SUPREME COURT OF NOVA SCOTIA
Citation: *Fadelle v. Samuelsen*, 2020 NSSC 164

Date: 20200519
Docket: Tru. No. 416820
Registry: Truro

Between:

Tamala Fadelle

Plaintiff

v.

Ove Samuelsen

Defendant

DECISION

Judge:	The Honourable Justice Jeffrey R. Hunt
Heard:	January 27, 28 and 30, 2020, in Truro, Nova Scotia
Final Written Submissions:	March 5, 2020
Decision:	May 19, 2020
Counsel:	John T. Rafferty, Q.C., Solicitor for the Plaintiff Colin D. Bryson, Q.C., Solicitor for the Defendant

By the Court:

Introduction

[1] Tamala Fadelle lost her home in a house fire on September 19, 2009. The property was uninsured on the date of the loss. At issue in this proceeding is who is responsible for the loss stemming from this lack of insurance. The parties each say the other is at fault.

[2] In the spring and summer of 2009, the Defendant had acted as Ms. Fadelle's lawyer in handling a mortgage refinancing of the property. He admits he erroneously allowed the mortgage to be placed and funds released without a confirmation of insurance being in place.

[3] Ms. Fadelle says Mr. Samuelsen's office became aware of the insurance problem prior to the fire but failed to advise her or the mortgage company. She asserts the Defendant is liable in damages for her significant losses.

[4] The Defendant says that if he failed to meet any legal obligations, these were duties owed to the lender only, and not the Plaintiff. He argues that she alone had the obligation to secure insurance and failed to do so. He says the evidence indicates Ms. Fadelle was aware the property was uninsured. Indeed,

it had been uninsured for more than a year before his retainer - a fact which Ms. Fadelle acknowledges.

Structure of these Reasons

[5] I will begin by setting out a more detailed overview of the positions of the parties followed by a summary of evidence. After making necessary factual findings, I will review the legal principles necessary to determine issues of liability and contributory negligence. Regardless of the determination on liability, I will assess the Plaintiff's damages claim.

Position of the Plaintiff

[6] Ms. Fadelle says the Defendant failed in his duty to her once his office became aware there was no fire insurance in place on the Nappan property. While she acknowledges knowing the property had been uninsured in the past, she points to evidence which made it reasonable for her to have believed insurance was in place when the mortgage was placed. She had been dealing with a broker. She produced evidence that she had directed the broker to secure a policy and instructed them to use a pre-authorized payment method she had previously employed. She supplied information to Mr. Samuelsen's office about the broker she was using.

[7] Mr. Samuelsen subsequently wrote her, confirming the refinancing transaction was complete and releasing funds to her. She says she believed this meant she was protected by insurance. Based on her prior experience, she assumed insurance had to be in place before funds could be released. Given her dealings with the insurance agency, she says her assumption was a reasonable one. If Mr. Samuelsen's office had advised her of the true insurance situation, she would have secured coverage and been protected from the loss that followed.

Position of the Defendant

[8] The Defendant acknowledges his office made an error in allowing mortgage funds to be advanced without confirmation of insurance in place. He argues, however, that this has not been the cause of any loss to the Plaintiff. The Defendant submits that Ms. Fadelle was well aware of the need for home insurance and had been courting this risk for some time. She alone had the duty to secure coverage and failed to do so.

[9] The Defendant makes three central arguments to support his position that no liability exists:

1. Ms. Fadelle was aware that insurance was not in place and she knowingly accepted that risk;

2. The home was not insurable in any event. The last insurer had cancelled the coverage due to upgrading issues which Ms. Fadelle failed to remedy;
3. Any failings on his part only make him liable for losses arising from claims against Ms. Fadelle by her bank (such as foreclosure costs), and there have been no such losses.

[10] As to damages, the Defendant argues the losses claimed by the Plaintiff do not flow from any breach of a duty of care owed to her. Additionally, he says the quantum of loss sought by her is excessive and not proved. He raises issues of contributory negligence.

Issues

1. What legal duties, if any, did the Defendant owe to the Plaintiff in tort or contract?
2. Was there a breach of the duty of care?
3. If the answer to question two is yes, did the breach cause loss or damage to the Plaintiff that was foreseeable?
4. Was the Plaintiff contributorily negligent to any degree?
5. Regardless of the determination on liability, what damages, if any, have been proven by the Plaintiff?

Evidence

[11] The testimony in this case was not voluminous. The Plaintiff presented one lay witness and two experts. The Defence called three witnesses.

[12] It is not my intention here to restate every single component of the evidence. I intend to concentrate on those portions necessary to give context to the Court's factual findings and conclusions. I have, however, assessed and considered all the testimony and evidence in making the Court's factual determinations.

Plaintiff Witnesses

Tamala Fadelle

[13] The Plaintiff was the first witness called in the trial. She indicated her educational background included a B.Sc. (Pharmacy) in 1987 and, more recently, an Executive MBA from Saint Mary's University. In the past, she practiced as a pharmacist and owned a community pharmacy in River Hebert, Nova Scotia. She subsequently gave up practicing. Most recently she was employed as an account manager for a business in Alberta. She is presently on long term disability.

[14] She testified about her situation in 2008 - 2009. At that time, she was in a dispute with her professional regulator and was also looking to finalize certain financial arrangements with her estranged husband, from whom she was in the process of divorcing. She required funds for both these purposes. She owned

two parcels of real estate in Sackville, New Brunswick, as well as the subject property in Nappan, Cumberland County. At that time, the Nappan property was serving as her residence where she was living with her daughters. She decided to refinance all three properties in order to free up cash. She opted to use TD Canada Trust as the lender. To carry out the required legal work she retained Ove Samuelsen, whose law office was in Sackville, New Brunswick.

[15] Ms. Fadelle had owned the Nappan property for some time. It had an existing mortgage with CIBC which was to be paid out as part of the refinance with TD Canada Trust.

[16] She testified to having some past experience with what lenders require in a refinancing. In her experience, banks require a certificate of clear title to the property, confirmation that the parcel is migrated, and proof the structure is insured. As evidence of this, she produced a letter she received in a prior mortgage transaction where a different lawyer wrote to her setting out the requirement for proof of insurance before mortgage funds could be advanced.

[17] Ms. Fadelle was directed to an April 15, 2009 commitment letter signed by her with TD Canada Trust. This letter referenced her obligation as property

owner to have the property insured. She acknowledged she was aware insurance was required before the refinancing could be closed.

[18] She was questioned about her efforts to secure insurance for all three properties including Nappan. She testified that, at one time, she was working with an agency in Parrsboro, Cumberland County but subsequently called Sears Insurance Agency in Sackville, New Brunswick. At Sears Insurance she worked with agent Roxanne Ward.

[19] She testified Ms. Ward helped her with any required applications and advised her on the quotes obtained. The quotes for the two Sackville, New Brunswick properties were accepted by Ms. Fadelle on May 27, 2009. The application documents for those properties were in evidence. These policies were put in place without complication.

[20] Ms. Fadelle testified she completed an application form respecting Nappan. It does not appear in the evidence. She did receive a detailed coverage quote for the Nappan property which was in evidence. It included particulars of coverage limits and proposed endorsements.

[21] Ms. Fadelle testified that she believed the premium attached to the quote obtained for the Nappan property was too high. She produced a document

which she testified she had faxed to Roxanne Ward at Sears Insurance on May 25, 2009. It read as follows:

> Please find any company that will insure Nappan for less than 1250 (previous fax). Note:
>
> Use highest deductible
>
> Use replacement cost as per conversation and all other specs we talked about.
>
> Any questions call me at 902-251-2711 otherwise just do a PAP to cheque.

[22] The Defendant questions whether this fax was ever actually sent. He points out that no fax transmittal sheet accompanies the document. The Plaintiff testified that the fax was sent. She states this explains why she felt it was reasonable to believe insurance was in place when she received confirmation from Mr. Samuelsen's office that the mortgage had gone through. There is no doubt she did use faxes to communicate with Sears. No representative from Sears Insurance was called.

[23] The Plaintiff had previously arranged pre-authorized payments in the way she described. In evidence were the materials she had previously forwarded to Sears Insurance which allowed payments to be set up for the two New Brunswick properties.

[24] The fact that securing insurance on the Nappan property might be a challenge was not a surprise to Ms. Fadelle. She testified she had placed insurance on it in the past, but coverage was ultimately suspended when she failed to satisfy requests for upgrades to the century old farmhouse in such matters as the chimney or wood heating issues.

[25] She testified she had complied with a number of upgrade requests for such things as moving the oil tank outside (and eventually replacing it) and upgrading the basement. Ultimately, however, she felt the demands were never-ending. She became discouraged and says she let the coverage lapse. She allowed this to occur despite the fact the property was then mortgaged to CIBC. This meant Ms. Fadelle was exposed to the mortgage debt as well as to the loss of her property value as well.

[26] The Plaintiff was questioned about an Amherst Daily News story, published in the days following the fire. In the story, a fire department official is quoted as saying that he learned from the homeowner that the property was uninsured. Ms. Fadelle acknowledges she did tell an official at the scene, later on the day of the fire, that the structure was uninsured. She explained that she established this by looking at banking information she was able to obtain on her phone and secondarily by sending her ex-partner to her pharmacy to look for information

in her files. The information she learned led her to realize no premiums were being withdrawn for insurance. The Defendant argued the Plaintiff knew there was no insurance and that it was implausible that, in all the chaos of that day, she would undertake a search for this information. She maintained under questioning that she had done so.

[27] The Plaintiff was asked to explain how she was able to justify allowing insurance coverage to lapse in 2008. By way of attempted explanation, she indicated the CIBC mortgage was much smaller prior to the refinance. She stated she knew she was taking a chance but could have handled this loss. She contrasted this with the higher debt to which she was exposed under the newly refinanced TD Canada Trust mortgage.

[28] As noted above, Ms. Fadelle acknowledged that, after May 25, 2009, she did not hear from Sears Insurance again on the issue of coverage for the Nappan property. When challenged on the fact that no premiums would have been charged to her or deducted from her bank account after the refinancing, she testified she been not been paying attention to issues such as this over the summer of 2009. She said she "took the summer off" and worked on her relationship with her daughters which had been suffering due to her work schedule. She had also lost her father at the end of 2008 and this was still

affecting her. When asked if she would have looked at or opened mail over the summer of 2009, she said she doubted she would have.

[29] She believes that, at some point in the summer of 2009, she received a call from Ove Samuelsen's legal assistant, Ms. Sheppard. Most of her dealings at the law firm had been with Ms. Sheppard. Ms. Fadelle testified she was asked to confirm again who her insurance was with. She indicated it was with Sears Insurance. Ms. Sheppard, in her evidence testified, she believed this call took place very close to the date of the fire. Ms. Fadelle believes it to have been earlier.

[30] On September 19, 2009 the residence was struck by the fire which largely destroyed the home. It could have been an even greater tragedy as most of the occupants were sleeping at the time. Luckily all escaped.

[31] Ms. Fadelle was asked what she would have done had she had been told by the Defendant there was no insurance coverage on the Nappan property. She testified she would have done whatever necessary to obtain coverage.

[32] Ms. Fadelle was asked how the Court could be confident she would have secured insurance in 2009 when she had not felt the need to do so in 2008 and into early 2009. She stated there were two reasons. First, in 2009, she had

signed a commitment to TD Canada Trust to carry insurance and this meant something to her. Second, the amount she owed on the property in 2008 was much lower. Her evidence was that it would have been "no problem" if she had been required to pay the smaller amount. After the refinance, however, the amount at risk was much greater and she could not have handled that loss.

[33] Ms. Fadelle maintained the reason she let the insurance go in 2008 was because the requirements of the insurance company were too demanding and seemingly unending. Yet, when asked if she would have done those things if asked by an insurer in 2009, she gave the impression these could have been accomplished very simply and quickly. There is an inconsistency in these positions.

[34] Ms. Fadelle was guarded as a witness. The passage of time has obviously impacted her ability to offer some details including portions of the timeline. This is not surprising in all the circumstances.

[35] The lapse of time, and subsequent loss of ability to offer a detailed recollection in some respects, leads the Court to exercise additional care in weighing her evidence.

Plaintiff's Expert – Elizabeth Haldane

[36] Elizabeth Haldane was retained as an expert witness on behalf of the Plaintiff. She is a senior and experienced practitioner in real estate law. Her credentials were accepted by the Defence. She was qualified to give expert opinion evidence on issues of real estate practice and law.

[37] Ms. Haldane's opinion was sought on the following issues:

> Whether a lawyer has a duty to his client to ensure that the client has placed insurance on property which she is using for mortgage financing and, as a corollary to that, whether a lawyer who becomes aware that his client is under the misconception that there is insurance on the property when in fact there isn't, should take immediate steps to advise the client that the client is wrong and needs to arrange insurance.

[38] She outlined the factual assumptions on which her opinion was based. In summary these were as follows:

- The Plaintiff retained the Defendant to act on her behalf in the mortgage refinancing of her residential property.
- Financing was obtained from TD Canada Trust.
- The mortgage in question contained expected terms respecting the need for valid property insurance and making it a breach of the mortgage to fail to have it in place.
- In this case, the Defendant lawyer was acting for both sides of the transaction. He was required to make a final report to the bank which included details of the property insurance.
- The Defendant's assistant contacted the Plaintiff to obtain insurance particulars. The Plaintiff told her the property was insured through Sears Insurance Agency. The assistant contacted the agency to get confirmation of insurance and was told there was in fact no insurance on the property through Sears Insurance.

- Neither the assistant nor the lawyer contacted the Plaintiff to share this information received from the agency.
- A few days later the house on the property secured by the mortgage was destroyed by fire. No insurance was in place at the time.
- The mortgage was in place and funds advanced without insurance having been arranged.

[39] The opinion of Ms. Haldane was directed solely to the duties, if any, between the lawyer and the homeowner as opposed to lawyer and lender. Ms. Haldane explored what she felt to be the sources of the duty between the lawyer and homeowner. This included the *Legal Profession Act*, SNS 2004, s.28 and elements of the *Legal Ethics and Professional Conduct Code* created by the Nova Scotia Barristers Society and in place at the relevant time.

[40] The report sets out Ms. Haldane's opinion that the Defendant failed to meet the requisite standard of care owed to his client. Ms. Haldane's conclusion is that once a law office has knowledge that the insurance agency says no coverage is in place, a duty to the homeowner is triggered. At its core, her opinion is as follows:

> Acting in the client's interest, therefore, the lawyer should not allow the client to go forward with the mortgage financing without insurance in place because he should know that if he does so, that client is immediately in breach of her obligation under the mortgage security and she is running the risk of financial hardship if anything happens to the property charged.
>
> It follows from this that if the reasonably competent lawyer discovers that the client believes she has complied with her obligation to arrange insurance when in

> fact she has not, he should advise her as soon as possible of the default so that she can take immediate steps to correct the problem.

[41] The report from Ms. Haldane expands on her view of the obligations of the solicitor in these circumstances. She states that anytime a lawyer (or the assistant who is their agent) learns there is no insurance, there exists a duty to advise the client of the risks to which he or she is exposed. A failure to have insurance would be a violation of the mortgage and would open the owner to serious consequences. Ms. Haldane states that, even where the client is aware of the lack of coverage, the advice should be given. In the event the client mistakenly believes insurance to be in place, the lawyer is under even more of an onus to act.

[42] The report expresses the view that this obligation is enhanced even further where the mortgage funding has already taken place and the homeowner, therefore, already exposed.

[43] Ms. Haldane was not cross-examined by the Defence. They did, however, challenge her report and conclusions, arguing the factual underpinnings and presumptions of the report were not proved by the Plaintiff.

[44] With respect to the report advanced by Ms. Haldane, she is obviously eminently qualified in her field. As with all expert reports, its application is dependant on the ability of the party advancing it to prove the underlying facts and assumptions. There is no doubt, however, that the report presents an analysis that exposes the Defendant to a finding that he breached the standard of care. He argues in response that, even if such a finding is made, there are issues of causation that undermine the Plaintiff's claim.

Plaintiff's Expert - Michelle Manuel

[45] Michelle Manuel is a clinical and forensic psychologist practicing in Dieppe, New Brunswick. She was presented as an expert witness on behalf of the Plaintiff. She was qualified as an expert by consent. The Plaintiff produced in evidence a series of three reports on Ms. Fadelle's mental state written by Ms. Manuel. The first two of these were originally created in connection with Tamala Fadelle's long term disability claim involving her employer in Alberta.

[46] In 2018, Ms. Manuel was asked to produce a medical-legal report providing her opinion on the Plaintiff's mental state in 2009, at the time of her dealings with Ove Samuelsen and home insurance for the Nappan residence.

[47] Ms. Manuel's 2018 report states that her opinion is limited by a number of factors. First, she notes that she has no access to Ms. Fadelle's health records from 2008-2009 and she was not treating her at that time. Second, Ms. Manuel states that she has no source of information, outside of her patient herself, for the proposition that Ms. Fadelle's mental health declined significantly in 2008-2009. These factors limit the expert's ability to be declarative about the events of that time.

[48] The 2018 report of Ms. Manuel does include an overview of Ms. Fadelle's mental health complaints, which Ms. Manuel believes could have impacted the Plaintiff's ability to effectively arrange and follow up on her property insurance issues in 2009.

[49] This opinion appears to be based largely on Ms. Fadelle's self-reports of her mental health deterioration and functional impairments in that time frame. Ms. Manuel does say that she believes Ms. Fadelle's reports to be credible.

[50] The Defendant challenges the usefulness of Ms. Manuel's opinion. It is highly dependant on self-reports from the Plaintiff, unsupported by contemporaneous medical documentation.

[51] Ms. Manuel is clearly highly qualified in her field. Ultimately, however, the usefulness of the report is limited by factors outside her control. The lack of medical records on which to ground the opinion, and its dependence on self-reports about events 10 years in the past, means its value is limited.

Defence Witnesses

Sandra Sheppard

[52] Ms. Sheppard is Mr. Samuelsen's long time legal assistant. She indicated she has been in that role doing largely real estate and estate work for over 40 years. Ms. Sheppard estimates that 90% of the work in the Samuelsen law office is real estate based.

[53] She handled much of the day to day transactional work on the Plaintiff's refinancing file for the three properties, including the residence in Nappan. She explained the scope of the work to be undertaken and the steps followed by her as legal assistant.

[54] Her understanding was that Ms. Fadelle was seeking to pay out her existing CIBC mortgage on the Nappan property and refinance at a higher amount with TD Canada Trust.

[55] With respect to the insurance issue, Ms. Sheppard acknowledged that as there was an existing CIBC mortgage on the property, she assumed the property would have had insurance already in place. This was a misplaced assumption.

[56] Ms. Sheppard was questioned at length with respect to the documents in the Samuelsen file. She identified materials including the mortgage instructions from TD Canada Trust. These clearly contained requirements around confirmation of insurance. She identified the letter from Sears Insurance Agency dated May 27, 2009 which confirmed coverage only on the two properties in Sackville, NB. It contained no reference to Nappan. Ms. Sheppard acknowledged that she mistakenly assumed the letter pertained to all three properties being refinanced. She does not recall if she read the entire letter. Based on her mistaken belief, the Samuelsen office erroneously allowed funds to be disbursed with respect to the Nappan refinancing.

[57] Under questioning, Ms. Sheppard acknowledged that it was unlikely Mr. Samuelsen was present for the June 3, 2009 transaction closing. Her belief is that only she and Ms. Fadelle were likely to have been present. She further acknowledged there was a practice in the Samuelsen office of having Mr.

Samuelsen pre-sign a number of trust cheques in order to facilitate the closing of transactions at which he could not be present.

[58] Ms. Sheppard was questioned as to when she first realized she did not have the necessary confirmation of fire insurance. She did not have a detailed recollection of the timing. She was shown the multiple letters from TD Canada Trust making requests for the mortgage reporting letter. When eventually completed, it revealed the lack of coverage. She testified that the normal practice of the office, at that time, was to complete mortgage reporting letters such as this in the early fall, once the office slowed down from the pre-September rush.

[59] She assumes that, as she worked on the reporting letter in this case, she would have realized she did not have the necessary insurance confirmation in the file. Her normal practice would have been to call the client seeking the details. She believes she did so and was told by Ms. Fadelle that coverage was through Sears Insurance. Her next step would have been to call Sears Insurance seeking a confirming letter.

[60] Ms. Sheppard cannot recall exactly when that contact with Ms. Fadelle or Sears Insurance was made. This was most likely in mid-September 2009. She

does recall however that, when she called Sears, she was told there was no coverage on the Nappan residence.

[61] Ms. Sheppard knows she did not call Ms. Fadelle right away once she had this information. She very likely felt she had to speak to Mr. Samuelsen about this development. She does not recall details of when exactly she raised it with Mr. Samuelsen.

[62] One of the only dates she can be sure of is the fact that Ms. Fadelle called her on the Monday after the fire to advise what had happened. This was Monday, September 21. She was directed to the Plaintiff's Statement of Claim which states that the call from Ms. Sheppard to Ms. Fadelle, seeking information about insurance coverage, had occurred on September 16, three days before the fire. Ms. Sheppard testified she could not be certain of this date and the reference in the Statement of Claim did not refresh her recollection on this point.

[63] In cross-examination an issue arose as to the date on the reporting letter to TD Canada Trust. Ms. Sheppard acknowledged that the date on this letter, which reported there was no insurance on the mortgaged property, was July 15, 2009. It was put to Ms. Sheppard that this revealed the Samuelsen law office

was aware of the lack of insurance for much longer than she acknowledged in her direct evidence.

[64] Ms. Sheppard said this was not the case. She stated that the practice in the office was to back-date the mortgage reporting letter to the date of the filing of the mortgage. This meant the letter could be back dated by many weeks or even months. She explained that she believed this was justified because it was the solicitor's way of saying that the bank had a first charge as of the date on the reporting letter.

[65] In his subsequent testimony, Mr. Samuelsen gave his own evidence on the issue of the mortgage reporting letter. His evidence demonstrated confusion about this back-dating practice. He seemed to contradict Ms. Sheppard to some degree. At one point he stated his belief that he had signed the reporting letter on July 15. Subsequently he appeared to move away from this.

[66] I conclude this inconsistency in testimony between Ms. Sheppard and Mr. Samuelsen was based in genuine confusion, as opposed to any intent to mislead the Court. But while there was no intent to mislead, there is no question the variations in the evidence on this point must lead the Court to view their recollections with caution.

[67] My impression of the evidence of Ms. Sheppard was that she absolutely was doing her best to provide truthful evidence. She made a number of admissions which were obviously embarrassing to her. She is someone who takes pride in her work and knows that various elements of this file reveal error and misjudgments. She did not attempt to cover up or conceal these aspects of her evidence.

[68] By her own acknowledgment, however, Ms. Sheppard's recollection was hampered by the significant passage of time since these events. Her recall, as to the timing of various events, is poor. She cannot recall when she first learned that the Nappan property was uninsured or when she would have shared this information with Mr. Samuelsen. This later date is less critical given that, in this context, Ms. Sheppard's knowledge is imputed to Mr. Samuelsen.

Jim O'Neil

[69] Jim O'Neil was called as part of the defence case. He has been a practicing lawyer in Amherst, Cumberland County for approximately 43 years. He works primarily in the fields of criminal and family law with a smaller proportion of civil work.

[70] He came to know Tamala Fadelle when he represented her then husband in an unrelated matter. Mr. O'Neil became friends with Ms. Fadelle following that representation and when she experienced the fire in September 2009, he began to offer her some unpaid legal assistance. Despite the fact he was unpaid, he did not question he was acting as her lawyer with all the usual duties and responsibilities.

[71] Mr. O'Neil testified that his understanding in 2009 was Ms. Fadelle blamed an electrical contractor for the fire. This contractor was insured by Wawanesa Insurance. Mr. O'Neil was assisting Ms. Fadelle in dealing with the adjuster at Wawanesa, as the company investigated the loss and the potential exposure of their insured.

[72] Mr. O'Neil stated he was concerned about Ms. Fadelle dealing directly with the adjuster. He began to act as a go-between. He believed this to be the better practice in such cases. He became aware Wawanesa was going to have an expert visit the scene of the fire. He learned that the insurer wanted a statement from Ms. Fadelle in advance of the site visit. The contents of this statement became an issue of importance and disagreement in the present case.

[73] Mr. O'Neil prepared the unsigned statement of Ms. Fadelle, in draft, although it was not marked as such, and faxed it to the adjuster at Wawanesa.

[74] This unsigned document was introduced in evidence and identified by Mr. O'Neil. He indicated it ought to have been stamped as a "draft". The document largely addressed itself to the potential liability of the electrical contractor. It did, however, contain the following passage:

> 6 There was no fire insurance on the house because it had been cancelled some time ago due to a wood-oil combination stove. I had done renovations to satisfy the insurer but gave up on [sic] frustration. I had no insurance for a number of years. I was in process of attempting to arrange fire insurance when the fire happened.

[75] Mr. O'Neil was asked about this reference. He emphasized that the document was done in a rushed fashion. He was not thinking about insurance issues, he testified. He discussed the circumstances under which the document was prepared. He indicated the adjuster had discussed taking a statement from Ms. Fadelle during the expert's site visit in December 2009. This concerned Mr. O'Neil as he did not believe he could be at the site visit due to other commitments. He did not want Ms. Fadelle giving a statement in those circumstances. For this reason, he believes he generated the document and sent it to the adjuster in an effort to head off the request and avoid the need for an interview at the scene. Mr. O'Neil also believed the two sides were intending

to conduct a more formal sit-down interview at his office at some point subsequent to the site visit.

[76] With respect to the source of the information found in the statement, Mr. O'Neil confirmed this would have come from several discussions with Ms. Fadelle. He believed these may have been telephone discussions, possibly while he was driving, as he was frequently on the road at that time. He confirmed he was attempting to accurately capture what he had learned from Ms. Fadelle, but he now is concerned that he failed to do so. He noted that the insurance issue was extraneous to what he was focusing on at that time.

[77] Counsel explored with Mr. O'Neil what he did with the statement after its creation. He agreed it was faxed to Wawanesa on December 21, 2009. He expressed doubts it was sent to Ms. Fadelle on that date or following. On balance he stated he felt it was unlikely to have been sent to her.

[78] Counsel put before Mr. O'Neil various copies of the statement which were disclosed in the Wawanesa file or alternatively in the Affidavit of Documents produced by Ms. Fadelle. The version of the document which had been disclosed in Ms. Fadelle's Affidavit of Documents bore a hard to decipher fax transmission line that possibly suggested Mr. O'Neil's office faxed the

statement to Wawanesa at 10:02 AM and then to another fax line at 10:22 AM. The suggestion from the Defendant was that the second fax would have been to his client, Ms. Fadelle. Mr. O'Neil indicated he could not offer any real insight into the fax transmission issue. He maintained his view that it was unlikely he would have faxed it to Ms. Fadelle. He said his typical method of dealing with Ms. Fadelle was by email.

[79] In summary, Mr. O'Neil confirmed that, in drafting the document, he would have been doing his best to convey what he learned from Ms. Fadelle. He expressed the concern, however, that he may not have accurately captured her comments about the insurance issue.

[80] With respect to the evidence of Mr. O'Neil, it is clear he feels bad for the loss experienced by the Plaintiff and the situation in which she finds herself. He worries that his attempt to offer assistance to her in 2009 may have inadvertently impaired her position in this litigation. Regardless of these considerations, I find Mr. O'Neil attempted to offer his best recollection to the Court. Unsurprisingly, the passage of time has impacted his memory in some respects. I do find it hard to accept that Mr. O'Neil would have failed to send a copy of the unsigned statement to Ms. Fadelle. He knew she was going to be at

the planned site visit. He would have been placing her in an exposed position were she to be unaware of the contents of the document.

[81] Notwithstanding my concern about this aspect of his recollection, I accept his evidence. The insurance question was clearly not the focus of his efforts at that time. He was almost entirely concerned with issues of contractor liability. It is a reasonable possibility that the references in the unsigned statement to insurance issues are unreliable. Mr. O'Neil lacks confidence in their accuracy. The purported source denies their accuracy. This denial from Ms. Fadelle must be treated with caution as there is now a motivation to deny it. I do conclude that the concern expressed by Mr. O'Neil about the accuracy of the insurance reference is genuine. In his haste to get a draft statement into the hands of the adjuster he may have failed to take steps to confirm this element which, at the time, was tangential to the case he was trying to make.

Ove Samuelsen

[82] Mr. Samuelsen has been practicing law for just over 50 years, working heavily in the areas of real estate and probate. For over 40 years Ms. Sheppard has been his trusted legal assistant. He estimated that, in a typical real estate file, 90 to 95% of the administrative work is completed by Ms. Sheppard.

[83] With respect to the files for the Plaintiff, Mr. Samuelsen confirmed the scope of the work for which his office was retained. He discussed the nature of the dual retainer. He was working for both the mortgage company and the homeowner. Mr. Samuelsen stated that he saw his primary duty as being to the TD Bank. The basis for this somewhat surprising view was challenged in cross-examination by counsel to Ms. Fadelle. Mr. Samuelsen explained his view that, in a refinancing, his duties to the homeowner are limited as the transaction is quite straightforward.

[84] He did acknowledge that Ms. Fadelle was relying on him to protect her interests in these transactions. He accepted that she reasonably would have expected him to inform her of any material facts impacting on her interests.

[85] He was directed to the file materials and was questioned about these. He confirmed that the mortgage instructions in this case, as would be entirely normal, included a requirement for confirmation of insurance before the release of any funds. He emphasized that the obligation to take out insurance and have it in place is the sole obligation of the homeowner. He noted that his office would have no power or obligation to put insurance in place.

[86] Mr. Samuelsen did accept that his office erroneously closed the transaction and released funds without having confirmation of insurance in place. He also accepted the suggestion of Plaintiff Counsel that the reason the bank required insurance was so that in the event of a fire, the bank would have coverage for its mortgage debt. He further accepted that without insurance coverage the homeowner would be exposed to the mortgage debt and would also lose the equity in their property.

[87] He acknowledged there was an error in the office with respect to this. Confirmation of insurance was not received, but the transaction was permitted to proceed with funds being released.

[88] Plaintiff Counsel put to Mr. Samuelsen, as he had to Ms. Sheppard, an extensive set of questions pertaining to the trust account balances for the Nappan transaction. The argument advanced by the Plaintiff was that the trust account records reveal the account was overdrawn for a period of time between the release of funds to Ms. Fadelle and her estranged husband, and the later receipt of funds from TD Canada Trust.

[89] It does appear that the trust account history, if accurate, supports this suggestion. It is difficult to know definitively. No forensic accounting was in

evidence. The relevance of this line of inquiry was questioned by the Defence. Counsel to the Plaintiff argued it was relevant because the Samuelsen law office might have been motivated by the need to close the transaction in order to close the gap in the trust account. The suggestion was that they would be motivated to do this, even while being aware of the insurance problem with the Nappan property.

[90] After hearing and reviewing the evidence on this issue, I am not satisfied the Defendant made any decisions around having this mortgage funded based on a motivation to close any gap in the trust account. I do not ascribe such motives to the Defendant or Ms. Sheppard.

[91] Mr. Samuelsen was questioned at length with respect to when he learned of the mistake which had occurred. He could not recall with certainty when he first learned of the error. The news would have come from Ms. Sheppard. He fully accepted that an error had been made with respect to the insurance status of the home. The suggestion from him was that this was discovered close in time to the fire but, ultimately, he could not be definitive on timing issues.

[92] Mr. Rafferty put the following to the Defendant:

> Q: But in any event, you knew before the fire that there was no insurance?

A: I did.
Q: And did you notify Toronto Dominion of that fact?
A: No, I did not.
Q: And did you contact Ms. Fadelle, yourself, about that fact?
A: No.

[93] It was also suggested to Mr. Samuelsen that if Ms. Fadelle were mistaken about having insurance coverage, then she could have been alerted to this fact by his office. This would have allowed her to take steps to remedy the situation. The Defendant accepted this.

[94] Later in his testimony, Mr. Samuelsen was asked if he accepted that he had an obligation to advise Ms. Fadelle of what his office had learned about the status of insurance coverage. He first stated that he did not feel he had any legal obligation to do so. When pressed, he acknowledged he feels that ethically he ought to have done so.

[95] It was finally put to Mr. Samuelsen that by not advising TD Canada Trust as to the lack of coverage, the opportunity for them to put in place fire insurance (as was their right under the mortgage) was lost. He accepted this was the case.

[96] My impression of the evidence of Mr. Samuelsen is that he is deeply embarrassed by what occurred in this case. He is a senior practitioner and

takes pride in his work. Like Ms. Sheppard, I believe he was attempting to give truthful evidence. There was, however, an element of his testimony in which he was attempting to make the case that his legal duties or obligations to Ms. Fadelle were somehow limited. I did not find his efforts in this regard to be compelling. When confronted on cross-examination, he tended to retreat from attempted assertions along these lines.

[97] Mr. Samuelsen's evidence suffers not only from the passage of time, but also from the fact that, at a minimum, 90% of the work on Ms. Fadelle's file was carried out by Ms. Sheppard.

[98] As was the case with Ms. Sheppard, it is difficult to be confident in Mr. Samuelsen's estimates on time in this matter. Much time was spent attempting to recreate the timeline of when they realized the Nappan property was without insurance. It is also relevant that, irrespective of when they realized the problem, the law office had the May 27, 2009 coverage letter from Sears Insurance, from which they failed to draw the proper conclusions.

[99] If the Defendant had complied with his duty under the terms of his retainer, the mortgage transaction would not have proceeded without Ms. Fadelle being

required to have coverage in place. This would have required the Samuelsen office to advise Ms. Fadelle that Sears Insurance was denying coverage.

Weighing the Evidence

[100] In the summary of evidence provided above, I have made some comments as to my impressions of the witnesses and their testimony. I will make further comment at points in the balance of the decision. In undertaking this assessment of witness testimony, the Court has the benefit of much case law offering direction on how this ought to take place. The case of *Baker-Warren v. Denault*, 2009 NSSC 50 provides a very helpful overview of the considerations going into such an assessment. I note these comments were cited with approval by the Nova Scotia Court of Appeal in *Hurst v. Gill*, 2011 NSCA 100:

> [19] With these caveats in mind, the following are some of the factors which were balanced when the court assessed credibility:
>
> > a) What were the inconsistencies and weaknesses in the witness' evidence, which include internal inconsistencies, prior inconsistent statements, inconsistencies between the witness' testimony, and the documentary evidence, and the testimony of other witnesses: *Re: Novak Estate*, 2008 NSSC 283;
> >
> > b) Did the witness have an interest in the outcome or was he/she personally connected to either party;
> >
> > c) Did the witness have a motive to deceive;
> >
> > d) Did the witness have the ability to observe the factual matters about which he/she testified;

> e) Did the witness have a sufficient power of recollection to provide the court with an accurate account;
>
> f) Is the testimony in harmony with the preponderance of probabilities which a practical and informed person would find reasonable given the particular place and conditions: *Faryna v. Chorney***,** [1952] 2 D.L.R 354;
>
> g) Was there an internal consistency and logical flow to the evidence;
>
> h) Was the evidence provided in a candid and straight forward manner, or was the witness evasive, strategic, hesitant, or biased; and
>
> i) Where appropriate, was the witness capable of making admission against interest, or was the witness self-serving?

[20] I have placed little weight on the demeanor of the witnesses because demeanor is often not a good indicator of credibility: *R v. Norman* (1993) 16 O.R. (3d) 295 (C.A.) at para. 55. In addition, I have also adopted the following rule, succinctly paraphrased by Warner J. *in Re: Novak Estate, supra,* at para 37:

> There is no principle of law that requires a trier of fact to believe or disbelieve a witness's testimony in its entirety. On the contrary, a trier may believe none, part or all of a witness's evidence, and may attach different weight to different parts of a witness's evidence. (See *R. v. D.R.*, [1966] 2 S.C.R. 291 at 93 and *R. v. J.H. supra*).

[21] Ultimately, I have considered the totality of the evidence in making credibility determinations. I have thoroughly reviewed the *viva voce* and documentary evidence in conjunction with the submissions of counsel, and the applicable legislation and case law.

[101] The Nova Scotia Court of Appeal in *MacNeil v. Nova Scotia (Attorney General)*, 2000 NSCA 31 offered the following comments on the subject of evaluating witness testimony:

> [9] The judge, as the trier of fact, must sort through the whole of the evidence and decide which to accept and which to reject so as to piece together the more plausible view of the facts. Many considerations properly influence this decision, including the nature of any unreliability found in a witness's testimony, its relationship to the significant parts of the evidence, the likely explanation for the

> apparent unreliability and so forth. The trial judge may find that some apparent errors of a witness have little or no adverse impact on that witness's credibility. Equally, the judge may conclude that other apparent errors so completely erode the judge's confidence in the witness's evidence that it is given no weight.

Credibility versus Reliability

[102] Courts have identified there is a distinction between the veracity or truthfulness of the witness (credibility) and the ability of the witness to accurately relate his or her evidence (the reliability). While a non-credible witness will not give reliable evidence, an apparently credible witness can offer unreliable testimony. It is important for the trier of fact to recognize that both credibility and reliability must be weighed when determining the truth and accuracy of evidence.

[103] In the case of *R. v. C. (H.)*, 2009 ONCA 56, the Court commented on the difference between credibility and reliability. In that case, the appellant argued that the trial judge had relied exclusively on demeanour in finding the complainant credible without assessing the reliability of the complainant's evidence. Watt, J.A. stated as follows:

> [41] Credibility and reliability are different. Credibility has to do with a witness's veracity, reliability with the accuracy of the witness's testimony. Accuracy engages consideration of the witness's ability to accurately

> i. observe;
>
> ii. recall; and
>
> iii. recount
>
> events in issue. Any witness whose evidence on an issue is not credible cannot give reliable evidence on the same point. Credibility, on the other hand, is not a proxy for reliability: a credible witness may give unreliable evidence.

[104] Additionally, the Court will look for evidence that is corroborative of the witness. Corroboration is evidence that "strengthens or makes more certain the matter which it corroborates": *Haché v Lunenberg County District School Board*, 2004 NSCA 46 at para. 75.

[105] I have applied all these considerations when considering the witness testimony in this case.

Legal Principles

Standard of Care

[106] The applicable standard of care is that of a reasonably competent solicitor. A lawyer who is retained must bring "reasonable care, skill and knowledge to the professional service which he or she has undertaken.": *Central & Eastern Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147 at para. 66.

[107] As well, a solicitor's conduct must be viewed in the context of the relationship being fiduciary in nature. The reasonableness of the lawyer's impugned conduct is judged in light of the surrounding circumstances, the nature of the client's instructions, and the experience and sophistication of the client.

[108] A solicitor has an obligation to disclose to a client when he or she has discovered a material error in their work for the client. This is canvassed in the Nova Scotia *Code of Legal Ethics and Professional Conduct* that was in effect at the time of this retainer:

> Errors or omissions
>
> 4.14 Upon discovering that a lawyer has made an error or omission in a matter in which the lawyer was engaged that is or may be damaging to the client and cannot readily be rectified, the lawyer has a duty to inform the client promptly of the situation but without admitting liability…

[109] A breach of a lawyer's ethical obligation to a client does not automatically equate to civil liability. These obligations do, however, provide context within which the nature and extent of the legal duty may be assessed: see *Lawyers' Professional Liability* (3rd ed.), Grant, Rothstein & Campbell, Markham: LexisNexis, 2013 and *Vienneau v. Vienneau*, [1982] N.B.J. No. 10 (C.A.).

[110] I accept the view expressed in the expert report of Elizabeth Haldane that a lawyer has a duty to make sure his client has insurance on the property being

charged by a mortgage. If the lawyer (or his staff) learns the client is asserting a belief in coverage, or erroneously believes there is coverage, and the law firm possesses contrary information, this must be acted on. This obligation is elevated where the lawyer has also failed to comply with their obligation to the lender, thus negating the possibility the lender could act independently to avoid at least a significant portion of the loss.

[111] In this case there was a serious failure of process within the Samuelsen law office. As early as June 2009, following the May 27 letter from Sears Insurance, the office had information in its possession which clearly stated only two of the three properties were insured. Ms. Sheppard believed that the coverage letter pertained to all three parcels. This was a mistake. After her assumption proved to be erroneous, she delayed in acting.

[112] There are no records which reveal exactly when Mr. Samuelsen was advised of the error. He put his signature to the reporting form to TD Canada Trust which is dated July 15, 2009. If this is date is correct, then the Defendant is exposed to the argument he knew of the problem for many weeks prior to the fire. Ms. Sheppard's evidence was that the practice of the firm was that this form would be backdated to the date the mortgage was put in place. She testified this particular form might actually have been filled in some weeks

later. Mr. Samuelsen's evidence is equivocal on the point. In any event, the management and systemic failures of the office, dating back to the treatment of the May 27 letter, are entirely the responsibility of the Defendant.

[113] The Defendant argues he breached only duties to the bank. There is no question he did fail to abide by the terms of his retainer with the lender. The bank's potential loss has not crystalized only because the Plaintiff has continued to pay the mortgage. Her decision to do so was not explored in evidence to any degree.

[114] The Defendant's failings with respect to the lender do not end the analysis. He had a dual retainer and dual obligations.

[115] In submissions it was argued by the Defendant that he had no duty to advise the Plaintiff because she was already aware there was no insurance in place. He relies on a line of cases standing for the proposition that a solicitor has no obligation to advise a client as to a fact which is already known to them or is plain and obvious.

[116] At the time of the transaction however his client was, at a minimum, asserting a belief in coverage through Sears Insurance. She did so on more than one occasion to Ms. Sheppard.

[117] Ms. Samuelsen argues that the Plaintiff knew she was not insured. He points to the Amherst Daily News story and the statement prepared by Mr. O'Neil, as well as to the circumstances in general.

[118] I have dealt elsewhere in these reasons with my concerns regarding the O'Neil statement. Mr. O'Neil's evidence has raised concerns in my mind with respect to how much reliance I can put on that portion of the document and thus what I can safely draw from it.

[119] His evidence, coupled with the denials of the Plaintiff, have led me to discount the value of the statement as a means of identifying with confidence her state of knowledge in 2009. He has successfully raised doubts in my mind as to whether he sent her the statement in December 2009.

[120] With respect to the newspaper story, the Plaintiff gave her account in direct evidence as to her discussion with the fire official. The Defendant argues it is implausible that Ms. Fadelle would have spent time on the day of the fire, in those circumstances, looking into the coverage issue. The Plaintiff testified that she did and learned the information.

[121] I agree with the Defendant to the extent that not everyone would have spent time on that issue in those circumstances. But individuals may react differently

in a crisis. In her testimony the Plaintiff explained what she did and why. Having seen her evidence and weighed it carefully I cannot reject her account of her decision making that day. I find that the contents of the newspaper story speak to her level of knowledge following the fire, but not prior.

[122] It is another matter, however, whether the Plaintiff took a cavalier approach to insurance and coverage issues. It is very difficult to argue otherwise. I will return to a more complete discussion of this point later in these reasons.

[123] Weighing the above factors, I have concluded that, in this transaction, the Samuelsen office did not act as a reasonably competent law office ought to have in the circumstances. There were manifest failures of management and process. It allowed the mortgage to be placed and funds released when doing so was not only a breach of the Defendant's obligation to the Bank but also his obligation to the Plaintiff. She relied on him to protect her interests and he failed in his obligations.

[124] In placing the mortgage as he did, he allowed his client to be immediately in violation of her legal obligations to the bank. In cross-examination, Mr. Samuelsen accepted that he felt he had an ethical obligation to share with the Plaintiff the information his office had on the insurance status of the property. I

find his obligation went beyond the ethical. He had a legal duty to protect her interests and advise her of material facts exposing her to potential loss. He failed in these obligations.

[125] As a result, I find that the Defendant's provision of legal services to the Plaintiff failed to meet the standard of care of a reasonably competent solicitor in the circumstances.

Causation

[126] The Plaintiff must establish on a balance of probabilities that the Defendant was negligent in that his actions fell below the standard of care of a reasonably competent lawyer; damage to her was a reasonably foreseeable result and the loss was caused by the breach. She has the onus of proving she suffered loss that would not have been sustained in the absence of the negligent conduct of the Defendant.

[127] Another way of expressing what must be proved is that the loss would not have occurred but for the fault of the Defendant. With respect to the "but for" standard and its application, see the analysis of the Nova Scotia Court of Appeal in *Ketler v. Nova Scotia (Attorney General)*, 2016 NSCA 64 where it

considers and applies *Clements (Litigation Guardian) v. Clements*, 2012 SCC 32.

[128] In *MacCulloch v. McInnes Cooper & Robertson*, 2001 NSCA 8, the Court of Appeal discussed the issue of causation in relation to claims of solicitor negligence:

> 63 While it is not enough to show that the damage was possibly caused by the defendant's conduct, it has been said that causation need not be determined with scientific precision. In *Snell v. Farrell* (1990), 72 D.L.R. (4th) 289 (S.C.C.) Sopinka J. quoted with approval (at p. 300) the comment of Lord Salmon in *Alphacell Ltd. v. Woodward*, [1972] 2 All E.R. 475 (H.L.), at p. 490:
>
> > ... [causation is] essentially a practical question of fact which can best be answered by ordinary common sense rather than abstract metaphysical theory.
>
> 64 Causation, particularly in cases of negligence through advice not given, is primarily a question of inference by the trial judge as was recognized in *Allied Maples v. Simmons & Simmons*, [1995] 4 All E.R. 907...

[129] In *Clements*, the Supreme Court of Canada offered a comprehensive analysis of the causation element, saying in part:

> [6] On its own, proof by an injured plaintiff that a defendant was negligent does not make that defendant liable for the loss. The plaintiff must also establish that the defendant's negligence (breach of the standard of care) *caused* the injury. That link is causation.
>
> [7] Recovery in negligence presupposes a relationship between the plaintiff and defendant based on the existence of a duty of care — a defendant who is at fault and a plaintiff who has been injured by that fault. ...

> [8] The test for showing causation is the "but for" test. The plaintiff must show on a balance of probabilities that "but for" the defendant's negligent act, the injury would not have occurred. Inherent in the phrase "but for" is the requirement that the defendant's negligence was *necessary* to bring about the injury — in other words that the injury would not have occurred without the defendant's negligence. ...
>
> [9] The "but for" causation test must be applied in a robust common-sense fashion. There is no need for scientific evidence of the precise contribution of the defendant's negligence made to the injury. ...
>
> [10] A common sense inference of "but for" causation from proof of negligence usually flows without difficulty. Evidence connecting the breach of duty to the injury suffered may permit the judge, depending on the circumstances, to infer that the defendant's negligence probably caused the loss. ...
>
> [11] Where "but for" causation is established by inference only, it is open to the defendant to argue or call evidence that the accident would have happened without the defendant's negligence, i.e. that the negligence was not a necessary cause of the injury, which was, in any event, inevitable. ...
>
> . . .
>
> [13] To recap, the basic rule of recovery for negligence is that the plaintiff must establish on a balance of probabilities that the defendant caused the plaintiff's injury on the "but for" test. This is a factual determination. Exceptionally, however, courts have accepted that a plaintiff may be able to recover on the basis of "material contribution to risk of injury", without showing factual "but for" causation. ... this can occur in cases where it is impossible to determine which of a number of negligent acts by multiple actors in fact cause the injury, but it is established that one or more of them did in fact cause it. ...
>
> [14] "But for" causation and liability on the basis of material contribution to risk are two different beasts. "But for" causation is a factual inquiry into what likely happened. The material contribution to risk test removes the requirement of "but for" causation and substitutes proof of material contribution to risk. ...

[130] In considering the application of the “but for” test, the Nova Scotia Court of Appeal in *Ketler* addressed the criticism that it can be exercised in conjecture.

The Court accepted this to be the case. Justice Bourgeois quoted Professor Klar in *Tort Law*, 5th ed. (Toronto: Thompson Reuters Canada Limited, 2012, at page 450:

> The "but for" test is evaluative and speculative. It requires the trier of fact to predict what would have happened to the plaintiff had the defendant not acted unreasonably. …Since a court cannot repeat a past event, controlling some conditions while altering others to see what results, the issue is necessarily speculative. The court must guess at what would have occurred, using its best judgment, intuition, common sense, experiences, expert evidence, and whatever else might be of assistance.

[131] Case law indicates that in cases of solicitor's negligence, additional factors come into play. Specifically, a claimant must address the issue that, if properly advised, he or she would have acted in a different manner and had an opportunity to have avoided the damages suffered: see *Rider v. Grant*, 2015 ONSC 5456; *Marcus v. Cochrane*, 2012 ONSC 146.

[132] The Plaintiff has argued the application of the lost chance doctrine. This doctrine has recently been addressed by the Nova Scotia Court of Appeal in *Jorna & Craig Inc. v. Chaisson*, 2020 NSCA 42. In *Jorna*, Justice Oland on behalf of the Court extensively reviewed the applicable principles. She commented in part:

> [113] Modern jurisprudence on loss of a chance can be traced back to *Chaplin v. Hicks* (1911), 2 K.B. 786. …

> [114] *Chaplin* directs that damages for loss of chance are to be discounted to account for the odds of the chance not materializing. This holding has been accepted and consistently applied in Canadian law since then. …
>
> [115] *Eastwalsh Homes Ltd. v. Anatal Developments Ltd*, [1993] O.J. No. 676 (C.A.), leave to appeal to S.C.C., refused [1993] S.C.C.A. No. 225, is the leading case on loss of chance. Griffiths J.A. stated:
>
> > 32 A second fundamental principle is that where it is clear that the breach of contract caused loss to the plaintiff, but it is very difficult to quantify that loss, the difficulty in assessing damages is not a basis for refusal to make an award in the plaintiff's favour. One of the frequent difficulties in assessing damages is that the plaintiff is unable to prove loss of a definite benefit but only the "chance" of receiving a benefit had the contract been performed. In those circumstances, rather than refusing to award damages the courts have attempted to estimate the value of the lost chance and awarded damages on a proportionate basis.

[133] The Ontario Court of Appeal in *Trillium Motor World Ltd. v. Cassels Brock & Blackwell LLP*, 2017 ONCA 544, has recently applied this law in the context of a solicitor's negligence case:

> 263 In a solicitor's negligence case like this one, where there is concurrent liability in contract and tort, the law is clear that a plaintiff may advance a claim for damages for "loss of chance". The leading case on the loss of chance to obtain a benefit or avoid a loss in the solicitor's negligence context is the English Court of Appeal's decision in *Allied Maples Group v. Simmons & Simmons*, [1995] 4 All E.R. 907 (Eng. C.A.). In *Allied Maples*, the defendant solicitors negligently failed to warn their clients of the consequences of deleting a warranty in an agreement of purchase and sale. The warranty stated that there were no existing or contingent liabilities on any leaseholds held by the vendor's subsidiary. In fact, there were such liabilities, and the plaintiff was bound by them.
>
> 264 The plaintiff sued its solicitors, arguing that if it had been properly advised, it would have successfully negotiated some level of protection from liability or, alternatively, walked away from the transaction. In an argument that mirrors Cassels' position on this appeal regarding the Canada Conflict, the solicitors countered that they were not liable because there was no causal link between the breach and the damages.

265 The Court of Appeal held that this argument confused the issues of causation and damages. The headnote of the case captures the court's key holdings:

> Once the plaintiff proved on the balance of probability as a matter of causation that he would have taken action to obtain a benefit or avoid a risk, he did not have to go on to prove on the balance of probability that the third party would have acted so as to confer the benefit or avoid the risk to the plaintiff. Instead, the plaintiff was entitled to succeed provided he showed that there was a substantial, and not merely a speculative, chance that the third party would have taken the action to confer the benefit or avoid the risk to the plaintiff. The evaluation of a substantial chance was a question of quantification of damages, the range lying somewhere between something that just qualified as real or substantial on the one hand and near certainty on the other.

266 The majority dismissed the solicitors' appeal because the plaintiff had established that it would have negotiated the warranty issue if it had been properly advised, and there was a substantial chance that it would have obtained partial or full protection from the leasehold liabilities: see *Lawyers' Professional Liability*, *supra*, at p. 227.

[134] Addressing the loss of chance doctrine within the liability and damages analysis, the Ontario Court of Appeal went on to say:

278 As I have described above, the jurisprudence on loss of chance claims confirms that the concepts of loss of chance, causation and damages overlap. The governing authorities establish that, at the first stage of a loss of chance analysis, liability, the plaintiff must prove on a balance of probabilities that, but for the defendant's conduct, it had a chance to obtain a benefit or avoid a loss. This is fundamentally a question of causation. At the second stage, damages, the court is required to determine how much of the plaintiff's loss is attributable to the defendant's conduct. This, too, is a question of causation.

279 Thus, in a loss of chance case, causation is relevant both to the existence of liability and the extent of liability: see Ken Cooper-Stevenson, *Personal Injury Damages in Canada*, 2d ed. (Toronto: Carswell, 1996), at pp. 750-51… (emphasis added)

[135] The decision in *Trillium* developed further the analysis of Justice Doherty in *Folland v. Reardon*, 2005 CarswellOnt 232 (Ont. C.A.). The principles set out in *Folland* were recently summarized by the Ontario Court of Appeal in *Jarbeau v. McLean*, 2017 ONCA 115:

> 26 In *Folland* this court discussed the elements of a cause of action for breach of contract based on solicitor's negligence. I extract the following principles from that decision, using the language used by Doherty J.A., at paras. 72-76:
>
> > 1. In most cases of solicitor's negligence, liability rests on both a tort and contractual basis.
> >
> > 2. The imposition of liability grounded in the loss of a chance of avoiding a harm or gaining a benefit is controversial in tort law, particularly where the harm alleged is not purely economic.
> >
> > 3. Whatever the scope of the lost chance analysis in fixing liability for torts claims based on personal injuries, lost chance is well recognized as a basis for assessing damages in contract. In contract, proof of damage is not part of the liability inquiry. If a defendant breaches his contract with the plaintiff and as a result the plaintiff loses the opportunity to gain a benefit or avoid harm, that lost opportunity may be compensable.
> >
> > 4. A plaintiff can recover damages for lost chance in an action for breach of contract if four criteria are met:
> >
> > > a. The plaintiff must establish on the balance of probabilities that but for the defendant's wrongful conduct, the plaintiff had a chance to obtain a benefit or avoid a loss.
> > >
> > > b. The plaintiff must show that the chance lost was sufficiently real and significant to rise above mere speculation.

> c. The plaintiff must demonstrate that the outcome, that is, whether the plaintiff would have avoided the loss or made the gain, depended on someone or something other than the plaintiff himself or herself.
>
> d. The plaintiff must show that the lost chance had some practical value.

> 27 Where a plaintiff in a tort action arising out of solicitor's negligence can establish on the balance of probabilities that but for the negligence he or she would have avoided the loss, he or she should be fully compensated for that loss.

> 28 Where a plaintiff can only establish that but for the solicitor's negligence, he or she lost a chance to avoid a loss, a claim for breach of contract may permit recovery for the value of that chance.

[136] Case law quantifying “the value of the chance”, by necessity, becomes an exercise in judgment-based speculation. In this respect, it mirrors the analysis commented by the Court of Appeal in *Ketler*.

[137] In *Berry v. Pulley*, 2015 ONCA 449 the Ontario Court of Appeal described a "two-step framework" for the determination of a loss of chance claim. Associate Chief Justice Hoy stated, at para. 72, that the court must first determine if the four criteria set out in *Folland* are met. If they are, then the court proceeds to the second step and "will award damages equal to the probability of securing the lost benefit (or avoiding the loss) multiplied by the value of the lost benefit (or the loss sustained)".

[138] The decision in *Alliance v. Gardiner Roberts*, 2020 ONSC 68 provides a recent statement respecting the operation of this doctrine within the context of a solicitor's negligence claim:

> 140 … Where a plaintiff can establish that but for the solicitor's negligence he or she lost a chance to avoid a loss, the plaintiff can seek recovery for the value of that chance: *Jarbeau v. McLean*, 2017 ONCA 115 (Ont. C.A.), at para. 28. In this case, the plaintiffs submit that if Gardiner Roberts had told Mr. Hart about Mr. Baker's conflict, Mr. Hart would likely have pursued arbitration and would have had a very good chance of recovering damages for Henry Schein's breach of the OSA. They value that chance at 85% to 90% of recovering the $12.7 million that the plaintiffs invested in Dentech.
>
> 141 There are two parts of the loss of chance analysis, causation and quantum. At the first stage, the plaintiff must prove on a balance of probabilities that the defendant's breach or negligence caused the plaintiff to lose a substantially real and significant chance to avoid a loss or obtain a benefit. At the second stage, a court will evaluate the reasonable probability of the real and significant chance and award damages based on the assessed probability: see *Trillium Motor World Ltd. v. General Motors of Canada Ltd.*, 2015 ONSC 3824 (Ont. S.C.J.), aff'd 2017 ONCA 545 (Ont. C.A.); see also *Folland*, at para. 73.

[139] The manner in which these principles are applied is driven by the facts of each case. On the present facts, how are we to determine whether the Plaintiff had an opportunity to avoid the risk by securing some level of coverage?

[140] The Defendant raises the question of whether coverage could have been obtained and argues causation is not made out due to this lack of certainty. In his pre-trial brief he states:

> Further, Ms. Fadelle (and her expert) state that Mr. Samuelsen should have advised her that no insurance was in place when he found that out on or about September 16, 2009. Mr. Samuelsen does not dispute that obligation, as Ms. Fadelle was in breach of her mortgage and should have been made aware of that. However, in light of the difficulty of insuring the property, it is highly unlikely that insurance could have been obtained before the September 19 fire.

[141] It should be remembered, however, that as early as following the May 27 coverage letter, the Defendant ought to have acted. He failed to appreciate the contents of the May 27 letter. If this error had not been made, he would have advised the Plaintiff he was unable to release funds. Outside of the May 27 letter there was more than one point in time when the Defendant ought to have acted. These include before closing the transaction, after receiving the multiple TD Canada Trust requests for the mortgage reporting letter, and after Ms. Sheppard's discussion with Sears Insurance.

[142] The Plaintiff needed the financing and was highly motivated in this regard. Had she been properly advised, and told the financing would not close, I am satisfied she would have pursued the coverage quote obtained through Sears Insurance, completed the application process and moved to do whatever was required to secure coverage. She placed a priority on getting this transaction closed. She was determined to gain access to these funds. If the only means of

securing the financing was to get coverage in place, I conclude she would have acted to do so.

[143] Accepting that she would have acted, the question becomes whether this lost opportunity was sufficiently real and significant enough to rise above mere speculation. This is the standard discussed and applied in *Trillium* and other authorities.

[144] In evidence was the detailed quote from the insurer. I have her evidence respecting what she was prepared to do to secure the release of funds. No party presented expert underwriting evidence. We are left with the record as it is. I accept her evidence as to the steps she would have taken. In the past the Plaintiff had a pattern of securing insurance followed by which there would be a review and the insurer would make requests for upgrades. This may have been the case here.

[145] It is also possible certain work could have been required in advance. She gave evidence as to what she understood was required in the past. There was no other evidence on this point. Following the May 27 letter, there was a period of months when the work could have been completed. It is also possible the policy may have been placed and then, within a period of time,

there would have been a review and request for upgrades, as had been the prior experience.

[146] Applying the reasoning in the case law reviewed above, I find the Plaintiff has carried her burden to prove causation to the required standard. I refer specifically to paragraph 278 of the *Trillium* decision which was quoted above. I conclude that but for the failings of the Defendant, the Plaintiff had a "real and substantial opportunity" to avoid the loss which she has suffered.

[147] There were certainly unknowns. This was the case in the authorities such as *Trillium* and *Allied Maples*. These factors are not dismissed and continue to play a role in the balance of the analysis.

Assessing the value of the chance

[148] I have concluded the Plaintiff did lose a real, and not merely de minimis, opportunity to have avoided the loss. The question becomes one of assessing the lost opportunity. The Alberta Court of Appeal in *Strategic Acquisition Corp. v. Stark Capital Corp*., 2017 ABCA 250 has recently commented on the issue of quantifying the value of the lost chance. The trial judge had assessed at 50% the possibility the Plaintiff might avoid a particular loss. After first setting out the *Folland* test, the Court stated:

76 In applying the second part of the test, that the plaintiff must show that the chance lost was sufficiently real and significant to rise above mere speculation, the court in *Kipfinch Developments Ltd.* addressed the argument that, in order to succeed in an action based on a loss of opportunity, the plaintiff must establish it is more probable than not that the transaction would have closed. In rejecting that argument, the court said at para 114:

> I do not think this is an accurate statement of the law. Instead, I think that the plaintiff is required to meet a lower threshold, namely demonstration that the lost opportunity was sufficiently real and significant to rise above mere speculation, which lost opportunity may have a probability of occurrence as low as 15%.

77 The *Folland* test was applied in Alberta in *Barlot v. Dudelzak*, 2005 ABQB 793, where the trial judge noted at para 68 that if, as a result of breach of contract, the plaintiff loses the opportunity to gain a benefit, the lost opportunity may be compensable. To receive compensation, the plaintiff must show that the chance lost "was sufficiently real and significant to rise above mere speculation". Pitch and Snyder also state that a court may discount damages based on an assessment of the contingencies affecting the likelihood of opportunity, citing *Multi-Malls Inc. v. Tex-Mall Properties Ltd.* (1980), 28 O.R. (2d) 6 (Ont. H.C.), aff'd (1981), 37 O.R. (2d) 133(Ont. C.A.), leave to appeal ref'd, [1982] SCCA No. 315 (note) (S.C.C.).

78 It is worth noting the third part of the *Folland* test, that the plaintiff must show that the outcome (whether the plaintiff would have made the gain) depended on someone or something other than the plaintiff itself. Arguably, much of the control for whether the ROFR would be exercised in this case rested with Strategic, although market conditions would clearly have an influence. Alberta courts have not taken this contingency into account and, generally, Canadian case law does not distinguish between circumstances where the chance is within or outside the plaintiff's control. The thrust of Canadian authority on breach of contract does not require the plaintiff to prove cause of damage on a balance of probabilities beyond the breach of contract itself. The overall position in contract is summarized by Pitch and Snyder at 3-12 to 3-13 [H.D. Pitch and & R.M. Snyder, *Damages*, 2nd ed., 1989] ((loose-leaf 2015 Rel 4), ch 3 at § 2(c)):

> It should be noted, of course, that if the plaintiff has offered whatever evidence is available and, although establishing a breach of contract, has difficulty in quantifying the loss, this difficulty will not disqualify the innocent party from compensation. In this situation, assuming that the

> plaintiff has made the best efforts to provide all necessary evidence, the Court will make the best estimate of the damages arising from the loss, based on the evidence presented.
>
> 79 In other words, once Multus's breach of contract is established, it is not necessary to require Strategic to meet an additional burden of proof on the balance of probabilities to show that it would have exercised its right under the ROFR. Based on the evidence presented, the trial judge was entitled to make his best estimate of the likelihood that the opportunity would have been exercised and discount the damages due to Strategic accordingly.
>
> 80 It was open to the trial judge to assess the likelihood of Strategic exercising the ROFR. The evidence on the point was thin, but as the trial judge pointed out, difficulty in conducting an assessment does not deprive the plaintiff of damages.

[149] The Plaintiff argues the likelihood she could have acted successfully to protect herself is high. She notes the refinancing funds were deposited to the Defendant's trust account on May 29, 2009. Prior to that time, she had received a detailed coverage quote through Sears Insurance. Undoubtedly, if the Defendant had refused to release funds, as ought to have been the case, the Plaintiff would have acted to secure coverage in order to achieve the release of funds.

[150] Ms. Fadelle argues there was sufficient time to act. She had the motivation to do so. She testified that she believed the only impediment to her last policy continuing in place was a repair to the ventilation system. She estimated the cost of this to be $1,000. No other evidence was presented.

[151] The Defendant submits that the likelihood of coverage being secured was low. The past cancellation of coverage would have been too great a hurdle to overcome. Time was short. He says the Plaintiff is being disingenuous when she says coverage would have been available. If this were the case, he asks, why did she allow herself to go without coverage in 2008?

[152] There are questions with respect to the policy which may have been obtained. The mortgage instructions required confirmation of replacement cost coverage. For cost reasons, it is likely the Plaintiff would have taken the least expensive option available. Any policy would have provided some coverage, thus mitigating her loss at least to some degree.

[153] As is stated in the authorities, the existence of uncertainties does not bring the analysis to a close. See: *Malcolm v. Usprech*, 2010 ONSC 4091, para 80-83; *Grant v. V&G Realty*, 2011 NSSC 2, para 50. See also *Henderson v. Hagblom*, 2003 SKCA 40 where at paragraph 210-11 the Court of Appeal addressed a number of cases and the deduction applied in each case depending on the factual scenario.

[154] I have assessed the evidence and the arguments advanced by both sides. I have concluded the lost opportunity to avoid the loss was a substantial one. As

was the case in the authorities reviewed above, there are unknowns which do lead to the application of a contingency reduction.

[155] If the Defendant had not breached his obligation to her, the Plaintiff would have had a real and substantial opportunity to avoid the loss. Case law directs that a deduction will be applied to reflect the Court's assessment of the contingencies based on the facts. In this case, the deduction under this element of the analysis ought to be 40%.

[156] Based on the methodology in the authorities reviewed above, this figure is applied against the provable losses to arrive at the damages figure. (See for eg. *Jorna & Craig Inc. v. Chaisson*, supra., at para 114). It is important to note that the question of contributory negligence is a separate element that must be considered by the Court. This will be addressed later in these reasons. The analysis now moves on to assess the Plaintiff's provable losses against which the deductions are to be applied.

Quantification of Loss

Residence

[157] The parties in this matter presented competing valuation reports for the lost structure. The Plaintiff relied on the report of Nigel Turner of Turner Drake & Partners. The Defendant presented the assessment of Philson Kempton. The reports were founded on competing assumptions.

[158] The Turner Drake report undertook an assessment of the 'replacement cost new' of the Nappan property. This was defined to mean the cost of replacing, repairing or reconstructing the structure with new construction of like kind and quality. The Kempton report approached the loss on the basis of the actual cash value of a replacement structure, if one were to be constructed on the site.

[159] The Plaintiff's calculation would result in a figure of $285,000.00 prior to the application of any deductions. The Kempton calculation advanced by the Defendant would result in a figure of $233,000.00.

[160] I have reviewed and considered the instructions from TD Canada Trust. I have also assessed the exemplar policy document which is in evidence by consent. I am aware of the maximum coverage figure contained in the quote provided to the Plaintiff.

[161] The lender's requirement for replacement cost coverage is entirely unsurprising. This is the means by which they protect the value of their

security. The policy which was likely to have been obtained in this case, in order to satisfy the bank's requirements, would have contained such coverage.

[162] I have considered the Defendant's argument that any rebuilt structure, in that location, would be overbuilt for the area. They argue a quantification of loss based on actual cash value would be more appropriate in the circumstances. I have assessed all their arguments in this regard.

[163] The Plaintiff testified, and I accept that in 2009 she would have opted to rebuild, as would have been her right under the policy. Her family circumstance at that time would have virtually guaranteed this. There would have been a coverage limit in the policy, as there was in the quote in this case. The Plaintiff's calculations and Turner Drake report account for this fact.

[164] I accept the rationale and conclusions of the Turner Drake report. The appropriate figure for calculation purposes for structure loss is the replacement cost of $285,000.00.

Personal Property

[165] The Plaintiff has presented a substantial claim for loss of personal property. The evidence presented by her seeks to quantify her personal property loss at $343,000.00 on a replacement cost basis.

[166] The issues of proof under this heading are substantial. The Plaintiff presented essentially a bare recital of items said to have been lost. Nothing was advanced by way of quotes, receipts or invoices. She provided an estimate of values based on a review of sources which were not put before the Court. The maximum coverage figure for contents in the coverage quote received through Sears Insurance was $264,000.00.

[167] There are issues as to what coverage might have been obtained. The TD Canada Trust mortgage instructions did not specify the need for any particular contents' coverage. Ms. Fadelle was looking to lower her premiums. It is unknown what impact this may have had on the nature of the coverage ultimately obtained.

[168] The Plaintiff argues she would have secured replacement cost coverage for contents. The coverage obtained for the two New Brunswick properties included only "actual cash value" coverage for personal property. Actual cash value calculations are subject to issues of deduction and depreciation. I do not

believe that any contents coverage obtained for Nappan would have been better than that obtained for the New Brunswick properties.

[169] While the Plaintiff clearly has suffered a substantial loss, the claim suffers from a number of issues of proof as outlined above. I have reviewed the portions of the policy pertaining to calculation of actual cash value and the treatment of depreciation. These would have presented a substantial challenge for her.

[170] A review of case authorities presented by both parties on this issue reveals that courts have struggled with the treatment of claims such as this. The Plaintiff clearly has suffered a loss. Its quantification is challenging.

[171] In *Zoltan Gergely Farm Inc v. Wawanesa Inc*, 2020 CarswellAlta 396, the obligation on the court was stated in these terms:

> 54 When the Court is faced with a proven loss or damage suffered by a party but has little or no evidence to support or assist in quantification of such a loss, the Court is obliged to do the best it can despite that paucity of evidence. In *Wood v. Grand Valley Railway*, [1915] S.C.J. No. 17 (S.C.C.) at para 13, (1915), 51 S.C.R. 283 (S.C.C.), Davies J stated, referring to the English case of *Chaplin v, Hicks*, [1911] 2 K.B. 786 (Eng. C.A.):
>
> > It was clearly impossible under the facts of that case to estimate with anything approaching to mathematical accuracy the damages sustained by the plaintiffs, but it seems to me to be clearly laid down there by the learned judges that such an impossibility cannot "relieve the wrongdoer of the necessity of paying damages for his breach of contract" and that on the

> other hand the tribunal to estimate them whether jury or judge must under such circumstances do "the best it can" and its conclusion will not be set aside even if the amount of the verdict is a matter of guess work.

55 In the Alberta case, *581257 Alberta Ltd. v. Aujla*, 2011 ABQB 39 (Alta. Q.B.), the Court in discussing the same principle stated in paragraph 59:

> 59. The following principles are relevant to the Plaintiff's proof of its loss:
>
> (a) The degree of certainty and particularity in proof of damage is that which is reasonable, have regard to the circumstances and to the nature of the acts themselves by which the damage is done (*Wood v Grand Valley Railway (1915), 51 S.C.R. 283 (S.C.C.), at 301).*
>
> (b) The difficulty of assessment of damages cannot relieve the wrongdoer of the necessity of paying damages (*Wood* at p. 289). If the amount is difficult to estimate, the tribunal must simply do its best on the material available (S.M. Waddams, *The Law of Damages*, looseleaf (Toronto: Canada Law Book, 2008) at para. 13.30).

[172] I have concluded as follows:

- The Plaintiff would have secured contents coverage but it would have been on the basis of actual cash value rather than replacement cost.
- I find the coverage limit (in keeping with the quote document) would have been restricted to a maximum of $264,000.00.

[173] I have assessed the quantification of loss presented by the Plaintiff. I conclude that a substantial reduction for contingencies is required. She would

have faced considerable issues with respect to depreciation. The Plaintiff lacks invoices or receipts. Any negotiation between the Plaintiff and her insurer with respect to arriving at a valuation would have been challenging. There is a likelihood, as would be common in such circumstances, that the negotiation would have resulted in the matter being resolved on the basis of a lump sum settlement.

[174] Given the relevant contingencies, I conclude her claim under this head of loss is limited to $125,000.00. This figure will be added to her structure loss and site clean up claims to arrive at the total loss figure.

Site Costs

[175] The Plaintiff produced proof she paid site clean up and debris removal costs of $14,487.00. This was not challenged by the Defendant. Coverage for this loss is a standard component of fire loss policies.

Contributory Negligence

[176] The issue of contributory negligence must be considered separately from that of the deduction applied following the analysis for loss of chance. The weighing of a contributory negligence is a separate matter as it addresses a

different set of considerations. See for example: *Doiron v. Caisse populaire d'Inkerman Ltée*, (1985), 17 D.L.R. (4th) 660 (N.B.C.A.).

[177] As is the case with most matters of solicitor-client negligence, this is an instance of joint contractual and tort liability. The Court of Appeal has dealt on a number of occasions with addressing issues of contributory negligence in such circumstances.

[178] In *MacDonald v. Wedderburn*, [1999] N.S.J. No. 93 (S.C.) the Court analyzed the issue at length:

> 33 The application of the principles of joint or several responsibility, that is, contributory negligence, to claims of professional negligence and breach of contract was extensively reviewed by La Forest, J.A., (as he then was), writing for the court in *Doiron v. Caisse populaire d'Inkerman Ltée*, (1985), 17 D.L.R. (4th) 660 (N.B.C.A.). After a review of both Canadian and other authorities, including the decision of the Nova Scotia Court of Appeal in *Finance American Realty Ltd. v. Speed* (1979), 38 N.S.R. (2d) 374 (N.S. C.A.), and after recognizing cases in the States of Victoria and New South Wales in Australia, and the report of the Law Commission of Great Britain in its 1977 *Report on Contribution* (Law Com., No. 79) took a contrary view, at p. 673, he concluded:
>
> > What the authorities demonstrate to me is that the doctrine of apportionment of loss where contributory negligence arises in contract cases is here to stay. There are strong underlying policy reasons favouring this approach and the courts, using one technical device or another will, I venture to think, continue to respond to these by applying the doctrine.
>
> 34 In *Finance American Realty Ltd. v. Speed*, supra, Chief Justice MacKeigan in writing for the court held the *Contributory Negligence Act*, R.S.N.S. 1967, c. 54, applied to breaches of contract as well as tort.

[179] To similar effect was *A.C.A. Co-operative Association Ltd. v. Associated Freezers* (1992), 113 N.S.R. (2d) 1.

[180] The Plaintiff relies on a line of cases which stand for the proposition that contributory negligence can be the exception in cases of solicitor-client negligence: see *Lawyers' Professional Liability* (3rd), Grant, Rothstein & Campbell, Markham: LexisNexis, 2013, para 7.167). This position is based on the fact that lay persons may not be in the best position to protect themselves from the failures of professionals they have hired to undertake particular specialized tasks.

[181] The Defendant argues that, on the facts of this case, this line of reasoning is not applicable. He submits a substantial deduction for contributory negligence ought to apply as the Plaintiff failed to take appropriate steps to protect her own interests. I have accepted that this is a proper case for a finding of contributory negligence. This is based on the considerations below.

[182] Ms. Fadelle was an experienced business person. She had the original duty to secure coverage. I have accepted that she did send the instruction fax of May 25, 2009 to Sears Insurance. On this basis, she argues it was reasonable for her to believe the policy was in place when the transaction closed. Having given

the instructions however, she was careless in her follow up. She failed to recognize that premiums were not being deducted. She testified she did not pay attention to these issues in the summer of 2009 because she was "taking the summer off". The Plaintiff neglected to take sufficient care of her own interests in the circumstances.

[183] Quantifying contributory negligence is a highly fact specific exercise. In *Doiron v. Caisse populaire d'Inkerman Ltée*, (1985), 17 D.L.R. (4th) 660 (N.B.C.A.) the court assessed a 50% finding of contributory negligence in a solicitor's negligence case where it concluded the parties contributed equally to the ultimate loss. Moir, J reached the same conclusion in *MacDonald v. Wedderburn*, [1999] N.S.J. No. 93 (S.C.) where he also split liability equally between a client and solicitor based on the particular facts of that proceeding.

[184] While I have concluded this is an appropriate case for a finding of contributory negligence on the part of the Plaintiff, I do not conclude the apportionment should rise to 50%. Every case turns on a weighing of its own facts. While the Plaintiff did fail to take adequate care for her own interests, and ought to bear a portion of the liability, I do not conclude the parties are equally at fault.

[185] Given the respective failings of the parties as outlined above, I have determined the Plaintiff ought to be found 30% contributorily liable for her own losses. As discussed above, this represents a separate deduction from that flowing from the loss of chance analysis.

Damages

[186] Accordingly, the Plaintiff's claim is assessed as follows:

Structure	$285,000.00
Contents	125,000.00
Debris Removal	14,487.00
Less agreed deductible	(5,000.00)
SUBTOTAL:	$419,487.00
LESS 40% (Lost Chance)	(167,794.00)
SUBTOTAL:	$251,693.00
LESS 30% (Contributory)	(75,507.00)
TOTAL:	**$176,186.00**

Conclusion

[187] Both parties in this matter made mistakes and assumed risks. It is fitting they share the responsibility for the loss. The Defendant failed to protect the interests of his client. As a consequence, she lost the opportunity to protect herself from the risk which eventually materialized. In all the circumstances, the Plaintiff was contributorily responsible as well and, to that extent, must assume a degree of responsibility for the loss.

[188] Following application of the lost chance analysis and contributory negligence deduction, Ms. Fadelle will have judgment in the amount of $176,186.00, together with pre-judgment interest and costs. The Plaintiff will draft the Order.

[189] The Defendant has given notice he seeks to limit the number of years for which the Plaintiff is entitled to claim pre-judgment interest. In the event the parties are unable to resolve issues of costs and interest, they may forward written submissions to the Court no later than 60 days following release of these reasons.

J.