SUPREME COURT OF NOVA SCOTIA
Citation: *Murphy v. Hants Realty Ltd.*, 2017 NSSC 282

Date: 20171122
Docket: Hfx No. 322089
Registry: Halifax

Between:

Hermiena Murphy

Plaintiff

v.

Hants Realty Limited

Defendant

and

Larry Matthews

Third Party

Judge: The Honourable Justice Ann E. Smith

Heard: September 5 and 6, 2017, in Halifax, Nova Scotia

Counsel: John T. Rafferty, Q.C. and Stacey England; for the Plaintiff
Robert H. Pineo; for the Defendant and Third Party

By the Court:

Introduction

[1] This is a case about whether a real estate company, Hants Realty Limited or its principal, Mr. Larry Matthews, owed its employee real estate agent, Hermiena Murphy, a duty of care to report a regulatory complaint made against her to the company's errors and omissions insurer, AXA Insurance.

[2] There was such a regulatory complaint – it was not reported during the policy period, and Ms. Murphy was denied insurance coverage in defending herself in a subsequent negligence action against her.

[3] If either Mr. Matthews or Hants Realty breached any legal duty owed to Ms. Murphy by not reporting the regulatory complaint, the parties agree that the amount of the legal fees, costs and disbursements Ms. Murphy incurred in defending herself in the negligence action were $75,711.23 plus pre-judgment interest and costs.

Issues

1) Did Hants Realty and Mr. Matthews breach any duties owed to Ms. Murphy by not reporting the regulatory complaint?

2) Is Mr. Matthews personally liable to Ms. Murphy for not reporting the regulatory complaint to Hants Realty's insurer?

Background

[4] On April 1, 2005, Robert and Anita Patten purchased a home at 26 River Court, Enfield, Nova Scotia (the "property") from CIBC, who obtained it through foreclosure. The property turned out to have an inadequate source of domestic water.

[5] The Pattens sued the real estate agent, Hermiena Murphy, and the brokerage where she was employed, Hants Realty Limited, alleging negligence, misrepresentation and breach of contract.

[6] Hermiena Murphy cross-claimed against Hants Realty Limited and sued Larry Matthews, the owner of Hants Realty, as a Third Party.

[7] By Consent Order dated November 5, 2015, the cross-claim of Ms. Murphy and the Third Party action against Mr. Matthews were severed from the main action.

[8] The main action was heard by the Honourable Justice Allan P. Boudreau in November, 2015. Boudreau J. issued a written decision dated December 2, 2015. He dismissed the Pattens' action against both Hants Realty and Ms. Murphy.

[9] Ms. Murphy's Third Party action against Mr. Matthews and her cross-claim against Hants Realty Limited were heard by this Court on September 5 and 6, 2017.

[10] The issue for this Court to resolve is Ms. Murphy's claim to be reimbursed the legal fees, disbursements and taxes she incurred in defending the Pattens' claim.

[11] Ms. Murphy incurred these costs because no claim was reported to the professional liability insurer of Hants Realty, AXA Insurance, during the policy period, February 10, 2005 to February 10, 2006.

[12] In July 2005, Mr. Patten made a complaint about Ms. Murphy to the Nova Scotia Real Estate Commission (the "regulatory complaint" or the "complaint") about the lack of domestic water, alleging he was not told about water supply issues prior to purchasing the property. He wrote that "the realtor should cover the costs that I'm going to have to pay to get water here." The complaint was allowed and Ms. Murphy was disciplined. Counsel from Burchell MacDougall acted for Ms. Murphy throughout the complaint process, including an unsuccessful judicial review and an unsuccessful appeal to the Nova Scotia Court of Appeal.

[13] In July 2005, Ms. Murphy was insured under the professional liability policy of Hants Realty. After the expiry of the AXA policy in February, 2006, Ms. Murphy had her own policy of professional liability insurance with Travelers Guarantee Company of Canada.

[14] The Patten complaint was reported to Travelers in 2009. The complaint was reported after counsel for the Pattens wrote to Hants Realty demanding compensation for the issues that they alleged arose with respect to the lack of domestic water at the property. They threatened legal proceedings.

[15] Travelers denied coverage for both Ms. Murphy and Hants Realty on the basis that the Patten regulatory complaint in 2005 constituted prior knowledge of both the insureds and was therefore not a complaint covered by the policy.

[16] Hants Realty and Ms. Murphy each commenced Applications in Court against Travelers seeking liability coverage, provisions of a defence and indemnification for legal expenses incurred. Those applications were heard together and, while the applicants were successful at trial (*Hants Realty Ltd. v. Travelers Guarantee Company of* Canada, 2013 NSSC 195), Travelers was successful on appeal (*Travelers Guarantee Company v. Hants Realty Ltd.*, 2014 NSCA 69).

[17] Ms. Murphy says that when she received the 2005 complaint she spoke to Mr. Matthews and asked him if the complaint should be reported to the firm's and her liability insurer. She says that Mr. Matthews told her that there was no need to report the complaint because it wasn't a claim.

Position of the Parties

[18] Ms. Murphy contends that Hants Realty was negligent and breached fiduciary duties owed to her when Mr. Matthews failed to report the complaint. She claims that Mr. Matthews negligently misrepresented to her that there was no need to report the complaint. She claims against Mr. Matthews personally in negligent misrepresentation.

[19] Hants Realty plead that Ms. Murphy failed to report material facts about the property to it contained in certain emails sent to Ms. Murphy by a third party. It plead that had she provided those facts, it would have reasonably led Hants Realty and Mr. Matthews to report the complaint. Hants Realty and Mr. Matthews also plead that Ms. Murphy deliberately and knowingly withheld those material facts from them in an effort to succeed on the regulatory complaint. They plead that Ms. Murphy acted in bad faith towards Hants Realty by deliberately withholding those materials facts.

[20] However, as will be reviewed below, on cross-examination, Mr. Matthews admitted that he had read the relevant emails.

[21] Hants Realty plead that it acted in good faith and in accordance with its obligations to Ms. Murphy on the information that it had on hand at the relevant times. Again, that information, on Mr. Matthew's own evidence, included the

information in the very emails that he claimed Ms. Murphy deliberately withheld from him.

Issue 1: Did Hants Realty and Mr. Matthews breach any duties owed to Ms. Murphy by not reporting the regulatory complaint?

[22] Ms. Murphy's entire career as a real estate agent was with Hants Realty or other companies owned and controlled by Mr. Matthews. She started her career as a real estate agent in 1985 after completing the real estate agent's licensing course. Her evidence was that when she interviewed for a job with Hants Realty in late 1985, she asked about insurance coverage. Mr. Matthews told her she would be covered under Hants Realty's policy.

[23] In 2005, at the time of the regulatory complaint, Ms. Murphy did not have her own liability insurance policy. Instead, she was insured under the professional liability (errors and omissions) policy of Hants Realty with AXA Insurance. Her undisputed evidence at trial was that neither Larry Matthews, nor anyone on his behalf, ever provided her with a copy of the AXA policy. In fact, Ms. Murphy's evidence was that she did not know the identity of the insurer, the terms of the policy, or how to report a claim.

[24] Ms. Murphy's career as a real estate agent lasted approximately 25 years. She retired in 2011. During her career she worked solely with Hants Realty and other corporate iterations of Hants Realty. Ms. Murphy testified that Hants Realty Limited became Hants Realty and Insurance Limited for a time, but that Mr. Matthews sold the insurance part of the business. The company then became Century 21 Hants Realty, and later became Hants Realty Limited again at some point before 2005. Larry Matthews was her boss for each of those 25 years.

[25] Ms. Murphy's undisputed evidence was that she was an employee of Hants Realty Limited in 2005 and 2006. At a later point in time she said that "The government changed us and we became independent contractors."

[26] Ms. Murphy testified that Hants Realty Limited and its various iterations were solely owned by Larry Matthews. He was the sole shareholder and director of each company. I heard no evidence to the contrary.

The AXA Policy

[27] As noted above, during the year 2005-2006 Ms. Murphy was covered under the AXA policy. She was entitled to coverage because she was a salesperson

associated with Hants Realty. Her name was listed under the category of 'Staff Member' on the insurance policy.

[28] Mr. Matthew's evidence was that he applied for and administered the policy as owner of Hants Realty. Mr. Matthews did not show Ms. Murphy a copy of the policy or provide her with a copy. He said that had Ms. Murphy asked for a copy of the policy, he would have given it to her.

[29] The application for the renewal of the policy dated January 31, 2005 was signed by Mr. Matthews as President/Broker of Hants Realty Limited.

[30] The application was approved and insurance coverage was provided for the time period February 10, 2005 to February 10, 2006.

[31] Relevant sections of the policy are as follows:

SECTION I – DEFINITIONS

Wherever used in this policy:

1.01 **Named Insured** means the individual, partnership, or organization named in the Declarations. Any change in the legal status of the **Named Insured** shall not invalidate the coverage afforded under this policy, unless such change is material to the risk.

1.02 **Insured means:**

(a)i) If the **Named Insured** is an individual:

- the individual so designated;

ii) If the **Named Insured** is a partnership:

- the partnership so designated;
- any member, former-member, partner and former-partner thereof, but only with respect to errors, omissions or negligent acts committed while acting within the scope of his duties;

iii) If the **Named Insured** is an organization (other than a partnership):

- the organization so designated;
- any executive officer or director thereof while acting within the scope of his duties;
- any stockholder thereof, but only with respect to his liability as such;

(b) any employee or former-employee of the Named Insured, salaried or not, but only with respect to errors, omissions or negligent acts committed while acting within the scope of his duties;

(c) the heirs, legal representatives or assigns of any of the above.

…

1.04 **Claim** means:

(a) a verbal or written claim for money damages made against the Insured; or

(b) a verbal or written allegation made against the **Insured**; or

(c) a fact or circumstance which could reasonably give rise to a claim for money damages;

in connection with such compensatory damages as covered under this policy.

1.05 **Loss** means any one error, omission or negligent act giving rise to one or more **claims**.

SECTION 2 – INSURING AGREEMENTS

2.01. Coverage

The insurer agrees to pay those sums that the **Insured** becomes legally obligated to pay as compensatory damages on account of any **claim** made against the **Insured** because of an error, omission or negligent act of the **Insured** or any other person for whose acts the Insured is legally responsible (including his predecessors) in the performance of **professional activities**, BUT ONLY IF SAID **CLAIM** IS FIRST REPORTED TO THE INSURER WHILE THIS POLICY IS IN FORCE. A **claim** by a person or organization seeking compensatory damages will be deemed to have been reported when written notice of such **claim** is received by the Insurer.

All **claims** resulting from an error, omission or negligent act will be deemed to have been reported at the time the first of those **claims** is reported to the Insurer.

The amount the Insurer will pay for compensatory damages is limited as described in Section 3 – Limits of Liability.

The Insurer will have the right and duty to defend any action seeking those compensatory damages but the Insurer may investigate any **claim** or action and negotiate the settlement thereof at its discretion.

The Insurer's right and duty to defend end when the applicable limit of liability has been used up in the payment of judgments or settlements.

> No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under clause 2.02 – Supplementary Payments – or under Section 5 – extended reporting period.
>
> …
>
> CLAIMS
>
> 4.09 Duties in the Event of **Claim** or Action
>
> a. The **Insured** shall see to it that the Insurer is notified of any **claim** as soon as practicable and WHILE THIS POLICY IS IN FORCE.
>
> Failure to comply with the above condition will not affect any **Insured** who did not have knowledge of the **claim** or of the circumstances giving rise to it, on condition that notice be given WHILE THIS POLICY IS IN FORCE and that such failure not cause prejudice to the Insurer.
>
> If a **claim** is made, the **Insured** must:
>
> 1) Immediately send to the Insurer copies of any demands, notices, summonses or legal papers received in connection with the **claim** or action;
>
> 2) Authorize the Insurer to obtain records and other information;
>
> 3) Cooperate with the Insurer in the investigation, settlement or defence of the **claim** or action; and
>
> 4) Upon the Insurer's request, assist in the enforcement of any right against any person or organization which may be liable to the **Insured** because of injury or damage to which this insurance may also apply.
>
> b. The **Insured** shall not, except at his own cost, voluntarily make any payment, assume any obligation, or incur any expense without the Insurer's consent.
>
> (emphasis in policy)

[32] A review of these provisions shows that the policy under which Ms. Murphy was insured was a claims-made policy with a reporting requirement on the part of the insured, Hants Realty, to the insurer.

[33] The regulatory complaint was filed and provided to Ms. Murphy, who reviewed it with Mr. Matthews in July 2005, during the period of coverage in the policy.

[34] I note that during the years 2002-2003, 2003-2004 and 2004-2005 Hants Realty and Ms. Murphy were covered under professional liability insurance policies with AXA Insurance with identical wording as that set out above.

[35] Prior to being insured with AXA Insurance, Hants Realty and Ms. Murphy had professional liability insurance with Lloyd's of London.

[36] In February 2002, when Hants Realty first became insured with AXA, Marsh Canada, insurance broker, sent correspondence to Mr. Matthews enclosing a copy of the insurance policy with AXA. I note that the letter includes the following statement which was indented by Marsh Canada for emphasis:

> This is a Claims Made policy which requires that as soon as you become aware of any event which may lead or could give rise to an actual/potential claim during the policy period, **it must** be reported **immediately** to the insurer in writing.
>
> (emphasis of Marsh Canada)

Also stated was the following:

> Your employees should be made aware of the claims reporting requirements. Special attention must be given prior to the expiry to insure that all incidents which may give rise to a claim and all actual claims are reported prior to the expiry date of the policy.
>
> (emphasis of the Court)

[37] Marsh sent a similar letter to Mr. Matthews in February, 2003 with the identical provisions and emphasis noted above.

[38] Mr. Matthews testified that he "didn't remember" if he had told his employees, including Ms. Murphy, that the policy was a claims-made policy requiring immediate reporting to the insurer as soon as one became aware of any event that could lead or give rise to an actual or potential complaint during the policy period. He did not remember whether he had given his employees, including Ms. Murphy, the advice recommended by Marsh so they knew about the claims reporting requirements.

[39] In fact, Mr. Matthews' evidence was that he had never read the 2005-2006 policy, including the definition of "claim" and the reporting requirement.

[40] Mr. Matthews' explanation as to why he did not report the regulatory complaint was that he did not think Ms. Murphy had done anything wrong. He also testified that the complaint was not a lawsuit, and it was his belief that only

lawsuits needed to be reported to the errors and omissions insurer. He said that he gained that information while attending a mandatory course put on by the Real Estate Commission "when we first set it up." I do not accept this evidence for the truth of its content, but only for the purpose of informing Mr. Matthews' understanding as to what constituted a claim.

[41] When Ms. Murphy advised Mr. Matthews about the Patten complaint, he said, "We didn't think there was a claim." He stated that he likely told Ms. Murphy it was a complaint, not a claim. He did not refer to the policy and he did not recall if he called AXA or Marsh.

[42] Ms. Murphy's evidence was that Mr. Matthews also told her there was no reason to report the complaint because it would be like reporting to your motor vehicle insurer that you intended to drive your car in case you were in an accident. Mr. Matthews said that he didn't remember if he had made such a statement or not.

[43] To the extent that I must decide whether to accept Ms. Murphy's version of events, or that of Mr. Matthews, I accept Ms. Murphy's evidence. Ms. Murphy gave a good and detailed recollection of events. Mr. Matthews stated several times during his evidence that Ms. Murphy had a better memory of the events than he did. In cross-examination Mr. Matthews often responded that he "did not know" answers to questions and facts put to him. For example, he did not remember if he called Marsh when he received the Patten complaint. He did not remember if Hants Realty had a lawyer at the time. He did not remember if he contacted any lawyer for advice as to whether he should report the claim. He did not recall if he asked advice of anyone. I note that when he was examined on discovery on August 13, 2015, he was asked by Mr. Rafferty, Ms. Murphy's counsel, whether he got advice from anybody else (other than his discussion with Ms. Murphy) – his response was "no."

[44] In determining that Ms. Murphy's evidence is accepted over the evidence of Mr. Matthews when it diverges, I also take into account his demeanour as a witness.

[45] For example, when counsel for Ms. Murphy put to Mr. Matthews on cross-examination that he was the person at Hants Realty in 2005 and 2006 who was responsible for reporting claims, he agreed. He disputed that it was his decision not to report, rather than a mutual decision with Ms. Murphy. His evidence was, "You would suggest that because you want your money."

[46] When it was put to Mr. Matthews in cross-examination that had he read the definition of "complaint" in the policy, he would have recognized that the regulatory complaint fit the definition of a complaint, his response was as follows:

> What person in their right mind could visualize themselves sitting here 12 years later being sued by the lawyer they had helping them for $100,000 – how could I envision that?

[47] This answer was not responsive to the question posed. The question was repeated. This time, Mr. Matthews' evidence was as follows:

> I didn't know how lawyers operate. I'd have been carefuller.

[48] Mr. Rafferty then put to Mr. Matthews the fact that he had been an insurance broker. He responded:

> A. Oh, that's a crock. I bought an insurance agency and other people ran it for me. I didn't know anything about insurance.
>
> Q. You took a course?
>
> A. Two weeks.
>
> Q. You passed and hung out a shingle?
>
> A. Yes. You've got a shingle too.

[49] When asked in cross-examination about the advice in the Marsh letter to report claims as soon as he became aware of any event which might lead, or could give rise to an actual or potential claim during the policy period, Mr. Matthews responded:

> The Pattens got no money. So there was no claim. They lost. We're just dealing with your fees here.

[50] In response to further questioning about the advice in the Marsh letter, Mr. Matthews stated, "This claim is your legal fees, it's not a claim."

[51] I accept that Mr. Matthews told Ms. Murphy, as she testified, that you would not report to your insurer that you intended to drive your car in case you were in an accident. I find that Mr. Matthews decided not to report the regulatory complaint and that he did not do so. He did not review the AXA policy before making that decision. In fact, he had never reviewed the AXA policy. He thought that only lawsuits needed to be reported, but did not bother to look at the policy to confirm that belief.

Law and Analysis Issue 1

Breach of Contract

[52] Ms. Murphy claims that it was an implied term of her employment contract with Hants Realty that it would provide adequate professional liability insurance coverage to her. She asked Mr. Matthews about insurance coverage when she first applied for employment with Hants Realty in 1985. Mr. Matthews told her that she was insured under the policy held by Hants Realty.

[53] It was Hants Realty which annually applied for insurance coverage, not Ms. Murphy. She was named as a salesperson on the application.

[54] The regulatory complaint was a "claim" within the definition of claim in the AXA policy. The Nova Scotia Court of Appeal in *Travelers Guarantee Company v. Hants Realty Ltd.*, 2014 NSCA 69 determined that the Patten complaint was a "claim" within the definition of the Travelers' policy, on wording similar to the AXA policy. Oland J.A. also determined that the Patten complaint was a claim at common law.

[55] Hants Realty and Mr. Matthews both plead that facts contained in a January 25, 2005 email from a Mr. DeVenne to Ms. Murphy concerning homes on River Court having wells which drained, requiring refill, were deliberately and knowingly withheld from Hants Realty and Mr. Matthews in order for Ms. Murphy to gain an advantage in the Real Estate commission hearing. However, counsel for Hants Realty and Mr. Matthews admitted in closing submissions that there was no evidence as to what was the supposed advantage Ms. Murphy would gain by not disclosing the emails to his clients.

[56] It is to be noted that the only material facts about the property which Hants Realty and Mr. Matthews say Ms. Murphy deliberately and in bad faith withheld from Mr. Matthews was the information contained in the January 25, 2005 DeVenne email. This is made clear from the response to a Demand for Particulars sent by Mr. Pineo to Mr. Rafferty dated October 13, 2015.

[57] Hants Realty and Mr. Matthews also plead that had Mr. Matthews known about the content of the DeVenne emails, this would reasonably have led to the reporting of the complaint. They allege bad faith on Ms. Murphy's part in not providing the information in the DeVenne emails to Hants Realty and Mr. Matthews.

[58] However, as noted above, on cross-examination, Mr. Matthews admitted to having read the two DeVenne emails that were copied to Hants Realty, including the January 25, 2005 email. Mr. Matthews said that the issue was not knowing about the emails, but that Ms. Murphy did not disclose the emails to the Pattens and the purchase and sale agreement was not drafted to protect Hants Realty from exposure. His evidence was that he assumed Ms. Murphy's emails would send these to the Pattens.

[59] Since Mr. Murphy's evidence was that he believed that he only needed to report lawsuits to AXA, then logically it would have made no difference to his decision to report whether Ms. Murphy had, or had not, passed the information in the DeVenne emails to the Pattens.

[60] The "issue" is not as Mr. Matthews testified, that Ms. Murphy did not pass along to the Pattens the January, 2005 DeVenne email; rather, the issue was whether the Patten complaint was a claim within the meaning of the AXA policy.

[61] It is to be noted that the Pattens knew about the email because Mr. DeVenne sent it to Mr. Patten. This is evident from looking at the complaint the Pattens filed with the Real Estate Commission in July, 2005. Mr. Patten says,

> I received a letter from my neighbor describing the problem with the road and all that he did, but also in the letter was a piece of paper telling hermie to fax to me the problem with the water on the side of the road that I'm on. He told her she should disclose this info to me regarding the new owner of house 26 rivercourt rd." Quite apart from the email, Justice Boudreau in the negligence action found that Mr. Patten had been told about the potential water problems by Ms. Murphy.

[62] In addition to being sent the DeVenne January 25, 2005 email, it is also clear that Mr. Matthews knew about the water supply issue and the fact that Ms. Murphy had not sent the Pattens the DeVenne email because he was copied on the report of the Registrar of the Real Estate Commission dated January 24, 2006. The Registrar was reporting to Ms. Murphy on the results of his investigation into the Pattens' complaint. The Registrar refers to Ms. Murphy knowing about problems with well water quantity for properties on River Court, and quotes from that part of the January 25, 2005 DeVenne email where Mr. DeVenne states, "even more times with the well being drained and have to pay to get it filled." The Registrar notes that Mr. DeVenne referred to this information as being "not hard fact just neighbourhood talk." The Registrar faults Ms. Murphy for not providing the Pattens with the information about well quantity problems on River Court.

[63] Mr. Matthews' claim that Ms. Murphy deliberately withheld the information about the well problems on River Court is completely without merit. He admitted that he read the January 25th DeVenne email, so he knew that there were possible issues with the quantity of well water from non-drilled wells. He received this information again in January, 2006 when he was sent a copy of the Registrar's report and at that time he also knew Ms. Murphy had not sent the DeVenne email of January, 2005 to the Pattens.

[64] In his testimony at trial, Mr. Matthews backed away from the pleading which said that had he known about the water problems, as conveyed to Ms. Murphy by Mr. DeVenne, "it would have reasonably led Hants Realty and Matthews to report to the insurer." Obviously, he had no choice but to do so since he admitted that he had received the email and read it. Rather, Mr. Matthews' evidence was that he would have thought about it and made a decision as to whether to report the complaint. Of course, this is at odds with his evidence that he thought only lawsuits needed to be reported to AXA.

[65] In July, 2005 when Ms. Murphy told Mr. Matthews that she had received the Patten regulatory complaint, Mr. Matthews had received and read the January 25, 2005 DeVenne email. Had the complaint been reported to AXA Insurance at that time, it would have been reported within the time period permitted in the policy. Further, when Mr. Matthews received the Registrar's January 24, 2006 report referring to the water problems, he still had a few weeks to report the complaint within the policy period which ended on February 10, 2006. He agreed that he would have received this report within a day or two after January 24, 2006. Mr. Matthews admitted that it would have been easy to report to the insurer, that all it would take was a phone call.

[66] I find that it was an implied term of Ms. Murphy's contract with Hants Realty that it would report any claim against her to AXA within the policy period. Ms. Murphy was denied insurance coverage because of the failure of Hants Realty to report within the period of coverage.

[67] I refer to the decision of the Supreme Court of Canada in *M.J. B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619 where Justice Iacobucci identified when contractual terms will be implied:

> 29…a contractual term may be implied on the basis of presumed intentions of the parties where necessary to give business efficacy to the contract or where it meets the "officious bystander" test. It is unclear whether these are to be understood as two separate tests but I need not determine that here. What is important in both

> formulations is a focus on the intentions of the actual parties. A court, when dealing with terms implied in fact, must be careful not to slide into determining the intentions of reasonable parties. This is why the implication of the term must have a certain degree of obviousness to it, and why, if there is evidence of a contrary intention, on the part of either party, an implied term may not be found on this basis. …

[68] Reporting a claim is necessary to give business efficacy to the insurance coverage.

[69] I find that Hants Realty breached its employment contract with Ms. Murphy when it failed to report the Patten complaint to AXA. The complaint was clearly a claim within the meaning of the definition of claim in the policy. By failing to report the claim, Ms. Murphy was denied the insurance coverage and defence costs available to her. She suffered damages as a result.

Negligence

[70] In determining whether Ms. Murphy has made out a claim in negligence, the first question I must answer is whether Hants Realty owed Ms. Murphy a duty of care to exercise reasonable care when determining whether to report the regulatory complaint.

[71] In *Elliott v. Insurance Crime Prevention Bureau*, 2005 NSCA 115, Justice Cromwell, as he then was, referred with approval to the test for determining whether a duty of care exists, to the decision of the Supreme Court of Canada in *Anns v. Merton London Borough Council and Kamloops (City) v. Nielsen*, 1984 CanLII 21 (SCC), [1984] 2 S.C.R..2. At paragraph 47 Justice Cromwell stated:

> It will be helpful first to situate the proximity issue in the broader context of a duty of care analysis. In a novel case (that is, one in which a duty of care has not been authoritatively recognized before), the existence of a duty of care is tested by applying the analysis from *Anns v. Merton London Borough Council and Kamloops (City) v. Nielsen* (citations omitted). That test was described as follows in *Cooper v. Hobart* [cite added, (2001), 206 DLR (4th) 193) at para. 30]:
>
> > 30. In brief compass, we suggest that at this stage in the evolution of the law, both in Canada and abroad, the Anns analysis is best understood as follows. At the first stage of the Anns test, two questions arise: (1) was the harm that occurred the reasonably foreseeable consequence of the defendant's act? and (2) are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here? The proximity analysis involved at the first

> stage of the Anns test focuses on factors arising from the relationship between the plaintiff and the defendant. These factors include questions of policy, in the broad sense of that word. If foreseeability and proximity are established at the first stage, a *prima facie* duty of care arises. At the second stage of the Anns test, the question still remains whether there are residual policy considerations outside the relationship of the parties that may negative the imposition of a duty of care. …
>
> (emphasis added)

[72] Ms. Murphy was an employee of Hants Realty. She was a real estate agent and Hants Realty was her employer. In my view, that relationship and the facts before me convince me that Hants Realty owed Ms. Murphy a duty of care to exercise reasonable care when determining whether to report the Patten claim.

[73] I note that a duty of care has been found to exist between an employer and a prospective employee. For example, in *Spinks v. R.*, [1996] 2 F.C.R. 563 the federal government failed to tell an employee who had emigrated from Australia to Canada that he could buy back his Australian pension credits and transfer them into a Canadian public service pension. The government was found liable in negligent misrepresentation.

[74] Numerous decisions of Courts across the country have found that employers owe a duty of care to employees in advising them about group insurance and pension benefits. I refer to *Grams (Estate of) v. Maple Leaf Metal Industries Ltd.*, 2006 ABQB 146 (Alta. Q.B.); *Perlett Estate v. Riverside Health Care Facilities Inc.* (2005, 199 O.A.C. 2601; *Tarailo v. Allied Chemical Canada Ltd.*, (1989) 68 O.R. (2d) (Ont. H.C.); and *Allison v. Noranda Inc.*, 2001 NBCA 67 (N.B.C.A.).

[75] On the facts before me, I find that Hants Realty owed a duty of care to Ms. Murphy to exercise reasonable care in determining whether to report a claim under the AXA policy. Mr. Matthews knew, or could reasonably have known, that the Patten complaint was a possible claim under the policy. It was reasonably foreseeable to Mr. Matthews that failure to report the claim within the term of the policy would cause harm to Ms. Murphy. She did suffer harm by being denied coverage when the complaint was reported after the policy had expired, and consequently by having to incur the cost of legal representation in the Pattens' negligence action.

[76] Hants Realty was the insured under the AXA policy. Mr. Matthews was the person who received the letters from Marsh which emphasized that the policy was "claims made" and underlined the importance of notifying the insurer immediately

on becoming aware of an event which might or could possibly lead to an actual or potential claim. Mr. Matthews could not remember if he heeded Marsh's advice to make his employees aware of the claims reporting requirements. Ms. Murphy said she was not aware of these requirements and that Mr. Matthews told her nothing about the claims reporting process. I accept her evidence.

[77] Further, Mr. Matthews did not, as advised by Marsh, pay "special attention" to the "expiry to insure that all incidents which may give rise to a claim and all actual claims are reported prior to the expiry date of the policy." That is because he did not read the policy at all, either when he received it, or upon being notified of the Patten complaint by Ms. Murphy. Rather, he dismissed the need to report out of hand by telling Ms. Murphy it was a "complaint" and not a "claim" without reference to the policy itself and the definition of "claim" contained in the policy.

[78] Hants Realty breached the duty of care owed to Ms. Murphy. She suffered damages, being the costs of defending herself in the Patten action. Those damages are not remote. The costs fall within the coverage which would have been available to her in the AXA policy. There are no policy reasons to negate the imposition of a duty of care in the circumstances before me.

[79] Before leaving the issue of negligence, there was some evidence of a meeting that Mr. Matthews and Ms. Murphy had with lawyer James Stonehouse, a legal partner of Mr. Rafferty, to respond to the regulatory complaint. This meeting took place in early 2006, approximately six or seven months after Mr. Matthews decided not to report the complaint. Mr. Matthews did not recall if the issue of reporting the claim was discussed with Mr. Stonehouse, but thought that he and Ms. Murphy told him everything about the complaint. The implication was that Mr. Stonehouse did not advise that the complaint should be reported to AXA.

[80] Mr. Stonehouse was not called as a witness. There is no evidence as to whether the reporting of the claim was discussed with Mr. Stonehouse. In the circumstances, the fact that there was such a meeting, without more, does not assist Mr. Matthews. He should have reported the claim when he became aware of the complaint in July, 2005.

Issue 2: Is Mr. Matthews personally liable to Ms. Murphy for not reporting the regulatory complaint to Hants Realty's insurer?

Negligent Misrepresentation

[81] Ms. Murphy claims against Mr. Matthews personally in negligent misrepresentation. In his pre-trial brief, counsel for Mr. Matthews states that being named as a third party to the action was done in bad faith and is "an act of betrayal." He asked that the Court censure Ms. Murphy by dismissing the claim and ordering solicitor and client costs against her.

[82] There is no evidence of bad faith on the part of Ms. Murphy in adding Mr. Matthews as a third party to the main action. No evidence of bad faith arose from either Mr. Matthews' evidence or that of Ms. Murphy.

[83] The elements of the cause of action of negligent misrepresentation are 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 misrepresentations;

(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 (*Queen v. Cognos Inc*., [1993] S.C.J. No. 3 at paragraph 33).

[84] In *Hercules Managements Limited v. Ernst and Young*, [1997] S. C. J. No. 51, the Supreme Court of Canada confirmed that the same two-stage *Anns* approach to duty of care applied to negligent misrepresentation cases; that is, whether there is a sufficiently close relationship between the parties (the defendant) and the person who has suffered the damage (the plaintiff) so that in the reasonable contemplation of the (defendant), carelessness on its part might cause damage to that person. If so, the Court must consider whether there are any considerations which ought to negative or limit the scope of the duty, the class of persons to whom it is owed, or the damages to which a breach of that may give rise.

[85] I previously determined that Mr. Matthews was in a sufficiently close relationship with the plaintiff, his employee, that he should reasonably have known

that carelessness on his part might cause her damage. Again, there are no compelling policy reasons that negate or lessen the scope of the duty in this case.

[86] The second criteria in *Cognos* is that the defendant must have made an untrue, inaccurate, or misleading statement. Mr. Matthews advised Ms. Murphy that there was no need to report the regulatory complaint because the complaint did not amount to a "claim" under the AXA policy. In saying so, Mr. Matthews made an untrue, inaccurate and misleading statement.

[87] The third *Cognos* requirement is that the defendant must have acted negligently in making the misrepresentation. I have previously found that Hants Realty was negligent when Mr. Matthews told Ms. Murphy that there was no need to report the complaint in circumstances where he had never read the policy, including the definition of complaint found in the policy. A reasonable person in the circumstances would have reviewed the policy before making a categorical statement that there was no need to report the complaint. A reasonable person could have also simply picked up the phone and called the insurance broker for advice. Mr. Matthews did neither.

[88] The fourth criteria in *Cognos* is that the plaintiff must have reasonably relied upon the representation. Ms. Murphy's evidence at trial was that she relied upon Mr. Matthews for various kinds of advice throughout the years relating to her practice as a realtor. She respected and trusted him and took advice he gave her. That advice had always stood her in good stead. Mr. Matthews acknowledged as much in cross-examination. Mr. Matthews was her boss for 20 years at the time. She had no dealings with Marsh or AXA Insurance. Rather, it was Mr. Matthews who applied for coverage, received the letters from Marsh describing the nature of the claims-made policy, the reporting obligations and the need to report claims that occurred within the policy period.

[89] I find that it was reasonable for Ms. Murphy to have relied upon Mr. Matthews' representations to her in the circumstances. She followed his advice that there was no need to report the regulatory complaint.

[90] The final requirement of *Cognos*, is that damage must have been incurred. Ms. Murphy suffered the financial loss which was consequential to losing insurance coverage and defence of the Pattens' negligence claim. She also testified as to the emotional toll that defending the lawsuit had on her while she successfully defended the negligent action. She was put in the position of having to fund her defence out of her own pocket. I find that Ms. Murphy's reliance on Mr. Matthews' representations was detrimental.

[91] I note that contributory negligence was not plead. I would not, had contributory negligence been plead, have found Ms. Murphy to have been negligent on the facts as I have found them.

[92] Mr. Matthews strenuously opposes any personal liability on his part for any negligent misrepresentation made to Ms. Murphy concerning the Patten complaint and its reporting. He says that at all times he was acting in his capacity as a director, agent or employee of Hants Realty, and not in his personal capacity. He says that he is protected from personal liability in accordance with the rule in *Salomon v. Salomon Company*, [1897] All ER 33 (HL). That rule is that actions undertaken on behalf of a corporation by its directors are the actions of the corporation, and not of the directors personally.

[93] Mr. Matthews refers to the statements of Finlayson J.A. of the Ontario Court of Appeal in *Scotia McLeod Inc. v. Peoples Jewellers Ltd.* (1996), 26 OR (3d) 481 at 491 (CA) at paragraph 26:

> A corporation may be liable for contracts that its director or officers have caused it to sign, or for representations those officers or directors have made in its name, but this is because a corporation can only operate through human agency, that is, through its so-called "directing mind". Considering that a corporation is an inanimate piece of legal machinery incapable of thought or action, the court can only determine its legal liability by assessing the conduct of those who caused the company to act in the way that it did. <u>This does not mean, however, that if the actions of the directing minds are found wanting, that personal liability will flow through the corporation to those who caused it to act as it did. To hold the directors of Peoples personally liable, there must be some activity on their part that takes them out of the role of directing minds of the corporation.</u>
>
> (emphasis added)

[94] I note that in his brief, counsel for Mr. Matthews does not refer to the first sentence in paragraph 26 which reads as follows:

> None of the conduct alleged against the respondent directors falls within the broad categories I have outlined above.

[95] Those "broad categories" appear in paragraph 25 of the decision and are as follows:

> The decided cases in which employees and officers of companies have been found personally liable for actions ostensibly carried out under a corporate name are fact- specific. In the absence of findings of fraud, deceit, dishonesty or want of

> authority on the part of employees or officers, they are also rare. Those cases in which the corporate veil has been pierced usually involve transactions where the use of the corporate structure was a sham from the outset or was an afterthought to a deal which had gone sour. There is also a considerable body of case-law wherein injured parties to actions for breach of contract have attempted to extend liability to the principals of the company by pleading that the principals were privy to the tort of inducing breach of contract between the company and the plaintiff: see *Ontario Store Fixtures Inc. v. Mmmuffins Inc.* (1989), 70 O.R. (2d) 42 (H.C.J.), and the cases referred to therein. Additionally, there have been attempts by injured parties to attach liability to the principals of failed businesses through insolvency litigation. In every case, however, the facts giving rise to personal liability were specifically pleaded. Absent allegations which fit within the categories described above, officers or employees of limited companies are protected from personal liability unless it can be shown that their actions are themselves tortious or exhibit a separate identity or interest from that of the company so as to make the act or conduct complained of their own.
>
> (emphasis added)

[96] The facts underlying the Court's decision are set out by Finlayson J.A. as follows:

> [1] This appeal deals with whether the issuance of debentures by a public company gave rise to liability on the part of the company's directors. The liability issue is raised by the pleadings in third party proceedings. …
>
> [2] I have taken the following relevant facts from the pleadings. For the purposes of these reasons I have accepted them as true. Montreal Trust Company of Canada ("Montreal Trust") and Credit Lyonnais Canada ("Credit Lyonnais") are the plaintiffs in the main action against the following defendants: ScotiaMcLeod, a firm of underwriters, Wood, a senior vice-President of ScotiaMcLeod, and Davies, Ward and Beck, a firm of solicitors who acted for the plaintiffs and for Peoples Jewellers Limited ("Peoples") at the material times. The action relates to a financing of Peoples.
>
> [3] The plaintiffs were the purchasers of issued senior unsecured debentures of Peoples in the principal amount of $17 million. Peoples was at the material times a Canadian jewellery retailer carrying on business in the Province of Ontario and a major shareholder in Zale Holding Corporation ("Zale Holding"). Zale Holding owned all of the shares of Zale Corporation ("Zale"), a large jewellery retailer carrying on business in the United States of America. Zale in turn owned all the shares of Gordon Jewellery Corporation ("Gordon"), another large U.S. jewellery retailer.
>
> [4] As an inducement to purchasing the debentures pursuant to a debenture purchase agreement, the plaintiffs were provided with an earlier prospectus relating to a share issuance by Peoples. The prospectus was part of an information package containing an interest and asset coverage sheet, audited

> financial statements, unaudited interim statements, a press release concerning current financial results, and Peoples' annual information form.
>
> [5] At the time the plaintiffs purchased the debentures, Peoples was a party to two other agreements pursuant to which it was conditionally liable for certain obligations of Zale Holding and Gordon, collectively referred to as the "Zale liabilities." …
>
> …
>
> [8] The plaintiffs plead that the existence of the Zale liabilities was crucial to their decision to purchase the debentures. They also plead that they relied on the documents in the information package in making this decision. The plaintiffs further plead that the omission of any reference to the Zale liabilities in the information package and in the other information provided to the plaintiffs constitutes an intentional or negligent material misrepresentation on the part of the appellants.
>
> [9] Each of the named respondents in this appeal was a director of Peoples at the material times in issue. Furthermore, at all material times, Gill was the Vice-President, Finance and Administration of Peoples and Irving Gerstein was its President and Chief Executive Officer. At due diligence meetings concerning the issuance of both the preliminary prospectus and the final prospectus relating to the share issue, Gill and Irving Gerstein represented to the appellants that the preliminary prospectus and the documents incorporated therein by reference did not omit any additional information that could be material to Peoples' financial condition. Also at those meetings, both Gill and Irving Gerstein represented directly to the appellants that the Zale liabilities were extremely remote and not material to the financial affairs of Peoples.
>
> (emphasis added)

[97] Finlayson J.A. notes that the plaintiffs in their statement of claim did not allege to have placed any reliance on the actions of the directors as a board or as individual directors. Rather the plaintiffs claimed, as purchasers of the debentures, they relied on the prospectus and the other information in the information package.

[98] In the result, while Finlayson J.A. struck out the third party claim against most of Peoples' directors, on the basis that the claim against them was "not based on any personal involvement on (their) part" and that the "claim against them is founded on a theory of liability which does not exist in law", he allowed the claims in negligent misrepresentation to proceed against Gill and Gerstein. He stated at para. 38:

> Accordingly, I am not disposed to allow the appeal with respect to the directors other than Gill and Irving Gerstein. Gill and Irving Gerstein are placed in a different position by reason of being the two most senior executive officers of Peoples. It is alleged against them that they were directly and personally involved

> in the marketing of the debentures and that they were involved in making certain representations personally which were relied upon by the appellants. The appellants have also made an allegation of negligent misrepresentation against both of them personally.
>
> (emphasis added)

[99] Recent case law has made it clear that directors, officers and employees of corporations can be liable for torts they commit personally even if they are acting in the course of their duties or in accordance with "the best interests of the corporation."

[100] In that regard, I note that in the course of his analysis Finlayson J.A. in *Scotia McLeod Inc*. refers to *Queen v. Cognos* (*supra*) and says that the representations relied upon by the plaintiff in that case were made by Sean Johnston, who was in a junior management position at the time. Representations he made to the plaintiff, as a prospective employee of Cognos, were found to be misleading and made in a negligent manner. Vicarious liability of the corporation for his acts was conceded. Johnston's personal liability was not an issue and he was not sued. Finlayson J.A. notes that a separate action could have been brought against Johnston, referring to the decision of the Supreme Court of Canada in *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299.

[101] In *London Drugs*, the plaintiff had a contract with the defendant company to store an expensive piece of equipment. The storage contract limited the liability of the defendant, both in contract and tort, to $40. Employees of the defendant negligently damaged the equipment while moving it. London sued in contract and tort against the defendant company and in tort against the employees.

[102] The majority of the Supreme Court of Canada affirmed the general rule that individuals are liable for their own torts, and did not recognize a general exception for acts done by employees during the course of performing their duties. The majority held that the employees owed a duty of care in tort, although the contractual limitation clause applied to limit their liability.

[103] In *NBD Bank, Canada v. Dofasco Inc.* (1999), 47 C.C.L.T. (2d) 213 (Ont. C.A.), leave to appeal refused [2000] 1 SCR xv, the bank sued an officer of Algoma Steel for negligent misrepresentations which were relied upon in advancing money to the company. The Ontario Court of Appeal determined that the vice-president of the company was personally liable for negligent statements he made to the bank.

[104] The vice-president, Mr. Melville, argued that he should not be held personally liable for acts that he performed in his role as an officer of the company. He argued that the bank should not be permitted to pierce the corporate veil, and that in his individual capacity he did not owe a duty of care to the bank.

[105] Rosenberg J.A. determined, based upon the *Anns* test, that there was a special relationship between Mr. Melville and the respondent bank. He was the bank's contact at Algoma. He held himself out as capable of making decisions on Algoma's behalf. "He must have known that carelessness on his part would result in a loss by the respondent." Mr. Melville's appeal from the trial judge's decision that he was personally liable in negligent misrepresentation to the bank was dismissed. Mr. Melville's actions were tortious and there was no policy reason not to hold him responsible for those actions.

[106] Counsel for Mr. Matthews relied on a number of cases for the proposition that this Court should not pierce the corporate veil and find Mr. Matthews personally liable to Ms. Murphy. Of course, Mr. Matthews denies that he was negligent but says that if there was negligence, the negligence was that of Hants Realty.

[107] The cases relied on by Mr. Matthews were cases where directors or officers were exonerated from personal liability because the Court found that their actions were within the scope of their employment and were taken to advance the interests of the company, in circumstances where they knew someone would be harmed by their conduct.

[108] For example, in *Craik v. Aetna Life Insurance Company of Canada*, 1995 CarswellOnt 3177 (Gen.Div.) individual corporate defendants moved to strike out claims made against them on the basis that the claims disclosed no reasonable cause of action against them.

[109] Cumming J. notes at paragraph 14 of his decision that there are competing policy considerations when corporate directors are sued individually. He notes that a corporation is separate and distinct from its shareholders, directors and officers, with that principle being fundamental to our legal system. On the other hand, he says that every person should, "of course, answer for his/her tortious acts."

[110] Cumming J. states as follows with respect to times when an officer or director, acting in the best interests of the company, must advise the company to act in breach of contract or engage in tortious conduct:

> The question to determine is whether the director or officer is acting for the corporation or whether s/he is acting in such a way to constitute the act or conduct as his/her own as distinct from that of the corporation. The director or officer owes duties to the corporation of which s/he is an agent. As a director or officer s/he must act in the best interests of the corporation. S/he has the duties flowing from a fiduciary relationship. The obligations concomitant to such duties may dictate that the director or officer on occasion must advise the corporation to break its contractual commitments or engage in conduct that is tortious. …
>
> (emphasis added)

I note that the Ontario Court of Appeal in a very brief endorsement dismissed an appeal from this decision (1997 CarswellOnt 4608).

[111] On the circumstances before this Court, it simply cannot be said that Mr. Matthews' duties owed to Hants Realty dictated that he engage in tortious conduct (the negligent misrepresentation that the complaint did not need to be reported to AXA) or break a contractual commitment to further the corporate interests of Hants Realty. Mr. Matthews' conduct harmed the interests of Hants Realty. Like Ms. Murphy, because the complaint was not reported during the policy period, both Hants Realty and Ms. Murphy lost the benefit of having the cost of their defence to the Pattens' negligence claim covered by AXA.

[112] The reasoning in *Craik v. Aetna* therefore does not assist Mr. Matthews' position that he should not be personally liable for his tortious conduct.

[113] Nor does the decision of the Ontario Court of Justice in *Islington Village Inc. v. Canadian Imperial Bank of Commerce*, 1992 CarswellOnt 368 assist Mr. Matthews. This was a claim brought against employees of the defendant bank. They moved to strike the claims against them. MacDonald J. struck the claims on the basis that the pleadings did not allege that these defendants did anything other than act in the interests of the bank, stating as follows at paragraph 8:

> Briefly the plaintiff would have to show that the employees acted outside the scope of their authority; that they were not acting in the best interests of the corporate defendant and that their acts were done for improper purposes. …In any event it is clear that what emerges from this case [*Ontario Store Fixtures Inc. v. Mmmuffins Inc.* (1989), 70 O.R. (2d) 42 (O.H.C.)] is that to support a claim against the officers and directors of a corporation for breach of contract the plaintiff must plead a specific act by the officer or director which is independent of the alleged breach of the corporate defendant. In the instant case the improper actions alleged by the plaintiff against the individual defendants all occurred under the umbrella of the employees' function as employees of the Bank, who was the party to the agreement between the Bank and Islington Village. There is

> nothing in the statement of claim that satisfies me that there is a proper allegation of an independent breach by the personal defendants.
>
> (emphasis added)

[114] The plaintiff had not plead that the individual defendants were relied upon by the plaintiff to exercise care and that they possessed a special skill or knowledge, and voluntarily undertook to exercise that skill.

[115] Contrary to the facts in *Islington Village*, in this case, Mr. Matthews did have special knowledge or skill which Ms. Murphy relied upon. He knew, or should have known, that the complaint was a claim under the policy.

[116] The defendant's counsel also referred the Court to the decision of the Ontario Superior Court of Justice in *Lussier v. Windsor-Essex Catholic District School Board* 1999 CarswellOnt 3632. In this claim for constructive dismissal, the plaintiff claimed against the trustees of the school board for defamation and conspiracy to terminate his employment.

[117] The Court relied upon the decision in *ScotiaMcLeod Inc. v. Peoples Jewellers Ltd.* (1996), 26 O.R. (3d) (C.A.) and the decision of the Ontario Court of Appeal in *Normart Management Ltd. v. West Hill Redevelopment Co.* (1998), 37 O.R. (3d) 97 (OCA), stating that "a party advancing the claim must set out the facts which point to specific tortious acts which are independent of any breach of contract already alleged."

[118] Unlike the facts before the Court in *Lussier*, in the within case, the tortious act is the negligent misrepresentation about the need to report, that Ms. Murphy relied upon to her detriment. That tortious conduct is independent from Hants Realty's breach of contract.

[119] Another case relied upon by Mr. Matthews is *Pearl v. Pacific Enercon Inc.* 1985 CarswellBC 784. This is another constructive dismissal case where the plaintiff alleged that the president of the defendant company had negligently induced the breach of his employment contract. The Court found that the officer was acting purely in furtherance of the company's bests interests and that the plaintiff's dismissal arose from *bona fide* actions of the company that negatively impacted the plaintiff. On those facts the Court determined that there was no personal liability on the part of the president of the company.

[120] Mr. Matthews also relied upon *Syrtash v. Provident Life & Accident Insurance Co.* 1996 CarswellOnt 1845, a decision of the Ontario Court of Justice.

In this case, the plaintiff's disability payments had been terminated on the basis that he failed to disclose a pre-existing medical condition in his application to another insurance company. The plaintiff sued in breach of contract against the insurer and claimed against employees of the company in negligence, breach of fiduciary duty and breach of good faith. The defendant employees moved to have the claims against them struck.

[121] The Court noted that there were no allegations that the plaintiff relied on the individual defendants to exercise care, that the defendants possessed a special skill or knowledge, or that they engaged in fraudulent misrepresentation. White J. struck the claims. He commented that "[W]here a plaintiff with ingenuity dressed the action up to make it look like a tort case when it is clear that it is only a case for breach of contract, the claims against individual defendants should be struck out" (para. 9).

[122] The decisions relied upon by Mr. Matthews in *Schouls v. Canadian Meat Processing Corporation* 1983 CarswellOnt 751, *Speck v. Greater Niagara General Hospital* 1983 CarswellOnt 755 and *Ten-Ichi Japanese Restaurant Inc. v. Fred T. Reisman & Associates Ltd.*, [1996] O.J. No. 3445 are also unhelpful to him on the facts before this Court.

[123] In *Schouls*, the director of the defendant company was alleged to have enticed the plaintiff to take up employment with the company and then induced the company to terminate his employment three months later. The Court determined that the plaintiff's claim against the individual director should be struck because there was no contractual relationship between the director and the plaintiff and the director's actions, although wrongful, were carried out in his capacity as director on behalf of the company in furtherance of its interests.

[124] In *Speck v. Greater Niagara General Hospital*, the plaintiff sued in wrongful dismissal. She claimed against several employees of the hospital whom she claimed had caused her mental distress by their actions. Although her claim succeeded against the hospital, the claims against the individual defendants were dismissed since each had acted in good faith, in the best interests of the hospital in their dealings with the plaintiff. They were not held to be personally liable to her.

[125] Finally, in *Ten-Ichi Japanese Restaurant Inc. v. Fred T. Reisman & Associates Ltd.* the defendant landlord terminated the plaintiff's lease. The plaintiff brought an action against individual directors of the defendant, claiming that they were individually liable for various torts. The Court struck these claims

because there was a lack of allegations of the kind necessary to attract personal liability of directors.

[126] In summary, the case law shows that while corporate officers and directors are often found not to be personally liable for actions they took on behalf of the corporation in furtherance of the interests of the company, that is an exception to the general rule that individuals are responsible for their own tortious conduct. That exception, too, has an exception, and that is where the tortious conduct of officers and directors is relied upon personally by the plaintiff to his or her detriment, in circumstances where the director has special skill or knowledge.

[127] Those were the circumstances which grounded personal liability for two of the corporate directors in *ScotiaMcLeod v. Peoples Jewellers* (*supra*), and those are the circumstances which ground the personal liability of Mr. Matthews in this case. Mr. Matthews was not furthering the interests of Hants Realty in not reporting the complaint to AXA. He in fact harmed the interests of Hants Realty, as the company, as well as Ms. Murphy, lost the coverage they otherwise would have had.

[128] Ms. Murphy did not rely upon the advice of an inanimate corporate entity, Hants Realty; she relied upon her long-time employer and time-to-time advisor on various matters, Mr. Matthews. She knew he had the policy of insurance and knew he had been an insurer broker.

[129] I find Mr. Matthews personally liable to Ms. Murphy in negligent misrepresentation.

Breach of Fiduciary Duty

[130] Ms. Murphy claims that Mr. Matthews and Hants Realty breached fiduciary duties owed to her by failing to notify AXA Insurance of the complaint against her within the time period permitted under the policy.

[131] A fiduciary obligation is a very high obligation of loyalty and requires the fiduciary to prefer the other party's interests to his own. As noted in Waters on Law of Trust in Canada (Third Edition, 2005 at page 885):

> The importance of this convergence of opinion is to re-establish the requirement that a fiduciary obligation generally rests on a voluntary relinquishment of self-interest by the fiduciary. The obligation cannot be unilaterally imposed by the expectations or by the reliance of the beneficiary; trust cannot be reposed without the consent of the trusted.

[132] I have determined that Hants Realty and Mr. Matthews each owed a duty of care to Ms. Murphy. However, it is a different matter to determine that Mr. Matthews owed Ms. Murphy a duty that would put her interests above his own. The difference between the owing of a duty of care, and the owing of a fiduciary duty was dealt with by the Nova Scotia Court of Appeal per Cromwell J.A. (as he then was) in *Barrett v. Reynolds* (1998), 170 N.S.R. (2d) 201:

> [196] The differences between these two duties may be regarded by some as overly subtle or as legal "technicalities". I do not agree. There are fundamental differences between a duty to take reasonable care and a duty of utmost good faith. LaForest, J. [in *Hodgkinson v. Simms*, 1994 CanLII 70 (SCC), [1994] 3 S.C.R. 377 at p. 405] summarized these differences as follows:
>
> > …the fiduciary duty is different in important respects from the ordinary duty of care. In *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534, at pp. 571-73, I traced the history of the common law claim of negligent misrepresentation from its origin in the equitable doctrine of fiduciary responsibility; see also *Nocton v. Lord Ashburton*, [1914] A.C. 932, at pp. 968-971, per Lord Shaw of Dunfermline. However, while both negligent misrepresentation and breach of fiduciary duty arise in reliance-based relationships, the presence of loyalty, trust, and confidence distinguishes the fiduciary relationship from a relationship that simply gives rise to tortious liability. Thus, while a fiduciary obligation carries with it a duty of skill and competence, the special elements of trust, loyalty, and confidentiality that obtain in a fiduciary relationship give rise to a corresponding duty of loyalty.
>
> [197] As LaForest, J. put it in *Hodgkinson*, these differences must be attended to so "… civil liability will be commensurate with civil responsibility": at p. 405.
>
> [198] There is nothing complicated or technical about what the duty of loyalty requires. The fiduciary must act in the client's interests (or in their mutual interest) to the exclusion of his or her own interests. One party has the obligation to act for the benefit of another: *Hodgkinson*, *supra*, at pp. 407 – 408.

[133] I find that Mr. Matthews and Hants Realty were not obligated in law to act to the exclusion of their own interests. In fact, by their actions, they injured their own interests. On the facts before me, I decline to find that either Hants Realty or Mr. Matthews owed Ms. Murphy a fiduciary duty, or that either Hants Realty or Mr. Matthews breached such a duty.

Conclusion

[134] As noted at the outset of this decision, the parties have agreed that Ms. Murphy's legal costs and disbursements to defend the Pattens' action, on a solicitor-client basis, amount to $75,711.23.

[135] Based on my decisions outlined above, Hants Realty is liable to Ms. Murphy in breach of contract and negligence for damages of $75,711.23. Mr. Matthews is personally liable to Ms. Matthews in negligent misrepresentation for damages of $75,711.23. The result is that Hants Realty and Mr. Matthews are jointly and severally liable to Ms. Murphy for damages in the amount of $75,711.23 plus pre-judgment interest in the amount of $6,533.27.

[136] I note that Mr. Rafferty provided the Court with statement of accounts provided by Burchell MacDougall to Ms. Murphy covering the period June 8, 2010 to March 2, 2016. He has calculated pre-judgment interest at 4% to the date of trial on $75,711.23 as being $6,533.27. I am prepared to award that amount.

[137] Ms. Murphy is also entitled to costs and disbursements. If the parties cannot agree on the quantum of costs and disbursements, I will receive written submissions on same within thirty days of this decision.

Smith, J.