IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Ferguson v. Doak Shirreff LLP,* 2025 BCSC 2157

Date: 20251031
Docket: S1710092
Registry: Vancouver

Between:

Cindy Ferguson

Plaintiff

And

Doak Shirreff LLP, a firm

Defendant

Before: The Honourable Mr. Justice Brongers

Reasons for Judgment

In Chambers

Counsel for the Plaintiff:	A. S. Dosanjh
Counsel for the Defendant:	P. M. J. Arvisais
Place and Dates of Trial:	Vancouver, B.C. September 8–9, 2025
Place and Date of Judgment:	Vancouver, B.C. October 31, 2025

Table of Contents

OVERVIEW

[1] This is a summary trial application brought in the context of a solicitor negligence claim arising from a real estate transaction.

[2] The application has been brought by the plaintiff, Cindy Ferguson ("Mrs. Ferguson"), the owner of a vacation property in Kelowna, British Columbia. The respondent is the defendant, Doak Shirreff LLP ("Doak Shirreff"), a Kelowna law firm. Mrs. Ferguson retained Doak Shirreff to act for her in connection with purchasing this property. Grant Shirreff ("Mr. Shirreff") was the Doak Shirreff lawyer primarily responsible for her file.

[3] Vehicular access from the public road network to Mrs. Ferguson's vacation property can only be effected by means of a private access road that crosses over two other adjoining properties. Mr. Shirreff advised Mrs. Ferguson that there was an easement in place permitting her to use this road. However, this advice was subsequently called into question when she was told by neighbours that no such valid easement existed, and that she could be denied access to her property.

[4] Mrs. Ferguson dealt with this concern by purchasing one of the two adjoining properties, and by negotiating an easement with the owner of the other. Mrs. Ferguson now sues Doak Shirreff to recover the expenses she incurred for these two transactions, alleging that they were necessitated by Mr. Shirreff's negligent advice.

[5] Doak Shirreff denies any liability, arguing primarily that Mr. Shirreff's advice did not fall below the applicable standard of care. Even if his advice was wrong, the firm says that it was not the cause of Mrs. Ferguson's losses since they were precipitated by transactions she entered into based on incorrect advice provided by her subsequent counsel. In Doak Shirreff's view, Mrs. Ferguson did not have to enter into either transaction in order to ensure road access to her property, and her actions therefore amount to unreasonable mitigation attempts that Doak Shirreff should not be held responsible for.

[6] Both parties do, however, agree that their dispute can be largely decided on this application. Mrs. Ferguson asks for a judgment finding Doak Shirreff liable and awarding her damages. Doak Shirreff asks for a judgment dismissing Mrs. Ferguson's claim in its entirety. I am also of the view that most of this claim is suitable for summary adjudication.

[7] On my assessment of the evidence tendered, I find that Mr. Shirreff was negligent when he advised Mrs. Ferguson, and that his negligent advice caused her losses for which Doak Shirreff is liable. However, there is insufficient evidence before me to fairly calculate the precise quantum of damages to be awarded, and that aspect of the claim will not be decided here.

BACKGROUND

Factual Background

Acquisition of the Ferguson Property

[8] Mrs. Ferguson and her husband, Brian Ferguson ("Mr. Ferguson"), are retirees who live in Calgary, Alberta.

[9] In 2007, they began looking for a vacation home in Kelowna to purchase. They wanted one on a lakefront with a sandy beach. Their realtor showed them approximately 10 properties that fit that description.

[10] They wound up purchasing one of those properties in July 2008. Its civic address is 195 Swick Road. It will be referenced as "the Ferguson Property" going forward.

[11] The Ferguson Property fronts upon Okanagan Lake and is situated on a steep hill. It can only be accessed from the public road network by means of a private road (the "Access Road") that bisects the Ferguson Property on a west-east axis that runs parallel to the lakefront.

[12] In 2008, the full Access Road extended over eight private properties, one of which is the Ferguson Property. The westernmost point of the Access Road is where

it connects to the public portion of Swick Road. The easternmost point of the Access Road is where it terminates at a ninth private property whose civic address is 275 Swick Road (also referenced as the “Treadgold Property”).

[13] The civic addresses of the eight private properties located along the Access Road, listed from west to east, are:

(a) 165 Swick Road;

(b) 185 Swick Road;

(c) 195 Swick Road (i.e., the Ferguson Property);

(d) 205 Swick Road;

(e) 215 Swick Road;

(f) 225 Swick Road;

(g) 245 Swick Road; and

(h) 255 Swick Road.

[14] Collectively, these eight properties will be referenced as “the Access Road Properties” going forward.

[15] Mrs. Ferguson entered into a contract of purchase and sale in respect of the Ferguson Property on July 27, 2008. It provided for a subject removal date of August 9, 2008, and for completion and possession to take place in November 2008.

[16] The Fergusons retained Mr. Shirreff of Doak Shirreff to act for them in connection with this transaction on or about August 7, 2008. Mr. Shirreff was called to the Bar of British Columbia in 1970 and became a partner of the firm in 1975. His primary area of practice was real estate solicitor’s work, including conveyancing, real estate development, and related matters. He has handled thousands of conveyances in his years of practice.

[17] Mr. Ferguson and Mr. Shirreff spoke by telephone about the Ferguson Property purchase on August 8, 2008. Mr. Ferguson indicated that he and his wife were particularly concerned about ensuring that they would have the legal right to use the Access Road in order to drive their vehicles to and from the Ferguson Property. Mr. Shirreff told Mr. Ferguson that there was a valid easement permitting such use.

[18] Mr. Shirreff provided this advice after having reviewed a number of documents. They included a title search relating to the Ferguson Property, and an easement agreement noted on the title that was registered on March 4, 1968 (the "Easement Agreement").

[19] The "Grantors" named in the Easement Agreement were Turner Lock Fumerton ("Mr. Fumerton") and Fredder Enterprises Limited ("Fredder"). At the time, Mr. Fumerton owned the large piece of land that, prior to being subsequently subdivided, encompassed all eight of the Access Road Properties. Fredder then had the right to purchase that land.

[20] The "Grantee" named in the Easement Agreement was Doris Irene Treadgold ("Ms. Treadgold"). She was the owner of 275 Swick Road, the property at the eastern edge of the Access Road (i.e., the Treadgold Property mentioned at paragraph 12 above).

[21] The Easement Agreement states generally that the Grantors grant the Grantee an easement over and upon the Access Road Properties for ingress and egress in common with the Grantors for the benefit of the owner of the Treadgold Property at 275 Swick Road. It also provides that this right is to extend to the heirs, executors, administrators, and assigns of the Grantors and the Grantees for the following purposes:

> For ingress and egress in common with the GRANTORS and their respective heirs, executors, administrators, successors and assigns, including the owners for the time being of any subdivision of the lands of the GRANTORS and all other persons having a similar right, for the GRANTEE, her heirs, executors, administrators and assigns and her agents, servants, workmen and others authorized by her and all other persons and vehicles and animals, to and from the land of the GRANTEE.

[22] While the Easement Agreement was noted on the title to the Ferguson Property, it was listed under the "Charges, Liens and Interests" heading. It was not listed under the "Legal Notations" heading, which is where an easement that benefits the owner of a property would ordinarily be shown. Mr. Shirreff was aware of this and thought it was "unusual". He nevertheless was of the opinion that the effect of the Easement Agreement was to provide the owner of the Ferguson Property with the right to use the entirety of the Access Road along all of the Access Road Properties.

[23] The day after Mr. Ferguson's discussion with Mr. Shirreff, on August 9, 2008, Mrs. Ferguson proceeded to remove the subjects in the contract for purchase and sale of the Ferguson Property. The sale was completed on November 10, 2008, and Mrs. Ferguson took possession of the Ferguson Property on November 11, 2008.

Access Road Easement Issues

[24] Initially, the Fergusons had no issues with vehicular access to their vacation home. However, over a three-year period extending from 2013 to 2016, certain discussions took place between the Fergusons, their neighbours, and others in respect of the scope and extent of the Fergusons' right to use the Access Road. From these discussions, the Fergusons developed a concern that, contrary to what they were told by Mr. Shirreff, they did not actually have the benefit of a valid easement permitting them to drive their vehicles to and from the Ferguson Property via the Access Road.

[25] The first indications of a potential problem arose in or around May 2013. At that time, the Fergusons were informed by three sources that they did not have a legal right to use the Access Road outside of the Ferguson Property.

[26] Two of those sources were neighbours, namely: (1) Dale Lamb ("Mr. Lamb") - the owner of 185 Swick Road; and (2) Bob Neal ("Mr. Neal") - the owner of 165 Swick Road. 185 Swick Road is situated immediately to the west of the Ferguson Property. 165 Swick Road is situated immediately to the west of 185 Swick Road. Collectively, these two properties will be referenced as the "West Properties" going

forward. The specific portion of the Access Road that the Fergusons need to traverse in order to get to and from the public road network goes through the two West Properties.

[27] Mr. Lamb's allegation that the Fergusons did not have a valid easement was made in the context of a discussion regarding Mr. Lamb's plan to relocate the portion of the Access Road on his property in order to accommodate the large home he planned to build there. Mr. Lamb wanted owners of the other Access Road Properties, including Mrs. Ferguson, to contribute to the cost of the proposed relocation.

[28] Mr. Neal told the Fergusons that it was the opinion of his daughter, a Calgary real estate lawyer, that there was no valid easement. Mr. Neal threatened to blockade the Access Road accordingly.

[29] The third source from which the Fergusons learned of the alleged invalidity of the easement was a lawyer for a potential purchaser of 215 Swick Road, a neighbouring property located to the east of the Ferguson Property. The lawyer, Howard Peet of Kelowna, proposed to the Fergusons and other neighbours a valid form of easement to enable common use of the Access Road.

[30] The Fergusons then hired their own lawyers to address the easement issue. They first retained Pushor Mitchell LLP of Kelowna in May and June 2013, and subsequently Miller Thomson LLP of Vancouver. They were advised by these counsel that the Ferguson Property does not have a valid easement allowing passage along the Access Road over the West Properties to the public road network. They were also told that the registered easement on title only grants a right of passage to the owner of the Treadgold Property at 275 Swick Road.

[31] In consultation with their legal counsel and some of their neighbours, the Fergusons considered several options to address the easement issue. One was to proceed with a court application to obtain an equitable easement. The Fergusons chose not to pursue this option because its outcome and expense were uncertain,

and because they did not want to be involved in a court proceeding involving their neighbours unless absolutely necessary. Instead, they decided to enter into discussions and negotiations with the owners of the West Properties to attempt to reach a contractual solution to the issue.

West Properties Transactions

[32] In the fall of 2014 and winter of 2015, Mr. Ferguson had discussions with the owners of the two West Properties – Mr. Lamb and Mr. Neal - to attempt to reach an agreement whereby the Fergusons would pay them money in exchange for newly registered easements ensuring a right of passage through their properties along the Access Road. A tentative settlement agreement to that effect was reached on or around January 25, 2015.

[33] However, this deal was never completed as Mr. Lamb decided to put his property – 185 Swick Road – up for sale. On February 25, 2015, Mrs. Ferguson agreed to buy it. Then, on May 13, 2015, Mrs. Ferguson executed an easement in favour of the Ferguson Property allowing for use of the Access Road over the 185 Swick Road property, which she could now do in her capacity as the owner of both properties.

[34] Mr. Ferguson then had further discussions with the owners of the 165 Swick Road property about granting an easement in favour of the Ferguson Property. They took place originally with Mr. Neal, but he subsequently sold 165 Swick Road to David Cormier (“Mr. Cormier”). They were then pursued with Mr. Cormier.

[35] Going into these discussions, the Fergusons had the benefit of a land survey they had done on the 185 Swick Road property that Mrs. Ferguson had just purchased. It revealed that 165 Swick Road encroached on the property line of 185 Swick Road. In exchange for granting 165 Swick Road an easement over that encroachment, the Fergusons received an access easement in favour of both 185 Swick Road and the Ferguson Property. The latter easement agreement was concluded with Mr. Cormier on March 22, 2016.

[36] Since effecting these transactions, the Fergusons are no longer concerned about their right to use the Access Road to travel over the West Properties between the public portion of Swick Road and the Ferguson Property.

Procedural Background

[37] On October 30, 2017, Mrs. Ferguson filed her notice of civil claim against Doak Shirreff. It alleges that the firm is liable for Mr. Shirreff's professional negligence as the solicitor who failed to provide proper advice about whether there was a valid easement over the Access Road in favour of the Ferguson Property at the time of its purchase. The claim states that Mrs. Ferguson seeks damages in respect of the losses she incurred to address this issue, namely, the costs of the transactions she effected in respect of the West Properties. These alleged losses include legal fees, property transfer taxes, and survey costs.

[38] On November 10, 2017, Doak Shirreff filed its response to civil claim denying any liability. The firm pleads that Mr. Shirreff's advice was not negligent as there was a valid easement over the Access Road at the time the Ferguson Property was purchased. In addition, Doak Shirreff pleads that this advice did not cause the losses claimed. To the extent that there was a subsequent concern over the validity of the easement, Doak Shirreff suggests it could have been addressed by a court application seeking a favourable interpretation of the Easement Agreement's terms, or, alternatively, a grant of an equitable easement. The response to civil claim also raises two other defences. One is that Mrs. Ferguson's claim is time-barred by reason of the *Limitation Act,* S.B.C. 2012, c. 13. The other is that there should be an apportionment under the *Negligence Act*, R.S.B.C. 1996, c. 333, in relation to the alleged acts and omissions of the vendor of the Ferguson Property and a neighbour (Mr. Neal) who asserted the easement was unenforceable.

[39] The action was not pursued with any apparent vigour. While examinations for discovery of Mr. Shirreff and Mr. Ferguson were conducted in 2019, no documents were filed with the court following the 2017 pleadings until almost six years later.

[40] Specifically, it was only on April 11, 2023 that Mrs. Ferguson filed the present application for summary trial, seeking a judgment finding Doak Shirreff liable in negligence for an unspecified amount of damages. Doak Shirreff filed its application response on April 25, 2023. While agreeing that the matter can be dealt with summarily, Doak Shirreff submits that judgment should be issued dismissing Mrs. Ferguson's claim.

[41] The summary trial application was then heard two and a half years later, on September 8 and 9, 2025.

[42] Mrs. Ferguson's evidence consists of affidavits made by Mrs. Ferguson herself, Mr. Ferguson, a former solicitor of the Fergusons, a real estate appraiser, and administrative assistants working for the Fergusons' current counsel. Notably, this material includes an expert report from a real estate solicitor who opines that Mr. Shirreff breached the applicable standard of care.

[43] Doak Shirreff's evidence consists of affidavits made by Mr. Shirreff and an administrative assistant working for Doak Shirreff's counsel. Doak Shirreff did not tender a responding expert report to dispute the one tendered by Mrs. Ferguson.

[44] At the hearing, counsel for Doak Shirreff initially raised a number of objections to certain portions of Mrs. Ferguson's evidence. However, he ultimately withdrew his objections at the conclusion of the hearing based on the submissions and discussions that took place between counsel and the Court. I have therefore considered all of the evidence tendered by the parties in the application record.

Mrs. Ferguson's Position at Summary Trial

[45] Mrs. Ferguson submits that Mr. Shirreff's acts and omissions constitute a breach of the standard of care of a reasonable solicitor. She asserts that this breach caused her various losses, and argues that she has proven her entitlement to a damages award against Doak Sherriff.

[46] The specific arguments that Mrs. Ferguson advances in support of her position that judgment should be granted in her favour can be summarized as follows.

Standard of Care

[47] Mrs. Ferguson submits that Mr. Shirreff breached the applicable standard of care in three ways:

> (a) Mr. Shirreff incorrectly advised that there was a valid easement in favour of the Ferguson Property;
>
> (b) Mr. Shirreff failed to advise that there was no valid easement noted on title in favour of the Ferguson Property; and
>
> (c) Mr. Shirreff failed to advise of the risks associated with the lack of a valid easement on title in the Ferguson Property's favour.

[48] With respect to the first alleged breach, Mrs. Ferguson says that the express terms of the 1968 Easement Agreement made by Mr. Fumerton and Fredder with Ms. Treadgold only provide the benefit of the right to use the Access Road to the owner of the Treadgold Property at 275 Swick Road. They also provide that the owners of the Access Road Properties are charged with the burden of allowing the Treadgold Property owner to pass through the Access Road Properties. However, the owners of the Access Road Properties are not granted any benefit under the Easement Agreement in terms of a right to use the Access Road themselves.

[49] Mrs. Ferguson acknowledges that Mr. Fumerton's land was subsequently subdivided into the eight individual Access Road Properties (one of which is the Ferguson Property). However, she says that the Easement Agreement does not provide that the owners of the subdivided properties were then granted the right to use the Access Road over each other's properties. It simply provides that the new owners are also required to afford the owner of the Treadgold Property the right to pass through the Access Road Properties.

[50] Mrs. Ferguson therefore argues that that there was no basis for Mr. Shirreff to have concluded that the Easement Agreement gave owners of the Ferguson Property a right to pass through the West Properties over the Access Road. As such, Mr. Shirreff was negligent.

[51] Second, even if Mr. Shirreff's apparent reading of the Easement Agreement was right, the title search he effected in respect of the Ferguson Property in 2008 revealed that it was only registered as a "Charge" on the property, and not as a benefit under the heading "Legal Notations". Having seen this, Mr. Shirreff ought then to have alerted the Fergusons that there was no easement noted on title in favour of the Ferguson Property. His failure to do so constituted a negligent omission.

[52] Third, Mr. Shirreff was also negligent because he failed to advise the Fergusons of the risks they faced if they proceeded to purchase the Ferguson Property in the absence of a properly registered easement. These risks included the possibility that the owners of the West Properties might object to the Fergusons using the Access Road over their properties, or the possibility that a future sale of the Ferguson Property might be compromised should a prospective buyer be concerned about the lack of an easement registered on title.

Causation

[53] Mrs. Ferguson submits that if Mr. Shirreff had properly advised that there was no registered easement allowing for use of the Access Road over the West Properties, she would not have purchased the Ferguson Property and would have bought another suitable Kelowna area vacation property instead. However, she recognizes the practical difficulty of effecting restitution in this case because it would require a notional undoing of the purchase 17 years after it was completed, coupled with an attempt to determine the net benefit or loss Mrs. Ferguson experienced as a result of the purchase.

[54] Accordingly, Mrs. Ferguson has limited her claim for damages to the consequential losses she experienced as a result of Mr. Shirreff's negligence. These

losses were the costs of the transactions she effected in respect of the West Properties to secure legal road access to the Ferguson Property. Mrs. Ferguson submits that these transactions would not have been undertaken but for Mr. Shirreff's negligence and were a reasonably foreseeable consequence thereof, thereby demonstrating causation.

Damages

[55] In her counsel's written submissions, Mrs. Ferguson identified three categories of expenses that were incurred to effect the transactions allegedly caused by Mr. Shirreff's negligence.

[56] The first are the legal fees and disbursements charged by the solicitors that Mrs. Ferguson retained to advise her about the access dispute, to handle the purchase of the property at 185 Swick Road, and to negotiate and register easements in favour of the Ferguson Property.

[57] The second are the property transfer taxes payable on the purchase of 185 Swick Road.

[58] The third are the survey costs incurred in connection with the purchase of 185 Swick Road.

[59] With respect to quantum, counsel for Mrs. Ferguson set out the amounts being claimed in his written submissions as follows:

(a) Legal fees and disbursements: $89,446.34

(b) Property transfer taxes: $22,000.00

(c) Survey costs: $10,144.42

[60] However, at the hearing of this matter, counsel for Mrs. Ferguson acknowledged that a portion of the legal fees claimed were not actually incurred to mitigate losses caused by Mr. Shirreff's negligence. That portion is said to amount to

$3,620.93. Counsel for Mrs. Ferguson then indicated that his client was reducing this aspect of her claim to $85,825.41.

Conclusion

[61] In sum, Mrs. Ferguson asks the Court to grant judgment against Doak Shirreff in her favour, and to award her damages in the amount of $117,969.83 plus interest pursuant to the *Court Order Interest Act,* R.S.B.C. 1996, c. 79.

Doak Shirreff's Position at Summary Trial

[62] Doak Shirreff denies that Mr. Shirreff's legal advice to the Fergusons breached the applicable standard of care. In the alternative, if the advice was wrong, Doak Shirreff says that Mrs. Ferguson did not act reasonably to mitigate her damages, and that there was no causal link between the advice and her alleged losses. In the further alternative, Doak Shirreff submits that the quantum of the losses claimed by Mrs. Ferguson are excessive and have not been proven.

[63] The specific arguments that Doak Shirreff advances in support of its position that Mrs. Ferguson's claim should be dismissed can be summarized as follows.

Standard of Care

[64] Doak Shirreff submits that Mr. Shirreff's advice that there was a valid and enforceable easement permitting the Fergusons access to the public road over the West Properties was correct.

[65] Doak Shirreff says that this is so because of the plain wording of the Easement Agreement. It effectively provides that the owners of the Access Road Properties are to retain the same right of passage over the entirety of the Access Road after the subdivision of the land owned by the grantor, Mr. Fumerton, as he had when he granted this right to the grantee, Ms. Treadgold, in 1968.

[66] However, even if this wording is ambiguous, the surrounding factual context indicates that it was always intended that there would be a reservation to the grantor of the right to use the Access Road, a right which then devolved to all of the owners

of the subdivided Access Road Properties. According to Doak Shirreff, these contextual factors include:

a) an agreement for joint maintenance of the Access Road;

b) the common use of the Access Road by the owners of the Access Road Properties, with each having their civic address on it;

c) the fact that there have been further subdivisions and conveyances of the Access Road Properties without any apparent issues with respect to the easement raised by either the City of Kelowna or by any of the lawyers or notaries acting on transfers of title; and

d) the impossibility of closing down the Access Road since it had to remain open to permit the owner of the Treadgold Property at 275 Swick Road to travel its entire length unobstructed.

[67] As Mr. Shirreff's legal advice that the easement was valid was correct, Doak Shirreff submits that he met the applicable standard of care. Furthermore, Doak Shirreff denies that the standard of care also required Mr. Shirreff to advise the Fergusons of the possibility that others might nevertheless dispute his opinion.

Causation

[68] In the alternative, if the Court finds that Mr. Shirreff's advice constituted a breach of the standard of care, Doak Shirreff submits that this breach has not been shown to be the cause of any loss.

[69] While Doak Shirreff acknowledges that the Fergusons have deposed that they would not have purchased the Ferguson Property if they had known there was a potential issue with respect to the validity of the easement, the firm asks the Court to disregard this evidence as self-serving. Doak Shirreff also notes that there is no evidence that there were any other comparable available Kelowna vacation properties for purchase that were entirely free of the possibility of a legal dispute over a charge or notation on title.

[70] Furthermore, Doak Shirreff submits that to the extent that Mrs. Ferguson can be said to have sustained a loss in terms of legal expenses and other fees incurred to address concerns about the validity of the easement, this loss was caused by the erroneous advice of the Fergusons' new counsel that the easement was not valid, and not by Mr. Shirreff.

Mitigation

[71] In the further alternative, Doak Shirreff argues that the approach taken by Mrs. Ferguson to address concerns about the easement did not amount to reasonable mitigation.

[72] That approach was to negotiate a resolution with the owners of the West Properties. It resulted in Mrs. Ferguson incurring legal and other expenses to purchase one of the two West Properties (185 Swick Road) and to enter into an easement agreement with the owner of the other of the West Properties (165 Swick Road). Doak Shirreff reiterates that this course of action was based on negligent legal advice that ought not to have been followed.

[73] Instead, Doak Shirreff submits that a reasonable approach to mitigation would have been for Mrs. Ferguson to apply to the Court for an equitable easement over the portion of the Access Road situated on the West Properties, an application that would likely have been granted.

[74] Furthermore, Doak Shirreff submits that by the end of January 2015, the Fergusons had reached an agreement with the then owners of the West Properties to settle their dispute over use of the Access Road. The proposed settlement sum of approximately $40,000 was lower than the amount ultimately spent by the Fergusons to arrange for the purchase of 185 Swick Road and to enter into an easement with the owner of 165 Swick Road. Accordingly, Doak Shirreff argues that Mrs. Ferguson should not be able to claim damages in respect of fees incurred after January 2015 in any event.

Damages

[75] Doak Shirreff submits that Mrs. Ferguson's evidence as to the legal fees allegedly paid in mitigation of her loss is so deficient as to be unproven. While Mrs. Ferguson has tendered some legal invoices issued by law firms demanding payment for legal work, there is no clear proof that all of this work was done to effect the specific transactions that Mrs. Ferguson alleges were necessitated by Mr. Sherriff's negligence. There is also no clear evidence that Mrs. Ferguson actually paid for all of this work.

[76] Doak Shirreff submits that if the Court is inclined to make an award in relation to these invoices, they should either be significantly discounted or be made the subject of an inquiry by the Registrar.

Conclusion

[77] In sum, Doak Shirreff's position is that the Court should grant judgment in its favour by dismissing Mrs. Ferguson's claim, because:

a) Mr. Shirreff's opinion that there was a valid and enforceable easement allowing the Fergusons access to the public roadway was correct, and therefore this act did not breach the standard of care;

b) there was no duty to advise sophisticated clients such as the Fergusons that others might nevertheless challenge Mr. Shirreff's opinion, and therefore this omission did not breach the standard of care;

c) if there was a duty to advise the Fergusons that others might challenge the easement because of how it was registered in the Land Title Office, this has not been proven to have caused any loss to Mrs. Ferguson;

d) if the easement is found not to have been valid and enforceable, then the Fergusons failed to mitigate reasonably as they did not apply to the Court for an equitable easement in its place; and

e) if the Fergusons mitigated reasonably by negotiating rather than litigating, a reasonable settlement was reached in January 2015 and they should not be able to claim damages for expenses incurred after that date.

[78] It should be noted, however, that Doak Shirreff made no submissions at the summary trial application in support of the statutory defences pled in its response to civil claim pursuant to the *Limitation Act* or the *Negligence Act*. Counsel for Doak Shirreff also made no reference to any evidence that could conceivably establish either defence. For present purposes, I will therefore consider these defences to have been abandoned.

ANALYSIS

1. Suitability for Summary Trial

[79] The Court's authority to issue judgment further to a summary trial is provided by Rule 9-7(15) of the *Supreme Court Civil Rules,* B.C. Reg. 168/2009:

> (15) On the hearing of a summary trial application, the court may
>
> (a) grant judgment in favour of any party, either on an issue or generally unless
>
> (i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or
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> (ii) the court is of the opinion that it would be unjust to decide the issues on the application.

[80] The principles for determining whether a matter can be adjudicated by means of a summary trial application are well established, and have been set out in the jurisprudence on numerous occasions. One example of a decision containing a helpful distillation of these principles is *Arbutus Investment Management Ltd. v. Russell,* 2022 BCSC 72 at paras 40–50. I will not repeat it in full, but I do wish to highlight the following:

a) the purpose of a summary trial is to expedite the early resolution of cases in which disputed questions of fact can be decided on the basis of affidavits, unless it would be unjust to do so;

b) a non-exhaustive list of factors that can be considered in deciding whether it would be unjust to grant judgment further to a summary trial include:

(i) the amount involved;

(ii) the complexity of the matter;

(iii) its urgency;

(iv) any prejudice likely to arise by reason of delay;

(v) the cost of taking the case forward to a conventional trial in relation to the amount involved;

(vi) the course of the proceedings;

(vii) the risk of wasted time and effort;

(viii) whether credibility is a crucial factor (although the fact that there may be a dispute on credibility does not mean that the matter cannot be dealt with by way of summary trial); and

c) as summary trials are trials, the parties must treat them as such by putting their best foot forward.

[81] The last of these points is particularly important. As was noted by our Court of Appeal in *Council of Canadians with Disabilities v. British Columbia (Attorney General)*, 2020 BCCA 241 at para. 64, a party responding to a summary trial application cannot frustrate the process by failing to take every reasonable step to put themselves in the best position possible to address the issues raised. There is no “respondent’s veto” over a summary trial.

[82] Commendably, that is not an issue here. Both Mrs. Ferguson and Doak Shirreff wish to have this claim decided by way of summary trial, although they seek different outcomes. As was noted in *McShane v. Eusanio,* 2011 BCSC 553

at para. 64, the consent of the parties to proceeding by summary trial is an important factor to be considered, and if it can be properly done, it should be done. However, it is ultimately up to the Court, and not the parties, to decide whether a case is suitable for summary trial.

[83] In my view, the issue of whether Doak Shirreff is liable for negligence as alleged by Mrs. Ferguson can be determined by summary trial. In particular, the parties have not raised any significant credibility issues and the facts are largely undisputed. What is in dispute is the application of the law to these facts, and I find that this can be done fairly with respect to liability on the basis of the affidavits tendered.

[84] Furthermore, the amount claimed by Mrs. Ferguson is relatively small in comparison to the cost of taking this case forward to a conventional trial. While there is no apparent urgency, this action has languished for many years since it was filed and relates to events that took place many years ago. It would not be in the interests of justice or the parties to delay a determination of Doak Shirreff's alleged liability to Mrs. Ferguson any longer.

[85] However, I do not reach the same suitability conclusion with respect to the issue of damages. Simply put, I am not satisfied that the evidence tendered allows me to find the facts necessary to fairly calculate the exact quantum of Mrs. Ferguson's losses, particularly in relation to legal fees. This will be discussed further below in these reasons, under the heading "Quantum of Damages".

[86] In sum, pursuant to Rule 9-7(15)(a), I find that while I can grant judgment on the issue of liability further to this summary trial, I cannot do so regarding the amount of damages payable. The latter issue will have to be resolved at a subsequent proceeding, if necessary.

2. Principles of Solicitor Negligence Law

[87] In *Mustapha v. Culligan of Canada Ltd.,* 2008 SCC 27, at para. 3, the Supreme Court of Canada set out the four elements that a plaintiff must establish in order to succeed in a negligence claim. They are:

1) the defendant owes the plaintiff a duty of care;

2) the defendant's behaviour breached the standard of care;

3) the plaintiff sustained damage; and

4) the damage was caused, in fact and in law, by the defendant's breach.

[88] In this case, the alleged negligence is that of a solicitor who provided legal advice. The standard of care that applies to a solicitor who owes a duty of care to a client was described by the Supreme Court of Canada in *Central Trust Co. v. Rafuse,* [1986] 2 S.C.R. 147, 1986 CanLII 29 (S.C.C.), at para. 58 as follows:

> [58] A solicitor is required to bring reasonable care, skill and knowledge to the performance of the professional service which he has undertaken. … The requisite standard of care has been variously referred to as that of the reasonably competent solicitor, the ordinary competent solicitor and the ordinary prudent solicitor.…
>
> [citations omitted]

[89] Our Court of Appeal in *Zink v. Adrian,* 2005 BCCA 93 at para. 23 approved the following list of obligations that a lawyer must fulfill in order to meet the requisite standard of care generally:

> [23] …
>
> The obligations of a lawyer are, I think, the following:
>
> (1) To be skilful and careful.
>
> (2) To advise his client on all matters relevant to his retainer, so far as may be reasonably necessary.
>
> (3) To protect the interests of his client.
>
> (4) To carry out his instructions by all proper means.
>
> (5) To consult with his client on all questions of doubt which do not fall within the express or implied discretion left to him.

> (6) To keep his client informed to such an extent as may be reasonably necessary, according to the same criteria.

[90] When a solicitor is retained for advice in respect of a real estate transaction, the solicitor is also obliged to investigate the state of any title that is germane to the matter, and to explain to the client exactly what it is that is portrayed by the state of the title: *Graybriar Industries Ltd. v. Davis & Co.,* 1990 CanLII 1572 (B.C.S.C.) at para. 83; aff'd 1992 CanLII 1838 (B.C.C.A.).

[91] The *Zink* decision also contains an important caution in respect of a unique aspect of solicitor negligence cases, namely, the risk that a judge may go "too far" in applying their own legal "expertise" in determining the specifics of the applicable standard of care. In her concurring reasons in *Zink*, Justice Southin wrote at paras. 42–45:

> [42] In the case at bar, the respondent did not call any expert evidence. The judge was his own expert. Before us, the appellant made nothing of this.
>
> [43] But it does seem to me that in cases of alleged negligence by a solicitor, judges can only rarely make such a finding in the absence of expert evidence as to the standard of a competent solicitor conducting the business in question.
>
> [44] The judge can only properly do so, in my opinion, if the matter is one of "non-technical matters or those of which an ordinary person may be expected to have knowledge." See *Anderson v. Chasney*, 1949 CanLII 236 (MB CA), [1949] 2 W.W.R. 337 at 341 (Man. C.A.). There is an underlying reason – the expert witness can be cross-examined with a view to showing he knows not whereof he speaks. But the parties have no means of discrediting a judge's implicit assertion that he knows the proper way to conduct a certain kind of legal business. One must not overlook that the reason some judges are judges is that whilst they were practising the profession they were of a standard far above that of the ordinary reasonably competent member of the profession.
>
> [45] As to whether this was a case in which the judge went too far in being his own expert, I make no comment at all.

[92] This caution has since been highlighted in a number of subsequent decisions of this Court and others, notably: *Odobas v. Yates,* 2021 BCSC 2320 at paras. 34–38; *Thind v. Smith-Gander,* 2022 BCSC 1167 at para. 110; and *Kiselbach v. DeFilippi,* 2024 YKSC 7 at paras. 301–312. I draw from this case law that it is generally inappropriate for a judge to determine what a lawyer was reasonably

required to do in a specific set of circumstances to meet the standard of care without expert evidence. The only exceptions to this rule are where: (1) it is a non-technical matter or one which an ordinary person may be expected to have knowledge; or (2) the solicitor's actions are so egregious that it is obvious their conduct has fallen short of the standard of care, even without knowing precisely the parameters of that standard.

3. Duty and Standard of Care

[93] I will address the first two elements of the negligence analysis – duty of care and standard of care – in this section of my reasons.

[94] Doak Shirreff does not dispute that its then partner, Mr. Shirreff, owed a duty of care to Mrs. Ferguson within the context of their solicitor-client relationship. The first element of Mrs. Ferguson's negligence claim is established.

[95] With respect to the standard of care, I am of the view that this is not an exceptional case in which I can determine its contours and whether it was breached without expert evidence. Providing legal advice on whether there is a valid easement to a client considering a purchase of real estate is a technical matter that an ordinary person cannot be expected to know how to do. It is also apparent that Mr. Shirreff's actions cannot be characterized as "egregious", such as might be the case if he had given advice without even doing a title search or reading the terms of the Easement Agreement.

[96] I turn now to the only expert evidence that was tendered. It is a report dated December 23, 2022 prepared by Duff Waddell ("Mr. Waddell"), a British Columbia lawyer who was called to the bar in 1970 and who practiced for many years as a solicitor specializing in real estate conveyancing. His report conforms with Rule 11-6(1) and is therefore admissible on this application pursuant to Rule 9-7(5)(e).

[97] The report sets out Mr. Waddell's opinion as to whether Mr. Shirreff fell below the applicable standard of care when he advised the Fergusons in August 2008 that there was a valid easement for the benefit of the Ferguson Property which would

enable its owners to pass over the Western Properties along the Access Road. Mr. Waddell answered this question in the affirmative.

[98] Specifically, Mr. Waddell opined that the wording of the Easement Agreement did not grant the right to use the Access Road to anyone other than the owner of the Treadgold Property at 275 Swick Road. It also did not provide for any rights of access that would benefit the new owners of the Access Road Properties following subdivision of the original lot owned by Mr. Fumerton. The fact that the City of Kelowna apparently approved these subdivisions without requiring such easements was a "red flag" indicative of a potential issue that needed to be investigated further.

[99] In Mr. Waddell's view, there were also a number of other red flags that should have informed the formulation of Mr. Shirreff's advice in response to the Fergusons' query about the easement. First, the contract of purchase and sale stated that there was easement access in favour of the Ferguson Property, and that the vendor should be contacted for details. Second, the title search of the Ferguson Property revealed that an easement was registered on title as a charge against the property but not as a right of way over another property. Third, there was a 1994 letter from the City of Kelowna to the vendor of the Ferguson Property advising that a private access easement agreement was needed if the lot were to be subdivided.

[100] Mr. Waddell therefore opined:

> Once [Mr. Shirreff] read the Easement [Agreement] he should have understood that it was not in favour of the [Ferguson] Property. He should have advised [Mr. Ferguson] of this fact as he had been asked whether there was an easement permitting access to Swick Road. [Mr. Shirreff] replied "yes". The answer should have been "no".

[101] Furthermore, Mr. Waddell stated that even if this interpretation of the Easement Agreement is wrong, the easement was improperly registered on title. Mr. Shirreff should have explained this situation to the Fergusons and their options. They would have included negotiating an extension of the subject removal date to permit a correction of the title registration, or else not proceeding with the Ferguson Property purchase at all.

[102] Mr. Waddell concluded his expert report with the following summary:

> 1. The required steps involve carefully reviewing the documents that [Mr. Shirreff] had before him to conduct his due diligence… Of utmost importance was to ascertain if there was an easement in favour of the [Ferguson] Property. I concluded that [Mr. Shirreff] did not properly carry out the required due diligence on behalf of [Mrs. Ferguson]. He fell below the standard of care required.
>
> 2. The legal effect of the Easement [Agreement] was to provide a right of way in favour of the [Treadgold] Property. I do not agree that the Easement [Agreement] created a right of way in favour of the [Ferguson] Property because its terms were clear that the [Ferguson] Property was the servient tenement and that the [Treadgold] Property was the dominant tenement…
>
> 3. The [Land Title Office] Search indicates that the Easement was registered as a CHARGE not a NOTATION which indicates it was not in favour of the [Ferguson] Property.
>
> 4. Assuming the Easement [Agreement] created a right of way in favour of the [Ferguson] Property over the West Properties, the [Land Title Office] Search indicates it was registered as a CHARGE and not as a NOTATION as it should have been, if it was in favour of the [Ferguson] Property. It would not be effective unless registration was corrected. In these circumstances, [Mr. Shirreff] had a duty to explain the situation to [Mrs. Ferguson] in order to obtain instructions to correct the matter or not proceed with the purchase of the [Ferguson] Property…
>
> 5. [Mr. Shirreff] did not take the proper steps and provide proper advice to [Mrs. Ferguson] required of a competent lawyer when he advised [Mr. Ferguson] that there was a valid registered easement in favour of the [Ferguson] Property over the West Properties.

[103] Counsel for Doak Shirreff did not object to Mr. Waddell's expert report and, as mentioned previously, did not tender an expert report in response. Instead, Doak Shirreff's position is that Mr. Waddell's opinion is simply wrong and ought not to be followed by the Court. The firm also submits that the report can be disregarded because interpretation of an easement is not a matter for expert opinion any more than is the interpretation of a contract.

[104] I do not agree with Doak Shirreff's position.

[105] In my view, Mr. Waddell's opinion is cogent, coherent, and accords with a common sense understanding of what would be expected of a reasonably competent solicitor who was in Mr. Shirreff's position in August 2008. In particular, I

agree that, based on the plain meaning of the Easement Agreement and the manner in which it was referenced on the Ferguson Property title, it was not apparent that the purchaser of that property would have a legal right to use the Access Road over the West Properties. I also agree that a reasonably competent solicitor in this situation would not give unqualified advice that there is a valid easement. And I further agree that a reasonably competent solicitor would have informed the purchaser of the risk of proceeding in the absence of a clear validly registered easement, so that the purchaser could either take corrective measures or choose not to purchase the property.

[106] Now, it is correct to say that the Court cannot rely on expert opinion to determine the validity of an easement, that being a matter of domestic law. However, this is a solicitor negligence claim. It is not a property law claim or an application to establish, modify or cancel an easement or other charge. The Court is not making a conclusive determination regarding the scope and extent of the legal rights that flow from the Easement Agreement. The Court is simply determining whether Mr. Shirreff's legal advice given in August 2008 fell below the standard of care that applies to a reasonably competent solicitor. In order to make that determination, the Court can (and arguably must) rely on expert opinion evidence.

[107] I therefore accept and adopt Mr. Waddell's opinion while being cognizant that I am not strictly bound to do so. However, the opinion is uncontradicted in the sense that Doak Shirreff elected not to tender a responding expert report with a contrary opinion, even though it was Doak Shirreff's obligation to put its best foot forward at this summary trial. In addition, Doak Shirreff did not argue that this matter is unsuitable for summary trial since Mr. Waddell ought to have been subject to cross-examination as he would have if this were a conventional trial.

[108] As a result, the only evidence before me in support of Doak Shirreff's position on whether the legal advice in question breached the standard of care is that of Mr. Shirreff himself. It is set out in his own affidavit and in an extract of his

examination for discovery that was attached as an exhibit to a legal assistant's affidavit.

[109] This evidence is to the effect that, in Mr. Shirreff's view, it was the intent of the parties who concluded the Easement Agreement in 1968 that it would provide subsequent owners of any subdivided lots within the original land owned by Mr. Fumerton (i.e., the Access Road Properties) with a right of access over each other's properties in common with the right enjoyed by the owner of the Treadgold Property. Accordingly, he felt that there was a valid easement. Mr. Shirreff says he was "bolstered" in his opinion by the factors listed above at paragraph 66 of these reasons. He also mentioned the fact that he grew up in Kelowna and was familiar with the topography of the area. As such, he knew that without a valid easement, some of the Access Road Properties would be landlocked and unable to access the public roadway.

[110] Now, I obviously cannot accept this as expert opinion evidence given that it is not set out in an expert report. Furthermore, Mr. Shirreff would not have the necessary impartiality to be qualified as an expert in his own case in any event. However, even if this opinion had been set out by an impartial expert in a proper report, I would have great difficulty accepting it given the wording of the Easement Agreement. Instead, I agree with Mr. Waddell that this wording does not clearly support the notion that, since 1968, there has been a single valid easement over the Access Road Properties that both charges and benefits all owners of these properties. As such, Mr. Shirreff could not reasonably provide unqualified advice to this effect to a prospective purchaser of one of those properties.

[111] In sum, I conclude that Mr. Shirreff breached the applicable standard of care in August 2008 when he provided advice in respect of whether there was a valid easement in favour of the Ferguson Property. The second element of Mrs. Ferguson's negligence claim is established.

4. Damage and Causation

[112] The remaining two elements of the negligence analysis – the sustaining of damage by the plaintiff and its causation by the defendant– are addressed in this section of my reasons.

[113] When assessing whether a solicitor's acts or omissions caused compensable damage to a client, a court is to answer the following factual question: would the loss have occurred but for the negligence of the solicitor? Consideration must also be given to whether the damage suffered was reasonably foreseeable; if it was not, then it may be found to be outside of the solicitor's duty of care: *Sports Pool Distributors Inc. v. Dangerfield,* 2008 BCSC 9 at paras. 80–81; rev'd but with apparent approval of this point 2009 BCCA 483 at para. 41.

[114] In their respective affidavits, both Mrs. Ferguson and Mr. Ferguson provide uncontradicted evidence that if Mr. Shirreff had identified any potential issues or risks with the easement, they would not have purchased the Ferguson Property. Instead, they would have bought another one of the properties in the Kelowna area that fit the description of what they were seeking at the time. The Fergusons' evidence also indicates that they purchased 185 Swick Road, and arranged for easements over it and 165 Swick Road (i.e., the West Properties), in order to resolve with certainty the issue of legal access to the Ferguson Property.

[115] I accept this evidence and find that these facts are proven on a balance of probabilities.

[116] In doing so, I use the causation test that the Supreme Court of Canada prescribed in *Arndt v. Smith,* [1997] 2 S.C.R. 539, 1997 CanLII 360 (S.C.C.) at paras. 1–17 for negligence claims when a determination must be made of what the plaintiff's actions would have been if the defendant had not committed the allegedly negligent act or omission. It is a modified objective test that requires the court to consider what a reasonable person in the circumstances of the plaintiff would have done if faced with the same situation, while taking into account the plaintiff's particular concerns and special considerations that affect them specifically. As such,

it is neither a purely subjective nor objective test. This is to address the concern that such hindsight evidence may be purely self-serving, as discussed in *Newton v. Marzban,* 2008 BCSC 328 at para. 761.

[117] In the case at bar, I am satisfied that a reasonable prospective property purchaser in Mrs. Ferguson's circumstances, having a particular concern about easement access that was expressly communicated to their real estate solicitor, would not have proceeded to simply buy a property if the solicitor had identified a risk that the property in question did not have a valid easement and would therefore lack legal vehicular access to the public road network.

[118] That said, Mrs. Ferguson has chosen not to claim restitutionary damages based upon a comparison of her present situation with the one she would have been in had she not bought her vacation property and instead acquired a comparable one without an easement issue. This, of course, is her right.

[119] Rather, Mrs. Ferguson has limited her damages claim to just consequential losses that flow from Mr. Shirreff's negligent legal advice. She claims specifically the legal fees spent investigating and resolving the easement issue, as well as the property tax and survey fees paid in relation to the purchase of 185 Swick Road.

[120] I am also satisfied that, but for Mr. Shirreff's advice, the Fergusons would not have incurred these consequential expenses, and that they were reasonably foreseeable.

[121] In particular, the Fergusons' affidavits and the correspondence from their solicitors tendered into evidence demonstrate that the Fergusons sought and acted upon legal advice when they negotiated and concluded a contractual resolution to the easement issue. In doing so, they incurred expenses which they would have been spared but for Mr. Shirreff's negligence. Furthermore, these expenses were a reasonably foreseeable consequence of that negligence.

[122] My conclusion here is similar to the one reached by the Ontario Court of Appeal in *Toronto Industrial Leaseholds Ltd. v. Posesorski* (1994), 21 O.R. (3d) 1, 1994 CanLII 7199 (O.N.C.A.) ["*TILCO*"] at paras. 102–108. This was a solicitor

negligence case in which the court awarded reasonably foreseeable consequential damages. They included the clients' cost of seeking legal advice to extract themselves from the problem created by their previous solicitor's negligence, as well as the costs of following that advice:

> [102] It was reasonably foreseeable that the clients would seek legal advice upon learning of Mr. Solway's error. They needed legal assistance in untangling themselves from the mess created by Mr. Solway's negligence. The clients are entitled to be compensated for the cost of that legal advice*:* *Kienzle v. Stringer, supra*, at p. 87.
>
> …
>
> [105] The clients' consequential damages do not stop with the indemnification for the costs associated with their new lawyer's attempts to extract the clients from the problem created by Mr. Solway's negligence. As is to be expected, the clients followed that advice, and that too cost them money. In my view, it was reasonably foreseeable not only that the clients would seek out new legal advice, but that they would follow any reasonable advice given to them by their new lawyers.
>
> …
>
> [108] By following the advice given to them by their new lawyers, the clients incurred one further monetary loss. Because the clients challenged the validity of the lease, the status of the property was uncertain in August of 1984 when the five-year lease expired. This uncertainty scuppered arrangements the clients had made to lease the property after the five-year lease expired. As a result, the property was vacant for several months and the clients incurred expenses in the amount of $39,422.57. As it was reasonably foreseeable that the clients would follow the reasonable legal advice given to them by their new lawyers, and as the expenses associated with maintaining the vacant property were a direct result of following that advice, I would hold that these too constituted consequential damages properly payable to the clients by Mr. Solway.

[123] In sum, I conclude that Mrs. Ferguson sustained damage in the form of certain expenses she had to incur in order to ensure valid legal access to the Ferguson Property. They included legal costs and disbursements, survey fees, and property transfer taxes. This damage was the reasonably foreseeable result of Mr. Shirreff's breach of the standard of care he had a duty to meet in relation to Mrs. Ferguson. The third and fourth elements of her negligence claim are established.

5. Mitigation

[124] Mitigation is not one of the four elements of a negligence claim *per se.* It is a doctrine that limits the extent to which a plaintiff may be compensated for a defendant's breach of a legal obligation, be it in tort, contract, or otherwise.

[125] The Supreme Court of Canada explained the law of mitigation in *Southcott Estates Inc. v. Toronto Catholic District School Board,* 2012 SCC 51 at paras. 23–25. The key principles that may be drawn from this explanation can be summarized in this way:

a) while a plaintiff who establishes a pecuniary loss that flows from a breach is entitled to compensation, the plaintiff must take all reasonable steps to mitigate the loss consequent on the breach, and may not claim any part of the damage which is due to the plaintiff's neglect to take such steps;

b) the burden of proof is on the defendant to prove (1) the plaintiff failed to make reasonable efforts to mitigate and (2) mitigation was possible; and

c) a plaintiff who takes reasonable steps to mitigate loss may recover as damages the costs and expenses incurred in taking those reasonable steps, provided they are reasonable and were truly incurred in mitigation of damages.

[126] Doak Shirreff argues that Mrs. Ferguson is precluded from claiming the specific damages she seeks in relation to the contractual steps she took to mitigate her losses stemming from Mr. Shirreff's negligent easement advice because these steps were not reasonable. Doak Shirreff says that Mrs. Ferguson should have mitigated instead by bringing an application to the Court for an equitable easement.

[127] On my assessment of the evidence presented, Doak Shirreff has not met its burden to show that Mrs. Ferguson's mitigation efforts were unreasonable. To the contrary, I find that these efforts were wholly reasonable in the circumstances.

[128] In particular, the Fergusons responded to their neighbours' assertions that there was no valid easement by obtaining legal advice from lawyers who presented options to address this issue. One of those options was to litigate by bringing an application to the Court for an equitable easement. The Fergusons were advised by their lawyers that the chances of such an application being successful were about 70%. The Fergusons did not want to incur the 30% risk of an unsuccessful outcome, and did not want to involve their neighbours in a court proceeding if this could be avoided. Rather, the Fergusons chose to follow their lawyers' advice to seek a negotiated resolution instead. They were ultimately successful in doing so.

[129] In my view, the actions taken by Mrs. Ferguson and her husband amounted to reasonable mitigation. Just because an equitable easement application to the Court might also have resolved the issue does not render the Fergusons' alternative approach unreasonable. This is especially the case when that approach was based on legal advice, which I find to have been reasonable.

[130] In addition, mitigation efforts need not be perfect. This point was made by the Alberta Court of Appeal in *Costello v. Calgary (City),* 1997 ABCA 281 at para. 42:

> [42] As the trial judge noted, the essential rules governing the duty to mitigate are clear and, for present purposes, can be stated briefly.
>
> …
>
> > 2. The onus of proof lies on the defendant to establish on a balance of probabilities that the plaintiff failed to take reasonable steps to avoid losses: *Red Deer College v. Michaels*, 1975 CanLII 15 (SCC), [1976] 2 S.C.R. 324 at 331; *Janiak v. Ippolito*, 1985 CanLII 62 (SCC), [1985] 1 S.C.R. 146 at 163-166. However, the courts will not allow the defendant, in discharge of that onus, to be overly critical of the plaintiff. Having committed a wrong, the defendant should not quickly be heard to point out his victim's shortcomings in avoiding resulting losses: *Banco de Portugal v. Waterlow & Sons,* [1932] A.C. 452 at 506 (H.L.). The benefit of doubt, therefore, generally will be given to the plaintiff.
> >
> > [emphasis added, not in original]

[131] Furthermore, while pursuing litigation against third parties may constitute reasonable mitigation in some circumstances, it is not a precondition for a successful

solicitor negligence claim. As was noted in *Moulton Contracting v. HMTQ,* 2009 BCSC 913 at paras. 40–41:

> [40] The obligation to mitigate damage may not include commencing proceedings against another even where there may be a prima facie right to the relief sought:
>
> > Ought the plaintiff as a reasonable man to enter on the litigation suggested? It was agreed that the defendant must offer him an indemnity against the costs, and it was suggested on the defendant's behalf that (i) if an adequate indemnity were offered, (ii) if the proposed defendant appeared to be solvent, and (iii) if there was a good prima facie right of action against that person, it was the duty of the injured party to embark on litigation to mitigate the damage suffered. This is a proposition which, in such general terms, I am not prepared to accept, nor do I think I ought to entertain it here, because I am by no means certain that the foundations for it exist. ...
> >
> > *Pilkington v. Wood*, [1953] 2 All E.R. 810 at 813.
>
> [41] In *Pilkington v. Wood*, the defendant solicitor provided negligent advice concerning title to a vendor's property. Despite the defendant's offer to indemnify the plaintiff in an action against the vendor to obtain clear title, the Court declined to find that the plaintiff failed to mitigate its loss. In reaching this conclusion, the Court considered that an action against the vendor would constitute a "complicated and difficult piece of litigation" and that the plaintiff's loss was occasioned by the defendant's solicitor's advice.

[132] It was also noted in *Costello* at para. 42 that a plaintiff need not incur an unreasonable risk, or embark upon a speculative venture, in an attempt to mitigate loss. In this case, I do not find that Mrs. Ferguson ought to have incurred the risk of bringing an unsuccessful equitable easement application in order to be able to recover damages for Mr. Shirreff's negligence.

[133] Before concluding this discussion, I will also address Doak Shirreff's further alternative mitigation argument. It is that Mrs. Ferguson should not be compensated for expenses incurred after January 25, 2015, as a settlement of the easement issue was allegedly reached on that date with Mr. Neal and Mr. Lamb.

[134] The difficulty with this argument is that the evidence tendered does not support it. The evidence shows to the contrary that there was no such final binding settlement.

[135] At his October 17, 2019 examination for discovery, counsel for Doak Shirreff and Mr. Ferguson had the following exchange about the extent to which the January 2015 tentative agreement had been finalized:

> Q. [*Counsel for Doak Shirreff*] Right. So subject to finalizing the deal –
>
> A. [*Mr. Ferguson*] Yeah.
>
> Q. -- you had an agreement to get things done to your satisfaction for 35 or $40,000?
>
> A. Yes.
>
> Q. And then, as you'll recall, I'm showing you document 4.468, what stopped that negotiation or what stopped the drafting of that agreement is Mr. Lamb put his property up for sale or offered to sell you his property?
>
> A. Yes.
>
> …
>
> Q. So February 20th, Mr. Lamb appeared to change his mind about selling you the property. So you sent the easement agreement proposal to –
>
> A: Sorry, February 19th he says, not the 20th. His e-mail is dated February 19th here.
>
> Q: You're right. So the 19th he appears to have changed his mind?
>
> A: Yes.
>
> Q: So February 20th you instructed Ms. Ramsay to go ahead and send out your proposal for settlement to all interested parties; right?
>
> A: Yes.
>
> …
>
> Q: February 25th, 2015, you agreed to purchase the Lamb property for $1.2 million.
>
> A: Yes. Lamb changed his mind again.

[136] In addition, Mr. Ferguson deposed to the following in his second affidavit made April 26, 2023:

> 3. The defendant asserts that I had reached an agreement with Mr. Lamb about the location of relocating the easement by January 25, 2015. At that time Mr. Lamb owned the property next to ours (185 Swick Road). This is not true. As is clear from Exhibit "W" of the first affidavit of Ms. Sapiencia made April 24, 2023, we had agreed to this in principle but this was subject to seeing a revised plan from an engineer and a survey plan.
>
> 4. In any event, the point was moot because less than two weeks later, Mr. Lamb changed course and offered to sell his property to [Mrs. Ferguson] instead. We finalized a deal to purchase his property in March 2015.

[137] As there was never a January 25, 2015 final agreement to settle the easement issue with the owners of the West Properties, I reject Doak Sherriff's argument that it need not compensate Mrs. Ferguson for damages incurred after that date.

[138] In sum, I find that Doak Sherriff has not established that Mrs. Ferguson failed to reasonably mitigate, and her claim will not be denied or reduced on this ground.

6. Quantum of Damages

[139] As is noted above at paras 56–58, Mrs. Ferguson claims damages under three specific categories: (1) legal fees and disbursements; (2) property transfer taxes; and (3) survey costs.

[140] With respect to the latter two categories, I find that Mrs. Ferguson has tendered sufficient evidence to establish the quantum of these damages. In particular, Mr. Ferguson deposes that he and his wife, Mrs. Ferguson, paid property transfer taxes on the purchase of 185 Swick Road in the amount of $22,000.00. The affidavit also establishes that the Fergusons incurred a cost of $10,144.42 for surveys of the 185 Swick Road property lines.

[141] However, the same cannot be said in relation to the category of legal fees and disbursements. The evidence tendered in support of the quantum of these damages is problematic in several ways, as was convincingly argued by counsel for Doak Shirreff at the hearing.

[142] First, neither of the Fergusons' affidavits contain statements that can reasonably be interpreted as indicating that they actually paid the claimed legal fees or disbursements. Instead, they have simply provided the Court with a number of invoices from law firms.

[143] Second, some of these invoices demand payment from third parties, not the Fergusons.

[144] Third, it appears that at least a portion of the legal work mentioned in these invoices may have been performed for the collective benefit of a number of the owners of the Access Road Properties, not just the Fergusons. There is also some indication that these costs were being shared, and not funded exclusively by the Fergusons.

[145] Fourth, and most significantly, it is unclear from the invoices whether all of the legal work mentioned was in fact done in relation to assisting the Fergusons with addressing their specific easement issue arising from Mr. Shirreff's negligent advice. This problem was acknowledged by counsel for Mrs. Ferguson when he revised the quantum of his claim at the hearing. However, the revision does not cure all of the deficiencies that afflict his client's evidence on quantum.

[146] I am not of the view that these issues warrant a conclusion that Mrs. Ferguson's claim for damages in respect of legal fees and disbursements should be simply dismissed. However, I do conclude that the issue of quantification of these damages cannot be fairly determined here on this summary trial application.

[147] Going forward, it is my hope that, with the benefit of these reasons, the parties will reach an agreement on quantum and that this issue can be resolved on consent. If they cannot, however, it may have to be decided at a subsequent proceeding such as by means of a Rule 18-1 inquiry before the Registrar (an approach that was proposed in *TILCO*, at para. 107).

DISPOSITION

[148] For the reasons set out above, I grant judgment to Mrs. Ferguson on her claim in solicitor negligence against Doak Shirreff.

[149] With respect to the calculation of damages to be paid pursuant to this judgment, the parties are directed to discuss this issue after having reviewed these reasons. If they are unable to reach an agreement on quantum, they are at liberty to request to appear before me to discuss next steps.

[150] The parties are also at liberty to request a hearing on costs if that issue cannot be resolved by agreement either.

[151] Any such requests to appear should be addressed to Trial Scheduling and made within 30 days of this judgment.

"Brongers J."