SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: Century 21 Trident Ltd. v. MacDougall Medicine Professional Corporation Ltd., 2024 NSSM 3

Date: 20240202
Docket: 522582
Registry: Halifax

Between:

Century 21 Trident Ltd.

v.

Peter MacDougall Medicine Professional Corporation Limited

And Between:

Date: 20240202
Docket: 524458
Registry: Halifax

Peter MacDougall Medicine Professional Corporation Limited

v.

Colleen Ryan and Atlantic Real Estate Services Ltd. doing business as Royal LaPage Atlantic

Adjudicator:	Dale Darling, KC
Heard:	October 23, 2023, in Halifax, Nova Scotia
Decision:	February 2, 2024
Counsel:	Kent W. Rodgers, for the Claimant Century 21 Heather Wyse, for the Defendant Peter MacDougall

By the Court:

[1] In a pretrial appearance before me by all parties, and upon request of all counsel, it was determined that these two actions should be heard together. This matter came before me as a video conference hearing on October 23, 2023.

[2] In Claim 522582, Century 21 Trident Ltd. (hereafter "Century 21") v Peter MacDougall Medicine Professional Corporation Limited (hereafter "Peter MacDougall Medicine "), the Claimant seeks the amount of $20,700 plus interest and costs, which it says is owed for the following reasons: After Peter MacDougall Medicine purchased a property in October of 2022 at 1048 Wellington Street in Halifax, Nova Scotia, the 2.5% commission owing due to a Buyer Designation Brokerage Agreement (the "BDBA") was not paid to Century 21 Trident, and the Claimant says that payment was required under a Buyer Designated Brokerage Agreement ("BDBA") between the Claimant and Defendant. It says that agreement was effective from June 17, 2022 until November 30, 2022.

[3] In its Defence to Claim 522582, Peter MacDougall Medicine states that while there a BDBA with Ian Anderson of Century 21 had existed, that BDBA was terminated by the Defendant due to breach of its terms, and that written notice

of termination was provided to Mr. Anderson on September 12, 2022, before the purchase of the property on September 14, 2022.

[4] Peter MacDougal Medicine has filed Claim 524458, Peter MacDougall Medicine Professional Corporation Limited ("Peter MacDougal Medicine") v. Colleen Ryan and Atlantic Real Estate Services Ltd, doing Business as Royal Lepage Atlantic ("Colleen Ryan and Royal LePage"), claiming that Ms. Ryan, who acted as agent in the September 14, 2022 transaction to purchase 03-1048 Wellington, was negligent in "advising Dr. MacDougall that the claimant was entitled to terminate the Buyer Designation Brokerage Agreement and could do so by way of an email to Mr. Anderson". The claim seeks indemnification from Colleen Ryan and Royal Lepage should Peter MacDougall Medicine be found liable to Century 21 in Claim 522582.

[5] Claim 524458 is in effect a third party claim. This unwieldy chain reaction process is made necessary because the Nova Scotia *Small Claims Court Act* and regulations do not allow for third party claims.

Decision:

[6] I find for the Claimant Century 21 in Claim Number 522582 in the amount of $20,700 plus applicable Court fees and interest ($18,000 + $2,700 + $199.30 +

$465.56), for a total award of $21,364.86. I further find for the Defendants Colleen Ryan and Atlantic Real Estate Services Ltd. (Royal LePage Atlantic) in Claim Number 524458, who are not liable to indemnify Peter MacDougall Medicine for the amount to be paid to Century 21. My reasons for both of these findings follow.

Evidence at the hearing:

[7] In the hearing before me, Mr. Rodgers represented Century 21, Ms. Wyse represented Peter MacDougall Medicine , and Ms. Myers represented Colleen Ryan and Royal LePage Atlantic.

[8] As this case turns so crucially on what was said and what was done, I will review the testimony of the witnesses in some detail.

[9] Ian Anderson testified for Century 21. He is a Real Estate Agent, and on June 17, 2022 he and Dr. MacDougall, as principal for Peter MacDougall Medicine, signed a BDBA for the term from June 17, 2022 to November 30, 2022. Some discussion of the terms of the BDBA will occur later in this decision, but the effect of this agreement was to make Century 21 the exclusive agent for Peter MacDougall Medicine during the term of the agreement, with remuneration at the rate of 2.25% for any property purchased during the term of the BDBA.

[10] In cross examination with Ms. Wyse, Mr. Anderson testified that he did not review the BDBA in detail with Peter MacDougall, and said that they advised they were familiar with the documents, having purchased two properties previously.

[11] Mr. Anderson testified that he was primarily dealing with Ms. Gail Sloane, Dr. MacDougall's partner, in the period following his retention and showed her several properties in the period leading up to September of 2022.

[12] There had been an offer on a condo unit at 1048 Wellington in June of 2022, with Mr. Anderson initially offering $575,000. He says he then discovered that Dr. MacDougall had meant to instruct $475,000 and clarified with the opposing agent. (Dr. MacDougall in his evidence says that he told Mr. Anderson $475,000 verbally but wrote $575,000 by mistake). The $475,000 offer was not accepted.

[13] The condo property which is the origin of this dispute, 03-1048 Wellington Street, Halifax NS, was initially shown to Dr. MacDougall and Ms. Sloane on September 7th, 2022.

[14] On September 10, 2022, Mr. Anderson issued an offer on 03-1048 Wellington Street for $780,000, to Rosie Porter of Royal LePage Atlantic, who

acted for the seller. Mr. Anderson says the offer was rejected on September 12, 2022.

[15] On or about September 12, 2022 Mr. Anderson says he was taking some time off for his health. He was asked whether he received an email sent by Dr. MacDougall on that date, dated September 12, 2022, 12:27 pm, which stated:

> "Ian: We have had significant discussions over the last few days regarding our position. We have appreciated all your assistance and support over the last few months within Peter McDougall Medicine Professional Corporation and personally. We have decided to go in a different direction. At this time we will end any contractual relationship either through the company or personally. Again, we have really appreciated all that you have done for us. All the best Peter MacDougall."

[16] Mr. Anderson indicated that the only response that was given to this was "an autoreply", as he was not in the office.

[17] On September 14th at 10:30 Mr. Anderson saw the property as "conditional and pending" for $800,000 on the system used by agents. He testified that agents "are not to meddle in any other transaction". He followed it "for 5 to 10 days" and discovered it was sold.

[18] There was no evidence from Mr. Anderson that he responded in any way to the email that Dr. MacDougall had sent.

[19] Sometime after that, in an envelope postmarked September 20, 2022, Mr. Anderson received a $25 Petrocan gift card and a note that said:

> Ian, we wanted to thank you for your time and effort in showing us properties. Despite our lack of focus and clear direction, we appreciated your help. We are taking a break and have been discussing our plan and we are on hold for now. All the best, Gail and Peter.

[20] Margaret Bowlen, a broker with Century 21 was called to ask if Dr. MacDougall had contacted her to express dissatisfaction or to attempt to end the June 17, 2022 BDBA. She said he had not.

[21] Dr. MacDougall testified. He is an anesthesiologist and President of the Defendant company Peter MacDougall Medicine . He testified he is "not an experienced real estate person", but owns a "few properties" (in cross with Ms. Myers he confirmed it was five in total). He came to do business with Mr. Anderson after Mr. Anderson sold his sister's home in early 2022.

[22] Dr. MacDougall says that he was looking for investment properties for his company, and over time found Mr. Anderson "unsatisfactory". He says that he and his wife were having to find properties to view themselves, and at one point

Mr. Anderson suggested a full price offer when his wife's review of comparables in the building suggested it was not necessary. Mr. Anderson, he says, suggested making an offer on another property they did not want. Dr. MacDougall testified that "I felt that he wanted to make a sale".

[23] Dr. MacDougall says with respect to the BDBA, "I understood these were standard documents that had to be signed", and "I assumed that if this didn't work out the agreement ended". He says Mr. Anderson did not discuss the BDBA with him.

[24] Dr. MacDougall says he sent the September 12, 2022 email "as the suggestion of Ms. Ryan", and "told him I was terminating the agreement". He says after his wife spoke to Ms. Ryan, he spoke to her on the phone and she "asked if I had a BDBA". He says "She told me I would have to write an email to end the agreement."

[25] Dr. MacDougall confirmed that the September 12, 2022 email was his, and that he did not hear back from Mr. Anderson.

[26] He says but for Ms. Ryan's advice he would not have made a second offer, and that he "would have contacted Ian and walked away", and "let the agreement run out".

[27] In cross examination Dr. MacDougall confirmed that some 36 hours after his email to Mr. Anderson on the 12th, he entered into a new BDBA with Ms. Ryan. (his e-signature on the new BDBA is 6 am on the 14th, , Ms. Ryan's 9.26 am). When asked if he reviewed the document with her, he said "No, he was not asked to do so."

[28] When asked in cross if Ms. Ryan advised him he could end the BDBA unilaterally, he said "I took it it could be done unilaterally and without consent".

[29] It was suggested in cross examination that the September 20 note and gift card stating that Dr. MacCulloch's purchase activities were "on hold" was "misleading" as an offer had been made and accepted on the 14th of September, 2022. Dr. MacCulloch explained that he and his wife were "trying to be nice people".

[30] Gail Sloan, Dr. MacCulloch's wife testified. She says that she knew Mr. Anderson both personally and professionally. Her position was that "he really didn't get us" and spoke of the $850,000 full price offer he had proposed, and her research that comparables in the building were lower when she compared.

She says that “we should have been more up front” regarding the issues they had.

[31] She says that she knew Ms. Ryan personally, knew she knew the real estate business, and arranged a meeting with her at a coffee shop to discuss her frustrations with the service they were receiving.

[32] Her evidence was that Ms. Ryan said that if you have an agreement, make sure to let the person know you are changing.

[33] With respect to the gift card, she says she was telling him “We were putting things on pause for personal reasons – we needed to take a break”.

[34] In cross examination, she says that she never saw the BDBA. When asked if she considered contacting a lawyer about ending the agreement, she said “I was asking a friend who was a real estate agent”. She confirmed with Ms. Wyse that Ms. Ryan advised her in the coffee shop meeting that she could not act for her if a BDBA was in place with another agent.

[35] Colleen Ryan testified that she had been a real estate agent for twelve years, knew both Dr. MacDougall and Ms. Sloan through a social connection, and “thought they were experienced buyers and sellers”. She says she had a voice mail from Ms. Sloan about a week before the meeting, which according to Ms.

Sloane's calendar note, took place on September 12, 2022 at 1 pm in a coffee shop, with a meeting title "Meet Gail Sloan to discuss listing".

[36] She says that when she arrived for the meeting, she was unaware that another agent was involved. The conversation with Ms. Sloane related to putting in an offer on 03-1048 Wellington, but Ms. Ryan says she was "uncomfortable with proceeding until the agreement was terminated".

[37] When asked if she told Ms. Sloan an email was sufficient, she answered "I didn't feel it was my place to tell her". She testified she did not recall speaking to Dr. MacDougall on this issue, and denied giving specifics on how to terminate a BDBA.

[38] Ms. Ryan testified that she thought the BDBA had been terminated when she entered into a BDBA with Peter MacDougall Medicine on September 14, 2022, which resulted in the property being purchased for $800,000 that day. In cross with Ms. Wyse, she asserted that "Gail told me Peter had taken care of termination and dealt with Ian".

[39] The first she knew of a problem, she says, was when she got a call from Mark Doucette at Century 21, wanting to know if the MacDougalls had been told the previous agreement had to be terminated.

Submissions by Counsel:

[40] Mr. Rodgers for the Claimant Century 21 says that the evidence clearly shows that 03-1048 Wellington, a property offered on by Mr. Anderson for Peter MacDougall Medicine, was purchased through Colleen Ryan for Peter MacDougall Medicine on September 14, 2022.

[41] This case, he says, therefore boils down to a straightforward question: Was the June 17, 2022 BDBA binding, or was it terminated? He points to Clause 9 of the BDBA, titled Termination of this Agreement, which he says is determinative of the grounds upon which the BSBA can be terminated:

> 9.1. Without prejudice to the acquired rights of the buyer or the brokerage, this agreement will terminate:
>
> a) on the expiration of the term of this agreement as specified in clause 3;
>
> b) on an earlier date than that specified in clause three if mutually agreed to by the Buyer and the Brokerage in writing;
>
> c) on a completed purchase of a property prior to the expiration of the term of this agreement;
>
> d) on the suspension or termination of the Brokerage's license to trade in real estate;
>
> e) on the bankruptcy or insolvency of the brokerage or if it is in receivership;

f) at the option of the non defaulting party, exercised in writing, on a material breach of any of the terms of this Agreement by either the Buyer, the Brokerage, or the designated agent;

g) at the option of the brokerage, if after reasonable effort, the Brokerage is unable to contact the buyer to satisfy this agreement or

h) at the option of the buyer if after reasonable effort, the buyer is unable to contact the brokerage to satisfy this Agreement.

[emphasis added]

[42] Of these options, Mr. Rodgers says that the only ones that could apply are 9.1 (b), termination by mutual agreement, and 9.1 (f) material breach. There was no mutual agreement to terminate the BDBA, only one-sided attempts by the Defendant to do so, which cannot succeed. There is no evidence of material breach by Mr. Anderson, and "material breach" was not what the Defendant alleged at the time of the attempt at unilateral termination, it was "taking a break". Their defence, he says, must therefore fail and the Court must find for the Claimant in 522582.

[43] Ms. Wyse on behalf of the Defendant Peter MacDougall Medicine, says that there is a significant amount of evidence to support that a Clause 9.1 (f) material breach occurred, either by Mr. Anderson's inadequate provision and

knowledge of properties, or in failing to give guidance to Dr. MacDougall as to what he had to do if unhappy with the Agreement. With respect to Ms. Ryan, she says the evidence of Dr. MacDougall and Ms. Sloan should be preferred, and that the evidence shows that they relied upon her professional advice to their detriment.

[44] Ms. Wyse cited the case of *Gilbert v. Marynowski*, 2017 NSSC 227, a case alleging negligence on the part of a lawyer in giving advice on a property transaction. That case dealt with how to assess the standard of care that a professional will be held to. The case spends a good deal of time considering whether expert advice is required to establish professional negligence, but Ms. Myers points to one of the possible grounds for finding liability of a professional, that being when the act or omissions are so "egregious", they would violate any standard of care. By telling her client that an email would suffice to terminate the BDBA, Ms. Ryan, says Ms. Wyse, gave advice no licensed professional should give. If her clients are found liable they should therefore be able to claim indemnity from Ms. Ryan.

[45] Ms. Myers says that a professional duty of care cannot be created out of a coffee date with Ms. Sloan, the partner of Dr. MacDougall, who is the principal in case 524458. There was no duty to Peter MacDougall Medicine created at

that time. Even if there was a phone call (which Ms. Ryan does not recall), Dr. MacDougall is an educated and experienced property buyer who could be expected to get legal advice on an issue as important as termination of the agreement.

[46] Ms. Myers for Ms. Ryan and Atlantic points again to the *Gilbert* case above, and says that primarily that case stands for the proposition that usually expert evidence is required to establish the standard for professional negligence, and none was provided in this case. She points to the required elements of the tort of negligent misrepresentation in *Atlantic Canada Log Homes v. Maji Buergi*, 2023 NSSC 91, para. 93, which quotes the test established by the Supreme Court of Canada in *Queen v. Cognos Inc*., [1993] I S.C.R. 87 as follows:

> The required elements of a successful Hedley Byrne claim have been stated in many authorities, sometimes in varying forms. The decisions of the court cited above suggest five general requirements: (1) There must be a duty of care based on a special relationship between the represent or an the representative; (2) The representation in question must be untrue, inaccurate, or misleading; (3) The represent or must have acted negligently in making the misrepresentation (4) the representation must have relied in a reasonable manner on said negligent misrepresentation, and (5) the reliance must have been detrimental to the representee in the sense that damages resulted.

[47] Ms. Myers says that Ms. Ryan did not act negligently. She was told that the BDBA had been terminated, and should have been able to rely on that representation from the Claimant.

Conclusion

[48] I have reviewed the evidence submitted during this proceeding, and considered the arguments of the parties.

[49] I find the crux of this case is that parties to a contract, which is what a BDBA is, have a positive duty to make themselves aware of the terms and conditions of their agreement. Signing a document electronically (a common practice in modern business) is no defence.

[50] Instruction on options on how to terminate the BDBA was contained in the three BDBA, or the one paragraph on termination. It is not written in "legalese", and largely appears designed for lay persons to understand. It is not the responsibility of Ms. Ryan (or Mr. Anderson for that matter), if Dr. MacDougall, an experienced and educated property buyer, by his own admission did not really read the BDBA in the first instance. In law, parties to agreements are expected to read what they sign.

[51] With respect to Claim 522582, I find that the Defendant, Peter MacDougall Medicine, was subject to the payment terms and conditions of 6.1 of the BDBA entered into with Century 21, as the BDBA was still in effect at the time of the purchase of 03-1048 Wellington. That clause requires payment of 2.25 % of the sale price, as well as HST, for a total of ($18,000 + $2700.00) $20,700.

[52] Pursuant to the termination provision of clause 9.1 b), I find that there was no mutual agreement between Century 21 and Peter MacDougall Medicine to end the contract, only a unilateral attempt to do so, which under the language of the BDBA cannot succeed.

[53] With respect to the argument that the Defendant has grounds for claiming material breach, there is no evidence that the behaviour of Mr. Anderson in his representation of the Defendant supports this claim. I take note of the fact that at the time Dr. MacDougall and Ms. Sloane communicated with Mr. Anderson on September 12 and 20th, 2022 no such allegation was made to trigger Clause 9.1 f), and language like “taking a break” and “our lack of focus” was used, not “your service is unsatisfactory”. The reason for the attempted termination is straightforward – Dr. MacDougall and Ms. Sloan wanted to use another agent, and they did not want Mr. Anderson to know that.

[54] I understand Dr. MacDougall and Ms. Sloan's argument that they were "trying to be nice", and I accept that, but I also conclude that based upon the evidence the issue of material breach was simply not in their minds in September of 2022. They were relying on a mistaken belief that they could unilaterally terminate the contract, not material breach, which is not surprising given that no evidence of such breach is shown by the evidence.

[55] The suggestion that the breach was created when Mr. Anderson should have told them how to terminate the BDBA is drawing far too long a bow to base a claim for material breach. First of all, they never asked him how to terminate the BDBA. Second, it would create an actionable breach that only manifested when Peter MacDougall Medicine was sued, rather than on September 12, 2022 which is when the Defendant says he had cause for termination based on material breach.

[56] With respect to the claim 524458 of Peter MacDougall Medicine against Colleen Ryan and Atlantic Real Estate Services, I dismiss the claim for indemnification against Ms. Ryan et al.

[57] There is of course a dispute between the parties as to what was said to Ms. Sloan, and whether anything was said to Dr. MacDougall. On the evidence, I

find that the evidence shows that in the conversation Ms. Ryan was concerned that the BDBA with Mr. Anderson be terminated prior to her engagement by Peter MacDougall Medicine. She probably suggested contacting Mr. Anderson to both Dr. MacDougall and Ms. Sloan, but I do not find that she gave extensive advice to either on termination of the agreement.

[58] I also do not accept that a conversation in a coffee shop prior to engagement by the client can reasonably be relied upon as a way forward. Ms. Sloan referred to Ms. Ryan as a real estate agent and a friend, but on September 12, 2022, she was a friend only. Further to the *Cognos* test for negligent misrepresentation, there was no "special relationship" yet existing between Ms. Ryan and Dr. MacDougall, and there never was one with Ms. Sloan.

[59] That would end the *Cognos* analysis, but I will also say it would not have been reasonable for the Claimant Peter MacDougall Medicine to rely exclusively on <u>anything</u> that was said by Ms. Ryan, as reading the BDBA, as I discussed above, would have immediately given the answer sought.

[60] The claim against Ms. Ryan and Atlantic Real Estate Services is therefore dismissed.

[61] I thank counsel for their able submissions. An Order will issue for each of the above matters.

Dale Darling, KC, Small Claims Court Adjudicator