [76] Mr. Sharif has produced yet another version of the contract. Four of its pages are identical to what was sent to Ms. Tong, but it contains the page 3 that is missing from her copy. In the Included Items clause, below the handwritten words "as is," the following appears in Mr. Sharif's handwriting:

No warranties or any presentations made by vendor generally or structurally or any other conditions or status of the property and complete all investigations and details info to their full satisfaction including city hall (illegible) re laneway house details, plans + costs etc. to their own risk and expenses. Owner ex-realtor relieved of future claims. Purchaser is aware that property was purchase (sic) at 2002 for \$211,000.00 and renovated and converted to 8 bedroom house from four bedroom single family house to a rooming house, which is unauthorized use of single family dwelling subject to risks.

- [77] Initials for Mr. Sharif and, purportedly, both Plaintiffs, appear next to that statement, but both Plaintiffs deny the authenticity of the initials that appear for them. They say they never saw that version of the contract until the document was produced during this litigation. No one else has produced a copy of the document containing that statement.
- [78] Mr. Sharif says the statement, which he calls his "disclosure," was written into the very first contract and all contract copies from which it is missing must have been tampered with. However, it is missing from the corresponding page in the first version of the second contract, which Mr. Sharif initialed when he signed that contract on May 25, 2010. He said he did not notice it was missing because he was in a hurry.
- [79] On the critical page of the document produced by Mr. Sharif, the disputed words are written in a different colour than the handwritten words "as is" immediately above them. A forensic document examiner, Dan Purdy, in a report dated January 25, 2016, said that page is not an original document, but a colour copy, although other pages contain original pen and ink entries. He said the disputed words appear to have been copied and digitally inserted into an earlier version of the document before being reproduced on a colour inkjet printer.
- [80] Mr. Purdy also examined the contract with an electrostatic detection apparatus, which he said can detect subtle indentations or impressions on paper. It can therefore be used to determine if handwriting on one page left indented impressions on pages that were below it when the words were written. He found that some written entries, including other handwriting on the original version of page 3, left such impressions, but the disputed handwriting did not.

- [81] After Mr. Purdy produced his report, the Plaintiffs' then counsel applied for an order that Mr. Sharif produce the original document. Mr. Sharif swore an affidavit saying the original of the document he had in his possession had been produced and given to the expert for review. At trial, Mr. Sharif first said he does not know where Mr. Purdy got the document he reviewed, then said it must have come from the Plaintiffs because Mr. Purdy received it from the Plaintiffs' then-lawyer, then said his own then-lawyer made available whatever he had for Mr. Purdy to review.
- [82] Mr. Sharif also suggested that, when the first contract was signed, the Plaintiffs kept the original with the disputed words and subsequently faxed a coloured copy to him. That would mean that an experienced realtor, having signed an agreement to sell his own property, did not produce and retain a copy at the time the agreement was signed and relied on the buyer to provide him one at a later date.
- [83] In any event, the disputed words are absent from the page Mr. Sharif later initialed when the contract was rewritten with a new price. As to his explanation that he did not notice the omission because he was in a hurry, I find it unlikely that a person with his extensive experience dealing with such contracts would be so careless, particularly given the importance he says he placed on that provision and how glaringly obvious its absence would be.
- [84] Further, if Mr. Sharif wanted the Plaintiffs to understand that he was not making any representations and that the rental accommodation was not authorized, all he needed to do was give them a copy of the property disclosure statement that he had provided to Ms. Chung, or a new version of the statement, in which he disclaimed any and all representations.
- [85] In conclusion, I find that the disputed "disclosure" on the document produced by Mr. Sharif never appeared on any version of contract signed by the Plaintiffs and was created by Mr. Sharif after the contract was signed and, perhaps, after litigation began. I also find that Mr. Sharif at no time disclosed to the Plaintiffs that the boarding house use of the property was not authorized. Although discussions between the Plaintiffs and Mr. Sharif centred primarily on the potential for a laneway house, I find Mr. Sharif led the Plaintiffs to believe they could rely on receiving rental income while the laneway house was being built.
7. The First Mortgage
- [86] The Plaintiffs retained Dominion Lending to act as their mortgage broker in obtaining a first mortgage. On June 17, 2010, First National sent Dominion Lending a mortgage commitment, agreeing to provide a first mortgage in the principal amount of \$496,000, with monthly principal and interest payments of \$1,648.80.

- [87] The mortgage commitment was stated to be subject to a number of conditions. One condition was that the property would be "owner occupied as a single family residence in accordance with all zoning bylaws." Another was that there would be no secondary financing.
- [88] Although the Plaintiffs had no intention of living in the property and would obtain secondary financing from Mr. Sharif, they signed their acceptance of First National's offer, including the conditions, on June 17, 2010. Mr. Chisholm did not recall if he reviewed the conditions in person with the Plaintiffs or simply sent them the commitment document, asking them to review and return it.
- [89] Mr. Froese testified that he and his wife reviewed the mortgage commitment document with Mr. Sharif, who told them the conditions were standard wording and of no concern. He testified they probably did not discuss the document with Mr. Chisholm, who had sent it to them.
- [90] Ms. Froese said they reviewed and signed the document with Mr. Chisholm. She said she was concerned about signing the documents knowing the conditions would not be complied with, but said that both Mr. Sharif and Ms. Tong knew they would not be fulfilled and persuaded them to sign. In fact, when they signed the mortgage commitment on June 17, the Plaintiffs had not yet met Ms. Tong. Mr. Sharif denies having any discussion with the Plaintiffs about the mortgage commitment.

8. The Closing

- [91] As said above, Mr. Sharif faxed a copy of the second contract to Ms. Tong on June 17, 2010. Ms. Tong testified that was the first time her office was approached about this transaction. She testified that she knew Mr. Sharif as a licensed realtor who her office sometimes dealt with and was unaware his licence had been suspended.
- [92] Counsel for the Plaintiffs attempted to put into evidence documents relating to other transactions as similar fact evidence that he said would show a longstanding course of dealing between Mr. Sharif and Ms. Tong. I ruled that those documents did not meet the test for similar fact evidence and were inadmissible. However, the documents that Mr. Sharif sent to Ms. Tong's office on this transaction indicate that he had some familiarity with her and her staff.
- [93] The Plaintiffs called a witness, Clarita Wywoil, for whom Mr. Sharif had acted as a realtor and provided a second mortgage in 2006. Ms. Tong was apparently the conveyancing notary in that transaction and prepared the first mortgage. Ms. Wywoil said she had no complaints about her dealings with either Mr. Sharif or Ms. Tong and was puzzled about why she had been subpoenaed to testify.
- [94] Although Mr. Sharif's fax of June 17 enclosing a copy of the contract is addressed "Dear Susan," Ms. Tong said she did not personally communicate with Mr. Sharif at that point.

- [95] The fax stated " I will give you purchaser's lawyer # tomorrow." That contact information was never provided. Ms. Tong said that, on receiving the fax, her office would have believed they were going to act for Mr. Sharif as the seller. She said acting for the seller generally involves less work than acting for a purchaser because most documents on a conveyance are prepared by the purchaser's lawyer or notary.
- [96] Mr. Sharif's fax to Ms. Tong on June 17 also included a handwritten addendum changing the closing date from June 16 to June 21. It is signed by Mr. Sharif, but not by the Plaintiffs, and there is no evidence the Plaintiffs ever saw it. The Plaintiffs did not sign, but say they saw, a similar addendum that later changed the closing date again to June 27 and signed a further one that changed it to June 29.
- [97] The three addenda are all written on letterhead of a real estate company that Mr. Sharif represented before his licence was suspended. Although they came after the contract of purchase and sale was signed, I find the two that were seen by the Plaintiffs likely confirmed their previous belief that Mr. Sharif was still practicing as a realtor.
- [98] On June 28, 2010, Ms. Tong's office received mortgage instructions from First National, which she said amounted to instructions to act for both First National and the Plaintiffs as borrower/purchasers on the subject transaction. The copy of the contract produced by First National identifies Ms. Tong as the vendor's legal representative and names another notary, Ms. Kinsey, as the person who would be acting for the purchaser. There is no evidence of how or by whom First National was told to send mortgage instructions to Ms. Tong rather than Ms. Kinsey.
- [99] Mr. Froese testified that Mr. Sharif directed him and his wife to use Ms. Tong as their notary. Mr. Sharif said the Plaintiffs' representation by Ms. Tong came at their request and Ms. Tong told him he needed to use another notary.
- [100] Ms. Tong said that, based on normal practice in her office, a staff member would have contacted the Plaintiffs to ensure they agreed to Ms. Tong's office representing them and would have contacted Mr. Sharif to determine who would represent him. Once her office confirmed matters with Mr. Sharif and the Plaintiffs, they would have switched the file to one in which they acted for the purchaser. The receipt of instructions on June 28 for a transaction that was to close the next day required preparation of documents on an unusually rushed basis.
- [101] Ms. Tong said the senior conveyancer in her office prepared all the conveyancing documents using a software program. Among documents generated were mortgage-related forms required by specific lenders. Ms. Tong said she would typically not communicate directly with the client until they came to her office to review and sign the documents that her staff had prepared.

- [102] On the morning of June 29, 2010, a member of Ms. Tong's staff sent Ms. Froese an email enclosing a draft statement of adjustments and showing the Plaintiffs needed to provide \$117,805.42 to Ms. Tong in trust as the balance to complete the transaction. That amount represented the balance of the purchase price after the First National Mortgage and the Plaintiffs' \$20,000 deposit. It also included certain other charges listed on the statement of adjustments.
- [103] Mr. Froese testified that email was the Plaintiffs' first communication with Ms. Tong's office, although it refers to a conversation with him the previous day. The email also says "Omar [Sharif] requested you bring all the sales documents with you for the appointment." Mr. Froese testified they went to Ms. Tong's office early that afternoon, but did not bring any documents with them.
- [104] Although the email asked the Plaintiffs to provide \$117,805.42 to complete the transaction, they brought a cheque for only \$66,805.42. The balance of \$51,000 came to Ms. Tong's office in the form a bank draft provided by Mr. Sharif.
- [105] Mr. Froese testified that Mr. Sharif offered the additional \$51,000 so the down payment could be 20 percent, rather than 10 percent, of the purchase price, thereby avoiding an additional insurance premium. That is not consistent with the First National mortgage commitment dated June 17, which refers to a mortgage of \$496,000. That indicates that on a \$620,000 purchase the Plaintiffs were always expected to provide a 20 percent down payment.
- [106] Ms. Tong said she did not know that part of the down payment was being provided by Mr. Sharif. She said she was made aware her office had received the necessary funds to complete, but her staff typically receives cheques and assigns the funds to the appropriate file without her necessarily seeing the cheques herself. The draft provided by Mr. Sharif does not identify whose account it was drawn on, but Mr. Sharif says it was delivered to Ms. Tong's office by someone on his behalf.
- [107] Ms. Tong testified that she met with the Plaintiffs and Mr. Sharif in the afternoon of June 29, 2010. She is the only party who says Mr. Sharif was present at that meeting. Both he and the Plaintiffs say he was not.
- [108] All of the conveyancing documents had been prepared for review and signature by the Plaintiffs prior to the meeting. Ms. Tong testified that they had to be given back to her staff for revision because, on the Plaintiffs providing her with identification, she realized the documents had misspelled Ms. Froese's middle name. Neither Plaintiff recalls any change in documents being necessary. Ms. Tong said after the corrections were made, she would have reviewed the documents with the Plaintiffs according to her normal practice and obtained their signatures.
- [109] Ms. Tong said she reviewed and obtained the Plaintiffs' signatures on documents that included the following:

- An Authorization and Consent, in which the Plaintiffs confirmed their agreement to Ms. Tong acting for them while she also acted for both Mr. Sharif and First National as lenders. It states that no information provided by the Plaintiffs would be kept confidential from the lenders and vice versa. It also states that, in the event of a conflict between the Plaintiffs and the lenders, Ms. Tong would be unable to represent any party. Ms. Tong said the inclusion of Mr. Sharif's name on the document was an error and she believed she was acting only for the Plaintiffs and First National.
- A mortgage commitment document from First National. The terms of that document were the same as the similar document the Plaintiffs had previously signed at the request of Mr. Chisholm, including the conditions that the property would be owner occupied and there would be no secondary financing. The document shows 5320 Knight Street as both the address of the subject property and as the "servicing address," which Ms. Tong understood as the address where the lender would send future correspondence to the Plaintiffs.
- An Acknowledgement of Receipt of Standard Mortgage Terms, referring to the First National mortgage.
- A Property Transfer Tax Return. Ms. Tong said she typically explains that the tax is a percentage of the purchase price but did not review the specific amount with the Plaintiffs. The tax amount is generated by her computer software program after her senior conveyancer inputs the purchase price. The tax on the documents is stated to be based on a purchase price of \$620,000.
- The Buyer's Statement of Adjustments, a copy of which had been emailed to the Plaintiffs earlier in the day. Ms. Tong said her normal practice is to either go through the statement of adjustments line by line or ask the clients to read it and raise any questions they might have. She could not say which approach she took in this case.

[110] For present purposes, the most important document prepared by Ms. Tong's office and signed by the Plaintiffs was a statutory declaration, which included an acknowledgment that the statements made were "of the same force and effect as if made under oath." Ms. Tong said her staff generated the declaration from the computer software after making the appropriate selections. It included the following:

That at the time of the registration we will not be filing any secondary financing and there will be no Vendor Take Back Mortgage

We will occupy the property as our principal residence and that no portion of the property would be rented

[111] The Plaintiffs knew those statements to be untrue when they signed the declaration. They had always intended to purchase a revenue property and had no intention of living there. As will be seen below, they also signed a vendor take back mortgage--the second mortgage in favour of Mr. Sharif--the same day as they signed the declaration.

- [112] Ms. Tong said she had, by that time, taken thousands of such declarations and always used the same procedure--asking the clients if they would like her to read it or if they will read it themselves, then asking them if they swear that the information is correct. If they say it is correct, she takes their signature. In this case, Ms. Tong recalled that the Plaintiffs were unsure as to the usage of the property and she told them to leave her office, give it some thought and come back. When they returned, she said, they told her the information was true and she took their signature.
- [113] Ms. Tong also said she never received information that would indicate the property was rented. Such information would normally include rental agreements, rental amounts and damage deposits. There are no adjustments for rental income on the Buyer's Statement of Adjustments and the Plaintiffs gave no forwarding address for themselves other than the Knight Street address of the property.
- [114] A "Purchase File Record Sheet" contained in Ms. Tong's file includes the handwritten words "live-in" in apparent reference to the property, but those words were crossed out and the word "invest" added. However, a section where information about tenancies is to be added was left blank. To the extent that indicates inconsistent or changing instructions, there is no evidence about where those instructions came from. The Plaintiffs deny providing that information. Their counsel argues it came from Mr. Sharif and relies on a handwritten note on the same document referring to further information that was to come from him. Ms. Tong says the record sheet is a document prepared by staff that she does not typically see.
- [115] Mr. Froese said he and his wife told Ms. Tong that the property would not be their principal residence but trusted Ms. Tong and did not know they were doing something illegal in signing the declaration. As for the condition about secondary financing and a vendor take back mortgage, he said Ms. Tong explained that it could be complied with by simply delaying the filing of a second mortgage until after First National received a copy of a title search.
- [116] Ms. Froese testified that her husband raised questions about the statutory declaration, but Ms. Tong made them "comfortable" to proceed. She added that Mr. Sharif provided comfort on the statutory declaration, although her own evidence is that Mr. Sharif was not present when they signed it and there is no evidence of Mr. Sharif having seen the document at the time.
- [117] Had Ms. Tong been aware of the Plaintiffs' intended use of the property and of any secondary financing, she would at least have been required to advise First National and determine if it was willing to provide financing on that basis, with appropriately revised documentation.
- [118] The effect of the Plaintiffs' evidence is that Ms. Tong permitted and encouraged them to sign a statutory declaration that she and they knew to be untrue and that Ms. Tong withheld that information from her other client. That would be among the most serious ethical breaches a person in her profession could be guilty of. Ms. Tong testified that conveyancing work

accounts for about 95 percent of her practice and, in 2010, she acted in average of about 1,000 transactions a year. I simply do not believe a notary in her position would jeopardize her practice and career for the sake of a single transaction. I prefer her evidence on this point to that of the Plaintiffs.

[119] For purposes of the property transfer, Mr. Sharif was represented by another notary, Jimmy Chong, although Mr. Sharif at trial would not acknowledge that to have been the case. By letter dated June 28, 2010, Ms. Tong sent Mr. Chong the documents that had to be signed by the seller and Mr. Chong returned the signed documents under cover of a letter dated the following day. There is also an invoice from Mr. Chong to Mr. Sharif.

[120] The offices of Ms. Tong and Mr. Chong were in the same building and on the same floor. Ms. Tong testified they had been partners at one time but the partnership had not ended on good terms and, at the time of this transaction, they were not speaking to each other.

9. The Second Mortgage

[121] In the Side Agreement of May 25, 2010, the Plaintiffs agreed to pay separately the \$69,000 difference between the prices in the first and second contracts. It did not specify how or when that amount would be paid, although Mr. Froese said there were discussions about it being provided through a second mortgage in favour of Mr. Sharif.

[122] On June 27, 2010, Mr. Sharif sent a handwritten fax to Ms. Tong's office, to the attention of an employee named Gloria, giving instructions for the preparation of a second mortgage in his favour in the amount of \$120,000, at 12 percent interest, with monthly payments of \$1,200. That principal amount consisted of the \$69,000 price difference between the first and second contracts, plus the further \$51,000 Mr. Sharif would contribute to the Plaintiffs' down payment.

[123] On June 29, 2010, Mr. Sharif again faxed the same handwritten mortgage instructions, with the amount of the mortgage changed to \$140,000 and the monthly payments increased to \$1,400. Mr. Sharif says this is because the Plaintiffs' bank told him the two deposit cheques totalling \$20,000 that he had received would not be honoured. Mr. Froese said there was money in their account to cover the cheques, but Mr. Sharif said he was not going to cash them, without explaining why. The Plaintiffs accepted the additional \$20,000 from Mr. Sharif and subsequently stopped payment on the cheques.

[124] The fax increasing the second mortgage amount was received in Ms. Tong's office (according to the time generated by the fax machine) at 4:07 p.m. Ms. Tong testified that would have been after she met with the Plaintiffs.

[125] Neither fax containing instructions for the second mortgage appears in Ms. Tong's file and she testified that she never saw them. She said that may be because her staff originally assumed the office would be acting for Mr. Sharif as vendor, but later received instructions to act for the purchasers and the first mortgagee. Any "vendor's file" that had been created would likely have been destroyed at that point.

[126] A second mortgage was prepared in the terms requested by Mr. Sharif and was signed by the Plaintiffs on June 29, 2010--the same day the sale transaction closed. As with the fax giving instructions for it, the second mortgage does not appear in Ms. Tong's file.

[127] One document related to the second mortgage that does appear in Ms. Tong's file is an Acknowledgment of Receipt of Standard Mortgage Terms, signed by the Plaintiffs, which refers to a second mortgage in favor of Mr. Sharif for \$120,000. Ms. Tong testified that document was not signed in front of her and she does not know how her office received it.

[128] Ms. Tong testified that she never prepared the second mortgage and has no knowledge of her office preparing it. That is contrary to evidence read in from her examination to discovery, when she said her office had prepared the second mortgage document and she gave it to Mr. Sharif. Her Response to Civil Claim also admits that the second mortgage was at least prepared by her office. It states:

The defendant [Ms. Tong and her corporation] also prepared mortgage documents relating to the Second Mortgage as requested by Sharif.

[129] Ms. Tong's pleadings also say that the second mortgage was given to either the Plaintiffs or Mr. Sharif, asking them to obtain independent legal advice.

[130] The Plaintiffs signed the second mortgage before Mr. Chong, the notary down the hall from Ms. Tong. Mr. Froese stated they were given the document in Ms. Tong's office, with Ms. Tong telling them she was not allowed to witness their signature on it and they needed to have Mr. Chong witness it.

[131] Ms. Tong said she would not have referred to the Plaintiffs to Mr. Chong because of her poor relationship with him at the time. Mr. Chong was not called to testify and there is no evidence from him about what legal advice, if any, he gave to the Plaintiffs. They Plaintiffs say he gave none.

[132] Ms. Tong knew that Mr. Chong was acting for Mr. Sharif in relation to the property transfer. Her letter to him of June 28 enclosing conveyance documents makes no reference to a second mortgage.

[133] Both the Buyer's Statement of Adjustments and a Trust Reconciliation Statement prepared by Ms. Tong's office refer to an "additional charge for 2nd mortgage" of \$168. Ms. Tong testified she did not notice this when she presented the statement of adjustments to the Plaintiffs. There is no mention of a second mortgage in Mr. Chong's bill to Mr. Sharif.

- [134] Even if Ms. Tong was not bound by the admission in her pleadings, the evidence is overwhelming that the second mortgage was prepared in her office. Mr. Sharif gave the instructions to her staff, who included a charge for it on the Buyer's Statement of Adjustments. I also find that someone in her office likely gave the document to the Plaintiffs to take to another notary, if not specifically to Mr. Chong.
- [135] The transaction was completed on a rush basis, Ms. Tong's office having received firm instructions to act for the Plaintiffs and the first mortgagee only the day before the closing and having received instructions from Mr. Sharif to prepare the second mortgage only a day before that. Further instructions from Mr. Sharif to increase the amount of the second mortgage were sent at 4:07 p.m. on the day of closing. In those circumstances, I find it likely that the second mortgage was hurriedly prepared by Ms. Tong's staff without recognizing the conflict it created. I also find that Mr. Sharif likely knew the rushed nature the transaction would make careful scrutiny less likely.
- [136] Although the second mortgage was signed on June 29, it was not registered in the Land Title Office until August 20, 2010. The document was filed at the same time as a number of other, unrelated documents from Ms. Tong's office and its file number indicates it was filed sequentially with those documents.
- [137] Ms. Tong agreed on cross-examination that it "looks like" her office filed the document, although she had no knowledge of it. She said documents prepared in her office are usually filed electronically and bear her electronic signature, but the second mortgage appears to have been filed manually and does not have the electronic signature. The Land Title Office form registering the mortgage shows Mr. Sharif as the "applicant" although the similar form for the property transfer that had been filed on June 30 identifies Ms. Tong.
- [138] Manual filing involves a staff member physically bringing documents to the Land Title Office. Ms. Tong said such documents are usually not time sensitive, have been brought in by clients and are filed as a "clerical" service by staff without her personal involvement and without a file being opened.
- [139] I accept Ms. Tong's evidence that she was not personally aware of the filing of the second mortgage, but find it was filed by her office. The most logical inference is that Mr. Sharif, having received the document after the Plaintiffs signed it before Mr. Chong on June 29, brought it to Ms. Tong's office at a later date and asked that it be filed for him.
- [140] In that regard, Mr. Sharif's actions are similar to what he was found to have done in the DeJesus case. As here, Mr. Sharif sold his own property to those plaintiffs and took back a second mortgage, which was not registered until after closing. The trial judge found the late registration of the second mortgage was for the purpose of avoiding the need to disclose the secondary financing to the first mortgagee.

[141] The combined effect of the first and second mortgages was to encumber the property for an amount in excess of the stated \$620,000 purchase price. They also required the Plaintiffs to pay a total of approximately \$3,000 a month, or \$36,000 a year in mortgage payments, not including property taxes that First National would collect and pay on their behalf.

[142] Based on the amounts in their income tax returns for 2009, the year immediately preceding this transaction, those mortgage payments would have equalled almost three quarters of their annual income. They obviously could not afford to buy the Knight Street property if it did not produce rental income and I find that to be the best evidence that they relied on Mr. Sharif's representation of the rental income they could expect.

10. Post-Completion Events

[143] The Plaintiffs testified that, after they took possession of the property, they understood that Mr. Sharif would remain in control of the rooming house operation and Ms. Prasad would remain as a manager on his behalf. Initially, Ms. Prasad continued to collect rent from the tenants and continued to pay \$2,100 or \$2,400 a month to Mr. Sharif, who then provided cheques in those amounts to the Plaintiffs. Ms. Prasad could not recall why she was paying rent to Mr. Sharif and not the new owners. Mr. Froese believed the property was generating \$4,000 a month in rent and assumed the difference between that amount and the amount they received from Mr. Sharif represented the amount being paid to Ms. Prasad for management services.

[144] Mr. Froese testified that he performed some repairs and began working on the laneway house project. By September 8, 2010, he has submitted a "Pre-Application for Engineering Services" to the City of Vancouver--a preliminary step toward the application for a building permit.

[145] He said that, based on estimates he received, he believed the laneway house could be built for about \$80,000 plus design and permitting costs, provided that he did much of the construction work himself. In order to obtain financing for that work, the Plaintiffs obtained a new appraisal dated October 22, 2010. That appraisal assumed completion of the laneway house and, with that assumption, put the property value at only \$725,000. Although that was more than the Plaintiffs had paid for the property, Mr. Froese said it did not leave sufficient equity against which they could finance construction of the laneway house.

[146] The Plaintiffs did not obtain a new appraisal showing the value of the property as it existed. If they had relied upon the June appraisal showing a value of \$620,000, the first and second mortgages encumbered the property for more than that amount. Even if a lender were to consider the October 22 appraisal, with its estimated future value after construction of the laneway house, the mortgages still encumbered almost 88 percent of that value.

- [147] The October 22 appraisal was not presented as expert evidence and I cannot accept it as accurately stating the property value at the time. Nor did the Plaintiffs actually attempt to obtain financing for the laneway house at that time. However, I find that the Plaintiffs reasonably relied on the October 22 appraisal to assume that financing for the laneway house was likely unobtainable.
- [148] Mr. Froese testified that after receiving the October 22 appraisal, they abandoned the process of applying for the necessary permits to build the laneway house. He said they then asked Mr. Sharif to take back the property, but he refused.
- [149] Meanwhile, the Plaintiffs say they learned that the rooming house operation was contrary to the City zoning bylaw, although they could possibly renovate the property to a one-family dwelling with a secondary suite. The first step in that process was a City inspection to determine what upgrading would be required. Ms. Froese spoke with the City inspector, Mr. Kelland, on October 13, 2010, and the Plaintiffs applied the same day for the necessary inspection.
- [150] At approximately the same time, the Plaintiffs terminated Ms. Prasad's involvement so they could retain the full \$4,000 a month rental income, but all but one of the tenants then left. Mr. Froese testified that Ms. Prasad and/or Mr. Sharif decided to move the tenants to other properties. Mr. Sharif says the Plaintiffs illegally evicted the tenants. Ms. Prasad's evidence is that the Plaintiffs wanted to take over management and the tenants moved, but there were no eviction notices and she did not take the tenants anywhere.
- [151] The City inspection took place on November 3, 2010, and the Plaintiffs received the results by letter dated January 7, 2011. That letter set out the work the City would require, including restoration of the property to a one-family dwelling.
- [152] Mr. Froese testified that he began renovation work to create two separate living units in late 2010, but soon ran out of money. He said they again asked Mr. Sharif to take back the property and he again refused. Instead, Mr. Sharif loaned the Plaintiffs a further \$20,000 on February 10, 2011. That loan was to be secured by an unregistered third mortgage at 12 percent interest. The Plaintiffs signed a document to that effect, handwritten by Mr. Sharif. It included the statement:

There will be no extra funds advanced as fourth mortgage unless laneway is to be built and lumpsum monies will be advance (sic) as per mutual agreement when time comes

- [153] Mr. Sharif says the \$20,000 advance was conditional on the Plaintiffs proceeding with the laneway house project. That is not strictly correct on the language of the document, which refers to the laneway house in the context of a future further advance, but the document provides some support for Mr. Sharif's assertion that he still expected the Plaintiffs to build a laneway house. By the date of that document, the Plaintiffs had abandoned the laneway house idea and were proceeding with the alternate project of turning the existing building into what would effectively be a duplex.

- [154] By February 15, 2010, Mr. Froese had completed sufficient renovations to rent out one unit and obtained short-term tenants. He said that in April 2011 he began the work necessary to complete the second rental unit. However, the Plaintiffs then decided to sell the property and listed it for sale on May 18, 2011 at a price of \$749,000. When the property did not sell, the sale price was lowered, first to \$679,000, then to \$669,000 and finally to \$659,000.
- [155] By December 1, 2011, having had no success at selling the house and with their listing agreement with a realtor expiring, the Plaintiffs decided to rent out both units. Both units were re-rented by February 1, 2012. The Plaintiffs received annual rental income of \$31,140 in 2012 and by 2016 that amount had increased to \$39,204.
- [156] The Plaintiffs again listed the property for sale in August 2016 and eventually entered into an agreement to sell it for \$1,090,000, with a completion date of May 1, 2017. Because of Mr. Sharif's foreclosure proceeding, that agreement required court approval and came before me on March 23, 2017. I approved the sale and ordered cancellation of the registered charges, but reserved judgment on the amount to be paid into court to secure Mr. Sharif's mortgage claim.
- [157] In reasons dated April 19, 2017, and indexed at 2017 BCSC 635, I ordered that \$254,000 be paid into court from the proceeds of sale. That amount included the total \$251,552.31 then owing under the second mortgage, plus a small allowance for the normal costs of a foreclosure proceeding. I declined to order payment into court of any amount to secure the third mortgage. (The fact I later became the trial judge after approving the sale is purely coincidental.)

V. Summary of Findings

[158] In summary, I make the following key findings of fact.

- Mr. Sharif suggested the Plaintiffs buy the Knight Street property from him after they approached him for additional financing on another property they had offered to buy. He told them it would be a better buy because of its potential for developing a laneway house.
- The Plaintiffs inspected the property and saw that it was being operated as a rooming house with eight tenants under the management of Ms. Prasad.
- The Plaintiffs assumed that Mr. Sharif was a practicing and licensed realtor, as he had been when they first met him six years earlier. Although Mr. Sharif did not specifically represent that to still be the case, he said nothing to suggest his professional status had changed.
- Although the Plaintiffs believed Mr. Sharif to be a realtor and hoped to learn about real estate investing from him, they also knew he was the vendor of the property. They therefore knew or should have known that he was not likely to protect their interest ahead of his own.

- The Plaintiffs were primarily interested in the property because of the laneway house potential, but needed to receive rental income from the property to make the purchase viable. They relied on Mr. Sharif's representation that the property generated \$4,000 a month in rental income. Although that representation was true, the Plaintiffs did nothing to verify it or to determine how much of that income, if any, was being paid to Ms. Prasad, who they understood to be the property manager.
- Mr. Sharif was aware that the applicable single family residential zoning under the City of Vancouver's zoning bylaw did not permit the property to be used as a rooming house, but did not disclose that to the Plaintiffs. The version of the contract that purports to contain such a disclosure was likely produced by Mr. Sharif after the fact.
- The evidence does not establish on whose initiative the stated purchase price was reduced from \$689,000 to \$620,000. The Plaintiffs have failed to meet their onus to prove that the initiative came from Mr. Sharif.
- The Plaintiffs applied for and received first mortgage financing from First National based on what they knew to be a falsely represented purchase price. The side agreement under which they agreed to separately pay Mr. Sharif an additional \$69,000 was not disclosed to either First National or Ms. Tong.
- The Plaintiffs signed documents, including a statutory declaration, knowing that those documents falsely asserted that the property would be their principal residence and there would be no secondary financing including, specifically, no vendor take back mortgage. The Plaintiffs did not tell Ms. Tong those statements were untrue and Ms. Tong did not encourage or permit them to sign documents that contained untrue statements.
- Although Ms. Tong was initially approached by Mr. Sharif, she subsequently agreed, at virtually the last minute, to act for the Plaintiffs and First National in completing the transaction. However, someone in her office prepared the second mortgage on Mr. Sharif's instructions and her office subsequently registered the document.
- The Plaintiffs learned after taking possession of the property that the rooming house operation was contrary to City bylaws and determined, based on an appraisal they received, that they did not have sufficient equity to finance construction of a laneway house. They decided instead to convert the property into two rental units.

VI. Liability--Sharif

[159] The Plaintiffs seek damages from Mr. Sharif for either fraudulent or negligent misrepresentation.

[160] The elements of fraudulent misrepresentation that a plaintiff must prove in order to establish a claim for damages are set out in *Wang v. Shao*, 2019 BCCA 130, leave to appeal refused 38704 (14 November 2019) at para. 24:

- (a) the wrongdoer must make a representation of fact to the victim;
- (b) the representation must be false in fact;
- (c) the party making the representation must have known the representation was false at the time it was made;
- (d) the misrepresenter must have intended the victim act on the representation; and
- (e) the victim must have been induced to enter into the contract in reliance upon it.

[161] One key difference between fraudulent and negligent misrepresentation is that, in fraudulent misrepresentation, the plaintiff must prove that the defendant actually knew the representation to be false (or at least was so reckless as to not care whether it was true or not) and intended that the plaintiff act upon it: *Catalyst Pulp and Paper Sales Inc. v. Universal Paper Export Co.*, 2009 BCCA 307 at paras. 56-57; *Neidermayer v. Gillies*, 2012 BCSC 143 at paras. 75-77.

[162] In both fraudulent and negligent misrepresentation, the plaintiff must prove that he or she relied on the representation, but a plaintiff alleging fraudulent misrepresentation does not need to prove the reliance was reasonable. A lack of due diligence on the plaintiff's part, even if it would have been clearly prudent to make their own investigation, is not a defence to fraudulent misrepresentation: *Neidermayer* at para. 54.

[163] The first essential element of fraudulent misrepresentation is that the representation must be one of fact. However, the representation may be implied and the misrepresentation may be made by omission. In *Battrum v. MacKenzie*, 2010 BCSC 1285 at para. 10, the Court adopted the following from S.M. Waddams, *The Law of Contracts*, 5th ed. (Toronto: Canadian Law Book Inc., 1999) at 311:

... An incomplete statement may be as misleading as a false one, and such half-truths have frequently been treated as legally significant misrepresentations. Almost always something is said to induce the transaction and it is open to the court to hold that the concealment of the material facts can, when taken with general statements, true in themselves but incomplete, turn those statements into misrepresentations.

[164] That principal has been applied in cases factually similar to this one.

[165] In *Graham et al. v. Legault et al.*, [1951] 3 D.L.R. 423, [1951] B.C.J. No. 49 (S.C.) [Graham cited to D.L.R.], the plaintiffs wanted a home with a rental suite and the defendant vendors were aware of that requirement. The defendants showed the plaintiffs a basement suite with a tenant at that time, but did not tell them that the basement suite was illegal under two municipal bylaws. The Court said at 426:

I think that a prospective purchaser, shown premises which included a leased and occupied apartment, would assume that the renting and occupation were lawful. Where such a purchaser had expressly stipulated to the buyer that the premises must contain a rentable revenue suite, then, I think, a particular burden was cast on the vendor to disclose all facts known to him relevant to the "rentability" of the suite on his premises.

[166] The Court also rejected (at 428-9) an argument that the misrepresentation was one of law, rather than fact:

It is all very well to say that all persons are assumed to know the law, but in these days of multiplicity of regulations very few people do. The defendants were put on their guard by their knowledge of the plaintiffs' requirements of a "rentable" suite. They know, or ought to have known that, for the two reasons above stated, their suite was not rentable. This fact they did not disclose to the plaintiffs. The "non-rentability" of the suite was not a mere matter of opinion; it was, or should have been, obvious to the defendants. The plaintiffs were entitled to expect that the defendants would disclose this, or any other disabling fact to them. The defendants did not do so.

[167] Similarly, in *Rankin v. Eversfield*, 15 W.W.R. 137, [1953] B.C.J. No. 87 (S.C.), the Court found an implied representation that a basement suite was legally rented. Justice Coady said at 139:

There was here an express representation made by the plaintiff [vendor] to the defendant and relied upon by the defendant as to the rents receivable and the expenses. There was in addition, it seems to me, an implied representation that the plaintiff was legally entitled to collect the rents which she had been collecting. In other words, a representation that these premises were rentable premises.

Further, under the circumstances here, it is clear that without this express representation as to revenue the contract of purchase would not have been entered into, and this the plaintiff well knew. The plaintiff must also have known too, it seems to me, that the express representation with respect to the rents involved an implied representation that these suites were legally rentable.

[168] In *Krahnbiel v. Dondaneau*, 17 W.W.R. 436 at 436, [1955] B.C.J. No. 76 (S.C.) the court found that a description of a house for sale as containing a rental unit could only mean that the unit could be legally rented:

... That advertisement was a representation that the premises included a self-contained suite in the basement. That could only mean a self-contained suite which could legally be occupied as such. Larsen, an employee of the real-estate firm, caused the advertisement to be published. He either knew that the suite was illegal, or he made the representation recklessly, not caring whether it was true or false. The representation was therefore fraudulent.

[Emphasis added.]

- [169] Graham and Krahnbien were both more recently cited by this Court in *Kohlke v. McWines The Winemaker Ltd.*, 2007 BCSC 1578.
- [170] A contractual term stating that a purchaser is taking the property "as is" is not a defence to fraudulent misrepresentation: *Davis v. Moranis and Smith*, [1949] 4 D.L.R. 433 at 438, [1949] O.J. No. 188 (C.A.); *Ding v. Joy Investments Ltd.*, 2003 BCSC 200 at para. 36.
- [171] Here, the Plaintiffs inspected the property and saw that it was rented to eight tenants. Mr. Sharif told them about the rental revenue that was being received, but did not tell them the rooming house operation was not permitted by the applicable zoning regulation, although he was fully aware of that illegality.
- [172] I find that there was an implied representation, or a misrepresentation by non-disclosure, that the Plaintiffs could legally continue to operate the property as a rooming house. That was a representation that Mr. Sharif knew to be false.
- [173] Although the Plaintiffs were primarily interested in the development of a laneway house, I find they relied on the prospect of rental income to make that project viable. Mr. Sharif knew they were relying on his representation and intended them to do so.
- [174] I find that the Plaintiffs would not have entered into any contract to purchase the property had they been aware that the rooming house operation was not permitted. All of the elements necessary to establish fraudulent misrepresentation have been satisfied and Mr. Sharif is therefore liable for fraudulent misrepresentation and any damages that are found to have been caused by that misrepresentation.

VII. Liability--Tong

- [175] The Plaintiffs signed documents, including a statutory declaration, that they would be living in the property and not renting it out. The Plaintiffs knew those statements to be false. Part of their counsel's submission, as I understand it, is that Ms. Tong should have realized the property was rented and not permitted her clients to sign those false documents.
- [176] The Plaintiffs' counsel relies on documents such as the portion of the contract that suggests the presence of tenants, or the file record sheet in Ms. Tong's file where the words "live-in" are crossed out and replaced by "invest." The fact that counsel identified those possible clues in his thorough review of the documents after the fact does not mean that the applicable standard of care required Ms. Tong to notice them in the course of a hurried conveyance transaction.
- [177] In *Esser v. Luoma*, 2004 BCCA 359, the Court of Appeal considered an argument that a notary should have identified warning signs or "red flags" in a transaction. The court said at para. 41:

With respect, this amounts essentially to a statement that 'Because an additional step would have foiled the scheme, Ms. Luoma [the notary] was negligent in failing to take that step.' This cannot be the correct standard, or a legally correct inference. The question is what a reasonably competent notary would have been expected to do in the circumstances in which Ms. Luoma found herself.

- [178] There is no dispute that the standard of care for a notary on a residential real estate conveyance is the same as for a lawyer performing the same service: *Dorndorf v. Hoeter* (1981), 29 B.C.L.R. 71, 122 D.L.R. (3d) 758 (S.C.). The standard of care is not perfection, but rather that of a "reasonably competent solicitor": *Pilotte v. Gilbert*, 2016 ONSC 494 at para. 32, citing *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147 at 208, 31 D.L.R. (4th) 481.
- [179] In cases of alleged negligence by a solicitor, judges can only rarely make a finding of negligence in the absence of expert evidence as to the standard of a competent solicitor conducting the business in question: *Zink v. Adrian*, 2005 BCCA 93 at paras. 43-44, Southin J.A., concurring.
- [180] The Plaintiffs introduced no expert evidence on the applicable standard of care. The only such evidence came from Andrea Rasmussen, called as an expert witness by Ms. Tong. Ms. Rasmussen is a lawyer with extensive experience in residential real estate conveyancing.
- [181] In her report, Ms. Rasmussen said every document Ms. Tong reviewed with the Plaintiffs was prepared on the basis that the Plaintiffs were going to be living at the property. Asked about the file record sheet, she said that regardless of what information is gathered by office staff at an earlier point, the purpose of the lawyer or notary's personal meeting with the clients is to verify the accuracy of the final documents.
- [182] Apparently, like Ms. Tong, Ms. Rasmussen did not notice the missing page in the copy of the contract that appears in Ms. Tong's file, but when it was pointed out to her on cross-examination, she said that page contained no information that was necessary to complete the transaction. Asked about the apparent reference on the preceding page to existing tenancies, she said she does not rely on the contract for information about tenancies. Such information would normally come from the vendor's solicitor or notary, who would expect appropriate adjustments to be made.
- [183] Ms. Rasmussen said the statement of adjustments prepared by Ms. Tong's staff showed her that she had all of the monies that she needed to close the transaction from the Plaintiffs and their first mortgage lender, so there was no need for any secondary financing. Asked in cross-examination about the two cheques Ms. Tong's office received, one of which had actually come from Mr. Sharif, Ms. Rasmussen said it is not uncommon to see cheques from more than one financial institution and she does not look into the sources of client funds.

- [184] She said statutory declarations like the one the Plaintiffs signed are commonly requested by "virtual lenders" like First National--those whose employees do not directly meet and obtain information from the clients. However, she said the document signed by the Plaintiffs is unusually specific in saying there will be no vendor take back mortgage in addition to the general statement that there will be no secondary financing.
- [185] She said all the conveyancing documents reflected the facts set out in the declaration. The documents indicate what the Plaintiffs represented to their mortgage broker, their lender, their insurer, the title insurer, the Minister of Finance and Ms. Tong: that they were planning to live at the property.
- [186] In cross-examination, Ms. Rasmussen was asked if there are situations in which a notary ought to know their clients are swearing a false statutory declaration. Ms. Rasmussen responded that the lawyer or notary only ought to know that if the clients expressly tell them it is false, in which case the lawyer or notary could not take the clients' signature.
- [187] She recalled three or four instances in her career when clients told her that the contents of a declaration were not accurate. In those cases, she had to obtain further instructions from the mortgage broker or lender and was able to resolve matters.
- [188] In re-examination, Ms. Rasmussen was asked what she would do if a client expressed uncertainty about the conditions in the statutory declaration they are asked to sign. She said if the client later came back and was prepared to swear to the declaration, she would take their signature and would not conduct further investigation before doing so.
- [189] In relation to the subsequent registration of the second mortgage by Ms. Tong's office, Ms. Rasmussen said when someone brings to her office an executed Land Title document without any restrictions or undertakings attached to it, her office may help them file it, without performing conflict searches or opening a file. She said she does not consider such services to be legal or notarial and her staff is able to handle them without asking her.
- [190] The purchase here was completed at the end of June and the mortgage was not registered until late August. Ms. Rasmussen said June and July are typically the busiest conveyancing months of the year and she would not expect a lawyer or notary to recall details of a seemingly unremarkable conveyancing file a month or two after closing.
- [191] Counsel for Ms. Tong argues that Ms. Rasmussen's evidence supports Ms. Tong's handling of the transaction. There is no other evidence on the standard of care and no evidence of the applicable standard of care in circumstances where the client actively conceals facts from the notary or lawyer. Accordingly, counsel argues, the Court must find that Ms. Tong acted in accordance with the applicable standard of care. I agree, except in one respect.
- [192] In cross-examination by Mr. Sharif, Ms. Rasmussen said that while it is acceptable for a lawyer or notary to act at the same time for a purchaser and an institutional lender, it is not acceptable to act for those two parties and a private secondary lender.

- [193] According to the authorization and consent form prepared by Ms. Tong's office, that is exactly what Ms. Tong was doing. The document asked the Plaintiffs to acknowledge that she was acting for them, First National and Mr. Sharif. That is the representation that was made to Plaintiffs, notwithstanding Ms. Tong's evidence that Mr. Sharif's name was included in error.
- [194] More importantly, Ms. Tong's office did, in fact, act for Mr. Sharif by preparing the second mortgage in his favour. Ms. Tong relied on her staff to prepare all documents and, in the end, only presented the clients with the documents her staff prepared to complete the purchase. Those documents did not include the second mortgage and I accept that Ms. Tong was unaware of it.
- [195] In relying on her staff to prepare all necessary documents, Ms. Tong followed what Ms. Rasmussen said is the normal practice. That practice is undoubtedly efficient and effective almost all of the time, but it creates a risk of something unusual being missed. In this case, someone on Ms. Tong's staff apparently prepared the second mortgage either without recognizing the conflict it created or without realizing that Ms. Tong's representation had switched from Mr. Sharif to the Plaintiffs at the last minute.
- [196] Reliance on staff does not relieve a professional from overall responsibility for the actions of her firm. I find that Ms. Tong must be responsible for the actions of her staff and should have known about the second mortgage. Had she known about it, there would have been an obvious conflict with her other client, First National. The authorization and consent she asked the Plaintiffs to sign specifically stated she would not be able to represent any party in the event of a conflict that could not be resolved.
- [197] I find that Ms. Tong completed the purchase on behalf of the Plaintiffs when she ought to have known she was in a conflict of interest and was required to decline to act. In that respect, I find she was in breach of the standard of care.
- [198] The question then becomes whether her breach caused any loss that the Plaintiffs suffered.
- [199] In an action based on a lawyer's alleged professional negligence, the plaintiff must demonstrate, on a balance of probabilities, that if properly advised, the plaintiff would have acted in a different manner and would have avoided the damages suffered: *Boland v. Sean Schaefer Professional Corporation*, 2020 ABQB 551 at para. 37; *Pilotte* at paras. 47-48.
- [200] Ms. Tong's meeting with the Plaintiffs took place late in the day on the closing date provided for in the contract. Had she told them she could not act, the transaction could not have been completed on that day. But the closing date had already been extended three times. Both the Plaintiffs and Mr. Sharif wanted to complete the transaction.

- [201] While Ms. Tong should have learned about the second mortgage from the staff member who prepared it, she also should have learned about it from the Plaintiffs, who instead falsely certified that there was no secondary financing. Their argument is essentially that Ms. Tong should have discovered their falsehood.
- [202] Had Ms. Tong identified her conflict and told the Plaintiffs why she was unable to act, she would have revealed no facts that the Plaintiffs did not already know. There is no reason to infer that Ms. Tong's inability to act would have lessened anyone's motivation to complete the transaction.
- [203] I have found that the Plaintiffs would not have proceeded with the transaction if they knew the rental accommodation was illegal. Nothing that Ms. Tong knew or should have known would have revealed that fact, even if the Plaintiffs had not falsely represented that they were buying the property to live in.
- [204] The Plaintiffs have not shown that Ms. Tong declining to act because of a conflict would have prevented them from completing the transaction. It would have been a simple matter for them to agree with Mr. Sharif to extend the completion date and proceed with another notary or lawyer, and I find that is what would most likely have happened in the circumstances. That other notary or lawyer would not have been in a conflict arising from the second mortgage because Mr. Sharif already had that signed document in hand.
- [205] The Plaintiffs may also have had to find another first mortgage lender from whom they could conceal the existence of the second mortgage as they concealed it from First National. There is nothing in the evidence to suggest that First National was uniquely able and willing to provide the Plaintiffs with a first mortgage.
- [206] I find that Ms. Tong's breach of the standard of care was not the proximate cause of any loss the Plaintiffs may have suffered. The case against her must be dismissed.

VIII. Damages

- [207] I have found that the Plaintiffs are entitled to damages from Mr. Sharif for fraudulent misrepresentation. Damages in tort are intended to put the plaintiff in the position they would have been in had the tort not been committed. In this case, that is the position the Plaintiffs would have been in had they not purchased the property.
- [208] The Plaintiffs' submissions seek damages under a number of heads. Some of those are, with respect, misconceived either because they are inconsistent with that basic rule or are unsupported by evidence.
- [209] Counsel for the Plaintiffs submitted that Mr. Sharif induced the Plaintiffs to pay \$689,000 for the property rather than the "fair market value" of \$620,000 and argues that, at a minimum, the Plaintiffs are entitled to the \$69,000 difference.

- [210] Generally, the measure of damages in a fraud action involving the sale of land is the difference between the price paid and the actual value of the property purchased, plus consequential losses such as the costs of repairs made necessary by the deceit: *C.R.F. Holdings Ltd. v. Fundy Chemical International Ltd.* (1981), 33 B.C.L.R. 291 at para. 10, [1982] 2 W.W.R. 385 (C.A.).
- [211] The Plaintiffs refer to DeJesus where, as in this case, Mr. Sharif sold his own property to the plaintiffs and took back a second mortgage, which was not registered until after closing. Unlike this case, there was no dispute about the fact Mr. Sharif was acting in a dual capacity as vendor and realtor and there was a more extensive history of prior dealings between one of the plaintiffs and Mr. Sharif. The trial judge rejected an allegation that Mr. Sharif had forged an addendum to the contract of purchase and sale.
- [212] Mr. Sharif was found to owe a fiduciary duty to the DeJesus plaintiffs and was found to have breached that duty by selling the property for a price in excess of the fair market value. The measure of damages was the difference between fair market value at the time of the purchase and the amount the plaintiffs paid. That difference was found to be \$135,000 and that amount, along with interest on it, was reduced from the amount owing to Mr. Sharif on his mortgage.
- [213] The difficulty facing the Plaintiffs here is that they have introduced no properly admissible evidence on which the court can find the fair market value of the property, as of June 2010, to have been \$620,000, \$689,000 or any other amount.
- [214] The value of a property at a given time is a matter for expert opinion evidence. Such evidence must be tendered according to requirements set out in Rule 11-6, which include proper notice and the ability of other parties to require attendance of the expert for cross-examination.
- [215] The Plaintiffs rely on the appraisal of June 1, 2010, but no attempt was made to introduce that appraisal as an admissible expert opinion. It was simply a document that was included (multiple times) in the many binders of documents that were introduced.
- [216] It is evidence that one appraiser, with knowledge of an agreed upon purchase price, provided advice to Dominion Lending for the specific purpose of confirming that agreed upon price was consistent with fair market value. It is not evidence of the accuracy of that opinion.
- [217] It is also not clear from the document whether or to what extent the appraiser considered the possible impact of a laneway house -- the prime motivation for the Plaintiffs' purchase - in arriving at his valuation opinion. That would presumably have been a point on which the appraiser could have been cross-examined if the Plaintiffs had given notice under Rule 11-6 of an intention to rely on the document as an expert opinion.

- [218] In the absence of proper evidence, I cannot award damages based on an asserted difference between the purchase price and fair market value.
- [219] The Plaintiffs' damages claim also includes approximately \$130,000 for the "shortfall" of rental income between the date of purchase and the date they ultimately sold the property. This is stated to be the difference between what they actually received and the \$4,000 a month represented by Mr. Sharif.
- [220] That \$4,000 a month was the income generated by the rooming house operation. Having shown that operation was illegal, the Plaintiffs are now effectively claiming the loss of that illegal income.
- [221] The governing rule is succinctly stated in G. H. L. Fridman et al., *The Law of Torts in Canada*, 3rd ed. (Toronto: Carswell, 2010) at 719:

The plaintiff is only entitled to be put back into the position he would have been in if the fraudulent misrepresentation had not been made, not into the position he would have been in had the representation been true.

(Citing *Burns v. Kelly Peters and Associates* (1987), 41 C.C.L.T. 257 at 285, 41 D.L.R. (4th) 577 (B.C.C.A.).)

The Plaintiffs are therefore not entitled to receive the claimed income "shortfall."

- [222] After acquiring ownership of the property, the Plaintiffs incurred expenses, both for immediate repairs that turned out to be necessary and the renovations necessary to create the two rental suites that complied with the City bylaws. Those are expenses they would not have incurred had the transaction not taken place and they are entitled to damages for those amounts.
- [223] Mr. Froese did much of that repair and renovation work himself, foregoing the income he would likely have otherwise earned from his small construction business. His net business income in 2010 was \$47,918 less than it had been in 2009 and I find that to have been a loss arising from having entered into this transaction. When the direct costs incurred for repairs (\$10,536.27) and renovations (\$27,129.84), the total direct consequential loss is \$85,584.11.
- [224] The Plaintiffs ultimately recovered that loss and more when they sold the property, but I find that the improvements to the property were a necessary and reasonable step in making it marketable.
- [225] The Plaintiffs are therefore entitled to damages as against Mr. Sharif of \$85,584.11 plus interest pursuant to the Court Order Interest Act, R.S.B.C. 1996, c. 79 [COIA].

IX. The Foreclosure Action

[226] Mr. Sharif advanced the Plaintiffs a second mortgage of a \$140,000 and a third mortgage of \$20,000. Any payment the Plaintiffs ever made toward those mortgages was minimal at best. He seeks payment of those mortgages, including interest at the specified rate of 12 percent.

[227] The Plaintiffs argue the court should not assist Mr. Sharif by granting relief in foreclosure because the agreements underlying the mortgages are illegal and contrary to public policy. They make three main arguments:

- a) the mortgages were illegal because Mr. Sharif was carrying on business as a mortgage broker without being registered as such, as required by s. 21(1)(a) of the Mortgage Brokers Act, R.S.B.C. 1996, c. 313 [MBA];
- b) the mortgages were illegal because the mortgage payments were remuneration for real estate services, which are prohibited under s. 4 of the Real Estate Services Act, S.B.C. 2004, c. 42 [RESA]; and
- c) the second mortgage was made for the unlawful purpose of deceiving the first lender and is unenforceable for public policy reasons. The third mortgage is subsequently unenforceable because it is a consequence of the second mortgage.

[228] Section 1 of the MBA defines "mortgage broker":

"mortgage broker" means a person who does any of the following:

- (a) carries on a business of lending money secured in whole or in part by mortgages, whether the money is the mortgage broker's own or that of another person;
- (b) holds himself or herself out as, or by an advertisement, notice or sign indicates that he or she is, a mortgage broker;
- (c) carries on a business of buying and selling mortgages or agreements for sale;
- (d) in any one year, receives an amount of \$1 000 or more in fees or other consideration, excluding legal fees for arranging mortgages for other persons;
- (e) during any one year, lends money on the security of 10 or more mortgages;
- (f) carries on a business of collecting money secured by mortgages;

[229] Based on Mr. Sharif's own evidence of the number of second mortgages he provided over the years, I am prepared to assume he meets the definition of a mortgage broker in paragraph (a).

[230] Section 21 of the MBA prohibits a person from carrying on business as a mortgage broker unless registered under the MBA. The consequences of a violation of the MBA, including carrying on business in violation of s. 21, are set out in s. 22, which creates offences and specifies fines. However, the MBA does not create civil liability or provide a defence to claim under a mortgage. Section 13(1) says:

13 (1) A mortgage is not rendered void, voidable or unenforceable, solely because of the failure of any person to register under this Act, or because of any defect or irregularity in an application for registration, or renewal of registration.

[231] In my view, s. 13(1) is a complete answer to the Plaintiffs' argument under the MBA.

[232] The Plaintiffs' argument under RESA is based on the proposition that Mr. Sharif's mortgages constitute remuneration for his real estate services. RESA prohibits an unlicensed person from providing real estate services for remuneration and s. 4(1) says no action may be brought or continued for remuneration in relation to real estate services provided by an unlicensed person. Section 1 defines "real estate services" as:

- (a) rental property management services,
- (b) strata management services, or
- (c) trading services;

[233] The detailed definitions of these three services do not include the loaning of money on the security of mortgages. The Plaintiffs may have believed Mr. Sharif was providing real estate services to them, but his advancing second and third mortgages was separate and apart from anything that can be defined as a real estate service. Simply put, the Plaintiffs granted Mr. Sharif a mortgage on their property because he loaned them money, not as payment for real estate services. Therefore, the Plaintiffs' second argument also fails.

[234] Finally, the Plaintiffs argue the second mortgage was made for an unlawful purpose--to deceive the first mortgage lender--and should be unenforceable for public policy reasons. The Plaintiffs rely on *Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd.*, 2020 BCCA 130, where Justice Hunter said at para. 3:

[3] Where one of the purposes of an agreement sought to be enforced is to commit a fraud and the agreement is deliberately structured in such a way as to facilitate the commission of the fraud, it is open to a court to decline to enforce the agreement on the ground that to do so would undermine the integrity of the legal system.

- [235] In Youyi, the plaintiff applied to enforce an agreement for sale of two commercial properties. The agreement included a term that the vendor would lease back the property for an annual lease rate stated as a percentage of the purchase price. However, a separate agreement called for payment at a lower percentage and the trial judge found that the agreement was purposefully designed so the purchasers could conceal the true lease rate and mislead lenders by artificially inflating the revenue from the property.
- [236] Hunter J.A. noted at para. 47 that contracts may be illegal in two distinct ways. First, a contract may be unenforceable because its performance would violate a statutory or common law prohibition, rendering it per se illegal. The second type of illegality is referred to at para. 48:
- [48] The second type of illegality is more nuanced. A contract may be unenforceable in circumstances where it is not per se illegal, but was entered into at least in part, with the object of committing an illegal act. Enforcement of such a contract may be so tainted with illegality that a court is entitled to refuse to enforce it. These cases must be considered on a case-by-case basis, unless there is controlling authority, as I conclude there is for the present appeal. But in examining the facts of each case, the application of the illegality defence should be approached on the basis of principal, namely the impact of enforcement on the integrity of the judicial process, rather than as a rules-based exercise.
- [Emphasis added.]
- [237] Youyi makes clear at para. 70 that a trial judge has discretion to decide whether to give effect to this defence, including consideration of whether a refusal to enforce the contract would be a disproportionate response.
- [238] In Youyi, the Court declined to enforce the agreement for sale and the effect of the decision was to restore the parties to their original position because the plaintiff could not enforce the agreement for sale of the property. The defendant retained the property and the plaintiff did not have to pay the purchase price (subject to an outstanding issue about deposits, on which the trial judge invited further submissions.)
- [239] In seeking dismissal of the foreclosure action in this case, the Plaintiffs seek to retain funds that Mr. Sharif has advanced to them. That amount was included in the price the Plaintiffs ultimately obtained on reselling the property. Retaining those funds would, in my view, amount to a windfall for the Plaintiffs.
- [240] The illegality the Plaintiffs complain of--the concealment of facts from the first mortgagee--is one they were fully aware of and complicit with. It was the Plaintiffs, and not Mr. Sharif, who had a contractual relationship with First National and were under any relevant duty of disclosure.

[241] The facts of this case are more comparable to *Bagry v. Vaishnav*, 2016 BCSC 1172, where the plaintiffs sued to recover monies owing to them pursuant to second and third mortgages securing funds they lent to the defendants. The defendants argued illegality, saying the effect of one of those mortgages was that the defendants did not have the amount of equity in the property that the first mortgagee required. Justice Ehrcke said at para. 107:

107 With respect to the Third Mortgage, there is nothing illegal or immoral about that contract per se. The alleged illegality, according to the defendants, is in failing to disclose its existence to the Toronto Dominion Bank. Yet the duty to disclose, if there was one, was a duty owed to the Toronto Dominion Bank by the defendants, not by the plaintiffs. The defendants had a contractual relationship with the Toronto Dominion Bank as borrowers on the first mortgage. The plaintiffs had no such relationship, contractual or otherwise, with the Toronto Dominion Bank.

[242] I find that it would undermine the integrity of the legal system to permit the Plaintiffs to retain the principal amounts borrowed from Mr. Sharif. However, that does not mean the Plaintiffs are required to pay the 12 percent annual interest set out in those mortgages.

[243] The Plaintiffs' liability to pay interest under the mortgages flows from having proceeded with the transaction, which I have found they did as a result of Mr. Sharif's fraudulent misrepresentation relating to rental income. Had the Plaintiffs not proceeded, Mr. Sharif would not have advanced them the money.

[244] Mr. Sharif, like the Plaintiffs, should be returned to his original position. He is entitled to return of the principal, but only with interest calculated pursuant to the COIA.

X. Summary and Conclusion

[245] The Plaintiffs will recover damages from Mr. Sharif for fraudulent misrepresentation in the total amount of \$85,584.11, plus interest pursuant to the COIA.

[246] Mr. Sharif will recover from the Plaintiffs the principal amounts advanced to the Plaintiffs as set out in the second and third mortgage, but interest on those amounts will be limited to interest pursuant to the COIA.

[247] The Plaintiffs' claim against Ms. Tong is dismissed with costs.

[248] As requested by the Plaintiffs' counsel in closing argument, the Plaintiffs have leave to make further submissions in regard to costs, provided that a request for a hearing date for those submissions is made to Supreme Court Scheduling within 30 days of the date of these reasons.

[249] The damages owing to the Plaintiffs may be set off against the mortgage amounts owing to Mr. Sharif prior to the payment out of any of the funds paid into court in respect of those mortgages.

[250] Any disputes that may arise between the parties regarding the amounts of court order interest owing, the amount of set-off in favor of the Plaintiffs, or the payment out of funds paid into court are referred to the Registrar for decision and certification.

"N. Smith, J."

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