# Court of King's Bench of Alberta

**Citation: 899755 Alberta Ltd v Herter, 2024 ABKB 427**

**Date:** 20240712
**Docket:** 1908 00132
**Registry:** Medicine Hat



Between:

**899755 Alberta Ltd. and Daniel Waynne Hamilton**

Plaintiffs

- and -

**Todd E. Herter and Courtyard Law Centre**

Defendants

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**Reasons for Decision**
**of the**
**Honourable Justice Lisa A. Silver**

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## I. Overview

[1] Daniel Hamilton, a successful local entrepreneur, sold his lucrative moving business to Jesse Standing. It was an asset sale. Mr. Hamilton negotiated the purchase price with Mr. Standing including vendor financing. The purchase price was for $650,000 with a $5000.00 deposit. Mr. Hamilton agreed to give Mr. Standing a loan as part of the purchase price in the amount of $220,000 paid over ten years at 4% interest. The agreement was put into writing.

[2] Mr. Hamilton contacted his long-time lawyer, Todd Herter, to review the agreement. Mr. Herter drafted a new asset sale agreement that included a personal guarantee from Mr. Standing.

[3] A year after the closing of the sale, Jesse Standing defaulted on the vendor loan and eventually filed for bankruptcy. Mr. Hamilton never recovered the full loan amount.

[4] Months after the default and after Mr. Standing filed for bankruptcy, Mr. Hamilton and his numbered company launched a claim for professional negligence and breach of contract against Mr. Herter and his professional corporation. The claim alleges Mr. Herter breached his

professional duty of care to his client, Mr. Hamilton, by failing to secure Mr. Standing's personal guarantee.

[5] The professional negligence and breach of contract claims are founded on Mr. Herter's alleged breach of his professional duty to Mr. Hamilton. To establish such a breach, Mr. Hamilton must show on a balance of probabilities that Mr. Herter owed him a duty of care, that the standard of care was breached, that Mr. Hamilton suffered a resulting loss, and that Mr. Herter's conduct was the cause of that loss: ***Boland v Sean Schaefer Professional Corporation***, 2020 ABQB 551 at para 36 [*Boland*].

[6] There is no dispute that Mr. Herter owed Mr. Hamilton a duty of care. There is dispute with what that duty of care is in this case, and whether Mr. Herter failed to fulfill it. Generally, a lawyer must act with reasonable care, skill, and knowledge in their professional duties. The standard of care is "not perfection" but that of a reasonably competent or ordinary prudent lawyer: ***Central Trust C. v Rafuse***, 1986 CanLII 29 (SCC) at para 58, [1986] 2 SCR 147; ***Froese v Sharif***, 2020 BCSC 1914 at para 178; ***Boland*** at para 41.

[7] I find Mr. Herter did not fail in his professional duty to Mr. Hamilton nor did he breach the contractual agreement. I am satisfied that Mr. Herter brought reasonable care, skill, and knowledge to the performance of his professional duties for Mr. Hamilton for four reasons.

[8] First, Mr. Herter acted within the scope of his verbal retainer with Mr. Hamilton that required Mr. Herter to close the asset sale. Second, Mr. Herter fulfilled the instructions given to him by Mr. Hamilton, who was a long-time, financially sophisticated client.

[9] Third, at all times, Mr. Herter kept Mr. Hamilton fully informed of the steps he was taking on Mr. Hamilton's behalf. The information and advice given by Mr. Herter accounted for their long-term professional relationship and Mr. Hamilton's financial knowledge.

[10] Fourth, Mr. Herter acted in the best interests of his client in the circumstances. The circumstances included Mr. Hamilton's financial knowledge, desire to sell the assets of the business, and for the deal to close as smoothly and efficiently as possible.

## II. Issues

[11] Considering my decision, I will answer the following questions in my analysis of the issues:

A. What was the scope of the retainer between Mr. Hamilton and Mr. Herter?

B. Did the standard of care require Mr. Herter to secure the purchaser's personal guarantee?

C. Did Mr. Herter breach the standard of care?

## III. Analysis

[12] To establish the applicable standard of care and decide whether Mr. Herter failed to meet it, I will be reviewing the applicable facts of the case and the expert evidence proffered by both parties. I will also comment on the credibility of Mr. Hamilton and Mr. Herter, which drive the key factual findings in this case. I will first remark on the general credibility findings of Mr. Hamilton and Mr. Herter.

### A. General Credibility Findings

[13] Overall, where Mr. Hamilton's evidence differs from Mr. Herter's evidence, I prefer and accept Mr. Herter's evidence. This credibility finding is based on the plausibility, believability, and consistency of Mr. Herter's evidence. It is also based on the internal and external inconsistencies of Mr. Hamilton's evidence including the implausibility of key pieces of his evidence. I will discuss these inconsistencies throughout the decision, but I will give two examples of Mr. Hamilton's inconsistent and implausible evidence involving Mr. Hamilton's understanding of the consequences of the personal guarantee and Mr. Hamilton's evidence on how he was informed of Mr. Standing's personal wealth.

#### i) Mr. Hamilton understood the consequences of the personal guarantee

[14] Mr. Hamilton's evidence that he did not understand the consequences of a personal guarantee is implausible because it is inconsistent with the previous personal guarantees Mr. Hamilton gave to advance his entrepreneurial activities, the terms of Mr. Standing's personal guarantee, and the information given to Mr. Hamilton by Mr. Herter on the steps taken to close the asset sale.

[15] According to Mr. Hamilton, he was under the "impression" that the personal guarantee protected the loan "100%." This understanding is contrary to the written terms of Mr. Standing's personal guarantee, contrary to previous guarantees signed by Mr. Hamilton, and not reflected in any of the steps taken by Mr. Herter nor the closing and security documents. A personal guarantee provides a pathway for recovering the default debt from the promising party, but it does not guarantee payment of the debt. This description of the consequences of a personal guarantee was clearly noted in the several personal guarantees signed by Mr. Hamilton and in the personal guarantee signed by Mr. Standing.

[16] I find that Mr. Hamilton knew the true import of a personal guarantee but minimized his knowledge at trial. Before the asset sale, Mr. Hamilton signed personal guarantees with the benefit of a full explanation from Mr. Herter of what a personal guarantee was, what the risks were in signing one, and how such a document could be enforced. The most recent guarantee signed by Mr. Hamilton was in 2012, only fours years before the asset sale.

[17] Since the time Mr. Hamilton signed those personal guarantees, he continued his involvement in business and financial affairs. I can therefore reasonably infer that Mr. Hamilton has gained more financial knowledge, not less, since signing those documents. In the interim, Mr. Hamilton became the head of his local municipal council or county reeve, flipped houses for profit, and owned other business enterprises.

[18] Mr. Hamilton's belief that the personal guarantee included security or "guaranteed" he would get the money loaned back is also contrary to the terms of the personal guarantee, including his own appreciation, that Mr. Herter would need to take steps to enforce the personal guarantee through the court process. Mr. Hamilton received drafts of the personal guarantees as well as the final signed version, all of which require a written demand for repayment of the loan before the guarantee could be acted upon through a lawsuit. In the end, Mr. Hamilton, who has been involved in several business ventures, knew there were no "guarantees" when it comes to business dealings.

[19] Even if Mr. Hamilton believed the personal guarantee included security, I find that Mr. Hamilton was well aware there was none because there was no mention of personal security,

such as a mortgage on Mr. Standing's home, in the asset sale agreement or in any closing documents. Mr. Hamilton was familiar with mortgages on homes, having flipped houses for profit. He knew what steps needed to be taken to place a mortgage on property. Mr. Hamilton was also aware that security was taken on the sale assets because Mr. Herter discussed this with him, sent him emails regarding this, and sent him proof of registration. For instance, Mr. Herter sent Mr. Hamilton and his spouse an email on September 15, 2016, asking for the equipment serial numbers for registration because "all of the assets you are selling" are the security for the vendor loan. Security on the assets sold was also a key requirement in the asset sale agreement. Mr. Hamilton would have noticed the absence of reference to Mr. Standing's own personal property as security.

[20] I reject Mr. Hamilton's suggestion that the closing documents were so opaque and full of legalese that he was unable to appreciate their import. The letters sent to Mr. Hamilton were easily understood and digestible, particularly the letter outlining the security taken for the General Security Agreement or GSA. Moreover, Mr. Hamilton was a Reeve involved in public financial business and managed multiple businesses. He was not a financial neophyte nor was he unaccustomed to contracts, mortgages, and agreements. He received drafts of the sale documents and made comments on them. The import of the reporting letter and the letter listing the GSA security was crystal clear: no security was obtained for the personal guarantee.

**ii) Mr. Hamilton and Mr. Standing discussed Mr. Standing's personal wealth**

[21] I also find it implausible and internally inconsistent with Mr. Hamilton's other evidence that Mr. Hamilton did not directly ask Mr. Standing about his personal financial worth because he did not want to "pry" into Mr. Standing's personal affairs. This position runs contrary to Mr. Hamilton's background as an astute and successful entrepreneur.

[22] It is incredible that over the months Mr. Hamilton and Mr. Standing were negotiating the sale, they would not have spoken of personal wealth. This kind of conversation would have been reasonable and expected. In fact, Mr. Standing confirmed they had ongoing discussions about the sale, the business, and Mr. Standing's business and life experiences. This would have included discussion of each person's financial background and worth.

[23] Even though I find Mr. Hamilton and Mr. Standing discussed their personal wealth with each other, Mr. Hamilton's suggestion that he would not "pry" is directly contradicted by his evidence at trial of his surreptitious examination of Mr. Standing's personal information. This examination happened when Mr. Standing purportedly left his list of personal assets open to view while he was out of the room. In my view, such conduct is "prying." Moreover, I do not accept that the cursory surreptitious examination described by Mr. Hamilton was long enough to determine what assets Mr. Standing had and their value. Yet, Mr. Hamilton had an intimate and clear memory of Mr. Standing's personal wealth both in content and value.

**iii) Mr. Herter is a credible witness**

[24] On balance, Mr. Herter's evidence was consistent, credible, and plausible. Mr. Herter did not try to enhance his efforts or his actions to make himself look better. He admitted he did not send a written confirmation of the terms of the retainer after the first conversation with Mr. Hamilton. He readily admitted he did not discuss taking security on Mr. Standing's personal guarantee. He also admitted he did not take security on the personal guarantee.

### B. What was the Scope of the Retainer?

#### i) The retainer was verbal and unwritten

[25] Before discussing the scope or terms of the retainer, I must determine its nature. In this case, the retainer was verbal and unwritten. When Mr. Hamilton called Mr. Herter about the deal, Mr. Herter was on holiday, driving in his car. Mr. Herter could have made notes of the discussion later, but he did not. I find Mr. Herter's actions were reasonable and appropriate because Mr. Hamilton was a well-known and longstanding client, for whom he acted many times before. In my view, the lack of a notation does not detract from Mr. Herter's evidence on the conversation, nor does it impact his credibility generally. Moreover, the task assigned to Mr. Herter by Mr. Hamilton to close the asset sale was straight forward, clear, and instruction driven.

#### ii) Preference for Mr. Herter's version of the retainer

[26] In reviewing the context of their lawyer-client relationship, I prefer Mr. Herter's version of the scope of the retainer because it is consistent with the nature of the task assigned to Mr. Herter as a pre-negotiated asset sale. Mr. Herter's version is also consistent with Mr. Hamilton's entrepreneurial spirit, his desire to sell the business, and to do so on his own terms. Moreover, I find Mr. Hamilton's evidence on the retainer less credible and believable.

[27] I am satisfied Mr. Herter's recollection of the terms of the retainer is correct. Mr. Herter did not confirm the retainer in writing nor did he note his initial discussion with Mr. Hamilton. In those circumstances, Mr. Herter has the burden to show his recollection of the scope of the retainer was the correct one: ***Skrepnek v Korchak*** 2014 ABQB 358 at para 42 [*Skrepnek*]. Where the communication between the client and the lawyer is known but ambiguous the client's understanding is preferred: ***Strother v 3464920 Canada Inc***, 2007 SCC 24, [2007] 2 SCR 177 para 40 [*Strother*]. In this case, the communications between Mr. Hamilton and Mr. Herter are subject to credibility findings, which I resolve in Mr. Herter's favour: ***Skrepnek*** at para 42.

#### iii) The context of the lawyer-client relationship

[28] I find the nature and scope of the retainer was reasonable and appropriate in the circumstances of Mr. Herter's and Hamilton's lawyer-client relationship. Counsel for Mr. Hamilton suggested that the nature of the retainer is indicative of the free-wheeling way Mr. Herter approached the file. I disagree. The unwritten retainer reflected the nature of Mr. Herter's on-going professional relationship with Mr. Hamilton. The retainer suited the task, which was specific and well-defined, and was proportionate to it.

[29] Mr. Hamilton started in the moving business over twenty years earlier as a novice but worked hard to gain knowledge and success. He branched out over the years, purchasing other businesses with partners and flipping houses for profit. Mr. Hamilton's reputation grew in the community. At the time of trial, he was a well-known and established business entrepreneur, who was also a municipal reeve.

[30] For over 20 years, Mr. Hamilton used Mr. Herter as his lawyer of choice. Mr. Herter was also a self-starter. Through the years, he too successfully grew his full-service law practice. In many ways, Mr. Hamilton and Mr. Herter grew professionally one with the other.

[31] It is therefore unsurprising that when Mr. Hamilton called Mr. Herter about the asset sale of his business, Mr. Herter took the call even though he was on vacation. Mr. Hamilton was an important, longstanding client, who needed quick attention and service. There was no doubt that

Mr. Herter would act for Mr. Hamilton on the sale. It was equally clear that Mr. Hamilton had already negotiated the sale but needed Mr. Herter's legal skill for the sale closing.

[32] Mr. Herter knew this sale was important to Mr. Hamilton because he knew Mr. Hamilton had wanted to sell the business for some time. Mr. Herter knew his client. He knew Mr. Hamilton was a fully informed business entrepreneur. He also knew Mr. Hamilton would want him to act quickly, efficiently, and competently. Mr. Herter was prepared to do so.

[33] Mr. Hamilton throughout his testimony minimized his business acumen while exaggerating his reliance on Mr. Herter's legal expertise. I do not accept Mr. Hamilton's characterization of their relationship. Mr. Hamilton was a highly competent entrepreneur who knew was in full control of the asset sale. He brought Mr. Herter into the deal because he needed a lawyer to finish it for him. Mr. Hamilton did not expect a written retainer and did not require one. What he expected and required from Mr. Herter was quick attention to his instructions.

**iv) Mr. Herter's version of the retainer**

[34] According to Mr. Herter, Mr. Hamilton retained him to close the asset sale. The terms of the sale, including the vendor loan, were already agreed upon when Mr. Herter was retained. Mr. Herter's role was to turn that agreement into a legally enforceable one. Mr. Hamilton was the primary point person for the details of the sale. He took the lead in the negotiations including the negotiations with the landlord. Mr. Hamilton told Mr. Herter not to ruin the deal by complicating matters.

[35] It was Mr. Herter who suggested Mr. Hamilton obtain equivalent to bank security for the sale by taking a second charge on a GSA against the sale assets and obtaining an unsecured personal guarantee from the purchaser. This was clearly reflected in the asset sale agreement Mr. Hamilton signed. Mr. Herter believed this would protect Mr. Hamilton's interest while still ensuring the deal would close. Although Mr. Herter did not specifically discuss with Mr. Hamilton obtaining security on the personal guarantee, Mr. Hamilton was aware the personal guarantee was unsecured and gave no instructions to the contrary.

[36] Moreover, Mr. Hamilton was involved with a previous business sale where he essentially gave a vendor loan. In this sale, he also calculated the risk and factored into the sale the possibility of buying back the business. He lost the money and never bought back the business. In my view, Mr. Hamilton also minimized his involvement in this previous sale blaming the paralegal for not securing the loan with a house mortgage.

[37] Although Mr. Hamilton pointed to this past experience as support for why he would have insisted on personal security, it also supports a finding that Mr. Hamilton was well aware of what a personal guarantee required and what kind of security needed to be taken. It confirms that Mr. Hamilton would have specifically directed Mr. Herter to take personal security, like a mortgage, if he wanted it done. It also confirms Mr. Hamilton would have checked to confirm that personal security, like a mortgage, was, in his words, "registered." Mr. Hamilton took none of these actions because he was content with the security taken.

[38] I accept that Mr. Hamilton was keen to sell the business and had tried to do so for some time, albeit in an ad hoc manner. The reduction in the sale price from $ 1.2 million to $899, 000 dollars, and the acceptance of an even lower sale price of $650,000, are all consistent with this desire to sell. I find the evidence of the real estate agent was not helpful on this point. The real estate agent was only involved in the initial deal and was not privy to the retainer agreement and

conversations, letters, and emails sent between Mr. Hamilton and Mr. Herter. The agent's memory of the events was also diminished through the passage of time. I place little weight on the agent's evidence.

[39] Mr. Hamilton's desire to sell the business is confirmed by the loose and informal way Mr. Hamilton dealt with Mr. Standing. For instance, Mr. Hamilton testified that the government moving contracts required skilful attention and a deft hand. Yet, Mr. Hamilton was not overly concerned with conducting any third-party background check of Mr. Standing. Mr. Hamilton was also unconcerned with Mr. Standing's change in the named corporate purchaser from a Winnipeg company to a newly created numbered company with no assets. Finally, also consistent with Mr. Hamilton's desire to sell, Mr. Hamilton agreed to give Mr. Standing an inordinately lengthy ten-year vendor loan.

[40] I further find that this desire to sell is also consistent with Mr. Hamilton instructing Mr. Herter not to ruin the deal. This instruction to Mr. Herter is confirmed by the events surrounding the termination of the lease.

[41] Mr. Hamilton had negotiated a re-assignment of the business lease to Mr. Standing. Mr. Herter advised Mr. Hamilton not to proceed with a lease assignment. Rather, Mr. Herter recommended Mr. Hamilton terminate the building lease with the landlord. By terminating the lease, Mr. Hamilton would not be liable for any missteps of the new owner. Mr. Hamilton cautioned Mr. Herter to not ruin the deal over the lease. Mr. Herter suggested Mr. Hamilton discuss the possibility of termination with the landlord himself to ensure there would be no problems. Mr. Hamilton successfully negotiated the lease termination with the landlord. Mr. Herter's involvement was confined to expressing the termination in legal terms.

[42] This episode shows that Mr. Herter gave advice when warranted. Moreover, it shows Mr. Herter's deference to Mr. Hamilton's instructions and abilities. Within this fluid and dynamic lawyer-client relationship, Mr. Herter advised but Mr. Hamilton instructed: ***Boland*** at para 45.

### C. Did the Standard of Care Require Mr. Herter to Secure the Personal Guarantee?

[43] Based on the expert evidence I accept and the factual circumstances specific to this case including that Mr. Hamilton was an experienced and sophisticated client, I find the standard of care in this case did not require Mr. Herter to obtain security on Mr. Standing's personal guarantee.

[44] The terms or scope of a retainer agreement inform how a reasonably competent or ordinary prudent solicitor should fulfill their duties to the client in the circumstances: ***Strother*** at para 34; ***Boland*** at para 42. I have found that the scope of the retainer was limited by the specific task at hand to turn the pre-arranged asset sale into an enforceable agreement and to close that sale quickly. The retainer was also coloured by the lawyer-client relationship Mr. Herter had with Mr. Hamilton. The retainer, therefore, gives context and shape to the specific professional duties Mr. Herter owed Mr. Hamilton: ***Pilotte v Gilbert***, 2016 ONSC 494 at para 39 [*Pilotte*].

[45] The standard of care owed by Mr. Herter to Mr. Hamilton must be viewed through their lawyer-client relationship and in the context of the circumstances of the retainer. Among other factors this includes the level of experience and sophistication of Mr. Hamilton, the nature and extent of Mr. Hamilton's instructions, and any time constraints placed on the retainer: ***Pilotte*** at para 39.

### i) Mr. Hamilton is an experience and sophisticated client

[46] I find Mr. Hamilton was an astute, active, independent, and experienced client, who was well-versed in business and financial dealings. In this case, Mr. Hamilton's many experiences as an entrepreneur, who owned several businesses, flipped homes for profit, held leadership positions in municipal affairs, and represented himself in court on legal matters, all establish Mr. Hamilton had a high degree of awareness and knowledge of financial and business affairs. This would include the financing of a business sale through a vendor loan, and the mechanics of a personal guarantee.

[47] Mr. Hamilton downplayed his knowledge and business acumen in his evidence. This minimizing of his abilities detracted from his credibility and believability. In support, Mr. Hamilton leaned heavily on his lack of higher education. I do not accept that a lack of higher education makes Mr. Hamilton an unsophisticated client. In my view, education is merely one factor in assessing a client's sophistication in the context of the standard of care a lawyer owes their client.

[48] This finding of sophistication is also consistent with Mr. Hamilton's conduct throughout the asset sale, where he took the primary role of negotiating the deal. Mr. Hamilton made comments on the legal documents for the sale and, when the loan defaulted, became actively involved in gathering intelligence on Mr. Standing's financial position. Moreover, when the loan defaulted and Mr. Standing filed for bankruptcy Mr. Hamilton examined the equipment and tried to negotiate their purchase with the bank. Finally, this finding is consistent with Mr. Hamilton's knowledge of the intricacies of a vendor loan including a personal guarantee as discussed earlier in this decision.

[49] In my view, Mr. Hamilton's words, conduct and actions throughout the asset sale and after including when Mr. Standing filed for bankruptcy, shows Mr. Hamilton as a confident, informed, and financially astute individual. He knew the financial risks in business and had experienced both high achievements in that sphere as well as financial lows. It is with this in mind that I determine the standard of care owed by Mr. Herter to Mr. Hamilton in the circumstances of the retainer.

### ii) Did the Standard of Care Require Obtaining Security on the Purchaser's Personal Guarantee?

[50] I accept the opinion from Mr. Herter's expert that in the circumstances of this case the standard of care did not require Mr. Herter to obtain a secured personal guarantee. Mr. Herter's expert accounted for the actual steps taken by Mr. Herter, the unique lawyer-client relationship, and Mr. Herter's previous experience with Mr. Hamilton. The expert also accounted for Mr. Hamilton's enhanced involvement in negotiating the terms of the sale before he brought the deal to Mr. Herter.

[51] Both parties proffered expert evidence on the standard of care required in the circumstances. I prefer the expert evidence introduced by Mr. Herter because it was grounded in reality, reasonable, and persuasive. On the other hand, the expert evidence introduced by Mr. Hamilton depicted an overly exacting standard that was grounded in best banking practices rather than in the steps the reasonably competent lawyer would do in the circumstances. Moreover, the opinion assumed the client was unsophisticated.

[52] Generally, a reasonably competent and diligent lawyer provides "relevant" advice and professional services that are "reasonably necessary" to the task for which the lawyer is retained: ***Boland*** at para 44. A lawyer's professional obligations include protecting the client's interests, carrying out the client's instructions, keeping the client informed and consulting with the client as is "reasonably necessary" in the circumstances: ***Boland*** at para 44.

[53] The expert identified the vendor financing as an issue Mr. Herter needed to assess, manage, and give advice on. According to the expert, Mr. Herter acted as a reasonably prudent lawyer would in the circumstances of vendor financing because he advised Mr. Hamilton to take better security than was contemplated, weighed the risks involved, and accounted for Mr. Hamilton's sophistication, desire to sell, and risk tolerance. Still, the expert acknowledged that no transaction is "perfect" and there will always be risk. I accept the expert's functional approach to the professional obligations owed by Mr. Herter to Mr. Hamilton.

[54] The expert's opinion is helpful in identifying whether Mr. Herter was acting reasonably competent in the circumstances but the opinion is only one of the factors in deciding whether Mr. Herter breached the standard of care required.

### D. Did Mr. Herter Breach the Standard of Care by Failing to Secure the Personal Guarantee?

[55] I am satisfied that Mr. Herter fulfilled his obligations and did not breach the standard of care required in the circumstances. Mr. Herter protected Mr. Hamilton's interests by recommending a personal guarantee and by minimizing Mr. Hamilton's exposure in the lease termination. He discussed with Mr. Hamilton the risks surrounding the deal but quite properly deferred to Mr. Hamilton's knowledge, needs, and involvement specific to the circumstance: ***Skrepnek*** at para 75.

[56] In deciding whether Mr. Herter breached his professional obligations, the focus must be on the words and actions at the time the sale was unfolding. I cannot assess Mr. Herter's performance after the fact or through the perspective of a transaction that ended badly for Mr. Hamilton.

[57] Looking at the steps actually taken, Mr. Herter took additional security including a GSA on the sale assets and an unsecured personal guarantee so that the purchaser had some "skin in the game." Mr. Herter told Mr. Hamilton that the GSA security was a second charge behind the bank. Mr. Herter confirmed in writing, via email, that the sale assets were the security for the vendor loan. This information was also in the asset sale agreement Mr. Hamilton signed.

[58] Mr. Herter contemplated what would happen if the loan was defaulted and discussed this with Mr. Hamilton who was content with the risks involved. Mr. Herter properly balanced managing the risk with Mr. Hamilton's desire to sell the assets and the overarching instruction from Mr. Hamilton to not ruin the deal.

[59] Although, Mr. Hamilton may have told Mr. Herter that Mr. Standing had assets to cover the personal guarantee this information was not given as a signal for Mr. Herter to take security on those assets. Rather, the information was given to confirm Mr. Standing had assets should Mr. Herter need to enforce the personal guarantee.

[60] Mr. Hamilton told Mr. Herter if the purchaser defaulted, Mr. Hamilton was prepared to take back the assets and run the business if necessary. It was in this context that Mr. Hamilton said he was not concerned with losing the vendor loan monies that amounted to $220,000

because he was satisfied with the monies otherwise received, about $430,000, a well as the security on the assets worth over $600,000. Mr. Hamilton knew at the time that the asset value would cover Mr. Standings bank loan and the majority of the vendor loan. Mr. Hamilton calculated his business risks and assumed those risks. In this context, if the loan did default, Mr. Hamilton's loss would be within the range of acceptable business risk. He also believed he could start his lucrative business again if the need arose.

[61] This finding is consistent with Mr. Hamilton's actions when the loan did default, which was to examine the assets remaining and try to buy back the assets from the bank. Mr. Hamilton was not prepared to pay as much as the bank wanted and he walked away from the offer. It is only when Mr. Hamilton's contingency plan did not work that he turned to Mr. Herter for compensation.

[62] I find that Mr. Hamilton's belief that Mr. Herter did not do what he was retained to do, namely secure the personal assets of Mr. Standing, arose after Mr. Hamilton's contingency plan failed. In my view, this after the fact calculation has no connection to Mr. Herter's performance of his professional duties. Mr. Herter fulfilled his professional duties in the circumstances. His duties did not include acting as an "insurance policy" for Mr. Hamilton: ***de Yong v Weeks***, 1984 ABCA 262 at para 34; ***Loeppky et al v Taylor McCaffrey LLP et al,*** 2021 MBQB 208 at para 174-177, 302.

[63] Although, the lawyer must present the client with all available options, it is the client's decision "to select the preferred course of action": ***Luft v Taylor, Zinkhofer & Conway***, 2016 ABQB 282 at para 193, varied by 2017 ABCA 228. I find Mr. Herter did not breach the standard of care because Mr. Hamilton, who was an experienced and sophisticated client, knew the course of action he wished to take. Mr. Hamilton was aware the personal guarantee was unsecured, did not instruct Mr. Herter to obtain security, and was satisfied with the security sought and received by Mr. Herter: ***623455 Alberta Ltd v The Partnership of Jackie Handerek & Forester and Shawn D Hagen***, 2018 ABQB 86 at para 72.

## IV. Conclusion

[64] Accordingly, I am satisfied that Mr. Hamilton has failed to prove Mr. Herter breached his professional duty and failed to prove a breach of contract. The claim against Mr. Herter is dismissed.

[65] I encourage the parties to negotiate the costs of this claim. If however the parties are unable to agree to costs within 30 days from the date of this decision, each party may file written submissions of no more than 3 pages plus supportive documents.

Heard on the 15th day of April, 2024 to the 19th day of April, 2024 and the 4th day of June, 2024.
**Dated** at the City of Medicine Hat, Alberta this 12th day of July, 2024.

**Lisa A. Silver**
**J.C.K.B.A.**

**Appearances:**

Kevin D. Ronan, Harvie denBok Pollock
for the Plaintiffs

Kerry R. Gellrich, North & Company, LLP
for the Defendants