SUPREME COURT OF NOVA SCOTIA

Citation: Adshade v. Auld, 2010 NSSC 77

Date: 20100126
Docket: Hfx No. 282654
Registry: Halifax

Between:

Marina Estelle Adshade

Plaintiff

v.

Gregory D. Auld, Dorothy Newcomb and Coldwell Banker Supercity Realty

Defendants

DECISION

Judge:	The Honourable Justice Suzanne M. Hood
Heard:	January 18-21, 2010 in Halifax, Nova Scotia
Written Decision:	March 2, 2010 *(Oral decision given on Jan. 26, 2010)*
Counsel:	Kent Noseworthy for Marina Adshade William Augustus Richardson, Q.C. for the defendant, Gregory Auld Franco Tarulli for the defendants, Dorothy Newcomb and Caldwell Banker Supercity Realty

By the Court:

[1] Marina Adshade testified that she came to Halifax in January 2004 for a job interview at Dalhousie University and, while she was here, she looked at houses. She contacted the Mariana Cowan Group at Coldwell Banker Supercity Realty and was referred to Dorothy Newcomb. Dorothy Newcomb showed her homes first in Clayton Park because Ms. Adshade said she was looking for a newer home. She realized that was too far from Dalhousie University and asked Ms. Newcomb to check out homes that were closer to Dalhousie. She still wanted a newer home and she wanted space for students.

[2] The following day, she saw a number of homes including 6196 Cedar Street. While she was there, she picked up a brochure which had been provided by the vendor's agent. She also had the listing cut from her own agent. She could see some landscaping and the fence in the yard but the yard was covered in snow as it was late January.

[3] She then returned to Kingston and had, at that time, made no decision with respect to the job or buying a house in Halifax. Subsequently, she decided to

accept the job and she knew that her teaching assignment would start the first week of September.

[4] She was interested in 6196 Cedar Street but had some concerns about the price of the house and she contacted Dorothy Newcomb about that. She also called Dorothy Newcomb on a Monday and asked her "Where is the parking?" She testified that Dorothy Newcomb told her that she didn't know and she would check into it and call her back. Dorothy Newcomb did call her back, said she had spoken to the listing agent who told her the parking was off Walnut Street. Ms. Adshade said that Dorothy Newcomb directed her to the Location Certificate which was reproduced in the brochure and said the right-of-way was where the parking was. She said Dorothy Newcomb did not tell her she should make any further inquiries.

[5] A few days later, Ms. Adshade decided to make an offer on the property which Dorothy Newcomb prepared for her on Thursday, February 5. She said Dorothy Newcomb said nothing about the parking and she did not ask about it because she was confident there was parking on Parcel C. After some negotiating, a counter-offer was accepted. She was given Gregory Auld's name by Dorothy Newcomb and she spoke with him on the phone about him representing her on the

purchase. She receive the Property Condition Disclosure Statement (PCDS) from Dorothy Newcomb. She read it and signed it but she said Dorothy Newcomb did not discuss it with her. She said she saw the reference to the right-of-way on it and concluded that that was where the parking was.

[6] Over the next while, she dealt with Dorothy Newcomb with respect to such things as insurance, the oil tank, checking out things in the home and the property inspection but there was nothing more about parking. She thought it was not a problem.

[7] Subsequently, Marina Adshade arrived in Halifax by car in time for the closing. She drove to the house and then to Walnut Street and saw the driveway for the first time. She thought that was where the parking was. She saw the basketball hoop facing the driveway. She then went to Gregory Auld's office for the closing. Subsequently, she stayed at the house for a few days but then flew to British Columbia and then spent the rest of the summer in Ontario. She left her car parked on the driveway all summer.

[8] Early in January the following year, she received a call from the owner of the neighbouring property who was upset about her parking on the right-of-way. She testified that she told her she was mistaken. She subsequently received a letter from the neighbour's lawyer saying she had no right to park there but that she would grant her a license for $1.00 a year revocable on the sale of the property or on thirty (30) days notice. She did nothing about changing her parking arrangements because she was sure she had the right to park there. Subsequently, Gregory Auld told her that she in fact had no right to park there and that she only had a right of access and egress. She had Greg Auld try to negotiate with the lawyer with respect to the license.

[9] The summer of 2005 passed and her car was not there as she took it when she left for the summer that year. In the fall of 2005, there was a new lawyer for the neighbour and that lawyer wrote to Gregory Auld saying that the license would be $50.00 per month and removed the condition about sale, but it was still revocable on thirty days notice. She did not agree to that arrangement. She said the neighbour offered to sell her the right to park for $40,000.00 but she testified she did not have $40,000.00 so she refused. Subsequently, a lawsuit was commenced by the neighbour and Marina Adshade was served in January 2006.

[10] Thereafter, she began to park on the street until her car was vandalized. She then decided she needed to build a parking space and did so in June 2006. She was away again that summer and the lawsuit was settled in the fall of 2006. Subsequently, the property at 6200 Cedar Street (which owns the right-of-way) was sold and she has tried to negotiate with the new owners without success.

[11] Dorothy Newcomb's testimony was that she was in the realty business for about four years in 2004 and that she was part of Mariana Cowan's team which acted only for buyers. She was referred to Marina Adshade by Mariana Cowan and contacted Ms. Adshade to see what she was looking for in a home. She knew Marina Adshade had never been to Halifax. She understood she was looking for a newer home so she first showed her homes in Clayton Park. That was too far from Dal and, on the second day, she showed her homes in the Dalhousie University area. She said that all but 6196 had driveways. She said she knew Ms. Adshade liked large houses, wanted to have students live with her family and wanted a newer house close to Dal. She said that when they looked at 6196 Cedar Street she and Marina Adshade went to the lower door and looked out. She could recall snow but she said she could tell that the yard was landscaped and could see a basketball

hoop in front of the gate. She said she did not see any parking in the yard. She said she would have given Marina Adshade a copy of the listing cut and noted as well that there was a brochure available at the house from the vendor's agent. The listing cut says there is a driveway for two cars off Walnut Street. Marina Adshade returned to Kingston and called Dorothy Newcomb on the following Monday. She expressed interest in the property but asked Ms. Newcomb: "Where is the parking?" Dorothy Newcomb testified that she told Ms. Adshade she would check this out and get back to her. Dorothy Newcomb then called the listing agent, Sandy Rutledge, and said she understood from him that the parking was off Walnut Street. She also went to the site and testified that she looked from the sidewalk down the lane to the fence. She noted that it was big enough for two cars and was separated from the other property and its driveway by bushes. Dorothy Newcomb said she saw the gate and a basketball hoop. She could not tell from there if the hoop was cemented into the ground or not but she had no doubt that was the parking area.

[12] Dorothy Newcomb testified that she did not talk to the neighbour, the owner of 6200 Cedar Street and would not normally do so. She said she called Marina Adshade and told her what she saw and what Sandy Rutledge said; that she had

seen that there was a long lane divided by bushes with a gate at the end. She said they discussed this while looking at the plot plan. She said Marina Adshade did not say very much. She said she herself believed that the parking was there. The listing cut referred to parking for two cars and she testified that, in her view, there was "overwhelming support" for that. She had no doubt where the parking was. She stated, "My mother could have said where the parking was."

[13] She said the source of a buyer's agent's information is the listing agent and, ethically, she could not speak to the vendor herself. She said it seemed to her that Marina Adshade was satisfied. Three days later, Marina Adshade asked her to do an Agreement of Purchase and Sale and she said that Marina Adshade said nothing to her about things she wanted added to the Agreement. Dorothy Newcomb put nothing in about parking or the right-of-way and had no reminder of it at the time she wrote the agreement. She said she had no doubt about it nor did she suggest that Marina Adshade talk to anyone about it. She did put a clause in the agreement about the agreement being subject to lawyer's review. She said she thought that was our, as she put it, "saviour." The review clause was important to her she said because Mariana Cowan had reminded them to do it and it was suggested to them

in the refresher course. She said they are not to interpret legal documents themselves.

[14] After the agreement was finalized, she received the PCDS and other documents and sent them to Marina Adshade. She also faxed them to Greg Auld to say she was referring a new client to him. On Friday, she also called him to say she was sending him a client and forwarding material to him. On Monday, she said she received a call from Greg Auld thanking her for the referral and telling her that he had spoken to Marina Adshade and everything was okay.

[15] Dorothy Newcomb testified that she called Greg Auld's office back later that day to ask him to look at the issue of parking. She says she remembers the call because she spoke to Natasha in his office and joked with her about him never being there. She said she really had no concern about the parking but did so in an effort to impress him. She said she hoped this would be helpful to her career. She said she did not expect a call back and she assumed he got the message.

[16] Her only contact with Marina Adshade after the Agreement of Purchase and Sale was signed was when Marina Adshade asked her to check the phone jacks and

other things in the house, to find out information about the oil tank and to discuss the results of the inspection. As a result of the latter, there was an amendment to the agreement with respect to the floors.

[17] Dorothy Newcomb said she had not read the PCDS by the time Greg Auld called her to say everything was in order and she had not discussed it with Marina Adshade. She said she was busy arranging for and attending at the inspection which took about four hours and she had spent an hour at the house checking out things to answer Marina Adshade's questions. She said she wanted to discuss the PCDS with Marina Adshade, but when Gregory Auld said he had talked to her and everything was fine, she did not.

[18] She said there was little contact between her and Marina Adshade until the day of the closing. Thereafter, she said the next thing was a telephone call from Mr. Noseworthy, counsel for Ms. Adshade. She said it "blew her mind" when she learned there was a problem with the parking.

Analysis

1) Negligent Misrepresentation

[19] The claim is made in terms of negligent misrepresentation or negligence generally. With respect to negligent misrepresentation, the parties had no dispute about the law. All counsel referred to *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 which set out at p. 12 five elements that a plaintiff must establish as follows:

> 1) there must be a duty of care based on a special relationship between the representor and the representee; 2) the representation in question must be untrue, inaccurate or misleading; 3) the representor must have acted negligently in making said misrepresentation; 4) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and 5) the reliance must have been detrimental to the representee in the sense that damages resulted.

[20] With respect to element number one, special relationship, it has been conceded that it exists between a realtor and a client. The second element is whether the representation is untrue, misleading or inaccurate. This is a crucial element in this case. Marina Adshade did not see any parking area or driveway when she viewed the property. She called Dorothy Newcomb and asked her "Where is the parking?" Dorothy Newcomb said she did not know and she would

check. She said she called the listing agent and, although she could not recall the exact conversation, she recollects that he told her that parking was off Walnut Street. This confirmed the information he had put in the listing cut.

[21] Dorothy Newcomb admitted that she has a hearing problem but she testified she is careful to be sure that she hears what is said and, if necessary, asks for things to be repeated. She said when she talks on the phone she uses a speaker phone and, if there are distractions, she uses a phone in a room where she can close the door and have privacy. When she uses her phone in the car, she said it is not a problem because the car is private. There were a few occasions at trial when Dorothy Newcomb had to have questions repeated but overall I did not find that she had great difficulty. I am therefore not satisfied that her hearing problem caused her to misunderstand what Sandy Rutledge said. She testified about other telephone conversations she had, many with Marina Adshade and others with Gregory Auld in his office, and there was no question about what she heard on those occasions.

[22] Issue was also taken with her memory. She was referred to her discovery transcript and said she was embarrassed about how poorly prepared she was for the

discovery. She did say, however, that the evidence is there, just that the time lines were somewhat confused at the time of her discovery. I am not satisfied that there are inconsistencies between her testimony at trial and the excerpts from discovery when read in their entirety.

[23] In addition to talking with Sandy Rutledge, Dorothy Newcomb went to the property, drove to Walnut Street and got out of her car and viewed the driveway. She testified that it was separated from the neighbouring property by a row of trees or bushes. She said it looked just like it does in Ex 4, photo #1. She said she could see a gate at the end. She said it was long enough to park, as she put it, two Cadillacs. She then reported what she saw and what she was told to Marina Adshade.

[24] *In Williams v. Saanich School District 63* (1986), 37 C.C.L.T. 203, aff'd 14 B.C.L.R. (2d) 141 (C.A.), the court said that the representation must be viewed at the time it was made. In my view, the representation was not untrue, misleading or inaccurate. Everything at that time pointed to the fact that parking was on the driveway which was referred to in the listing cut, confirmed by the listing agent and seen by Dorothy Newcomb. In my view, the representation was not untrue or

inaccurate at the time. Everything pointed to parking being on the right-of-way. It was not misleading on the part of Dorothy Newcomb to tell Marina Adshade that that was where the parking was. I therefore conclude that the claim for negligent misrepresentation fails at this point.

[25] It is unnecessary for me to consider the other elements in *R. v. Cognos Inc., supra*, because the claim for negligent misrepresentation fails at the second element. However, in the event that I am wrong, I will go on to consider the other elements.

[26] Was any misrepresentation made negligently? The question is whether Dorothy Newcomb exercised reasonable care in making the statement to Marina Adshade that parking was off Walnut Street. As Justice La Forest said in *Queen v. Cognos, supra* at p. 18:

> It also requires that the representor exercise such reasonable care as the circumstances require to ensure that the representations made are accurate and not misleading.

[27] He continued in the following paragraph:

> As noted above, the applicable standard of care is that of the objective reasonable person. The representor's belief in the truth of his or her representations is irrelevant to that standard of care.

[28] Dorothy Newcomb did not quickly give Marina Adshade an answer on the phone when she called. She said she did not know and would get back to her. She then did two things. First, I accept that she did call Sandy Rutledge, the listing agent, and that he told her the parking was off Walnut Street. This confirmed the information he, as seller's agent, had put in the listing cut. However, Dorothy Newcomb did more than just call Sandy Rutledge. Second, she went to the site and looked at the driveway. She was satisfied, based upon both these things and the information in the listing cut, that the parking for 6196 Cedar Street was off Walnut Street. She could see the division between the parking behind 6200 Cedar Street and she could see the gate opening into the backyard of 6196 Cedar Street.

[29] In *Bolton v. Salaga*, [1989] B.C.J. No. 1565 (S.C.), the distinction was made between the duties of a buyer's agent and those of a seller's agent. It is the duty of the seller's agent to verify the accuracy and completeness of the information he or she puts in the listing, especially if he or she has doubts. In that case, the court said:

> ... That broader duty to ascertain and verify all pertinent facts is the duty of a listing agent. Mr. Salaga's duty was the narrower duty of the selling agent, to check the completeness and accuracy of all information which it is usual or customary for brokers to verify and of all other information as to the completeness and accuracy of which he is in doubt before conveying that information to the prospective purchaser.

[30] It was not up to Dorothy Newcomb as the buyer's agent to verify the accuracy of what she was told by Sandy Rutledge, what she read in the listing cut and what she saw when she visited the driveway site. I therefore conclude that she did not make a negligent misrepresentation when she gave this information to Marina Adshade.

[31] The final elements are often dealt with together: the elements of reliance and detriment/damages. Again, I do not need to consider these but I will consider these last two elements in the event that I have been wrong.

[32] In my view, it was reasonable for Marina Adshade to rely on the information she had been given by Dorothy Newcomb. It seems there was no issue taken with her reliance on Dorothy Newcomb.

[33] This leads to the issue of whether Marina Adshade suffered a detriment leading to damages as a result. In her statement of claim, she seeks general damages for the diminution in value of her property as a result of having to create a parking space in her backyard, special damages for the cost of doing so ($4,234.10) and "such other relief" as the court "deems just." She also seeks costs and pre-judgment interest.

[34] In his closing submissions, counsel for Marina Adshade argued that his client should receive damages in effect for inconvenience and disruption. Counsel for Dorothy Newcomb and Supercity Realty vehemently opposed such a claim on the basis that it was not in the pleadings. I do not need to deal with the defendant's submissions with respect to this claim, since I conclude there is nothing in Marina Adshade's evidence to support such a claim.

[35] In my view, this is an entirely different situation from those in *Caldwell v. Fitzgerald* (1977), 26 N.S.R. (2d) 140 (T.D.) and *Paton v. Shaw* (1995), 134 Nfld. & P.E.I.R. 271 (P.E.I.T.D.) In the former, the plaintiffs were given, in addition to the costs they incurred as a result of the solicitor's negligence, $3,000.00 as general damages "for inconvenience and discomfort and disruption." In that case, the

plaintiffs' property was foreclosed on and they had to move out temporarily and repurchase the house at an increased cost.

[36] In *Paton*, *supra*, the negligence resulted in the plaintiff facing a potential debt to Revenue Canada of over $6 million for five and one-half years. In the decision, the court referred to the mental anxiety of having a $6 million tax liability hanging over him which would cause the plaintiff, if it was successful, at age sixty-eight to lose everything. The court also referred to the "humiliation and indignity" he would face if he lost everything and the fact that he "devoted much of his time trying to prove he was not responsible for the tax." In the face of this, the award was $15,000.00 per year.

[37] In this case, Marina Adshade received a call from the owner of 6200 Cedar Street in the winter of 2005 and was a defendant in a lawsuit seeking an injunction to prevent her from parking on the right-of-way. She ultimately built the driveway in her yard and settled the lawsuit.

[38] During the time that the lawsuit was pending, she parked on the street for a few months and, after her car was vandalized, she had a parking area built in her

yard. This process was over a period of approximately eighteen months. I am not satisfied such an award should be made in a situation such as existed here. The circumstances are vastly different from those in *Caldwell, supra* and *Paton, supra,* and do not merit an award of damages in my view.

[39] If I were satisfied the other four elements in *Queen v. Cognos Inc., supra,* were established, I would agree that the special damage claim of $4,235.10 is made out.

[40] The law with respect to damages in a negligent misrepresentation case is that the plaintiff is to be put in the position she would have been in had there been no negligent misrepresentation.

[41] In *Rainbow Industrial Caterers Ltd.* v. *Canadian National Railway Co.*, [1991] 3 S.C.R. 3, Justice Sopinka, writing for the Supreme Court of Canada at p. 8 said:

> The plaintiff seeking damages in an action for negligent misrepresentation is entitled to be put in the position he or she would have been in if the representation had not been made.

[42] In this case, Marina Adshade concluded that she had to construct the parking area in her yard. No suggestion has been made that this was not a reasonable expenditure or that the cost of building the parking area was not reasonable.

[43] Marina Adshade also claims a diminution in value of her property as a result of having to construct the parking area in her yard. Her yard had been completely landscaped with raised flower beds, paths and a basketball hoop cemented in at the end of the driveway just inside the gate. She herself presented no evidence of such a diminution in value. She tried to have an appraiser testify about the value of parking spaces but, in a decision during trial, I ruled the report inadmissible on the grounds of lack of relevance.

[44] In *Messimeo v. Beale* (1978), 20 O.R. (2d) 49 (C.A.), the court concluded that the proper way to assess damages was to determine the difference between the price paid for the property and its fair market value. In that case, the price paid included the value of a piece of land called Murch's Point. The plaintiff ended up not owning the land because the vendor in fact did not own it and, of course, could not sell it to the plaintiff.

[45] Similarly, in *Toronto Industrial Leaseholds Ltd. v. Posesorski* (1994), 21 O.R. (3d) 1 (C.A.), the court concluded that was the proper means of determining the damages. I agree that it is a proper means of determining the damages here.

[46] The defendants retained Cherie Gaudet who prepared two appraisals of 6196 Cedar Street: one as of February 13, 2004 and the other as of June 23, 2009. She appraised the property as of both dates with the parking in the backyard of 6196 Cedar Street. She concluded the value would have been the same in February 2004 with parking in the yard as the price that Marina Adshade paid for it before that parking was constructed.

[47] On cross-examination, she was asked if the $40,000.00 for which the neighbour offered to sell her parking rights was an indication of the value of the parking rights. Cherie Gaudet said it was not as it was not an accepted offer. She referred to the definition of "fair market value" in her appraisal report as being, in summary: the price a willing and informed buyer and a willing and informed seller agree to for the sale and purchase of a property.

[48] On cross-examination, Cherie Gaudet was also asked about the adjustment she made between the comparables she used to arrive at her value and, in particular, the $40,000.00 adjustment she made for “style.” She admitted it is subjective. Counsel for Ms. Adshade submits that, if a $40.000.00 adjustment was not made, the value of 6196 Cedar Street in February 2004 with a driveway in the yard would be $450,000.00 not $490,000.00 and that this is the measure of the diminution in value.

[49] One can look at the photos of the street views of the comparables. However, Cherie Gaudet said there was a difference in style because between 6196 Cedar Street and the others because of its overall curb appeal, its architectural features and its custom features. In her appraisal report, she says it was designed by an architect, the owner, David Rickard. Some of these features are evident in the last photo in Exhibit 4. It was, in my view, reasonable for Cherie Gaudet to conclude there should have been an adjustment and there was no evidence to the contrary.

[50] However, there is no reference to the landscaping of 6196 Cedar Street at the time Marina Adshade bought it. In her testimony, she described the yard. She said there were several raised flower beds, shrubs and paths between the flower beds.

She said David Rickard gave her a list of all the plantings and she said he was obviously very proud of his landscaping efforts. There are no photographs in evidence from that time, but I accept that that evidence is accurate.

[51] It seems to me that the yard, although still useful, is less attractive now than it was in 2004. Photographs are in evidence of its current state. The lot is small, only 2,500 square feet, and most is used by the footprint of the house and the large deck from its main level. The photographs in Exhibit 4 show the yard, now to be almost completely occupied by the parking area with a small triangular space in a rear corner. A fruit tree between the parking area and the neighbouring house behind has been saved. Marina Adshade testified there is one landscaped area remaining but it is near the passenger side of her vehicle and it is walked on by anyone exiting the passenger side of that car. The photographs show, in essence, a very small yard almost filled by Marina Adshade's car.

[52] I therefore conclude that there is a diminution in value to 6196 Cedar Street by the loss of the landscaping and its replacement by a parking area. I do not agree it is $40,000.00 which would be the case if no adjustment were made for the style of 6196 Cedar Street. In my view, Cherie Gaudet was correct to make an

adjustment for style. There is no evidence to the contrary. The amount of that adjustment is subjective according to Cherie Gaudet. In my view, it could be less than $40,000.00 and that would reflect the actual fair market value of the property with parking in the yard instead of attractive landscaping. It would not, however, be nothing as counsel for Marina Adshade submits. Ms. Gaudet is a qualified appraiser and I do not accept that her valuation would be wrong by close to ten percent or even half that.

[53] If I were to put a value on the diminution in value of 6196 Cedar Street because of the parking in the yard rather than the landscaping, I would conclude it was $10,000.00. I do not accept that the $40,000.00 that Valerie Harris offered for parking rights on the right-of-way is any indication of the diminution in value. I say that because Cherie Gaudet did not accept that an unaccepted offer is any indication of value. I accept her opinion in that regard.

[54] The remaining damage claim advanced by Marina Adshade is one for loss of enjoyment of the yard. Such awards were made in the cases cited by her counsel. In a 2008 decision, *Crawford v. Town Council of the Town of Torbay*, 2008 NLTD 161, an award of $5,000.00 was made for loss of privacy and loss of enjoyment of

property, In *Mundell v.Wesbild Holdings Ltd.*, 2007 BCSC 1326, the plaintiff claimed $20,000.00 per year for inconvenience and stress from having a soggy back yard for a total of $140,000.00 over seven years. Instead, he was awarded $15,000.00 which took into consideration his failure to mitigate.

[55] Marina Adshade seeks damages of $3,100.00 per year for loss of enjoyment of her back yard since it is no longer landscaped and most of it is taken up with a parking space for her car. However, one must be careful in assessing such a claim not to double count the diminution in value and the loss of enjoyment. The two must be valued separately. One is related to the overall value of the property and the other is personal to the plaintiff.

[56] If I were to award damages for this, I would award a sum of $3,000.00. Marina Adshade admits she is not a gardener and no longer has a dog. Her children are able to use the basketball hoop and there is still a fruit tree which gives some privacy and seasonally blossoms. The loss of landscaping and its attractiveness is a factor already considered under the heading of diminution of value.

[57] If I had found that there was a negligent misrepresentation, I would have therefore concluded that the damages suffered as a result were:

$10,000.00 for diminution in value;

$3,000.00 for loss of enjoyment; and

$4,235.10 for the cost of building the parking space.

2) Negligence

[58] Marina Adshade's alternate claim is for negligence on the part of Dorothy Newcomb. I have already concluded her statement was not a negligent misrepresentation. Now I must address whether Dorothy Newcomb was negligent in her overall duties as Marina Adshade's agent.

[59] The steps she took in response to Marina Adshade's question: "Where is the parking?" were made before the Agreement of Purchase and Sale was drafted by her. I conclude there was no negligence on Dorothy Newcomb's part to that point for the same reasons that I have considered there was no negligent misrepresentation.

[60] Dorothy Newcomb testified she was satisfied with respect to the parking and that it seemed Marina Adshade was as well. When Marina Adshade called her to say she wanted to put an offer in on 6196 Cedar Street, neither discussed parking. Dorothy Newcomb said she did not believe anything needed to be put in the Agreement of Purchase and Sale. As she put it, after viewing the driveway, "Even my mother could tell where the parking was." She said she put in the agreement a standard provision about it being subject to lawyer's review. She said she was told to do this by the broker and also learned this at mandatory refresher courses that realtors must take yearly to retain their licenses. In evidence is her message to Gregory Auld to "review the agreement."

[61] Dorothy Newcomb also testified that she went one step further. She says she called the office of Greg Auld. She says she left a message with his assistant for him to check the parking.

[62] After the action against Greg Auld was dismissed on a motion by his counsel for a non-suit, the plaintiff subpoenaed him to testify. He testified that he never received a message from Dorothy Newcomb to that effect. He put in evidence two

phone messages he did receive (Exhibits 15 and 16) and the cover page of the fax that Dorothy Newcomb sent him (Exhibit 14). The latter refers to a financing letter. Exhibit 15 is dated February 6 and is headed “please review agreement” and refers to Marina Adshade, her purchase of 6196 Cedar Street and gives Marina Adshade’s phone number. The other message has no date and refers to a call from Dorothy Newcomb with her telephone number. In the message box, it simply says “Marina Ads” (incompletely spelling the last name) and “cell” and no telephone number. There is nothing else in the message.

[63] Dorothy Newcomb testified she sent the Agreement of Purchase and Sale and the other documents to Greg Auld by fax on Friday, February 6 and called to tell him to check the agreement. She said on the following Monday Greg Auld called her to thank her for the referral. This was confirmed in a letter from Greg Auld to Dorothy Newcomb in which Greg Auld referred to their telephone conversation of the previous day.

[64] Dorothy Newcomb says, after the telephone call on Monday, she again called Greg Auld’s office on the same day and left a message with respect to the parking. She said she had no concerns about the parking and did it merely to

impress him and to show him she was on top of the matter, in hopes that word would spread that this was the case, which would be good for her career. There is no substantiation of this call by way of a phone message and Greg Auld testified that he received no such message. I do not accept that, if Dorothy Newcomb was going to raise such an issue, she would have made a separate call rather than raising it when she spoke to Greg Auld. I therefore conclude that no such call was made.

[65] I must consider whether Dorothy Newcomb was negligent in her duties as a buyer's agent. Was what she did sufficient to meet the standard of care imposed upon her as such? She was asked about where the parking was. She then called the listing agent and was given information. It confirmed what was in the listing cut. She did not stop there. She went to the site and looked at the driveway off Walnut Street. She got out of her car and looked down the driveway shown on Exhibit 4. She saw a long laneway with lots of room for two cars. She said it was divided from the adjacent property and looked separate from it. She said she saw the gate and the basketball hoop inside the yard. This too was consistent with the listing cut which said there was parking for two cars.

[66] Dorothy Newcomb said her source of information was the listing agent who, as she put it, should be giving me "good information." She also said that ethically she is not to speak to the vendors, only their agent. After making these inquiries and viewing the site, she called Mariana Adshade and passed the information on to her while they both looked at the plot plan which showed Parcel C, the right-of-way. Dorothy Newcomb said she was satisfied with respect to the parking and so, it seemed, was Marina Adshade because she said nothing more about it when she called a few days later to say she wanted to put in an offer. Dorothy Newcomb said she therefore put nothing in the Agreement of Purchase and Sale to make parking on the right-of-way a condition to the purchase. Nor did she recommend to Marina Adshade that further inquiries be made or that she should get legal advice about it.

[67] After the counter-offer was accepted, Dorothy Newcomb received the PCDS which she sent on to Marina Adshade. Her email to Marina Adshade with respect to it said "I need you to read that carefully." She was then to sign it and return it to Dorothy Newcomb.

[68] Question 10 A on the PCDS is as follows: “Are you aware of any limitations with the property such as: Restrictions or Protective Covenants, Easements and Rights-of-Way, Shared Wells, Driveway Agreements, Encroachments on or by adjoining properties? If yes, give details.” Written in by hand is “right-of-way over adj property 6200 Cedar.” It refers to the right-of-way but makes no mention of parking.

[69] Dorothy Newcomb also sent the PCDS to Gregory Auld along with the Agreement of Purchase and Sale. When she spoke with him the following Monday after the material had been sent to him, she said he told her he had spoken to Marina Adshade and everything was going forward. Dorothy Newcomb was busy arranging the inspection, attending it and doing other things for Marina Adshade who was, of course, in Kingston, Ontario at this time.

[70] Dorothy Newcomb said she did not read the PCDS and it would normally have been her practice to review it with her client. She said, however, when she learned Greg Auld had been talking to Marina Adshade and everything was going forward, she concluded that included the review of the PCDS.

[71] Greg Auld was called as a rebuttal witness and Marina Adshade's counsel was very limited in the questions he could put to him. Accordingly, he did not testify with respect to his conversation with Marina Adshade on Monday, February 9. Marina Adshade said she read the PCDS and understood there was a right-of-way and that was where she would park. She signed it and returned it to Dorothy Newcomb and nothing more was said with respect to the right-of-way.

[72] Dorothy Newcomb said she would normally have reviewed the PCDS with her client but did not for the above reasons. Is there negligence on her part for having failed to do so? If there was negligence, did it cause the problem Marina As subsequently faced?

[73] Dorothy Newcomb testified she did not read the PCDS. She said she knew nothing about any problem with the right-of-way until she received a call from Marina Adshade's present counsel some years later. In my view, had Dorothy Newcomb read the PCDS and reviewed it with Marina Adshade, it would not have changed the result. Both were satisfied about the parking and about it being on the right-of-way. When they discussed it before the Agreement of Purchase and Sale was executed, they were looking at the Location Certificate which said "Parcel C

right-of-way." Nothing in the PCDS would have led them to think anything different than what they already had satisfied themselves about with respect to the parking. The PCDS said nothing about parking.

[74] I therefore conclude that, although Dorothy Newcomb was negligent in failing to review the PCDS with her client and assuming Gregory Auld had, that failure did not lead to the problem that subsequently arose. The causal link between the failure and the damages has not been made out.

[75] The standard of care was referred to in *Queen v. Cognos Inc.*, *supra*. There the court said at p. 16:

> ... The applicable standard of care should be the one used in every negligence case, namely the universally accepted, albeit hypothetical, 'reasonable person'. The standard of care required by a person making representations is an objective one. It is a duty to exercise such reasonable care as the circumstances require ..."

[76] Although the court there was talking about negligent misrepresentation, they made it clear that they were also referring to the standard of care in "every negligence case." The court continued, quoting from Professor Klar, Tort Law, (1991) at pp. 159-60 as follows:

> ... As with the issue of standard of care in negligence in general, this is a question of fact which must be determined according to the circumstances of the case. Taking into account the nature of the occasion, the purpose for which the statement was made, the foreseeable use of the statement, the probable damage which will result from an inaccurate statement, the status of the advisor and the level of competence generally observed by others similarly placed, the trier of fact will determine whether the advisor was negligent.

[77] I conclude Dorothy Newcomb had no obligation to go beyond what she did in checking on the parking. In *Kisil v. John F. Stevens Limited* [1980] N.S.J. No. 515 (T.D.), Grant, J. said at paras. 59 and 60:

> **59** I find that Buckley, as the employee of Stevens, was under no duty to check out the truth of each particular fact represented by Tremblay and Sackville but was justified in relying on the representations so made.
>
> **60** I find that Buckley acted reasonably in assuming that a well would provide 'potable' water.

[78] In my view, Dorothy Newcomb was not negligent. She checked the parking, she spoke to the listing agent, she viewed the right-of-way, she read the listing cut and she concluded there was no need for anything to be put in the Agreement of Purchase and Sale. In my view, reviewing the PCDS would not have changed things because there was no reference in it to parking. I therefore conclude she met the standard of care and she acted reasonably with respect to the parking. I

conclude therefore that there was no liability on the part of Dorothy Newcomb or Coldwell Banker Supercity Realty.

[79] Although, because of my conclusion, I do not need to deal with the issues of contributory negligence and mitigation, I will deal with them in the event that I am wrong on the issue of liability.

[80] With respect to contributory negligence, the defendants say that Marina Adshadewas contributorily negligent in two respects: first, that she left it too late to raise the parking issue with Gregory Auld and, second, that she knew about rights-of-way and should have been more cautious herself. With respect to the latter, I accept Marina Adshade's testimony that she knew very little about rights-of-way and therefore was under no greater obligation in this regard than Dorothy Newcomb would have been. I have concluded that Dorothy Newcomb was not negligent in doing nothing further with respect to the right-of-way issue. The same applies to Marina Adshade's late request to Gregory Auld. If it was made (which I do not need to decide), she had no concerns with respect to parking at the time she entered the Agreement of Purchase and Sale and, therefore, it was not unreasonable for her to do nothing further about it.

[81] With respect to mitigation, the defendants say that Marina Adshade failed to mitigate her loss. They say that she could have had a license from the owner of 6200 Cedar Street for $1 a year. Marina Adshade said she did not want to have an arrangement like that because it would be revocable on thirty days' notice. I do not consider this to be a failure to mitigate. The risk of it being revoked would always be there and Mariana Adshade would then be in the same position she found herself in in 2006.

[82] With respect to settling the lawsuit against her, it is not a failure to mitigate on her part either. Lawsuits are costly and there is no evidence before the court to establish that she was guaranteed of success. If she was not successful, she would have had to bear the costs of the lawsuit and still incur the costs of building a parking space.

[83] The parties have reserved the right to speak to costs.

[Note: The action against Gregory D. Auld was dismissed on a non-suit motion made at trial.]

Hood, J.