SUPREME COURT OF NOVA SCOTIA
Citation: *van Delft v. Maddalena*, 2024 NSSC 75

Date: 20240125
Docket: 494824
Registry: Halifax

Between:

Dilrukshi van Delft ("Dilly") and Lee van Delft

Plaintiffs

v.

Michael Maddalena

Defendant

Written Decision

Judge:	The Honourable Justice Bodurtha
Heard:	January 30, 31, February 1, 2, 6, and 9, 2023 in Halifax, Nova Scotia
Oral Decision:	January 25, 2024
Written Decision:	March 18, 2024
Counsel:	David G. Coles, K.C., for the Plaintiffs Stephen Kingston, K.C., and Natasha Puka for the Defendant

By the Court (orally):

Introduction

[1] Mr. Maddalena represented the Plaintiffs in connection with their purchase of a tract of bare land in 2010.

[2] The Plaintiffs claim that Maddalena is liable to them for breach of contract and negligence as regards the purchase transaction. They say that Maddalena failed to notify them of a right-of-way and a utility easement in advance of closing and that, if they had known, they would not have purchased the Property.

[3] They claim damages because of this alleged omission on the part of Maddalena.

Facts

[4] Michael Maddalena "Maddalena" is a practicing lawyer admitted to the Nova Scotia Bar in 1982. Maddalena's current practice centres on real estate and corporate law, and this was also the case in 2010.

[5] In late February 2010, Maddalena was retained by the Plaintiffs in connection with the purchase of a large (35 acre) parcel of bare land known as Block R2, Barachois Lake Road, Prospect, Halifax Regional Municipality (PID No. 41055369) (the "Property"). Access to the Property is via a deeded right of way over Barachois Lake Road, a private roadway.

[6] In late 2009 Plaintiff Lee van Delft ("Lee") became aware that the Property was listed for sale. She discussed the Property with the other Plaintiff, her mother ("Dilly"), and they agreed that they would purchase the land together and then each build separate residences on the Property.

[7] In or about January 2010 Lee and Dilly visited the Property with their realtor and walked part of the Property. At some point Dilly made an inquiry with Nova Scotia Power Inc. ("NSPI"), to ascertain how much it would cost to install power lines.

[8] Following negotiations with the Vendor, the Plaintiffs agreed to purchase the Property for $88,000 on January 17, 2010. The Plaintiffs terminated that Agreement, however, due to issues regarding the timing for the completion of

conditions. On February 25, 2010, the Plaintiffs and the Vendor entered into a new Agreement (the "Agreement of Purchase and Sale"), again for $88,000. The closing originally scheduled for March 25, 2010, was extended to April 1, 2010 (the "Closing Date").

[9] After the Plaintiffs executed the Agreement of Purchase and Sale, they retained Maddalena as their legal counsel on February 26, 2010.

Benefits and Burdens

[10] The Property had been migrated to the *Land Registration Act* system in 2008. It was the remainder parcel from a larger block of land, which had been subdivided into various residential lots.

[11] The Property benefited from an access right-of-way over the subdivision's private road network and, separately, a right-of-way over an adjacent property allowing access to Prospect Bay.

[12] The Property was also subject to two burdens. The first was a 50-foot-long access right of way in favour of a neighbouring property known as Lot 88 (the "Lot 88 ROW"). The second was an NSPI power easement (the "NSPI Easement"). The NSPI Grant of Easement stated:

> ... the Owner grants the Company the free and uninterrupted right, privilege, liberty and easement in perpetuity for the Company to do the following:
>
> (a) To enter on, over, across or under **that portion of the Lands shown outlined on the sketch attached hereto as Schedule "A" (the "Easement")** to lay down, install, construct, operate, maintain, inspect, patrol, alter, remove, replace repair, reconstruct and safeguard a transmission and/or distribution facility or facilities in the Easement consisting of poles, guys, anchors, underground conduits, wires cables and/or other structures or equipment for the distribution of electrical power and energy, and the transmission of telecommunications signals, and all other communication signals (the "Equipment") and to clear the Easement of all or any part of any trees, growth, buildings or impediments or obstruction, nor or hereafter on the Easement which might, in the opinion of the Company, interfere with the rights or endanger the equipment. **The said Equipment and Easement is permitted to be located in its existing location within the boundaries of the "Private Roads" as shown in Schedule "A" and may be located or relocated within the said Private Road boundaries provided herein that the said Equipment is located proximately to the right of way boundary as is normal and**

> **customary for the Company** and in no event shall the location of the Easement interfere with any "Traveled Ways" for motor vehicles, pedestrians, etc., **nor shall the said Easement in any way be greater than three meters from the said right of way boundary**. Provided however, that the Company shall be permitted to cross over the right of way at a height so as not to interfere with vehicular or pedestrian traffic.
>
> [Emphasis added]

[13] Schedule "A" to the Grant of Easement was a sketch showing various private roads, including a roadway over the Property ("Easement Sketch").

[14] There was never a roadway constructed over any portion of the Property, whether as shown on the Easement Sketch or otherwise.

[15] After reviewing the parcel register, Maddalena was aware of the utility easement and the Lot 88 ROW, which were listed as burdens. Maddalena testified that he was also aware that there was no reservation of rights other than the owner's right to build a roadway across Block R2 or upon Block R2. In his opinion, there was nothing giving a third party the right to construct on the Property.

[16] Prior to closing, Maddalena sent an email (copied to Dilly) dated March 10, 2010, to Ms. Shaffner (the vendors' solicitor's assistant), which stated in part:

> 5. The NSPower easement while showing roadway through Block R2, the roadways do not actually cross Block R2. There should be a TQ added to the parcel register to explain the effect of this **non-easement.**
>
> [Emphasis added]

[17] Maddalena described the NSPI easement as a "**non-easement**". This comment was predicated upon his receipt earlier on March 10, 2010, of an email from the vendors' solicitor's assistant which stated in part:

> …Please note that the **utility easement runs over the rights of way and not the property itself, I usually put this in as a comment and not as a burden or a benefit.** To the best of my knowledge, there is no power running into Block R2, however – if this is of any help to you – Lot 88 has a right of way over a portion of Block R2 extending in a northerly direction from the end of Barachois Lake Road, and it reserves the right to install power poles and lines, etc. over that right of way, Joe Roza acted for the purchaser of Lot 88.
>
> [Emphasis added]

[18] After receiving that email of March 10, 2010, Maddalena looked at the grant of easement, including the sketch. The easement was to run adjacent to the existing and proposed roadways in the subdivision. He testified that he contacted Dilly, and during this telephone conversation advised her of the easement and asked whether there were any roads on the Property. She confirmed there were none. In Maddalena's view the easement granted rights to NSPI regarding future roadways, if and when constructed. The NSPI easement was a right that had been granted and therefore existed, but in his view it was conditional or "inchoate" upon a roadway actually being constructed. He did not advise Dilly of his views on the easement.

[19] Maddalena testified that he did the following at the pre-closing meeting with the Plaintiffs. He reviewed the conveyance and the subdivision plan, and the highlights of the legal description for the deed. He identified the Lot 88 ROW, and the utility easement that ran adjacent to Lot 88. He did not go further and explain that under certain conditions the NSPI easement might extend further than that. In his view, the easement was "inchoate", or was subject to a pre-existing condition.

[20] Maddelena, as counsel for the Plaintiffs accepted a warranty deed from the vendors to the Plaintiffs which stated in part:

> THE GRANTOR covenants with the GRANTEE that the GRANTEE shall have quiet enjoyment of the lands, that the GRANTOR **has good title in fee simple to the lands and the right to convey them as hereby conveyed, that the lands are free from encumbrances**, and that the GRANTOR will procure such further assurances as may be reasonably required.
>
> [Emphasis added]

[21] Maddelena did not take any steps to remove the easement from the description of the Property prior to closing. In addition, the description of the Property upon closing did not have a textual qualification added, as per Maddalena's request in his email of March 10, 2010. A textual qualification appears on property online for the purpose of providing information that cannot be determined from registry sources. In this case it would alert a prospective buyer of the easement.

[22] The Plaintiffs were to receive title insurance in respect to the purchased property. The Defendant, in obtaining their title insurance, excluded from coverage the PID # of the grant of easement to NSPI. Maddalena's "report on title" to Stewart Title Guaranty Company stated in part:

> …obtain a good marketable interest in the insured land referred to in Schedule "A" of the Policy, subject only to the qualifications of which I have advised the insured and are attached as Schedule "B"; and I have advised each named insured that no coverage will be provided in respect to the above-noted qualifications,…

[23] The Defendant did not advise the Plaintiffs of the qualification on title, namely, the NSPI easement.

[24] Following closing, the Plaintiffs held the land until 2015, eventually deciding to sell it. The Plaintiffs listed the property and received an offer to purchase. The Plaintiffs counter-offered and the prospective purchaser did not re-offer. The prospective purchaser advised that she did not re-offer because she became aware of the existence of the NSPI easement. Dilly testified that this was how the Plaintiffs first learned of the existence of the easement.

[25] The Plaintiffs contacted the Defendant to have him remove the easement. He did not advise that the easement was "non-existent". He requested NS Power release the easement. By email dated May 17, 2018, a representative of NSPI stated, in part:

> …my understanding of the easement is that it is not limited to only the boundaries of private roads. **Regardless of if there is a road in place or not NSPI continues to have the right of way within the area outlined in Schedule "A" attached to the easement document.**
>
> [Emphasis added]

[26] Subsequently, the Defendant advised the Plaintiffs to make the request personally, but they had no success.

[27] Maddalena inquired on May 17, 2018 of the NSPI representative:

> … Is there a procedure to request release of the right-of-way?

[28] To date, neither the right-of-way for the road, nor the easement has been released.

[29] The Plaintiffs testified that if they had known of the existence of the easement, they would not have bought the Property.

Issues

[30] The issues are as follows:

(a) Did Maddalena satisfy the applicable standard of care as regards his representation of the Plaintiffs in connection with their purchase of the Property;

(b) Have the Plaintiffs sustained any loss or damage because of any act or omission of Maddalena; and,

(c) Have the Plaintiffs acted reasonably to mitigate any loss or damage which they may have sustained.

Analysis

Issue (a) Did Maddalena satisfy the applicable standard of care as regards his representation of the Plaintiffs in connection with their purchase of the Property

[31] In *Robb v. Walker*, 2015 BCCA 117, the majority of the British Columbia Court of Appeal stated that, when interpreting an easement, effect must be given to the plain and ordinary meaning of the words in the grant to determine the intention of the parties at the time the agreement was entered into. Surrounding circumstances, such as objective evidence of the background facts at the time of the execution of the contract, are to be considered and the wording of the instrument creating the right-of-way should govern the interpretation - unless there is an ambiguity in the wording, or the surrounding circumstances demonstrate otherwise. Regard is to be given to the words used, in their ordinary meaning in the context of the instrument as a whole (paras. 30-33).

[32] The NSPI Grant of Easement specifically states that the NSPI easement is located within the boundaries of private roads as shown on the sketch. The boundaries are clear. At the relevant time there was no roadway constructed on the Property, and no power lines were installed. Had the parties to the grant intended to provide NSPI with a right-of-way in all circumstances, they could easily have done so without reference to a private roadway, but they did not.

[33] Schedule “A” to the NSPI Grant of Easement evidences the intention of the grantor (at that time) to construct a private road network throughout the subdivision, including the Property. The Grant of Easement benefitted the grantor, as it would assist in the marketing of the subdivided residential lots.

[34] An easement can validly exist despite no particular “way” being specified by the grantor of the easement. The court in *Remington v. Crystal Creek Homes Inc.*,

2018 ABQB 30, considered a situation in which the applicant landowner applied to have the scope of an easement narrowed. An easement had been granted in 1984 over a 10.55-acre portion of land where a road had not yet been built, and it was not known where precisely such road would be. The Court stated:

> 12 Westside argued that the 1984 Easement originally included an area as large as the Easement Land because it was not known at the time where the Existing Road would be located. The Existing Road having been constructed, it argued that the 1984 Easement should relate to the Existing Road only and not the entire 1984 Easement Land.
>
> 13 Rooke, J, as he then was, found the wording of the 1984 Easement clear and unambiguous and that the parties to this easement intended to include all of the 1984 Easement Land as part of the 1984 Easement. Rooke, J noted the Easement Land's definition as "Area A" on plan #8410951. That plan, he noted, was clearly marked with an "Area A" which included the whole of the 1984 Easement Land without qualification.
>
> […]
>
> 21 In *Stephens v. Gordon* (1893), 22 S.C.R. 61 (S.C.C.) the defendant was granted a general right of way to enter upon a parcel of land in order to harvest timber. The dispute was whether the defendant could only access the timber by the way designated by the grantor. Sedgewick, J ruled at p 99 that,
>
> > ... where no right of way is specified in the instrument of grant the grantor may assign a right of way, but that way must be a reasonable one — a way that will enable the grantee to enjoy, in a reasonable manner, the thing granted. **If the grantor does not assign a way, or if he assigns a way that is unreasonable, the grantee may select a way, a way that is "most direct and convenient" for himself, but one the use of which will not unreasonably interfere with the grantor in the enjoyment of his rights upon the servient tenement …**
> >
> > [Emphasis added]

[35] The effect of *Remington*, and particularly its citation of *Stephens v. Gordon*, is to implicitly reject – on a general level – the vendor's position that because there is no road, there is no right. If that were the case, there would not be such a line of case law dealing with the right of a grantee to appoint a way and to construct a road over such way to give effect to their right.

[36] That said, the specific wording of a particular instrument of grant, may in individual cases establish that the non-existence of a road may defeat the entire easement. Such was the case in *Finley v. Sutherland*, (1969) 4 D.L.R. (3d) 586,

[1969] N.S.J. No. 133 (S.C.A.D.), which is relied upon by the Defendant in their pre-trial brief. From the Defendant's brief:

> 57. In *Finley v. Sutherland*, the Nova Scotia Court of Appeal considered a grant of easement which provided the grantee a right to construct a roadway over the servient tenement with a coupled uninterrupted right-of-way. The Court found that this did not constitute an express grant of a right-of-way – it merely provided a right to construct a right of way and, as no roadway had been constructed, the easement was found to have been abandoned due to non-user.
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> 58. While *Finley* did not concern a utility easement, it illustrates that an easement may be contingent upon the construction of a roadway and not operate as a right-of-way irrespective of whether the roadway has been constructed.

[37] The Defendant fails to note that the finding in *Finley* that the right-of-way was contingent upon the construction of a roadway came down to the very particular wording of the grant in that case. From *Finley*:

> 31 I now direct myself to the questions of law arising in this appeal. The first of these is whether a right of way was granted by the 1891 Deed or merely the right to construct a right of way. **I have no doubt that what was given was merely a right to construct and build a right of way**.
>
> 32 In arriving at this conclusion I have first looked at and considered the words quoted above from the 1891 Deed and considered them in the light of a reading of the whole document. The object of interpretation of a deed, as of other written instruments, is to discover the intention of the author. **But that intention must be gathered from the deed itself** — see 11 Hals., 3rd ed., pp. 381-2. The relevant words of the 1891 Deed appear to me to be clear and unambiguous in granting Bradford a right to construct only. What else can the words "Also a free and uninterrupted right for the said Henry Martin Bradford, to construct and build a carriage road of the width of an ordinary carriage road ..." mean? After construction of the carriage road, then Bradford, his heirs and assigns were to have "a free and uninterrupted right-of-way upon, along and over the carriage road hereby *to be constructed* ..." (emphasis added). Reference is made again in the document to the carriage road "hereby to be constructed". Thereafter follow words enlarging the right to pass and repass to do so with or without horses, cattle and so on along the "said carriage road hereby constructed". **I do not consider that the words "hereby constructed" so appearing can have the effect of enlarging the right to construct into a grant**.
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> […]
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> 35 Counsel for the appellant argued that all essential characteristics of an easement were set out in the 1891 Deed and that the words "hereby to be constructed" were used in an adjectival sense and were in effect subordinate to the words introduced by "together with" so that what was granted was a right of way

> and not a mere right to construct a right of way. **I cannot so read the document. Its plain effect in my view is to grant a right to "construct and build a carriage road" and after that was done the grantee, his heirs and assigns would have a right of passage over the road**. [Emphasis added in bold]

[38] In *Finley*, the explicit language in the grant was clear. The right given was a right to the grantee to construct a road, constructed in accordance with the terms of the grant, and the grantee could enjoy a right-of-way.

The NSPI Easement

[39] Maddalena never explained his theory of the "non-easement", that is, that the easement does not come into operation until there is a road. "Non-easement" is a term I have not been able to find in any case or in *Black's Law Dictionary*, nor was any authority provided to me regarding same. He did not provide further explanation to his lay clients as to what was meant by a "non-easement". It is entirely believable that the Plaintiffs would interpret it to mean there was no easement.

[40] Maddalena developed a thesis which was the easement will not arise unless and until a road is built. He took the view that the easement was not important because there were no roads currently on the property, so he classified it as a "non-easement" and not a problem for his clients. This was based on his interpretation of the Grant of Easement, including the sketch.

[41] Maddalena identified the burden, read the grant of easement, exercised his professional judgment in interpreting the easement and came to a conclusion.

[42] Maddalena admitted that the easement would exist if a road existed. He did not tell that to the Plaintiffs, informing them only that this is a "non-easement", without any explanation of what that meant.

[43] In *Rice v. Condran*, 2012 NSSC 95 (which will be discussed in more detail later), the Court addressed professional negligence where a lawyer failed to provide relevant information to their client:

> Omissions and the Duty to Warn
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> 35 In this case, the plaintiffs contend that they would not have purchased lots 23 and 17 if they had been advised or "warned" by Ms. Condran that waiver clause 27 permitted Armco to waive any or all of the restrictive covenants governing the use of lots in Canterbury Crossing. This therefore brings into play the issue of professional negligence by virtue of "omission and failure to warn" on the part of

Ms. Condran. Counsel for the plaintiffs has referred the Court to two cases which deal with this issue. The first case cited is *Major v. Buchanan* (1975), 9 O.R. (2d) 491 (Ont. H.C.). In that case, the Ontario Supreme Court, per Goodman, J., at paras. 56, 57 and 58 discussed the "duty to warn" as follows:

> 56 The case of *Sykes et al. v. Midland Bank Executor & Trustee Co., Ltd. et al.*, [1969] 2 All E.R. 1238, varied as to damages in the Court of Appeal and reported at [1970] 2 All E.R. 471, dealt with a solicitor-client relationship where the plaintiffs entered into a sublease which contained several clauses of an unusual nature which had a detrimental bearing on their right effectively to assign or sublet and when the plaintiffs sought to sublet or assign part of their premises for the remainder of the term they encountered substantial delay resulting in loss to them. In an action for damages the plaintiffs contended that the solicitor's omission to advise them of the legal effect of the clauses in question constituted professional negligence. In giving judgment at trial, Paull, J., said at p. 1245:
>
> > When a solicitor is consulted by a client with reference to a lease which the client is considering entering into the solicitor knows, or ought to know, that one of the main purposes of consulting him is to ensure that where there is any clause the legal effect of which the client may not fully understand because of the wording, or where legal consequences may follow which the client may not realise, the meaning and the consequences of the clause will be pointed out to him or her. The last step, so far as the client is concerned, will be that the solicitor will present him with a document to sign, and he relies on the solicitor not to present him with a document which contains hidden dangers, of which the solicitor ought to know, but of which he, as a non-lawyer, may not know or realise the import. What has to be pointed out may well vary with the client. The test for negligence is whether the court is prepared to hold that in the particular case the solicitor ought to have realised that the consequences in law of any particular words used in the lease might well not be fully realised by his client. Even if the client is a fellow solicitor or a barrister the client is still entitled to have pointed out to him any clause which is unusual or which may have what I would call, an indirect effect on another clause; but, of course, if either the transaction does not come to fruition for any reason, or the client already knows the effect of the clause no "causation" (if I may use that word) flows if the effect is not pointed out to him and, therefore, no action lies. If there are several clients it is not enough that the solicitor thinks one of them understands; he must consider each of them, although if one is clearly acting as sole agent for the others, an explanation to him may (but not necessarily will) be sufficient. Each case must be considered on its own facts.

> The solicitor was held liable at trial.
>
> 57 On appeal the decision of the trial Judge was upheld as to the finding of liability on the part of the solicitor. At p. 478, Salmon, L.J., said:
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> > The question then arises: are the plaintiffs entitled to recover any damages in respect of this negligence? The duty of care in this case arose out of the solicitor-and-client relationship. It was an implied term of the contract between Mr. Rignall and the plaintiffs that he should exercise reasonable care and skill in advising them. A breach of this term by itself, entitles the plaintiffs to no more than nominal damages. In order to recover anything more, the onus is on the plaintiffs to show that the breach caused substantial damage**.**
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> Further, at p. 478:
>
> > It was for the plaintiffs to show that it was probable that if they had received proper advice they would not have entered into the underleases, at any rate not at the rents reserved. In my opinion they completely failed to prove anything of the kind. No doubt it would have needed very little evidence to establish this fact.
>
> Nominal damages only were awarded to the plaintiffs.
>
> 58 These two decisions, in my opinion, establish a principle mentioned only incidentally, if at all, in the other cases referred to me by counsel, namely, that a solicitor has the duty of warning a client of the risk involved in a course of action, contemplated by the client or by his solicitor on his behalf, and of exercising reasonable care and skill in advising him. If he fails to warn the client of the risk involved in the course of action and it appears probable that the client would not have taken the risk if he had been so warned, the solicitor will be liable. If he warns the client of the risk involved in the course of action, then he can only proceed to follow such course if the client instructs him so to do. If he fails to exercise reasonable care and skill in advising the client with respect to his risk and the client or solicitor on his behalf adopts a course of action which the client would probably not have taken or authorized if he had been properly advised, again, the solicitor will be liable if the client suffers a loss. It should be noted that in the Sykes case the plaintiffs, in response to direct questions from the trial Judge, would not say that their course of action would have been any different if the proper advice had been given and, accordingly, were awarded only nominal damages.
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> [Emphasis in original]

[44] In *Ivans v. Glenmore-Ellison Improvement District*, 2018 BCSC 2301, the British Columbia Supreme Court considered the effect of a utility easement from a parcel referred to as “Lot 6”, which permitted the installation of an underground water and sewer system to the benefit of certain adjacent properties. The plaintiffs

lived on adjacent lots (Lots 1 and 2). For many years they had received their water supply through the water connection on Lot 6 ("Line A"). The dispute arose because a local regulator determined that this arrangement did not comply with the local bylaws. To become compliant, the owners of Lot 6 installed a new independent water line that capped off Line A and stopped the water supply to the plaintiffs' properties.

[45] The plaintiffs argued that they were entitled to access water from Line A, as they benefitted from a utility easement over Lot 6. The Court held that the easement had to be interpreted in the context of the surrounding circumstances at the time it was granted. The Court found that the easement permitted access to water utilities that passed over Lot 6 to other adjacent properties, but not to Lots 1 and 2. Additionally, the Court determined that the easement was restricted to the installation and maintenance of sewer infrastructure in the "existing roadway" at the time the easement was created. Line A was in existence at the time the instrument was created, as was the existing roadway. Line A was not located within the existing roadway, however, and the Court held that it was therefore not captured by the easement.

[46] By analogy, the NSPI Easement referenced the boundaries of a "Private Road" depicted in the Easement Sketch, which was at that time intended to be constructed upon the Property. This did not occur. These were the circumstances at the time the NSPI Easement was granted.

[47] In this case, the language of the NSPI Easement says nothing about the construction of a road. The language of the grant provides for an easement within a particular boundary drawn on a sketch of the Lands. The fact that the outer limits of the boundary correspond with, or are labelled as, a planned network of private roads does not mean that the easement was contingent on the construction of those roads, merely that the easement must be located within that still-identifiable piece of the Lands, whether the roads actually exist.

[48] The description of the land conveyed to the Plaintiffs in the Warranty Deed states:

> SAVING AND accepting from the above described property a utility and access easement as shown on a plan of subdivision C-1127, signed by Mark J. Whynot, NSLS #615 which plan is found filed in the Registry of Deeds as Plan #86751527.

[49] This description, given its plain and ordinary meaning, is clear that the property is subject to a single utility and access easement as shown on a particular plan. There is no stated limitation that the road must be "constructed".

[50] Furthermore, it would be inconsistent with the language of the grant to suggest that the easement does not exist because the road was not built, given that the grant reads "[t]he said Equipment and Easement is permitted to be located **in its existing location** within the boundaries of the "Private Roads". If such an interpretation were accepted, the words "existing location" would arguably be meaningless. If the intention was for the easement to only exist once the roads were constructed, the drafter might have written "… permitted to be located in its *planned* location" or "… provided that the Private Roads are constructed". As written, the grant implies that the easement exists and existed in force from the date of the grant.

[51] I find that the NSPI Grant of Easement may reasonably be interpreted as delineating the location of the easement over the Property irrespective of whether a private roadway is constructed on the Property.

[52] The evidence is clear that Maddalena knew of the easement before the time for the lawyer review had expired. However, Maddalena did not inform his clients of the existence of the easement such that they could exercise their right to terminate the APS.

[53] The easement exists and was always in operation. I find that Maddalena had a duty to let the Plaintiffs know of the existence of the easement, explain to them what he meant by a "non-easement", and then express his opinion on its status. His clients then could have decided whether they wanted to proceed with closing on the Property. He did not give them that opportunity.

[54] The evidence is that had the Plaintiffs known of the "non-easement" prior to closing they would not have closed. Dilly testified that she still would not have closed even if she needed to forfeit the $10K. I accept the evidence that the Plaintiffs would not have closed if they had known about the existence and effect of the "non-easement".

[55] The grant of the NSPI easement describes NSPI as having the easement in perpetuity. I agree with the Plaintiff's submission that whatever the ultimate status/content or scope of the NSPI easement, based upon the description of the lands, and the text of the deed to NSPI, Maddalena had to make a decision whether

to treat the easement as if it did not exist or to acknowledge that in purchasing the lot there existed an easement which might be exercised in the future. Maddalena should have advised the Plaintiffs of these possibilities and the risks of proceeding such that the Plaintiffs could decide whether they wanted to close the transaction.

[56] It is understandable why a lay person would conclude that the term "non-easement" in the March 10, 2010 email would mean the easement did not exist. The *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/non- defines the prefix "non" as:

> non-prefix
>
> 1: not: other than: reverse of: absence of
>
> 2: of little or no consequence: unimportant: worthless
>
> 3: lacking the usual especially positive characteristics of the thing specified

Standard of Care

[57] In *Rice*, a case which I will quote from extensively because it is applicable to the case before me, the plaintiffs purchased two vacant lots, with an intention to construct a home on one. The plaintiffs' Deeds contained restrictive covenants prohibiting them from keeping horses and livestock on the properties, as well as a clause permitting the developer to waive covenants in respect of any parcel within the subdivision. After purchasing the lots, the plaintiffs discovered that a neighbour was constructing a barn to keep horses, with the permission of the developer. The plaintiffs sued their solicitor, alleging that she negligently failed to explain the waiver clause to them. The court stated the following regarding the standard of care of a lawyer:

> 25 There is no significant dispute as to the standard of care owed by a lawyer to his or her client. The standard is to act reasonably in the performance of the services as is required by the circumstances of each lawyer/client situation. A guarantee of a particular result forms no part of the standard of care required of a lawyer.

[58] The Court found that the lawyer had breached the standard of care but dismissed the claim as the plaintiffs had failed to prove that the lawyer's acts or omissions had caused a loss. The Court stated at paras. 52 and 57:

> 52 The test in circumstances as in the present case, a non-feasance or omission situation, is the "but for" test. The Rices allege that, "but for" the omission of Ms. Condran in failing to warn them about the potential effect of

> clause 27, they would not have purchased lots 23 and 17. Needless to say, the burden of proving this proposition on a balance of probabilities rests with Mr. and Mrs. Rice. As stated in the cases cited previously, I would have to be satisfied, on the civil burden, that Mr. and Mrs. Rice would not have purchased either lot had they been advised of the legal effect of clause 27. Also as stated in the cases quoted previously, that is a finding of fact which has, of necessity, to be made by inference drawn from the established facts and all of the evidence.
>
> …
>
> 57 In the final analysis, I am not satisfied, on a balance of probabilities, that "but for" Mrs. Condran failing to warn the Rices about clause 27, they would not have purchased lots 23 and 17. I am not satisfied that it would have made any difference [...] Therefore, any omission on the part of Ms. Condran was not the cause of Mr. and Mrs. Rice purchasing lots 23 and 17 and of subsequently not building on those lots.

[59] In this case, the evidence before the Court is that "but for" the omission of Maddalena the Plaintiffs would not have purchased the Property.

[60] In *Meister v. Coyle*, 2010 NSSC 125, affirmed at 2011 NSCA 119, Smith, A.C.J. (as she then was), discussed the standard of care when considering a claim of negligence against a lawyer. I note that the *Meister* case was dealing with a lawyer representing a client in a criminal prosecution, not in a real property transaction; however, the stated principles provide some general guidance for the case before me:

> 43 In my view, Strathy J. summed up the matter nicely in *Di Martino v. Delisio* (2008), 58 C.C.L.T. (3d) 218 (Ont. S.C.J.) where he stated at para. 54:
>
> > .... barristers, like other professionals, will not be found negligent if they make the kind of judgment call that could reasonably have been made by a reasonably competent professional in similar circumstances, even if it is later proven that another decision would have produced a better result or that even the decision itself was a mistake. Recognizing that there is often no single correct decision, or that the circumstances sometimes do not allow time for reflection, the professional will not be held negligent unless the judgment he or she made was outside the range of reasonable choices that could have been made by a competent member of the profession.
>
> 44 I conclude from the above authorities that the standard of care owed by a lawyer to his client is that of the reasonably competent lawyer — no more — no less. Lawyers are not held to a standard of perfection nor are they responsible to ensure a certain result. They are, however, expected to represent their client in a reasonably competent manner making decisions and conducting a case within a range of reasonable, acceptable choices.

[61] The court in *Rice* addressed the Nova Scotia Barristers' Society Practice Standards and the prevailing practice in the real estate bar when representing property purchasers. The court found that following the prevailing practice may not necessarily avert liability; that practice must be "demonstrably" reasonable. Courts can refuse to follow the prevailing practice where it does not follow basic rules of caution or has numerous obvious risks (paras. 29-34).

[62] The paragraphs in *Rice* about the duty to warn are relevant in the case before me. I have previously referenced paragraph 35. In para. 36 the court went on to explain how the failure to warn relates to causation, and how expert evidence to address the "knowledge and expectation of lawyers at large" is not helpful:

> 36 The issue of a solicitor's omission or failure to warn, as it relates to causation, was discussed by our Court of Appeal in *MacCulloch v. McInnes Cooper & Robertson*, 2001 NSCA 8, 2001 CarswellNS 8 (N.S. C.A.); however, the Court first discussed the value of expert opinion as it pertains to establishing the standard of care in such cases. Writing the judgment for the Court, Bateman, J.A., said the following at para. 42:
>
> > 42 The problem here was not that Mr. McInnes did not know the law, but that he did not clarify the law once put to his inquiry. In these circumstances, expert evidence on the standard of practice was unnecessary. On this issue *Cordery on Solicitors*, 10th ed., Vol. 1, London, Butterworths, at p. J/305 is instructive:
> >
> > > [274] An allegation of professional negligence against a solicitor is serious and 'the onus of proving professional negligence over and above errors of judgment is a heavy one'. In that the trial judge is a lawyer himself, often he will judge negligence by what he perceives to be the standard of an ordinary competent solicitor. Indeed calling solicitors as experts has been criticised, it having been said:
> > >
> > > > I must say that I doubt the value, or even the admissibility, of this sort of evidence, which seems to be becoming customary in cases of this type. The extent of the legal duty in any given situation must, I think, be a question of fact for the court. Clearly, if there is some practice in a particular profession, some accepted standard of conduct which is laid down by a professional institute or sanctioned by common usage, evidence of that can and ought to be received. But evidence which really amounts to no more than an expression of opinion by a particular practitioner of what he thinks that he would have done had he been placed ... in the position of the defendants, is of little assistance to the court; whilst evidence of the witnesses' view of what, as

> a matter of law, the solicitor's duty was in the particular circumstances of the case is, I should have thought, inadmissible, for that is the very question which it is the court's function to decide.

It is submitted that only in cases where judgement must be based on material peculiarly within the knowledge of the solicitor's profession, as opposed to the knowledge and expectation of lawyers at large, would such expert evidence be either helpful or admissible.

37 In *MacCulloch*, Justice Bateman, in reviewing the *Sykes v. Midland Bank Executor & Trustee Co.* [[1969] 2 Q.B. 518 (Eng. Q.B.)] case on the issue of reliance/causation, quoted the following, at para. 59 with apparent approval:

> . . . . .
>
> Whether the plaintiffs are entitled to anything more than nominal damages remains to be considered. ... it seems to me, it is necessary for the plaintiffs to prove something more, namely, that the solicitor's omission did make a difference to them and was at least one of the elements, though there may be others, which influenced their minds to enter into the underlease.
>
> [Emphasis in original]

and further at para. 64:

> 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 Group v. Simmons & Simmons*, [1995] 4 All E.R. 907 (Eng. C.A.). ...
>
> [Emphasis in original]

and further at para. 65:

> 65 Stuart-Smith, L.J. said at pages 914 - 915:
>
> > 1. What has to be proved to establish a causal link between the negligence of the defendants and the loss sustained by the Plaintiffs depends in the first instance on whether the negligence consists on some positive act or misfeasance, or an omission or non-feasance. In the former case, the question of causation is one of historical fact. ...
> >
> > 2. If the defendant's negligence consists of an omission, for example to provide proper equipment, or to give proper instructions or advice, causation depends, not upon a question of historical fact, but on the answer to the hypothetical question, what would the plaintiff have done if the equipment had been provided or the instruction or advice given. This can only be a matter of inference to be determined from all the circumstances. The

> plaintiff's own evidence that he would have acted to obtain the benefit or avoid the risk, while important, may not be believed by the judge, especially if there is compelling evidence that he would not. In the ordinary way, where the action required of the plaintiff is clearly for his benefit, the court has little difficulty in concluding that he would have taken it ...
>
> Although the question is a hypothetical one, it is well established that the plaintiff must prove on balance of probability that he would have taken action to obtain the benefit or avoid the risk. ...
>
> [Underlining in *MacCulloch* decision]

[63] The Plaintiffs claim that they were unaware of the NSPI Easement and the Lot 88 ROW when they purchased the Property in 2010, and that they would not have done so if they had known of these burdens, particularly the NSPI easement. They maintain that they would not have purchased the Property "but for" Maddalena's alleged acts or omissions. Maddalena testified that the Plaintiffs were aware of both items in advance of closing.

The "But for" Test

[64] In applying the "But for" Test the court in *Rice* stated:

> 38 The above cited cases on the issue of causation appear to stand for the proposition that, "but for" the omission of the solicitor in failing to warn, the plaintiffs would not have followed a certain course of action. This may at first glance seem to be an oversimplification of the causation issue, but it appears to be an appropriate one in cases of nonfeasance by omitted advice or warning.
>
> 39 In *Hanke v. Resurfice Corp.*, 2007 SCC 7, 2007 CarswellAlta 130 (S.C.C.), the Supreme Court of Canada again reiterated the importance of causation as a component of a negligence claim. The Court also affirmed that the basic test for causation is the "but for" test. Chief Justice McLachlin (writing for the Court) stated the following at para. 21:
>
> > 21 First, the basic test for determining causation remains the "but for" test. ... The plaintiff bears the burden of showing that "but for" the negligent act or omission of each defendant, the injury would not have occurred. ...

[65] The only evidence I have before me as to whether the Plaintiffs would have gone ahead with the purchase of the Property is their *viva voce* evidence, which was to the effect that if they had known the extent of the non-easement they would not have gone through with the sale. I agree with counsel for the Defendant that the Plaintiffs were aware of the easement, but being aware of the easement and

having knowledge of the extent and significance of the easement are two different things.

[66] In *Rice*, Catherine Walker, a past president of the Nova Scotia Barristers' Society, who practised real estate law for more than 30 years, provided an expert report and testified regarding the conduct of Condran as it related to the Practice Standard and the real estate practice in Nova Scotia. The court focused on whether there was a duty to warn prospective purchasers about the potential impact of a waiver clause in relation to the restrictive covenants in the deeds to the lots and said:

> 46 Ms. Walker did agree that clause 27 was a potentially very powerful clause which could impact on all the other clauses in the restrictive covenants and significantly diminish the protection afforded by those covenants. But even as such a potentially powerful clause, it was not her common practice, and, as far as she knew, it was not the common practice of the local real estate bar to bring such a clause to purchasers' attention or to warn them of its potential impact; especially so if the lawyer was dealing with what they considered reputable developers and/or experienced residential property purchasers, as the Rices were perceived to be.
>
> 47 Ms. Walker agreed that purchasers of residential lots in a subdivision rely on the protection afforded by the restrictive covenants, especially in a new subdivision, in order to assess what kind of community they are buying into. If that is the case, would it not be important to point out that one waiver clause could change some or all of that? Ms. Walker did not agree because such a clause was not, in her opinion, "unusual."
>
> 48 Ms. Condran testified that, since the commencement of this law suit, she has followed the practice of pointing out the effect of such waiver clauses and having the purchasers acknowledge that fact. She also testified that, out of 90 transactions, not one purchaser had opted to not complete the purchase. Again, reliance appears to be placed on the representations or the reputation of the vendor/developer. While that may be the attitude of many purchasers; it is [sic] reasonable practice for real estate lawyers to take that decision upon themselves when representing clients faced with such a waiver clause? Would that not be the purview of an "informed" client? It would certainly not be very onerous for real estate lawyers to point out the potential effect and impact of such a clause to purchasers, particularly to purchasers of lots in a relatively new subdivision.
>
> 49 I find that the practice standard published by the Nova Scotia Barristers Society does not provide an exhaustive exposé of a lawyer's duty or obligation. I find that the practice of not pointing out to purchasers the potential effects of waiver clauses in subdivisions restrictive covenants is not reasonable, nor defensible, given the tremendous power of such a clause. It is not reasonable for the lawyer to rely on the reputation of the developer. That kind of decision is for

> an "informed" purchaser. The risks are readily apparent. As we can see, a lawyer's assessment of a developer's reputation may not always carry the day. I find that such a practice does not meet the standard of care required of a reasonably competent lawyer in the circumstances described above. It is difficult to imagine a duty less onerous.

[67] This case dealt with the omission of a lawyer to explain the effect of a waiver clause on the restrictive covenants found in the deed. The principles in this case are analogous to the case before me. A practice of pointing out an "inchoate" or "non-easement" to purchasers of property without explaining its effect or what is meant by that phrase is not reasonable. This is not too onerous a task for a lawyer.

[68] I find based on all the evidence that "but for" the omission of Maddalena in failing to warn the Plaintiffs about the potential effect of the NSPI easement, the Plaintiffs would not have purchased the Property.

[69] Maddalena failed to advise his clients of the risk associated with the non-easement. He did not advise them that the easement existed and could only arise in certain situations. I find Maddalena negligent and as a result he breached his contractual obligation to the Plaintiffs.

Issue (b) Have the Plaintiffs sustained any loss or damage because of any act or omission of Maddalena

Damages

[70] The NSPI Easement and the Lot 88 ROW pre-dated the Plaintiffs' purchase of the Property. They "run with the land". They did not arise through any act or omission by Maddalena.

[71] In *Messineo v. Beale*, 1976 CarswellOnt 773, 13 O.R. (2d) 329 (Ont. S.C.), the plaintiffs entered into an agreement to purchase a property. The plaintiffs' lawyer did not identify a defect in the vendor's title prior to closing. The plaintiffs brought a claim against their lawyer for damages to compensate them for the value of the affected portion of land. The trial judge found that no loss (beyond nominal damages) had in fact been sustained. This result was upheld by the Ontario Court of Appeal, [1978] 2 A.C.W.S. 275, 20 O.R. (2d) 49, where Justice Arnup described the appropriate measure of damages as follows:

> 17 After reviewing the authorities in Ontario and England, the trial Judge came to the conclusion that the measure of damages was the actual loss sustained by the plaintiffs arising from the defendant's negligence. He has referred to virtually all of the relevant cases. I agree with his result, but would state the principle in these words. The measure of damages is the difference in money between the amount paid by the client to the vendor, and the market value of the land to which the client received a good title.

[72] In brief concurring reasons, Justice Zuber added:

> 28 ... The defendant's negligence simply caused the plaintiffs to complete a transaction that they otherwise would have avoided. Therefore, it is the responsibility of the defendant to compensate the plaintiffs for the loss suffered as a result of entering this transaction; but as the reasons of Arnup, J.A., demonstrate, there was in fact no loss. I would dismiss this appeal with costs.

[73] *Messineo* defines damages as the difference in value between the amount paid and the market value of the property at the time. My ability to calculate damages is hampered by the fact that I do not know what the market value of the Property was in 2010. The Property was taken off the market in 2019, and as a result, I have no later sale comparables. What I do have is the evidence of two valuators, Philson Kempton and Nigel Turner, and a sale purchase price of $88,000 in 2010.

[74] The Court in *Rice* addressed the situation if causation had been proven but there were no damages:

> 61 However, if it was found that causation had been proven, which I have found otherwise, damages would be limited to diminished market value and fees or loss on resale resulting from the change of the "no horse" policy for the neighbour's lot. Lot 23 had not been resold at the time of trial and no evidence of diminished market value was presented to the Court. There would be no foundation for awarding damages on the basis of the evidence presented because, as I stated earlier, rescission would not be an appropriate remedy against Ms. Condran and there is no evidence of diminished value.

Expert Evidence regarding Value

[75] Nigel Turner provided expert evidence regarding the value of the Property. He filed an Expert's Report (the "Turner Report"). The Turner Report sets out a detailed analysis regarding the value of the Property and concluded that its current fair market value is $130,000 with or without the NSPI easement as of October 20, 2021.

[76] The Turner Report valuation of the NSPI easement was neutral for the following reasons:

> It is our opinion that there will be no measurable impact on value to the subject property as a result of the Nova Scotia Power easement for the following reasons:
>
> - The subject property has 100 ft. of frontage onto a private road, which satisfies both the LUB and Regional Subdivision Bylaw requirements such that it may be used for residential use under the requirements of its current zoning, and pending approval of on-site services. The NSPI easement does not interfere with the property meeting this requirement.
> - In order to utilise the subject property in the future, it would be necessary to run electrical services to any future residential lots. We would assume this electrical path would follow the same route that exists under Scenario (2).
> - If the Regional Municipal Planning Strategy (RMPS) is changed at some point in the future which would allow the property to be subdivided, it would be necessary to construct an access route which would provide access to any future residential lots. The NSPI easement would likely be located within the same access route. We note that this arrangement has been used throughout the adjacent residential subdivisions and is typically used when developing subdivisions.
> - The land on the east side of Barachois Lake is located well south of the easement, nowhere near the NSPI easement.
> - The subject property is located in a generally rural area with pockets of residential development. Demand for land in the immediate area is moderate with power line easements being quite common in the general area.
> - Lastly, the NSPI easement is quite small at just 0.64 acres (27,735 $ft.^2$) and represents a very small portion of the parent parcel.

[77] Turner testified to corrections in his report. The NSPI easement of .64 acres should be .44 acres, and the unencumbered land should be altered slightly to address this. Otherwise, his opinion remained the same.

[78] When asked whether, in the event the width of the NSPI easement was broader based on Schedule A than in his report, that would affect his valuation, he said it would not.

[79] Philson Kempton provided an expert report regarding valuation (the "Kempton Report"). The Kempton Report assessed the Property as having a value of $124,000 without the NSPI easement, and a reduced value of $80,500 with the NSPI easement, as of April 15, 2021.

[80] Kempton filed revisions to the Kempton Report on January 23, 2023, after reviewing the Turner Report. In the "Corrected Report" Kempton calculated the total loss in value resulting from the easement as $16,200 (Ex. 9, p. 4). Therefore, a market value plus HST with the easement is $107,800 ($124,000 less $16,200).

[81] The Plaintiffs paid $88,000 plus HST, for the Property. Based on the evidence, they have not suffered a loss. The Plaintiffs have not established a diminished value as required in *Rice* nor have they demonstrated a loss based on market values in 2010 as required in *Messineo*. The Court is only left with market values more than what the Plaintiffs have paid for the Property. There is no loss or damage to the Plaintiffs. According to both valuators, the Property is worth more than the Plaintiffs paid for it, even with the Lot 88 ROW and the NSPI easement being considered.

[82] According to both valuators, the Plaintiffs can list the Property for sale and suffer no loss. Maddalena did not create the defect in title. The Plaintiffs have suffered no loss as regards any act or omission on the part of Maddalena. There has been no loss, and the appropriate manner of damages is nominal. This was discussed by the trial court in *Messineo v. Beale*:

> 34 There is also a well-known Ontario decision that indicates that the Court awards damages for the negligence of a solicitor on the basis of the actual loss sustained by the purchaser in taking conveyance of a property subject to title defects, and that if there should be found to be no loss, the purchaser should receive no (other than nominal) damages.
>
> …
>
> 38 Since the plaintiffs received a property with a fair market value of $43,500 for a purchase price of $35,000, they suffered no loss from closing the transaction. In conclusion I find that the defendant was negligent but in the circumstance the purchasers can receive only nominal damages.

Loss of enjoyment

[83] The Plaintiffs claim general damages for their loss of enjoyment from the Property. They argue that the easement compromised their privacy rights and interfered with the use of enjoyment of the Property. The Plaintiffs provided no authority for this head of damages but said an amount in the range of $5,000-$10,000 would be appropriate.

[84] Aside from the fact that no authorities were provided to support this award of damages, the evidence of the Plaintiffs themselves was that circumstances had changed after purchasing the Property, which made them decide to sell. At that time, they were still not aware of the easement. The Defendants made no changes to the Property after the closing and then changed their plans, which had nothing to do with the easement. This resulted in them putting the Property back on the market in 2015. The Property has been off the market since July 2019. It was not until an eventual sale of the Property fell through because of a potential purchaser raising the location of the easement that the Plaintiffs allege they became aware of it.

[85] I find the Plaintiffs had no loss of enjoyment because they did nothing to the Property and had no plans for the Property other than to resell it.

Failure to Mitigate

[86] The Plaintiffs listed the Property for sale in 2015 for 397 days. It was on and off the market. The Property remained unlisted, from 2017 to 2019. The Plaintiffs have allowed the Property to remain unlisted since July 2019.

[87] It is well-established that a party claiming damages has a duty to take all reasonable steps to minimize its loss. As per Burchell J in *Duchene v. Veniot* (1989), 90 N.S.R. (2d) 74 (S.C.T.D.):

> 3 ... On this aspect of the case the defendants rely on the following summary of relevant principles extracted from Waddams' *The Law of Damages* (Toronto: Carswell, 1983) beginning at p. 695:
>
> > The leading case on mitigation is generally taken to be *British Westinghouse Electric & Manufacturing Co., Ltd. v. Underground Electric Rys. Co. of London Ltd.*, where Viscount Haldane said:
> >
> > > The fundamental basis [of a damage assessment] is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss

> consequent on the breach and debars him from claiming any part of the damage which is due to his neglect to take such steps.

[88] There was no mitigation of damages in this case. The Plaintiffs have failed to act reasonably in mitigating their alleged losses in the present case.

Conclusion

[89] I find that the Defendant was negligent and in breach of his contractual obligation to the Plaintiffs insofar as he did not alert them prior to closing of the possible, however remote, consequences of the existing NSPI easement. The NSPI right-of-way, whether built upon yet or not, certainly could have interfered with the Plaintiffs' enjoyment of the land. The possibility of NSPI exercising its rights under the easement is a real possibility.

[90] The Plaintiffs purchased a property for $88,000, plus HST. Even if I take the lower market value from the Corrected Kempton Report of $107,000 plus HST, the Plaintiffs have suffered no loss from closing the transaction. I find that the Defendant was negligent, but there was no loss in the circumstances. As a result, the Plaintiffs are only entitled to nominal damages.

[91] I award nominal damages of $1,000. There will be no costs awarded. Each party shall bear their own costs. I would ask that counsel for the Defendant prepare the Order.

Bodurtha, J.