

CANADA / JUDGMENT

Pasternak v. Morden

2022 BCSC 433

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Supreme Court of British Columbia

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2022 BCSC 433 Pasternak v. Morden

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Pasternak v. Morden,

2022 BCSC 433

Date: 20220316

Docket: S184260

Registry: New Westminster

Between:

Arthur Pasternak and Jadwiga Dobrowolski

Plaintiffs

And

Hilary (Kim) Morden

Defendant

And

Gina Halinda & Brookside Realty Ltd.

d.b.a. Royal LePage Brookside Realty

Third Parties

And

Michael Morden

Fourth Party

Before: The Honourable Mr. Justice Armstrong

Reasons for Judgment

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Place and Dates of Trial:

New Westminster, B.C.

June 14-18, 21 and 22, 2021

Place and Date of Judgment:

New Westminster, B.C.

March 16, 2022

Contents

Introduction. 3

Background. 4

The Transaction. 5

The Collapse of the Transaction. 7

The Sale of the Property. 12

The Mordens' (Defendant and Fourth Party) Submissions. 13

The Third Parties' Submissions. 14

Legal Framework. 16

When did the contract end?. 16

Was Mr. Morden an agent for Ms. Morden?. 18

Agency Relationship. 19

Implied Agency. 20

Agency by Ratification. 21

Conclusion: Agency Relationship. 21

Scope of Authority. 23

Conclusion: Scope of Authority. 24

Did the third parties breach the standard of care?. 27

Did the third parties cause the plaintiff's losses?. 29

Conclusion: Causation. 38

Disposition and Costs. 40

Introduction

- [1] This action concerns a collapsed real estate transaction involving the plaintiffs' sale of a residential property located at 12452 Meadowbrook Place, Maple Ridge, B.C. (the "Property") to the defendant in June 2016.
- [2] The defendant, Ms. Morden, agreed to purchase the Property under a contract of purchase and sale made June 20, 2016 (the "Contract"). She breached the Contract by failing to pay the deposit required by the Contract and refusing to complete the transaction. The defendant has admitted liability for the plaintiffs' damages resulting from her refusal to complete purchase of the Property, but she takes issue with the measure of damages claimed.
- [3] Additionally, the defendant makes a third party indemnity claim against her former realtor, Ms. Gina Halinda, and Ms. Halinda's brokerage, Brookside Realty Ltd. ("Brookside"). The defendant and her husband, Mr. Morden, contend the decision to abandon the Contract would have been different if Ms. Halinda or Brookside had performed their duties with the requisite level of skill including, among other things, by recommending the Mordens obtain independent legal advice prior to collapsing the transaction and by informing them of the potential consequences of breaching the Contract. The defendant seeks indemnity from Ms. Halinda and Brookside for all of the damages caused to the plaintiff on the basis that they breached their duty of care and were negligent.
- [4] Additionally, Ms. Halinda and Brookside bring a fourth party claim against the plaintiff's husband, Mr. Morden. This claim is for contribution and indemnity on the basis that Mr. Morden induced the defendant to breach the Contract when he said they would not complete the Contract and removed deposit funds from his bank account to ensure the deposit cheque would be returned with non-sufficient funds ("NSF"). The third parties also allege that Mr. Morden is liable for breaching his warranty of authority when instructing Ms. Halinda to return the deposit cheque and cancel the Contract.

Background

- [5] The defendant and Michael Morden had been married for 41 years at the time of this trial. Ms. Morden is 62 years old. She holds a Bachelor's degree in English and a Master's degree in Criminology. In 2016, she was teaching at Simon Fraser University. She is currently disabled from work for health reasons.
- [6] Mr. Morden is 61 years of age. He is the mayor of Maple Ridge and was previously the president of the local Chamber of Commerce. He operates an electronics security company.
- [7] In 2016, the plaintiffs owned and occupied the Property. They rented a part of the Property to a tenant.
- [8] In or about March 2016, the plaintiffs decided to purchase a new home. They obtained mortgage approval for \$600,000 on the condition that the Property would be sold at the time of their new home purchase. They entered into a contract of purchase and sale to buy a new home on May 16, 2016 for \$1,071,555 with a completion date of August 2, 2016. This agreement was a subject-free contract and the plaintiffs paid an initial \$35,000 deposit with a further \$35,000 deposit payable in May 2016.
- [9] On June 13, 2016, the plaintiffs listed the Property for sale at a price of \$915,000. After open houses were held on June 18 and 19, 2016, the plaintiffs received offers for their home at \$850,000 and \$920,000.
- [10] At that time, Ms. Halinda represented Mr. and Ms. Morden in their efforts to acquire a new home in the area; they had hoped to purchase a property on the Fraser River in Maple Ridge.
- [11] Prior to June 20, 2016, the Mordens had purchased more than 10 properties, some of which were rental homes and some for their personal use. They had also purchased properties they intended to improve or renovate and sell. They had engaged Ms. Halinda to assist them in purchasing some properties in the past. They had also retained another realtor to advise and assist with other purchases. The Mordens described having had a good relationship with Ms. Halinda throughout their dealings.
- [12] Mr. Morden indicated that he ultimately made the decisions to purchase other land or not, and he assumed the role of communicating with realtors.
- [13] When purchasing other property, the Mordens worked together with their realtors. Sometimes the Mordens held title jointly, but on other occasions, they held title separately. Their previous acquisitions of real estate were joint efforts. It was customary that Mr. Morden would locate possible opportunities to buy property. He normally made decisions concerning those purchases, and he would communicate directly with realtors.

[14] Most recently, on October 10, 2015, the Mordens had made an offer to purchase a property on River Road in Maple Ridge for \$1,100,000 with a \$5,000 deposit and subject to an approved inspection. The "subject to inspection" clause was inserted on Mr. Morden's instructions. The Morden's contract concerning this property included the following clause:

The buyer and seller agree should the buyer not remove subjects by November 22/2015 the seller agrees to release the initial deposit and instruct their agency representation to do so within five days of receipt of release from the buyer.

[15] This transaction did not complete because of problems revealed through an inspection of the lands; the Mordens eventually obtained a "collapse of sale - release form" and their \$5,000 deposit was returned. This agreement ended without any claims being made.

The Transaction

[16] In June 2016, the Mordens were introduced to the plaintiffs' Property, firstly through Mr. Morden; he was the first to visit the property on June 18 and said he "liked it". After his first visit, he and Ms. Morden returned on June 19 with Ms. Halinda and walked through the house, making their own inspection before making their decision to purchase. They had hoped to find a house on the river. Although this house was away from the river it had some unique qualities that attracted their interest. They decided to make an offer to purchase the Property.

[17] Ms. Halinda drafted a contract of purchase and sale, which named Michael Morden and Hillary Morden as purchasers. Mr. Morden was leaving for a vacation over the following days, thus his name was struck from the Contract because he would not be present to sign documents or for further negotiations. Mr. Morden told Ms. Halinda to work with Ms. Morden on the deal. They intended that Mr. Morden would be registered on title at the time the transaction completed. Indeed, the Contract contained the following clause: "Seller acknowledges Michael Morden will be added to the title at completion."

[18] Ms. Halinda drafted the defendant's first offer to purchase the property on June 19, 2016 for \$920,000. The initial draft included a "subject to inspection" clause. Ms. Halinda met with the Mordens at their home and reviewed the offer. At this meeting, Mr. Morden asked that this clause be removed from the contract because he believed a subject-free offer was going to be more attractive to the plaintiffs. Ms. Halinda expressed concerns about the risks of making a subject-free offer but eventually revised the document on Mr. and Ms. Morden's instructions. Mr. Morden was, at this point, still included as a purchaser on the initial draft of the Contract.

[19] Mr. Morden spoke to Ms. Halinda and told her to go ahead with an offer. He said she could work with Ms. Morden on the deal. Mr. Morden knew that Ms. Morden wanted to buy the property even though it required some remedial work. He said "go ahead".

- [20] The form of contract was a standard Real Estate Board of Vancouver document and included a term that a \$20,000 deposit would be deposited with Brookside within 48 hours of the plaintiffs' acceptance of the offer.
- [21] Ms. Halinda obtained the defendant's initials and signature to the pages of the offer and presented the offer to the plaintiffs' realtor on June 20. The plaintiffs made a counteroffer, seeking a price of \$935,000 with a deposit of \$50,000.
- [22] When Ms. Halinda received the plaintiffs' counteroffer, she was unable to contact Ms. Morden. She spoke to Mr. Morden to determine whether the counteroffer was acceptable to them. Mr. Morden confirmed that they accepted the counteroffer. Ms. Morden said when she talked to Mr. Morden about the plaintiffs' counteroffer with a \$15,000 price increase and \$50,000 deposit, he said "we were okay" with the proposal. Ms. Halinda met Ms. Morden that evening and Ms. Morden initialed the counteroffer changes. Later, Ms. Halinda returned the Contract to the plaintiffs' realtor because it required the signature of Ms. Dobrowolski, the other plaintiff in this action, concerning notice to an existing tenant. The fully executed Contract was returned to Ms. Halinda at 12:50 a.m. on June 21, 2016.
- [23] Ms. Halinda met Ms. Morden on June 21, 2016 and provided a copy of the fully executed Contract. At that time, Ms. Morden initialed the buyer's notice to seller for vacant possession of the property, delivered the \$50,000 deposit cheque, and the Contract was complete. A copy of the deposit cheque was sent to the plaintiffs' realtor on the same day.

The Collapse of the Transaction

- [24] Sometime during the evening of June 21, 2016, the Mordens had an emotional discussion, during which Mr. Morden indicated he did not want to proceed with the purchase. They had a disagreement, following which Ms. Morden said she left the decision to terminate the Contract with Mr. Morden. He made the decision to collapse the deal, and he was left with the responsibility of communicating that decision to Ms. Halinda.
- [25] Mr. Morden testified that Ms. Morden wanted the house but it needed a lot of work. He reported that when he spoke to Ms. Morden on the evening of June 21, he believed she was having "rough times". He was unclear about what the status of the transaction was, but at that juncture, he had not decided whether to cancel the agreement. He said that on the next morning, he spoke to Ms. Morden and she agreed to cancel the deal. Ms. Morden said that Mr. Morden felt strongly about terminating the Contract and she concurred. She made her decision freely and voluntarily and was not being forced. She said she made her decision without discussing the matter with anyone other than her husband.

- [26] Mr. Morden communicated the instructions to collapse the transaction to Ms. Halinda on the morning of June 22, 2016, by voicemail. He had previously deposited funds to their joint account for the deposit required by the Contract. However, on June 22, he transferred funds out of the parties' joint bank account, thereby ensuring that if the deposit cheque was deposited, it would be returned NSF.
- [27] Mr. Morden said that from his experience, if you do not give a deposit to a vendor in the time provided for in the agreement, the deal collapses and comes to an end. After his conversation with Ms. Halinda, Mr. Morden ensured that the deal would not take place by removing money from the account that would have been necessary to honour the deposit cheque. He also gave instructions that the bank should not use his line of credit to allow negotiation of the cheque. When the defendant's brokerage deposited the cheque to their trust account in the usual course, it was returned NSF.
- [28] According to Mr. Morden, Ms. Halinda had advised him that cheques often go NSF without warning him about the consequences of not paying the deposit at the time. He said that they received no information or advice from Ms. Halinda about the consequences of allowing the deposit cheque to go NSF. He believed the collapse process was beginning; he did not explain his understanding of "a collapse" of a deal, but he said he did not need to see a lawyer because the cheque was still in the possession of Ms. Halinda and he had asked for it to be returned to Ms. Morden.
- [29] Ms. Halinda said she thought the plaintiffs would consent to a collapse of the Contract after the deposit cheque cleared. She believed the plaintiffs could sell the property for more than the defendant's contract price and it was her hope they would simply "move on".
- [30] Ms. Halinda called Mr. Morden that morning and asked about the status of the cheque; Mr. Morden asked Ms. Halinda to return the deposit cheque to Ms. Morden. Ms. Halinda told him that she would work with the vendor's realtors and get back to him. She told him there would be a collapse process to end the Contract. The events unfolded as follows:

June 22

8:29 a.m.: voice message from Mr. Morden for Ms. Halinda:

I do not want you to deposit that cheque and I need to tell you how this things going to go. We do not want to buy this house on Meadowbrook. Okay I'm just what it is. So call me on that please and will have a chat.

At 8:32 a.m., Mr. Morden texts Ms. Halinda:

Gina please give me a call ASAP. Do not give the deposit cheque. Please end this deal. Call me and I'll explain.

At 8:35 a.m., Mr. Morden calls Canadian Western Bank and removes funds from their account ensuring the deposit cheque would go NSF.

At 9:46 a.m., Ms. Halinda texts Ms. Morden:

Good morning sunshine don't stress anymore on this Time to start planning the new adventure. I will be both faxing and emailing a collapse to you. Soon as you get it back to me the better. I have already pulled the deposit and will drop it off later today.

At 10:34 a.m., Ms. Halinda emails Ms. Morden, attaching authorization to release trust funds and final general release, as follows:

hi Kim, soon as you can send back. I will grab the cheque ASAP and drop off.

[31] Ms. Halinda returned the cheque to Ms. Morden but learned that it was improper to return a cheque received for a deposit from the buyer. At Ms. Halinda's request, Ms. Morden returned the cheque to Ms. Halinda:

June 23

4:04 p.m., Ms. Halinda texts Mr. Morden:

hi Mike. I grabbed the cheque from the office and dropped it off to Kim However, it is apparently illegal for me to do that. The office must deposit the cheque even though funds are not available. Can Kim reissue me one or give the other one back

Ms. Halinda texts Mr. Morden at 4:05 p.m.:

The other office apparently is making a big deal about it and they have not sent the release through.

At 4:54 p.m., Mr. Morden texts Ms. Halinda:

Okay will please sort this out with Kim as I am in Osoyoos.

At 4:57 p.m., Ms. Halinda texts Ms. Morden:

Hi Kim apparently, I was not allowed to grab the cheque from the office Once delivered it is viewed as deposited So, it's viewed as stealing from the trust account. So, I need the cheque back for deposit even if it bounces Apparently the other side will not sign the release until this is done.

At 5 p.m., Ms. Halinda texts Mr. Morden:

No trust cheques bounced It's the process.

At 5:01 p.m., Mr. Morden texts Ms. Halinda:

I don't understand. Do funds need to be there.

At 5:03 p.m., Ms. Halinda texts Mr. Morden:

No The cheque will come back NSF.

June 25

At 6:41 p.m., Mr. Morden texts Ms. Halinda:

So, did the release go through or don't you know? Isn't it a bit weird that they are running open houses this weekend on that hours. I have to wonder if the other offer was real. Or maybe they said no. Anyway, I'm sure you will advise me as this goes through the process or do they not keep you in the loop? It would be sincerely appreciated to know when it's released. PS who owns Sutton these days?

At 6:46 p.m., Ms. Halinda texts Mr. Morden:

Sometimes people won't go back if they have lost it in multiples Always the question is their something wrong with the house Or they buy plan B or plan C. No release yet. They will most likely wait until the cheque doesn't clear or they have an accepted offer subject to the collapse of this offer. People can be funny.

[32] On June 27, 2016, Ms. Halinda met with Bob Quinnell, the principal of her real estate agency. Ms. Halinda confirmed that when she spoke with Mr. Riddell, the conversation was brief and centered on his receiving copies of documents.

[33] Mr. Morden had a relationship with Mr. Quinnell before these events, and they spoke on June 27. Mr. Morden was concerned about maintaining a good relationship with Mr. Quinnell.

[34] Mr. Quinnell recommended that Mr. Morden speak to a lawyer. Mr. Morden then spoke with Bart Finley, a lawyer he was acquainted with, who referred him to David Riddell, another lawyer in the area. The sequence of events was as follows:

June 28

2:44 p.m., Ms. Halinda emails Mr. Morden:

Hi Mike I am sending you a copy of the full contract in PDF so you can forward to your lawyer.

2:45 p.m., Ms. Halinda texts Mr. Morden:

Had a meeting with Bob this afternoon. He says you really should contact a lawyer ASAP. I have emailed you the file so you can forward to your lawyer. Bob thinks the costs could be as much as 100 K if they push. Might be in your interest to move forward with it. Do some updating and sell while the market is still moving up. In that case I would waive my side of the commission. You would still pay the selling side.

June 29

At 10:08 a.m., message from Mr. David Riddell (a lawyer):

Calling on behalf of Kim Morden. She's been in to see Findlay (a lawyer) and then myself about this deal for Meadowbrook place. I need to speak to you fairly urgently if I may.

At 10:35 a.m., Ms. Halinda sends Mr. Riddell an email attaching a release sent to the plaintiffs' realtor:

Hi Dave sent to realtor, scanned sent also. Wondering although received, deposit was due within 48 hours or at the latest the 23rd. Does this have any impact?

June 30

At 4:21 p.m., Ms. Halinda texts Mr. Morden:

Hi Mike how did things go with Riddell. We talked briefly yesterday.

At 7:50 p.m., Mr. Morden texts Ms. Halinda:

I don't have any news.

- [35] At one point, Mr. Morden said he was not advised by Ms. Halinda to obtain legal advice concerning collapsing the transaction; however, at his examination for discovery, he did not recall whether she recommended he get legal advice.
- [36] He saw Mr. Riddell about the transaction because he wanted to find out about his options. He said he never considered continuing with the purchase of the property and never considered that to be an option. He testified "I never changed my mind" and "I didn't want the house".
- [37] Mr. Morden confirmed that Mr. Quinnell warned him that he could lose as much as \$100,000 and recommended they proceed with the transaction. After receiving legal advice from Mr. Riddell, neither Mr. Morden nor Ms. Morden made any attempts to perform their obligations under the Contract.
- [38] In the end, Mr. Morden said he met with a lawyer but did not change his decision because he trusted Ms. Halinda and relied on her.

The Sale of the Property

- [39] On June 22, 2016, the plaintiffs were informed by their realtor that the defendant did not intend to complete purchase of the Property.
- [40] Over the weekend of June 25 and 26, 2016, the plaintiffs continued to offer their home for sale at \$915,000. They received no offers and on June 30, 2016, they reduced the asking price from \$915,000 to \$850,000.
- [41] By July 5, 2016, the plaintiffs had received three offers at \$835,000, \$820,000, and \$850,000, respectively. They accepted the \$850,000 offer on the same day, subject to inspection by the prospective purchasers, at which time they were bound to complete the transaction. Subjects were removed on July 11: After the inspection, the prospective purchasers renegotiated the price and the plaintiff accepted a reduced sum at \$835,000 to complete the transaction on July 28, 2016.

- [42] The plaintiffs claim damages of \$100,000, being the difference between the defendant's offer of \$935,000 and the eventual sale price at \$835,000.
- [43] The plaintiffs also said that if the defendant had offered to pay the deposit before they accepted the second offer, they might have completed the transaction at the higher price.
- [44] The plaintiffs never communicated their acceptance of the defendant's repudiation of the agreement to the defendant. Moreover, the plaintiffs' pleadings included an assertion that they were ready, willing, and able to complete the Contract at all times; this assertion has been admitted by the defendant in the response to civil claim.
- [45] As will be explained in these reasons, I find that the plaintiffs' acceptance of the defendant's repudiation of the Contract occurred by July 5, 2016, when they entered into the binding contract of purchase and sale with a new buyer.

The Mordens' (Defendant and Fourth Party) Submissions

- [46] As noted, Ms. Morden is the defendant and Mr. Morden is a fourth party to this lawsuit. While admitting liability for the plaintiffs' losses, Ms. Morden contends the \$100,000 difference in sale prices overstates their loss because they failed to mitigate. Ms. Morden argues that it is necessary to deduct that portion of the real estate commission that would otherwise have been paid on the \$100,000 and was not.
- [47] Ms. Morden contends that Ms. Halinda owed her (and possibly Mr. Morden) a fiduciary duty that included a duty to act loyally and transparently and in their best interests. She contends Ms. Halinda breached this duty of care for the following reasons:
- a) she failed to advise her to seek legal advice;
 - b) she failed to provide accurate advice concerning "breaches of contract" and "collapsing contracts";
 - c) she inappropriately speculated that a seller would "likely sign the collapse" once the deposit cheque was returned NSF;
 - d) she failed to inform Ms. Morden of the potential consequences of breaching the Contract;
 - e) if Ms. Halinda gave spoke to Mr. Morden between 8:30 a.m. and 9:41 a.m. on June 22 concerning the breach of contract she gave negligent advice about the damages issue;
 - f) Mr. Morden was not an agent for Ms. Morden in any respect in his involvement with the transaction. More importantly, Ms. Morden did not consent to Mr. Morden taking steps to effect her legal position in regard to the contractual rights or obligations created;
 - g) even if an agency relationship existed between Mr. Morden and Ms. Morden, he did not have any ability to instruct Ms. Halinda to enter the agreement on Ms. Morden's behalf; and

- h) the defendant's breach was a failure to pay the deposit. They contend that the plaintiffs had considered the agreement at an end on June 24; it was not until June 29 that Ms. Halinda informed the plaintiffs the cheque had bounced.

The Third Parties' Submissions

- [48] The third parties argue that Ms. Morden had given Mr. Morden her power of decision making in regard to the Contract. They contend there was an implied agency relationship between the two. They argue that when Mr. Morden received legal advice concerning the options and strategy open to them, he received it on her behalf. Implied agency occurs when an alleged principal and alleged agent give the impression to a third party that agency exists.
- [49] The third parties concede that Ms. Halinda owed the defendant a duty of care and stood in a fiduciary relationship with her.
- [50] The plaintiffs' expert outlined an agent's responsibility when a party is contemplating backing out of a contract of purchase and sale to advise their client to seek legal advice. Breaches of a statutory regulation do not create an independent cause of action. The third parties contend nothing in the Real Estate Services Act, S.B.C. 2004, c. 42 speaks to a client's damages resulting from a breach of the Act; the duty to pay the deposit already existed before the deposit cheque was delivered to Ms. Halinda.
- [51] The third parties argued that the expert's opinion should be given little weight insofar as it was simply a copy and paste of a professional standards manual, without any analysis or opinion.
- [52] The third parties contend that Ms. Halinda should be believed on her evidence that she delivered a copy of the Contract to the defendant. They contend that the evidence supports the third parties' claim that Ms. Morden was informed of the need to seek legal advice and those steps were taken by Mr. Morden on her behalf. She said she spoke to Mr. Morden and reiterated the need for him to speak to a lawyer and told him the plaintiffs could sue for the deposit and the difference between the contract purchase price and the ultimate sale price. Mr. Morden told her that the plaintiffs would likely make money on a new sale of the property because of the state of the market.
- [53] On the question of causation, the third parties contend that Ms. Halinda Ms. Morden has not met the "but for" test. In their submission, even if Ms. Halinda failed to recommend independent legal advice to the defendant, the plaintiffs have not proved that such advice would have prevented the damages suffered.

- [54] The third parties emphasize that it was always open to Ms. Morden to remedy her breach of the Contract and avoid any losses by purchasing the Property from the plaintiffs. They contend that, by failing to do so between June 22 and July 4, 2016, Ms. Morden failed to mitigate her exposure to damage. They contend that Ms. Morden had received that advice and declined to act.
- [55] The third parties claim an adverse inference should be drawn because of the Mordens' failure to tender evidence from Mr. Riddell. Mr. Morden claimed solicitor client privilege over those discussions. The third parties contend that, absent evidence of the advice he received, I should infer that he could have been told to replace the deposit cheque and continue with the Contract.
- [56] I have accepted that the Mordens were in possession of legal advice before the plaintiffs accepted the July 5, 2016 offer to purchase their house. In the result, I accept that mitigation is not an issue in this case.
- [57] Lastly, the claim against Mr. Morden arises only if Ms. Morden is successful in her defence and Mr. Morden is found not to be her agent. All of his behaviours, which triggered the collapse of the Contract, were made by him and on his advice to Ms. Morden. Further, his interference in the Contract by stopping payment on the deposit cheque caused the breach of the deposit terms in the Contract, resulting in the claim by the plaintiffs against Ms. Morden.
- [58] Further, Mr. Morden's behaviour communicated to Ms. Halinda that he was an agent for Ms. Morden; but for his directing her to collapse the deal, Ms. Morden would have completed on the purchase of the property.

Legal Framework

When did the contract end?

- [59] The principles concerning anticipatory breaches and actual breaches of real estate contracts are set out in *Sethna v. 350 Kingsway Development Ltd.*, 2011 BCCA 434 at para. 24; *Homestar Industrial Properties Ltd. v. Philips* (1992), 72 B.C.L.R. (2d) 69, 1992 CanLII 570 (B.C.C.A.) [*Homestar*] at paras. 13, 25-26, 29; and *Dosanjh v. Liang*, 2015 BCCA 18 [*Dosanjh*] at paras. 33-34. These were summarized as follows at para. 33 of *Dosanjh*:
- A party to a contract has two alternatives if the other party repudiates the contract: the innocent party may accept the repudiation or affirm the contract.
 - If the innocent party accepts the repudiation, the contract is at an end, both parties are relieved of their obligations under it, and the innocent party may sue for damages immediately without waiting for the time that the contract should have been performed.

- If the innocent party affirms the contract, the contract remains alive in all respects for both parties, and the risk exists that the party beginning as the innocent party will subsequently commit a breach of its own.
- If the innocent party wishes to accept the repudiation, he or she must make his or her election known.
- Once made, the election is irrevocable.

[60] An anticipatory breach - that is, a breach of contract that occurs before performance of the contract is due - has different legal consequences than an actual breach of contract. As explained in *Homestar* at para. 29:

The legal results are quite different: where there is an actual breach the injured party has a choice of remedies and his election may be made in the court room. In the case of an anticipatory breach, if the innocent party elects to keep the contract in being, no cause of action arises until there is an actual breach. If the innocent party wishes to crystallize his rights before the time for performance and elects to accept an anticipatory repudiation as putting an end to the contract he must so notify the other party and thereupon his rights to damages arise.

[61] As noted in this passage, in an anticipatory breach situation, the contract can be kept alive until the innocent party elects to accept repudiation. The innocent party need not make its election immediately and may be given a reasonable period of time to decide whether to affirm the contract or accept the repudiation: *Dosanjh* at para. 37. The court "should be slow to treat equivocal statements or acts as affirmations of the contract", at least until a reasonable period of time has elapsed: *Dosanjh* at para. 37.

[62] In this case, the first issue to be resolved is whether, and if so when, the plaintiffs accepted the defendant's repudiation of the Contract. Until that moment, the defendant could, if she wished, have paid the deposit and completed the purchase of the Property without incident.

[63] The defendant argues that the plaintiffs "clearly accepted the repudiation" when they re-listed the Property and sued for damages. She contends that the breach entitling the plaintiffs to accept repudiation was the failure to pay the deposit.

[64] The plaintiffs testified that once the deposit cheque had bounced, they understood the defendant had refused to buy the property; however, they say if the defendant had pursued buying the Property, the plaintiffs might have sold the Property to them. The plaintiffs never communicated to the defendant that they accepted her repudiation of the Contract, nor did they trigger the termination clause arising from non-payment of the deposit. This clause read:

In the event the buyer fails to pay the deposit as required by this contract, the seller may, at the seller's option, terminate this contract.

- [65] The plaintiffs did not consider the Contract as "at an end". They held an open house during the week of July 25-26, which the defendant contends was "likely" a communication that they accepted her repudiation. I reject the defendant's assertion on this point. The plaintiffs did not communicate their acceptance of the defendant's repudiation of the agreement, and an unaccepted repudiation does not end a contract: see *Dosanjh* at para. 33; *Norfolk v. Aikens*, [1989] B.C.J. No. 2256, 1989 CanLII 245 (B.C.C.A.) at page 26.
- [66] The plaintiffs were entitled to withhold communication of an acceptance of the repudiation for a reasonable period of time to assess the circumstances they found themselves in: see *Dosanjh* at paras. 36-37.
- [67] In the circumstances of this case, although the purchaser breached the Contract, it was not until the sellers entered into a new contract to sell the Property that their actions could be interpreted as acceptance of the repudiation: *E. & B. Mortgages Ltd. v. Skrivanos* (1980), 118 D.L.R. (3d) 139, 1980 CanLII 262 (B.C.S.C.) paras. 8-12. Simply marketing the property does not amount to an acceptance of repudiation, even when a buyer is specifically informed of the marketing efforts by the innocent vendor: see *Hydes v. Shaer*, [1992] B.C.W.L.D. 2295, 1992 CanLII 258 (B.C.S.C.) at paras. 48-54.
- [68] I find that the defendant could have acted to repair her breach by replacing the deposit cheque and performing the balance of her obligations under the Contract until such time as the seller entered into the new contract to sell the Property or had elected to terminate the contract due to the defendant's failure to pay the deposit on time. In this period, the absence of communication from the plaintiff to the defendant that they accepted her repudiation of the Contract meant the Contract was still alive and defendant was able to save the transaction. I find the plaintiffs did not accept the defendant's repudiation until they entered into a binding contract to sell the Property.

Was Mr. Morden an agent for Ms. Morden?

- [69] Next, I will deal with the agency issue because the outcome of a finding on this question will determine whether Ms. Morden was bound by Mr. Morden's decision to breach the Contract and the deposit requirement.
- [70] Additionally, the agency issue affects the issue of whether Ms. Morden received legal advice through Mr. Morden as her agent. Ms. Morden contends that Ms. Halinda was not entitled to take instructions from Mr. Morden that affected her legal position. She says any advice from Ms. Halinda or from lawyers advising Mr. Morden did not absolve the third parties from Ms. Halinda's failure to give timely warnings to Ms. Morden or to advise her to seek her own lawyer, if any, concerning her options.

[71] Ms. Morden contends that she did not give Mr. Morden the authority to direct Ms. Halinda concerning the decision to abandon the Contract, and she says he was not her agent. Moreover, if Mr. Morden obtained legal advice from Mr. Riddell, Ms. Morden says that advice did not assist her, nor did it relieve Ms. Halinda from her responsibility to give appropriate and necessary advice to Ms. Morden.

[72] The legal issues engaged are:

- a) whether an agency relationship was created;
- b) whether it was in the scope of that agency relationship that Mr. Morden's instructions to Ms. Halinda were legally binding on Ms. Morden;
- c) whether advice from a lawyer or the realtor to Mr. Morden can be considered to have adequately informed Ms. Morden's decisions.

Agency Relationship

[73] The defendant relied on the court's comments concerning agency in *Penderville Apts. Development v. Cressey Development Corp.*, [1990] B.C.J. No. 278, 1990 CanLII 170 (B.C.C.A.):

The learned judge below founded his determination on Mr. MacRae having no power to bind his client. That power does, of course, create one kind of agency. But there is another kind. As Halsbury puts it in the 3d. ed., Vol. I, at p.147:

The word "agent" in addition to meaning a person employed to create contractual relations between two parties is used in at least two other senses. Further, it is frequently used to describe the position of a person who is employed by another to perform duties often of a technical or professional nature which he discharges as that other's alter ego and not merely as a conduit pipe between the principal and the third party. Thus a solicitor is his client's agent for the purpose of instituting or continuing legal proceedings on his behalf. Similarly where a person (not being a servant) is permitted by the owner of a vehicle to drive it, whilst the owner retains possession thereof, the driver is the owner's agent for the purpose of rendering the owner civilly liable for driver's negligence or breach of duty in driving. Generally, wherever one person lawfully delegates to another his common law or statutory duties, that other person is in law his agent for the purpose of rendering the principal civilly liable for the defaults of the agent. Thus a person who carries out an extra-hazardous operation for another is his agent for that purpose, as a contractor employed by a local authority to perform any of the functions which it may properly so delegate.

[74] The defendant suggests that three categories of agency might exist in this case: (1) implied agency, (2) agency by ratification, and (3) agency by estoppel. Each of these is discussed below.

Implied Agency

[75] Concerning the question of whether Mr. Morden was an implied agent for Ms. Morden, the principles were discussed in *Siemens v. Howard*, 2018 BCCA 197 [Siemens]. In *Siemens* at para. 11, Justice Fenlon referred to the following definition of deemed or implied agency, as set out in Peter G. Watts & F.M.B. Reynolds, *Bowstead & Reynolds on Agency*, 20th ed. (London: Sweet & Maxwell, 2014):

Agreement between principal and agent may be implied in a case where one party has conducted himself towards another in such a way that it is reasonable for that other to infer from that conduct assent to an agency relationship.

In addition, Fenlon J.A. went on to say at para 12:

The question is whether it is reasonable for the party asserting an agency relationship to infer from the conduct of the other party that he or she consented to an agency relationship.

[76] Agency relationships can be implied from the conduct or circumstances of parties and are ultimately questions of fact, see: *1196303 Ontario Inc. v. Glen Grove Suites Inc.*, 2015 ONCA 580 at para. 71.

[77] The important focus in the implied agency argument should be the conduct of the principal, not the agent: see *Maggiacomo v. Yumusak*, 2018 ONSC 3368 at paras. 18-31.

Agency by Ratification

[78] The plaintiff also made submissions on agency by ratification. Agency by ratification is established where an individual represents himself as agent, though not validly an agent at the time, and the principal ratifies the action previously taken. The agent is treated as having been authorized to act at the time in question.

[79] Although not validly acting as agent at the time, a principal may ratify the action previously taken by the unauthorized agent and the agent is treated as having been authorized at the time: see G.H.L. Fridman, *Canadian Agency Law* (Markham, Ontario: LexisNexis Canada Inc., 2009) at 46-47.

[80] Silence or inaction on the part of the principal is insufficient to ratify the actions taken by the unauthorized agent: see *Crampsey v. Deveney*, [1969] S.C.R. 267, 1968 CanLII 34 (S.C.C.) at 268:

Agency by Estoppel Agency by estoppel exists when a principal makes a representation to a third party that another person is agent for the principal, and the third party relies on the representation to its detriment. The representation must be made by the person who had actual authority, and a third party must be induced to rely on that representation. Finally, the third party must alter its position. Representations are usually made by conduct by the principal with authority.

Conclusion: Agency Relationship

- [81] An overarching consideration in this transaction is that at the outset, this was a joint purchase to be in the names of both Mr. and Ms. Morden. They acted jointly in reviewing the Property and meeting with Ms. Halinda. Although they decided Ms. Morden would be the named purchaser of the Property they intended - and it was agreed in the Contract - that Mr. Morden would be a transferee of title when the time came to register their transfer.
- [82] After the Mordens discussed Mr. Morden's antipathy towards completing on the Contract, Ms. Morden said she left it with him and that she would honour his decision, whatever it was. In my view, that assertion by Ms. Morden was a clear statement that he had authority to make the decision for both of them and then instruct Ms. Halinda accordingly.
- [83] Whether two persons married to each other can become principal and agent of the other requires a factual analysis. Here, there is positive evidence concerning the relationship between the parties, including the following:
- a) specific references, affirmed by Ms. Morden, that Mr. Morden was the decision-maker;
 - b) Mr. Morden managed the funds in the bank for the deposit and he caused the cheque to be returned NSF;
 - c) Ms. Morden continued to like the Property but deferred to Mr. Morden's decision to abandon the Contract;
 - d) the parties had purchased multiple properties jointly;
 - e) the Mordens expressly told Ms. Halinda that they intended to own the Property jointly and this fact was mentioned in the Contract;
 - f) Mr. Morden would be a transferee under the Contract;
 - g) Mr. Morden was away on vacation at the time of signing and told Ms. Halinda to deal with Ms. Morden;
 - h) Mr. Morden instructed Ms. Halinda to retrieve the deposit cheque and return it to Ms. Morden, who accepted it and then returned it to Ms. Halinda; and
 - i) Ms. Morden left the decision to buy with Mr. Morden and whatever he decided, she said "I will honour his decision".
- [84] I have no doubt on all of the evidence that Mr. Morden had actual authority that could reasonably be inferred from the Mordens' historical relationship with Ms. Halinda and the words spoken to her before and at the signing of the Contract. Counsel did not address the question of whether Mr. Morden was an undisclosed principal; it was obvious that as between them, they were purchasing the Property and he was the decision-maker. The acquisition of the property was a joint action by them, and they intended for him to manage to transaction.

[85] The defendant also argued there was no implied agency; she contends that there must have been some positive conduct on her part to establish this. However, I find he had actual authority. I am satisfied that Ms. Morden made representations to Ms. Halinda clearly signifying that Mr. Morden had authority to make the decision in directing her to cancel the Contract. I do not accept the defendant's submission that Ms. Morden did not communicate to Ms. Halinda that Mr. Morden had actual authority.

Scope of Authority

[86] Ms. Morden raises the question concerning Mr. Morden's ability to instruct Ms. Halinda even if an agency relationship existed between them. Authority can take four forms:

- a) actual express authority;
- b) actual implied authority;
- c) apparent/ostensible authority; and
- d) presumed authority.

[87] In *Dawson v. Tolko Industries Ltd.*, 2010 BCSC 346 at para. 37, the Court distinguished between actions carried out within the scope of an agency and actions taken independent of an agency relationship.

[88] The defendant alleges that Mr. Morden had no ability to instruct Ms. Halinda to enter into a binding agreement or terminate a binding agreement. They contend the scope of authority in each case - and whether authority was actual, implied, apparent/ostensible, or presumed - is dependent on the nature of the agency appointment.

[89] Ms. Morden contends that the evidence does not support an assertion that Mr. Morden had implied authority to give instructions regarding the termination of the Contract. The defence argues that, in the past, Ms. Halinda had explained the legal consequences of each contract to both Mr. and Ms. Morden; it does not follow that he was her agent for the purposes of receiving such advice on June 22, 2016.

Conclusion: Scope of Authority

[90] I am satisfied that Mr. and Ms. Morden were acting jointly in this purchase and that she gave him the authority to give instructions on her behalf concerning the termination of the Contract. It is important to understand that Mr. Morden directed the bank to remove the money from their joint account, thereby preventing the deposit cheque from being negotiated. It is clear that the Mordens communicated to Ms. Halinda that Ms. Morden was the named buyer because Mr. Morden was leaving on vacation and trusted her to deal with the matter in his absence and on his behalf. After the Mordens agreed between themselves to collapse the Contract, Mr. Morden was managing their position.

- [91] In the past, the Mordens had purchased in the order of 10 properties. They owned each jointly, but some were registered in one spouse's name alone.
- [92] Overall, Mr. Morden's authority was actual and express to act as Ms. Morden's agent. He had authority to make decisions and communicate those decisions to Ms. Halinda in their efforts to purchase the Property and then to repudiate their agreement in light of factors noted above.
- [93] Ms. Halinda was informed by:
- a) the prior dealings between Mr. and Ms. Morden and Ms. Halinda;
 - b) the exchanges and decision-making process that was communicated to Ms. Halinda concerning Mr. Morden's role after he departed for his vacation; and
 - c) the decision-making authority Ms. Morden left to Mr. Morden concerning termination of the Contract and her concurrence in his decision.
- [94] Throughout the transaction, Mr. Morden was agent for Ms. Morden, including when Ms. Halinda communicated that her client was ending the deal. Even if Mr. Morden was not an actual or express agent, all of the Mordens' behaviours would have implied to Ms. Halinda that he was her agent. I find that the Mordens conducted themselves in regard to this transaction in such a way that it was reasonable to infer from their conduct that Ms. Morden consented to Mr. Morden acting as her agent. The Mordens were both intimately involved in the decision-making process leading to the defendant's breach. These conclusions are based on a number of facts, including:
- a) Mr. Morden was the first party to be exposed to the Property when he viewed it on June 18;
 - b) Ms. Morden visited the Property with Mr. Morden one day later, on June 19;
 - c) both Mr. Morden and Ms. Morden intended to purchase the Property and when drafting the Contract, Ms. Halinda included a subject to inspection condition but Mr. Morden requested that condition be deleted and insisted on a subject-free offer;
 - d) the offer to purchase initially included Mr. Morden as a principal buyer but changed when it became apparent he would not be available during potential negotiations. On that basis, Mr. Morden's name was removed from the Contract but with the joint intention that when title transferred, he would be named as an owner;
 - e) Ms. Halinda informed the Mordens that she would keep "them" apprised of her presentation of their offer;

- f) when the counteroffer was received, the defendant was unreachable and Ms. Halinda contacted Mr. Morden to inquire if the counteroffer was acceptable. Mr. Morden communicated that the Mordens accepted the counteroffer. Later that evening, Ms. Halinda met with the defendant and presented an amendment to the Contract with the changes approved by Mr. Morden. Ms. Morden initial those changes;
- g) Mr. Morden had put the deposit funds into the parties' joint bank account and after instructing Ms. Halinda to collapse the deal, he directed the bank to remove those funds from the account before the deposit cheque could be negotiated;
- h) Ms. Halinda was aware that Mr. Morden and Ms. Morden had communicated on the evening of June 21, 2016, following which she was instructed by Mr. Morden to "collapse the transaction". Ms. Morden agreed to collapse the transaction;
- i) Mr. Morden's subsequent telephone conversations and messaging to Ms. Halinda were unwavering, firm, and direct; she was instructed to end the Contract;
- j) After Mr. Morden gave instructions to Ms. Halinda to collapse the Contract, Ms. Morden signed the collapse of sale document prepared for her;
- k) Mr. Morden instructed Ms. Halinda to communicate with the plaintiffs' realtor and inform them the Mordens would not be completing on the Contract. Ms. Halinda first contacted her office manager and then communicated with the plaintiffs' realtor;
- l) Ms. Halinda inquired of Mr. Morden if he had obtained legal advice; he questioned whether further legal advice was something "they" needed to do. Ms. Halinda repeated her advice that Mr. Morden needed to speak with a lawyer and told him they could be sued for the deposit and the difference between the Contract price and the ultimate sale price achieved by the plaintiffs. Mr. Morden commented that the plaintiffs were likely to receive more money because of the state of the real estate market; and
- m) Mr. Morden instructed Ms. Halinda to obtain return of their deposit cheque.

[95] I note that Ms. Morden never told Ms. Halinda that she did not want to cancel the Contract and wanted to keep the deal in place. I find this was because she knew Mr. Morden had decided, with her concurrence, that they would not purchase the Property in any event of the risks. I infer from that behaviour that Ms. Morden endorsed Mr. Morden's decisions and communicated the same to Ms. Halinda, expressly or by implication telling her Mr. Morden possessed the authority to act on her behalf and bring the Contract to an end.

[96] Mr. Morden had actual authority and acted on that authority. Mr. Morden may have been an undisclosed principal to the extent that it was always intended the parties would take title to the property jointly. There is no doubt that he had authority to make the impugned decisions.

[97] I also accept that if Mr. Morden did not have authority to make those decisions acted on by Ms. Halinda, he was responsible for inducing Ms. Morden's breach of the Contract by acting beyond his authority and giving instructions to end the Contract.

Did the third parties breach the standard of care?

[98] A realtor owes a primary duty to their principal and is obliged to carry out the lawful instructions of the principal: see *Reed v. McDermid St. Lawrence Ltd.*, [1990] B.C.J. No. 2703, 1990 CanLII 5406 (B.C.C.A.) at para. 7.

[99] Justice Dickson summarized the scope the fiduciary owed by a in *Mulligan v. Stephenson*, 2016 BCSC 1941 at para. 64:

The Scope of a Realtor's Fiduciary Duty

[112] The fundamental undertaking of a realtor is to act, loyally and transparently, in the best interests of the client. The precise scope of his or her duty is informed by applicable professional conduct rules and relevant case law: *Galambos*, at para. 29. In *S. MacLise Enterprises Inc. v. Grover*, 2014 ABQB 591, Gates J. summarised many of the duties typically owed by a real estate agent to his or her principal. He stated:

89 A real estate agent owes both contractual and fiduciary obligations to her principal. These include the duty to make full and fair disclosure of all material circumstances and of everything the agent knows regarding the subject matter to its principal [citations omitted].

90 The duties also include an obligation to make full disclosure of all facts within the agent's knowledge which might affect the value of the property or the principals' decision [citations omitted].

91 The test of what an agent must disclose is objective, determined by "what a reasonable man in the position of the agent would consider, in the circumstances, would be likely to influence the conduct of his principal" [citations omitted].

92 A real estate agent will not be found to have breached his fiduciary duty just because the selling price obtained for a property is not the "best possible price" However, the "price paid must be adequate and the transaction must be a righteous one and the price obtained must be as advantageous to the principal as any other price that the agent could, by the exercise of diligence on his principal's behalf, have obtained from a third person" [citations omitted].

[113] A realtor is also obliged to maintain the client's confidences. The duty of confidentiality has long been recognised as a vital element embedded within the fiduciary principle. Further, a realtor must act within the scope of authority granted by the client, assiduously avoid conflicts of interest and promptly disclose any that arise in the course of the fiduciary relationship. All of these duties apply strictly unless and until the parties agree otherwise: *DeJesus; D'Atri v. Chilcott*, [1975] O.J. No. 228; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377; *Real Estate Council Rules*, s. 3-3 (c), (e), (i) and (j).

[100] In *Shave v. Century 21 Assurance Realty Ltd.*, 2022 BCSC 183, Justice A. Ross said:

[65] I find the most assistance in para. 91 of the *S. MacIse Enterprises Inc.* decision. The test of what the realtor must disclose is determined by what a reasonable person would consider likely to influence the conduct of his principal. Further, I find that I do not need expert opinion evidence to arrive at that assessment. This is an area where an ordinary person would have knowledge, which accords with the first exception discussed in *Krawchuk*.

[101] Expert evidence of the standard of care expected of a prudent real estate agent is not necessary: see also *Burbank v. R.T.B.*, 2007 BCCA 215 (leave to appeal ref'd: [2007] S.C.C.A. No. 315).

Did the third parties cause the plaintiff's losses?

[102] A realtor's negligence alone does not expose that person to liability unless their negligence caused the loss in question: see *Alvas v. Barrett*, 2018 ABQB 651 at para. 106.

[103] The defendant contends that the third parties caused her loss. The test of what the defendant might have done if she had been properly advised cannot be made with hindsight but should be assessed on an objective basis, being what a reasonable person in Ms. Morden's circumstances would have done. The Mordens' decisions and approach to the collapsed Contract would have been informed by whatever advice Mr. Morden had received from Mr. Riddell.

[104] The question reduces to this: would a reasonable person in Ms. Morden's circumstances aided by Mr. Morden have continued with the purchase of the Property, rather than abandoning the transaction, had she been properly advised by a lawyer or realtor? (See *Tellini v. Bell Alliance*, 2021 BCSC 549 at paras. 110-111).

[105] Objectively, Ms. Morden argues she would not have terminated the transaction if she had been properly advised. The question is whether she relied on the advice of Ms. Halinda, Mr. Riddell, or Mr. Findlay when taking the decision not to resubmit the deposit and keep the Contract alive or have acted against Mr. Morden's express directions.

[106] The test for establishing causation of damage caused by a tortfeasor is whether the defendant would not have suffered the damages but for the alleged tortious conduct. There must be a substantial connection between the alleged tort and the damages suffered: see *Clements v. Clements*, 2012 SCC 32 at para. 8 to 11. At para. 8 the Court said:

The test for showing causation is the "but for" test. The plaintiff must show on a balance of probabilities that "but for" the defendant's negligent act, the injury would not have occurred. Inherent in the phrase "but for" is the requirement that the defendant's negligence was necessary to bring about the injury — in other words that the injury would not have occurred without the defendant's negligence. This is a factual inquiry. If the plaintiff does not establish this on a balance of probabilities, having regard to all the evidence, her action against the defendant fails.

[107] Considering the findings, I have reached above, it was open to the defendant to take steps to keep the Contract alive until July 5, 2016 and complete on their purchase. Ms. Morden denied receiving a copy of the Contract or any advice from Ms. Halinda to take legal advice or to pursue a remedial course of action that would keep the Contract alive. Ms. Halinda testified that she gave advice on this point to Ms. Morden. Until July 5, 2016, the plaintiffs had not accepted Ms. Morden's repudiation of the Contract; thus Ms. Morden could have offered to pay the deposit and complete the purchase within the time prescribed by the Contract.

[108] Well before July 5, 2016, Mr. Morden had received legal advice in regard to the Contract. She had also received Ms. Halinda's suggestion that the parties move on to complete the transaction and, if necessary, resell the property. Ms. Halinda had offered to waive her commission to assist in this strategy.

[109] There is no evidence concerning the advice received by Mr. Morden from the solicitor, nor whether that information had been communicated to Ms. Morden.

[110] The Mordens testified that they were unaware of an option to complete the transaction by replacing the deposit cheque, even after obtaining legal advice on June 28. Ms. Halinda texted Mr. Morden on that date and told him that:

you should really contact a lawyer asap. I have emailed you the file so you can forward to your lawyer.

Bob thinks the costs could be as much is 100 K if they push might be in your interest to move forward with it. Do some updating and sell while the market is still moving up. In that case I would waive my side of the commission. You would still pay the selling side.

[111] The Mordens chose not to call the lawyer Mr. Morden consulted as a witness. Mr. Morden received advice from a solicitor on June 28, 2016 and Ms. Halinda communicated with Mr. Morden on June 29, 2016, inquiring into his meeting with the solicitor the day before. The solicitor, Mr. Riddell did not testify at this trial and his advice was not reported through Mr. Morden. The third parties contend the court can draw an adverse inference from the defendant's failure to call Mr. Riddell to testify: see *Insurance Corporation of British Columbia v. Mehat*, 2018 BCCA 242 at para. 86. It was explained that Mr. Riddell was no longer practicing law, but Mr. Morden's refusal to waive solicitor-client privilege concerning his meeting with Mr. Riddell leads me to infer that the advice he received would have been unhelpful to the defendant.

[112] In dealing with the "but for" test, the question is what Ms. Morden and Mr. Morden would have decided when faced with the opportunity to complete the purchase.

[113] I conclude that a competent real estate solicitor would have given Mr. Morden the advice that he could complete the sale by paying the deposit money and informing the vendor that he would be ready, willing, and able to complete the transaction on the completion date. I accept that after Mr. Morden's meeting with Mr. Riddell, he would have received fulsome

advice concerning his and Ms. Morden's options in regard to the real estate contract. The plaintiffs did not express a desire to abandon the Contract; their actions in continuing with open houses marked their efforts at mitigating any loss that might occur as a result of losing Ms. Morden's purchase offer.

[114] I am satisfied that the defendant's failure to pay the deposit in accordance with the terms of the Contract as orchestrated by Mr. Morden constituted a breach of that agreement. Although Ms. Halinda communicated to the plaintiffs' agent that the defendant was not going to complete the agreement, the defendant would have been able to complete the Contract in the absence of an accepted repudiation.

[115] The plaintiff, Arthur Pasternak, testified at his examination for discovery that:

The [realtor] also said that we are still obliged by the contract that was signed, so if we were to relist the property immediately, we might get into trouble because, as I mentioned at the very beginning, the buyer may come back and is, like, no no no, we bought this property because everything up until now was verbal as far as the backing out part of what we just discussed.

[116] The plaintiffs were entitled to accept the repudiation based on the failure to pay the deposit and the assertions that Ms. Morden did not intend to complete the transaction. In the end, the plaintiffs did not accept the defendant's repudiation of the Contract until they entered into a contract to sell the property to new purchasers on July 5, 2016. Thus, the Contract remained alive for the defendants to complete until the plaintiffs had accepted the new offer to purchase the Property.

[117] I conclude that a reasonable realtor receiving instructions from a client to collapse a contract unilaterally would have provided basic advice concerning the impact of that decision on their legal rights and would have informed a client to immediately seek independent legal advice. Even in the absence of independent legal advice, realtors are possessed of enough knowledge to recognize that an anticipatory breach of a contract can result in significant damages (whether actually incurred or notional) from forfeiture of deposit monies.

[118] Ms. Halinda displayed significant failures in this regard. However, I am satisfied that Ms. Halinda and her real estate agency advised Mr. Morden to obtain independent legal advice about the strategy he could follow and the consequences stemming from his decision to collapse the transaction. It appears he obtained that advice.

[119] Ms. Halinda did not clearly warn the Mordens in a timely way about the nature and extent of these risks before communicating to the plaintiffs' agent. She was aware of the emotional tension between the Mordens and should have been especially cognizant of her duty to fully inform them.

- [120] I also find that Ms. Halinda gave deceptive information to Ms. Morden indicating she should have no concerns that the plaintiffs would refuse to agree to the collapse until the collapse agreement was signed; her comments "don't stress any longer and start planning the future" completely failed to describe the Mordens' precarious position and risks well at that stage in the transaction (and in fact concealed their jeopardy).
- [121] Ms. Halinda breached her duty of care in her texts to Ms. Morden and with Mr. Morden; I find these shortcomings left the Mordens with a false sense of security. This false sense of security was reinforced by her comments about allowing cheques to bounce and her indication that removing funds sufficient to honour the deposit cheque was not a bad strategy. She wrongfully returned the deposit cheque to Ms. Morden without proper authority and did not immediately recommend that the Mordens obtain legal advice to discuss the consequences of their breach of contract, nor did she discuss those consequences with them herself. In fact, she led Ms. Morden to believe that the consequences would not be serious: She said "don't stress". She also misled Ms. Morden into believing that once the deposit cheque had been returned to Ms. Halinda's agency, the plaintiffs would be prepared to sign the release of claims and no loss would transpire.
- [122] In my view, Ms. Halinda was harbouring a vain hope that the plaintiffs would be able to sell his home for the same price offered by Ms. Morden and that no loss would result from the breach of the Contract. I conclude this expectation clouded Ms. Halinda's conduct after receiving instructions to collapse the transaction. However, she said she told Mr. Morden that the plaintiffs would have had a claim to the deposit and an independent claim for damages over and above the deposit amount.
- [123] On the question of legal advice, Mr. Morden said he was not advised to take legal advice but later confirmed he was not sure if he was advised to get legal advice on June 22. However, there is no doubt that Mr. Quinnell recommended the Mordens obtain legal advice; Mr. Morden met with Mr. Quinnell and spoke to him about this issue. A lawyer for Mr. Morden contacted Ms. Halinda and she provided paperwork for the lawyer's consideration.
- [124] Nevertheless, Mr. Morden did obtain legal advice on June 28, 2016. In my view, at that time, Mr. Morden would have been in possession of all of the advice necessary to address this question. At this time, he would have known that the Contract had not been repudiated and that he remained in a position to perform under the Contract, provided that he promptly paid the deposit monies. Moreover, the Mordens would have been in a position to complete the transaction, unless the plaintiff accepted the repudiation. This would have obviated any risk of damages. Mr. Morden's testimony on this point was abundantly clear: He had no interest in acquiring the Property and was unconcerned about damages that might flow from that decision.
- [125] Ms. Morden also confirmed that at one stage Ms. Halinda recommended that she proceed to purchase the Property, but she declined this suggestion because she was left with a feeling there were already threats of lawsuits, problems with the deposit cheque, and things were a

mess. One of the reasons Ms. Morden did not consider purchasing the property after June 22 was her belief that the plaintiffs would not suffer any losses when reselling the property to someone else. I did not accept the Mordens' explanation that they were unclear about the status of their transaction after the deposit cheque had become NSF.

- [126] As noted earlier, the Contract remained alive and binding on both parties until the plaintiffs made their July 5 agreement to sell the property, after which the plaintiffs were bound to complete the new agreement. Until July 5, the Contract remained open and the defendant could have cured her failure to make the deposit payment, completing the transaction on the completion date.
- [127] The defendant admits liability for her breach of the agreement but contends that her liability for the plaintiffs' damages was caused or contributed to by Ms. Halinda's breach of her duty of care, as described above.
- [128] The third-parties allege that Mr. Morden represented to them that he was the defendant's authorized representative of the defendant and that instructions given by him to the third parties were instructions authorized and approved by the defendant. I have already found that Mr. and Ms. Morden were intending to purchase the plaintiffs' house jointly and that they each took steps to acquire the Property jointly. As noted, Ms. Morden said "we decided to put an offer for purchasing the property". Mr. Morden had instructed Ms. Halinda to present an offer without a "subject to inspection" clause. He was to be on title and he managed the funds for the deposit "coming from a joint bank account". Ms. Morden had agreed to the subject-free offer.
- [129] Ms. Morden testified their late-night discussion on June 21 reflected Mr. Morden's misgivings. They had a disagreement; the conversation ended with her telling him "whatever you decide I will honour your decision". She said Mr. Morden made this decision and communicated it to Ms. Halinda.
- [130] If I were to accept Ms. Morden's assertion that she did not receive a copy of the Contract nor a recommendation to obtain legal advice, I would have in any event concluded that her exposure to the plaintiffs for damages was not caused by Ms. Halinda's actions. In the but for analysis, the following factors persuade me that Ms. Morden would not have avoided responsibility for the plaintiff's damages because, inter alia, of the following factors:
- a) Ms. Halinda had conversations with Mr. Morden informing him of the need to obtain legal advice, and she told him about the possibility of completing the Contract and reselling the Property themselves;
 - b) Mr. Quinnell advised the Mordens to receive legal advice, recommended Mr. Findlay, and told them their liability to the vendor could be in the order of \$100,000; and

- c) Mr. Morden had a subsequent conversation with Mr. Riddell, during which he would likely have received advice that would have protected Ms. Morden. Ms. Halinda had sent information to Mr. Riddell.
- d) Mr. Morden's testimony at trial and his examination for discovery evidence, concerning the possibility of completing the transaction after they made the decision to collapse the Contract, are telling. He was firm and unwavering; there were no circumstances under which he would have considered completing the contract with or without legal advice. He said:

Q: And you didn't backtrack on the decision even after getting legal advice.

A: I've already answered that. Is the - when I collapsed the deal with Gina [Halinda] - when I gave her direction that morning, that was the end of it. There was no change ever in the decision.

Q: Even after you spoke with the lawyer?

A: Never. I've already said that. I've said it three times. Never. Never change my mind one time. Didn't want the house.

Q: Did you and Kim consider going through with the purchase and just reselling it?

A: No

Q: - so that the plaintiff wouldn't -

A: No. I remember that there was a suggestion somewhere that came to us to do that. And it was, like, not even a consideration.

Q: Not a consideration for you or Kim?

A: No. No. The decision was made.

Q: That consideration of buying - - going through with the purchase and reselling, that - you didn't consider that, even after speaking with lawyers?

A: No.

[131] Mr. Morden said he did not want the house and he never had any inclination to complete the transaction, even after receiving legal advice. I took from his testimony that legal advice and risk of significant damages did not persuade him to change his approach.

[132] He said that he and Ms. Morden never considered going through with the purchase because "we'd made the decision that we weren't interested in the house" and that they gave no consideration or had no discussion about purchasing and reselling the plaintiffs' house:

- a) It may have been that the Mordens believed the plaintiff would sell the property again at a price equal to or better than their Contract price. That did not happen.

- [133] In my view, the defendant has not met the burden of proof to establish her liability to the plaintiffs resulted from Ms. Halinda's actions or failures in advising her.
- [134] I reject Ms. Morden's assertions that neither she nor Mr. Morden were advised to obtain legal advice. Mr. Morden obtained legal advice and either shared it with her or based the decision he made on her behalf upon that advice. I conclude that advice given to Mr. Morden would have been advice to Ms. Morden because it was his duty as agent to share the information with her.
- [135] Ms. Morden said she was not 100% certain when she learned about the liability or jeopardy she faced because of her repudiation of the agreement. She said that Mr. Morden talked about it and said he was going to talk with Mr. Bart Findlay, a lawyer and an acquaintance of his. She also knew that he had obtained legal advice.
- [136] The defendant contended she was never advised by her realtor to seek legal advice concerning her options at any time up to the date the plaintiffs accepted an offer to buy their home. Although Ms. Halinda's comments to Ms. Morden were less than helpful in informing Ms. Morden of the risks she was facing, I find Ms. Morden was aware of other options and the need for legal advice, and that Mr. Morden had received this advice prior to July 5.
- [137] Notwithstanding Ms. Halinda's negligence, Mr. Morden was giving instructions to Ms. Halinda and he would not have considered completing the transaction regardless of the advice he received. He had caused the deposit cheque to become NSF and was the person who could have rectified the failure to pay the deposit by putting funds back into the account. The absence of advice directly to Ms. Morden would not satisfy the but for test when it comes to establishing Ms. Halinda's failures as causing Ms. Morden's loss.
- [138] The third parties breached their obligations to deposit the defendant's deposit cheque in a timely way and their duty to explain that the concept of a "mutually acceptable collapse of the transaction" would require agreement with the plaintiffs, failing which the defendant would be liable for damages. The language Ms. Halinda used when speaking to the Mordens lacked the urgency and seriousness necessary to convey the level of risk they faced. It was not made clear enough that there was a possibility or likelihood that the plaintiffs would not simply agree to ending the Contract without regard for any damages or losses that might have occurred. The fundamental and most obvious piece of advice that Ms. Halinda should have given was that the defendant could pay the deposit and abide by the Contract or take a chance that the plaintiffs might reject their request for a mutual collapse of the agreement and seek damages.
- [139] However, I am satisfied that whatever flaws or shortcomings existed in the advice given by the third parties, nothing about the Mordens' decision-making would have changed based on that advice.

[140] Ms. Morden acknowledged that, in their previous dealings with Ms. Halinda, she had advised them to seek independent legal and other professional advice before signing other contracts of purchase and sale. In this case, the Contract did not contain similar advice.

[141] The Mordens were familiar with real estate transactions and the concepts of "collapsed deals" they knew about the importance of "subject to inspection clauses" and knew legal advice could be important. I accept that Ms. Morden and Mr. Morden had been informed that they could have paid the deposit monies and kept the Contract alive. However, it is clear that Mr. Morden never entertained the option to keep the Contract alive and complete the transaction; for him, the deal was dead and he was not prepared to take any steps to ameliorate the situation.

Conclusion: Causation

[142] Considering Mr. Morden's testimony and the possibility of purchasing the plaintiffs' house, it is improbable that Mr. Morden would have accepted any advice to continue with the Contract (and probably did not accept advice on that point). In summary, I am satisfied that Ms. Halinda advised Mr. and Ms. Morden to take legal advice before resiling from their decision to end the Contract prior to July 5; even if proper advice had been given, that advice would not have obviated the loss brought on Ms. Morden by her admission of liability in this case. Mr. and Ms. Morden were aware of their options to avoid liability by completing on the Contract; because Mr. Morden was adamant and unwavering that they were not going to buy the Property, they accepted the risk that the plaintiffs' claim for damages against Ms. Morden could be substantial. It is probable the Mordens accepted this risk because they believed the plaintiffs could sell the Property at or near the Contract price.

[143] Ms. Halinda informed Mr. Morden on June 28, 2016 that he should be taking legal advice and that the plaintiffs' damages could be as much as \$100,000. Later, on June 30, 2016, she asked him how things went with their lawyer; he said he did not have any news.

[144] On the question of causation, it is clear to me the Mordens would have never contemplated completing this transaction and would never reconsider this decision.

[145] Overall, I am satisfied that any shortcomings in advice given or not given by Ms. Halinda to the Mordens had no impact on their decision to abandon the purchase of the plaintiffs' Property. Ms. Morden's obligation to compensate the plaintiffs for their losses would have crystallized regardless of Ms. Halinda's actions and negligence.

[146] Claims for damages resulting from negligence must be established on a "but for" test. In this case, the defendant failed to prove that the alleged breach of Ms. Halinda's duty of care (being her failure to inform them to seek legal advice prior to June 28, 2016) caused her to quit the Contract and expose her to damages. Any negligence on her part, was not the cause of Ms. Morden's liability to the plaintiffs for damages. This is simply not established on the evidence. The defendant could have remedied her default regarding the deposit until the

plaintiffs had sold the Property avoiding any loss exposure to the plaintiffs; the Mordens were ad idem and proceeded without concern for the consequences that would have been known to them before July 5, 2016.

[147] On the question of mitigation, I accept the Third Parties' submission that if the contract was alive after the Morden's consulted a lawyer and obtained advice, subsequent conduct would be irrelevant because it would not have been causative of the defendants losses: see *British Columbia v. Canadian Forest Products Ltd.*, 2004 SCC 38 at para 176.

Disposition and Costs

[148] As a result of my findings, I dismiss the claim against Ms. Halinda and Brookside. Based on these findings, it is not necessary to decide the fourth party claim, other than to dismiss that claim for the reasons noted above.

[149] The plaintiffs will have damages in the sum of \$97,800 and interest pursuant to the Court Order Interest Act, R.S.B.C. 1996, c. 79.

[150] The question of costs was not argued at the trial; the parties are at liberty to make further submissions on the question of costs within 30 days of the date of these reasons.

"Armstrong J."

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