IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Shortreed Joint Venture Ltd. v. Guvi,* 2025 BCSC 1003

Date: 20250602
Docket: S179979
Registry: New Westminster

Between:

Shortreed Joint Venture Ltd.

Plaintiff

And

Echiford Guvi aka Archie Guvi, John S. Piamonte, John S. Piamonte Law Corporation and Royal Bank of Canada Banque Royale du Canada

Defendants

Before: The Honourable Mr. Justice Armstrong

Reasons for Judgment

Counsel for the Plaintiff:	D. Gautam H. Hehar, Articled Student
Counsel for Defendants John S. Piamonte and John S. Piamonte Law Corporation:	J.G. Dives, K.C. P.N. Williams
Place and Dates of Trial:	New Westminster, B.C. March 25-28, 2024 April 2-5, 2024; April 8, 9, 2024 September 9-13, 2024
Place and Date of Judgment:	New Westminster, B.C. June 2, 2025

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Introduction

[1] This action originated from a dispute between Shortreed Joint Venture Ltd. ("Shortreed") and Brian Perrin, concerning funds that had been paid into court by Shortreed stemming from a disputed real estate transaction. The money in court represented security for Mr. Perrin's claims in that litigation.

[2] Between March and November 2012, the defendants John Piamonte, a solicitor, and his law firm John Piamonte Law Corporation (the "law firm"), acted on the instructions from the defendant Echiford Guvi who was working on behalf of Shortreed to obtain payment of the money out of court to Shortreed. Pursuant to an apparent settlement of the disputed real estate transaction litigation between the plaintiff and Mr. Perrin concerning those funds, a cheque payable to Shortreed

was sent by the Court to the law firm. Shortreed denies that it settled the foreclosure dispute with Mr. Perrin on terms that he would receive any portion of the money held in court.

[3] Mr. Guvi instructed the law firm to make application for, and the law firm received, a Province of British Columbia cheque from Court payable to Shortreed in the sum of $422,923.30 (the “cheque”) in late October 2012. The law firm delivered this cheque to Mr. Guvi on behalf of Shortreed. Mr. Guvi appears to have deposited the cheque into a bank account in the name of his own real estate agency, Oasis Eco Realty Corp. in trust (the “Oasis account”), at the Royal Bank of Canada (“RBC”) on December 11, 2012.

[4] Mr. Guvi appears to have delivered two cheques for $50,000 from the Oasis account to each of Mr. Perrin’s two daughters and, on February 1, 2013, a cheque for $110,000 payable to Shortreed was issued from the Oasis account and delivered to Shortreed. The balance of the initial deposit of the cheque in the Oasis account was then appropriated by someone with control over the account. Shortreed contends that Mr. Guvi misappropriated these funds and that it has never recovered any of the money deposited into the Oasis account except for the $110,000 it received by cheque from the Oasis account.

[5] The principal issues in this trial are whether Shortreed made a settlement agreement with Mr. Perrin, and the terms of any settlement, whether Mr. Piamonte and his law firm were negligent and/or acted in breach of their fiduciary duty to Shortreed in delivering the cheque to Mr. Guvi, and whether Shortreed suffered any loss resulting the law firm’s negligence and/or breach of fiduciary duty.

[6] Originally, Shortreed’s notice of civil claim included claims against RBC based on its role in allowing the cheque to be deposited into the Oasis account without Shortreed’s authority. Shortreed has since settled its claim against RBC and, as a result, now claims against Mr. Piamonte for the balance, being the difference between the value of the cheque and the money paid by RBC combined with the $110,000 paid to Shortreed by the Oasis account: $47,288.

[7] Mr. Guvi was served with Shortreed’s notice of civil claim in July 2016. Default judgment was taken against Mr. Guvi. At trial, I was informed that

Mr. Guvi's whereabouts are unknown and he did not file a response to the notice of civil claim.

[8] Shortreed is a limited company with three directors but no officers. Only one of the directors, Hari Bandesha, testified at trial in support of Shortreed's claims.

Background

[9] The undisputed facts in this case include the following.

[10] In February 2005, Shortreed was involved in a commercial real estate transaction concerning development property. The vendor, Mr. Perrin, sold the property to Shortreed with the assistance of its realtor, Mr. Guvi. When Shortreed acquired the development property from Mr. Perrin, it recognized a debt of $375,000 owed to Mr. Perrin, which became secured by a mortgage against the property. The mortgage stipulated that if Shortreed was unable to achieve subdivision of the property into at least 25 single-family residential lots or 50 townhouses, Mr. Perrin would discharge the mortgage without payment of loan amount. Conversely, if the property was capable of yielding subdivision of the property into 25 single-family residential lots or 50 townhouses, the plaintiff would pay $375,000 to Mr. Perrin.

[11] In Action No. H0917722, Mr. Perrin brought foreclosure proceedings (the "foreclosure action") against Shortreed and obtained judgement under his mortgage for $375,000: *Perrin v. Shortreed Joint Venture Ltd.*, 2008 BCSC 1393.

[12] Shortreed successfully appealed this judgement: *Perrin v. Shortreed Joint Venture Ltd.*, 2009 BCCA 478 (the "Appeal Judgment"). The Court of Appeal concluded that further evidence on the issue of the subdivision potential of the property was required, and that if Shortreed was unable to obtain subdivision approval for the minimum density development as required in the mortgage the debt would cease to be owing; if Shortreed failed to establish it was unable to obtain subdivision approval it would owe the debt due under the mortgage: Appeal Judgment at paras. 36–37. In the result, the Court of Appeal directed that whether Shortreed was unable to obtain subdivision approval for the minimum density development was a question of fact that had to be determined at trial: Appeal Judgment at para. 36.

[13] Eventually, Shortreed paid $400,000 into court as security to obtain a discharge of the mortgage and enable it to sell the property while continuing to dispute its obligations under the mortgage.

[14] Geoffrey Cowper, K.C. of Fasken Martineau Dumoulin (“FMD”) was counsel to Shortreed in the foreclosure appeal proceedings and made early efforts to settle the claim and prosecute the action against Mr. Perrin once the matter had been remitted for trial. FMD eventually took steps to obtain the funds out-of-court long after Mr. Guvi had dissipated the funds. Mr. Cowper was Shortreed’s principal contact at FMD and Mr. Bandesha represented Shortreed.

[15] Between 2010 and 2012, there was no resolution of the dispute between Shortreed and Mr. Perrin. In this time period, Mr. Bandesha authorized Mr. Guvi to assist Shortreed to settle the dispute with Mr. Perrin. Mr. Guvi told Mr. Bandesha he would “get the matter settled, directly with Mr. Perrin”, and would work to obtain payment of the funds out-of-court in favour of Shortreed.

[16] Mr. Guvi facilitated a settlement agreement between Shortreed and Mr. Perrin on or about February 20, 2012 that included those parties signing a Mutual Release of Claims and settlement (the “Mutual Release”). Once this Mutual Release had been signed, Mr. Guvi proceeded to take steps to obtain payment of the money out of court. Also on February 20, 2012, Shortreed issued an “official cheque” payable to Oasis Realty in Trust for $110,000. This cheque was deposited to the Oasis account on March 6, 2012.

[17] The Mutual Release was likely prepared by Mr. Perrin’s lawyer, Timothy Watkins, and was dated and signed by Mr. Perrin and Mr. Bandesha on or about February 21, 2012. Settlement of the foreclosure action was a prerequisite to obtaining the funds out-of-court.

[18] The Mutual Release included the following:

> Shortreed will be entitled to payment out-of-court of the Security and of any interest accrued thereon, free and clear of any further claim by Perrin, and the parties will instruct their respective solicitors to enter into a Consent Order reflecting the terms of this Mutual Release, to dismiss the Foreclosure Action and to facilitate the release of the Security to Shortreed

[19] The Mutual Release ended all claims in relation to the mortgage, the foreclosure action and the appeal, including all costs.

[20] The Mutual Release was then appended to a form of consent order, signed by Mr. Bandesha and Mr. Perrin. The consent order was made and entered March 15, 2012. The only term of this order was:

> By consent, both parties agree to a mutual release of all claims as outlined in schedule “A”.

[21] It is not clear who submitted the Consent Order that was dated February 21, 2012, but not entered until March 15, 2012, although it was most likely Mr. Guvi’s work.

[22] On March 29, 2012, Mr. Guvi himself prepared and submitted documents to support an application to obtain the funds in court. This step was completed by submitting a requisition with a copy of the Mutual Release, a copy of the March 15, 2012 order, and the draft Consent Order signed by Mr. Perrin and Mr. Bandesha. This effort was rejected by the Registrar.

[23] By May 2012, Mr. Guvi had failed to file the required documents to obtain the payment of the funds out of court and requested the assistance of Mr. Piamonte.

[24] On May 1, 2012, Mr. Guvi contacted the law firm requesting its assistance in preparing the required documents to obtain payment of the funds out of court. Mr. Guvi informed the law firm that a lawsuit (the foreclosure action) between Shortreed and Mr. Perrin had been settled, and Mr. Guvi was seeking help to deal with the funds held in court. He made an appointment to see Mr. Piamonte on May 2, 2012.

[25] On May 2, 2012, Mr. Guvi sent Mr. Piamonte documents he had prepared earlier, including the Consent Order made March 15, 2012 confirming the parties’ settlement of the foreclosure action and a copy of the Mutual Release, along with a requisition to obtain funds from court which was signed by Mr. Bandesha and Mr. Perrin.

[26] That same day, Mr. Piamonte’s office sent a letter to Oasis Realty (attention Archie Guvi) enclosing a new draft Consent Order for payment of the funds from

court for signature by the parties.

[27] On May 4, 2012, Mr. Guvi returned a copy of the Consent Order with two signatures. However, it is apparent that Mr. Guvi's receptionist returned the Consent Order without the original signatures, as required. The Consent Order with original signatures was then provided to Mr. Piamonte's office on May 11, 2012.

[28] On May 14, 2012, the law firm sent the Consent Order to Mr. Guvi's office on the understanding that Mr. Perrin would personally take the Consent Order to the New Westminster Courthouse. On May 16, 2012, Mr. Guvi reported to Mr. Piamonte that the court had again rejected the application for payment out of court for want of a requisition and a copy of the order by Master Keighley authorizing payment of the funds into court.

[29] On May 22, 2012, the law firm sent a corrected package of documents to Mr. Guvi which were eventually filed with the court. The order directing payment out of court of $400,000 together with accrued interest to Shortreed was entered May 24, 2012.

[30] It appears that Mr. Piamonte did not receive a copy of the order entered May 24, 2012 from Mr. Guvi until sometime in early October 2012.

[31] On October 10, 2012, Mr. Piamonte sent a letter to the New Westminster Court Registry with a certified copy of the order entered May 24, 2012 requesting funds. In that letter, Mr. Piamonte said he had been consulted by Shortreed to assist in arranging payment of the funds out of court. He asked when the funds could be picked up by Shortreed. Eventually, a cheque for $422,923.30 was issued by the Province of British Columbia, payable to Shortreed, and sent to the law firm.

[32] On October 29, 2012, a letter was written by Heather Watson, a legal assistant in the law firm, to Oasis Realty (attention Archie Guvi), enclosing the cheque from the court payable to Shortreed together with the law firm's account to Mr. Guvi for its services. It is apparent that Ms. Watson prepared this letter to Mr. Guvi enclosing the cheque without Mr. Piamonte's knowledge.

[33] On December 11, 2012, Mr. Guvi deposited the cheque to the Oasis account. On December 12, 2012, two cheques in the sum of $50,000 each were issued from the Oasis account to two of Mr. Perrin's children, and $10,000 was transferred to another bank account.

[34] On January 16, 2013, $187,923.30 was paid by cheque from the Oasis account to BCLD Holdings Ltd. This company was incorporated in 2006 and dissolved in June 2014. According to the BC Registry Services search, the registered and records office of the company was in the same building as Oasis Eco Realty and the law firm.

[35] RBC appears to have permitted Mr. Guvi to deposit the cheque payable to Shortreed into the Oasis account, in the name of Oasis Eco Realty Corp., without evidence of an express authority from Shortreed to do so. Shortreed has since settled its claim against RBC most likely on the basis that RBC failed to follow its own standards and procedures and acted below the standard of care required of a bank in depositing a cheque payable to a specific party into an account of an entity other than the depositor.

[36] On February 27, 2013, a cheque for $110,000 drawn on the Oasis account was received by Shortreed.

The Issues

[37] The issues in this litigation, as framed by the parties, are:

a) whether there was a settlement of the dispute between Shortreed and Mr. Perrin and, if so, the terms of that settlement;

b) whether the law firm owed a common law duty of care to Shortreed as its solicitor in delivering the cheque to Mr. Guvi and, if so, whether the law firm breached that duty and thereby caused Shortreed loss; and

c) whether the law firm owed a fiduciary duty to Shortreed as its solicitor in delivering the cheque to Mr. Guvi and, if so, whether the law firm breached that fiduciary duty and thereby caused Shortreed loss.

[38] Shortreed recognizes that the $110,000 it received came from the Oasis account into which the $422,923.30 had been deposited. Shortreed also conceded

that, after settlement with RBC and receipt of those funds from Oasis account, its claim against the law firm is for $47,822, plus interest.

[39] Shortreed also seeks judgement separately against Mr. Guvi for $110,000 which was paid into a different account in the name of Oasis Realty in Trust in February 2012 and never repaid thereafter.

The Evidence

[40] In what follows I set out the evidence of the key witnesses at trial and, where necessary, my assessment of its credibility and reliability.

Mr. Piamonte

[41] Mr. Piamonte is a retired lawyer called to the bar of BC in 1983. In 2011-2012, Mr. Piamonte's practice comprised 30% civil litigation and 70% solicitor's practice with emphasis on real estate and estates.

[42] Mr. Piamonte's first contact with Mr. Guvi occurred on May 1, 2012, beginning with a note from a staff person indicating Mr. Guvi had a settlement of a dispute that would result in payment of money out of court and he was seeking assistance to obtain the funds.

[43] Mr. Piamonte had known Mr. Guvi for two years and understood he was a realtor. Mr. Guvi informed Mr. Piamonte he was a long-time friend of both parties to the litigation and they were relying on him to get the money out of court for Shortreed. There was no discussion about details of the settlement between the parties. Mr. Piamonte understood that the assistance he was requested to give was the preparation of the forms necessary to secure payment of funds held in court.

[44] Mr. Piamonte was aware that Mr. Guvi carried on business as Oasis Realty and that business address (in the same building as his law firm) was the contact point for Mr. Guvi. Between May 2, 2012 and May 16, 2012, there were communications with Mr. Guvi concerning signatures required on consent orders required to obtain funds out of court. A Consent Order that was apparently signed by Mr. Perrin and Mr. Bandesha was received by the law firm from Okxana Agen, a general manager in the Oasis Group, on May 4, 2012.

[45] A new draft Consent Order was found to be necessary, and records indicate this document was delivered by Mr. Guvi's receptionist to the law firm. It is apparent that on May 16, 2012, Mr. Perrin picked up the Consent Order and took it for entry. Mr. Piamonte's instructions to staff were to include Mr. Perrin as the applicant for the order.

[46] After some confusion about the requirements of the registry concerning the original order for payment into court, Mr. Piamonte's office provided the documents and instructions necessary for the funds to be paid out of court. The law firm's letter to Mr. Guvi was collected by Mr. Perrin on May 22, 2012.

[47] Mr. Piamonte had no further involvement with the matter until September 15, 2012. At that time, Mr. Piamonte realized he had not seen the entered order for payment of the funds out of court between May 24, 2012 and September 2012. Mr. Guvi eventually provided the law firm with a copy of the order.

[48] Eventually, Mr. Piamonte wrote to the New Westminster Court Registry and forwarded a certified copy of the May 24, 2012 order ordering funds to be paid out. His letter to the Registry read: "Kindly advise when the funds can be picked up by the defendant" (i.e. Shortreed).

[49] In the letter, Mr. Piamonte referred in error to a consultation on this issue with Shortreed; his only consultation was with Mr. Guvi, who was apparently acting as agent for Shortreed. He had no retainer agreement with Shortreed, was not paid by Shortreed and never reported to Shortreed. He considered his client to be Mr. Guvi.

[50] Mr. Piamonte was not aware that the cheque had arrived at his office in October 2012 and did not instruct his staff to deliver it to Mr. Guvi. He only learned that there had been a problem with the cheque in 2015, when he was contacted by FMD. He testified that the letter delivering the cheque to Mr. Guvi was signed by his assistant, Heather Watson, and the acknowledgment on that letter appeared to be Mr. Guvi's signature.

[51] Under cross-examination, Mr. Piamonte acknowledged that he had met Mr. Guvi only once concerning the request to obtain funds out of court. He acknowledged that there were no specific instructions for his firm to deliver the cheque to Mr. Guvi and that he relied solely on Mr. Guvi representations of his

authority to act for Shortreed. Mr. Piamonte considered Mr. Guvi to be his client and the agent of Shortreed in regard to his efforts to obtain payment of the money out of court. Mr. Piamonte did not meet Mr. Perrin or Mr. Bandesha at any time and the services his firm provided were on the instructions of Mr. Guvi.

[52] Mr. Piamonte acknowledged that he was never given a written direction to permit Mr. Guvi to accept delivery of the cheque on behalf of Shortreed. Mr. Piamonte confirmed that he was familiar with the Law Society Rules and knew there was an obligation to identify a lawyer's client. He said he had the identification information of Mr. Guvi but had received no contact information for Shortreed.

[53] In cross-examination, Mr. Piamonte reiterated that he knew Mr. Guvi was acting as agent for Shortreed and that his services, to obtain payment of the money out of court, actually served the purposes of both Mr. Perrin and Shortreed.

Mr. Perrin

[54] Mr. Perrin was a businessman who sold the property to Shortreed, taking back a $375,000 mortgage to secure a part of the purchase price. The amount payable would depend on how the property could be developed. Mr. Perrin foreclosed on the mortgage and, after Shortreed's successful appeal, Shortreed paid $400,000 into court to obtain a discharge of the mortgage, leaving the parties to determine their respective entitlements to that money.

[55] Mr. Guvi was involved as the realtor in the initial transaction. Mr. Perrin had known Mr. Guvi for 25 years and in 2012 Mr. Guvi became involved in resolving the issue of the $400,000 paid into court. Mr. Perrin asked Mr. Guvi to arrange a meeting with Mr. Bandesha and suggested a settlement could include payment of a commission to Mr. Guvi for his involvement and settlement of Mr. Perrin's claim.

[56] Mr. Perrin testified that he attended a meeting with Mr. Guvi and Mr. Bandesha at Mr. Guvi's office. This was a cordial meeting. Mr. Perrin told Mr. Bandesha he wanted $100,000 of the money in court and wanted an additional $10,000 to be paid to Mr. Guvi. Mr. Perrin and Mr. Bandesha then discussed a distribution of the funds whereby each of the directors of Shortreed would receive $100,000 before adding in interest, Mr. Perrin would receive $110,000 ($10,000 of which would be paid to Mr. Guvi), and the balance would be paid to Shortreed.

Mr. Bandesha agreed that $110,000 would be paid to Mr. Perrin, $10,000 of which would be paid to Mr. Guvi, and $100,000 of which would be paid in two cheques of $50,000 sent to each of Mr. Perrin's daughters.

[57] After Mr. Perrin and Mr. Bandesha agreed on this distribution, it was further agreed Mr. Guvi would distribute the money and prepare documents necessary to obtain payment of the funds out of court. The parties did not sign any formal agreement at this time; Mr. Perrin believed he had a handshake agreement with Mr. Bandesha and that the money would be paid in accordance with their agreement.

[58] Mr. Perrin said he signed the Mutual Release in Mr. Guvi's office on February 21, 2012. Mr. Guvi presented these papers and Mr. Perrin was aware that the Mutual Release operated to release his claims to the money in court.

[59] Mr. Perrin understood that $110,000 of the money in court would go directly to him and not to Shortreed. He wanted to be certain that he would receive his share of the settlement funds and was satisfied that this would be assured because all of the money in court would be managed by Mr. Guvi, who would pay Mr. Perrin's daughters and then the balance would go to Shortreed. Mr. Perrin said that Mr. Guvi assured him he would take care of the payment he was expecting to receive.

[60] Although there was some confusion about the various draft Consent Orders concerning payment of the funds out of court, Mr. Perrin was primarily focused on receiving the cheques for his daughters.

[61] Mr. Perrin said he had told Mr. Watkins about the settlement before learning about Shortreed's concerns about the funds in court. He did not know why, in 2015, an issue had arisen concerning the cheque, or why Mr. Watkins had not remembered their conversation about settlement.

[62] Overall, I found Mr. Perrin's testimony to be largely consistent with the facts known including his expectation to receive some of the money held in court as part of the settlement with Shortreed. He was aware that when the Mutual Release was signed his right to receive the money in court was extinguished.

[63] Notwithstanding the effluxion of time, Mr. Perrin's testimony was largely consistent. It was clear to me that it was his intention in seeking to settle the foreclosure action that his daughters would receive $50,000 each and Mr. Guvi would keep $10,000 and the balance would go to Shortreed. I did not find his answers on cross-examination to be evasive or inconsistent in any meaningful respect.

[64] Although Mr. Perrin's evidence was attacked on cross-examination and in argument, I find that, contrary to Shortreed's contention, his recollection of the facts remained consistent and in "harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions": *Faryna v. Chorny*, [1952] 2 D.L.R. 354, 1951 CanLII 252, (B.C.C.A.) at 357.

Mr. Watkins

[65] Mr. Watkins was a lawyer. He was called to the bar in 1986 and primarily practiced civil litigation. He acted for Mr. Perrin in the foreclosure action and in the Court of Appeal.

[66] After the Court of Appeal decision, Mr. Watkins had discussions with Mr. Perrin concerning options to resolve the dispute that centred on the number of lots that could be achieved from the development of the property.

[67] Mr. Perrin was convinced the property could yield more than the number of lots mentioned in the mortgage and, after the decision, Mr. Watkins pressed Shortreed's lawyer, Mr. Cowper, to make his client available for a discovery. Mr. Watkins said that between 2009 and January 2012 there were some exchanges between himself and FMD. Notwithstanding his requests to conduct examinations for discovery, and the suggestion of new trial dates, FMD did not agree to dates for examinations for discovery. Further steps were not taken.

[68] Mr. Watkins drafted a settlement agreement and recalled receiving a call from a lawyer about the money paid into court, but could not recall whether, between 2012 and 2015, he was told there had been a settlement. He did remember speaking with Mr. Perrin in February 2012 and asking to be informed if there was a settlement reached with Shortreed. He said did not hear from Mr. Perrin.

[69] Mr. Watkins said he did not know that Mr. Perrin had settled the dispute until receiving an application from FMD, with an affidavit from Mr. Bandesha, in 2015. At that time, Mr. Perrin told Mr. Watkins he had settled with Shortreed and had an agreement.

[70] Overall, Mr. Watkins believed Mr. Perrin was tired of the litigation and attendant costs and wanted to settle the issues directly with Shortreed.

[71] Although Shortreed attacked Mr. Perrin's testimony, it did not suggest Mr. Watkins was in any way unreliable. One difference Mr. Watkins' testimony and that of Mr. Perrin was the latter's statement that he had informed Mr. Watkins about the settlement. It was clear that Mr. Watkins had drafted the Mutual Release and would have been aware that settlement discussions had taken place. However, given the effluxion of time between the events of February 2012 and the 2015 discovery of a problem concerning the money in court, this difference in the evidence did not persuade me that he lacked credibility in any way.

Geoffrey Cowper K.C.

[72] Mr. Cowper was counsel for Shortreed at the Court of Appeal hearing and continued to act for it, from time to time, until he discovered that the money held in court had been paid out to Shortreed in 2012. After the Appeal Judgment was delivered, Mr. Cowper was in communication with Mr. Watkins, counsel for Mr. Perrin. In July 2010, Mr. Watkins wrote that the dispute should be resolved at a trial rather than on a summary trial application in Chambers.

[73] Mr. Watkins proposed that his client would be open to discussions about dividing the funds in court between the parties in the face of evidentiary difficulties faced by both parties. Mr. Cowper said he discussed this possibility with Mr. Bandesha in person and at other times. Mr. Cowper confirmed that settlement would be possible if Mr. Bandesha desired a compromise.

[74] In March 2011, FMD corresponded with Mr. Watkins about dates for examinations for discovery.

[75] Mr. Cowper described Mr. Bandesha as a very experienced businessman with whom he was able to communicate in English. In discussions with Mr. Bandesha concerning the documents that came to his attention about the

payment of funds out of court, Mr. Cowper said he did not recall Mr. Bandesha saying his signature(s) were forged. He said that if he had been informed of this by Mr. Bandesha he would have remembered.

[76] In January 2013, Mr. Cowper initiated efforts to obtain instructions from Mr. Bandesha concerning resolution of the claims. Mr. Cowper had a discussion with Mr. Bandesha, who informed him that he had been dealing with Mr. Perrin and had settled the dispute, with $40,000 going to Mr. Perrin and the balance to Shortreed. Mr. Cowper confirmed his opinion that $40,000 was a reasonable sum for settlement of the claim. Mr. Bandesha said he would provide further instructions to Mr. Cowper if he needed assistance to complete the settlement. Nothing transpired in this retainer until June 2013, when Mr. Cowper asked Mr. Bandesha if the settlement had been finalized.

[77] Throughout his relationship with Mr. Bandesha, Mr. Cowper was not informed that Mr. Guvi was involved in negotiations with Mr. Perrin. Moreover, while Mr. Cowper had not drafted or seen the Mutual Release until 2015, he testified that it predated the discussion in which Mr. Bandesha told him that Mr. Bandesha had settled the claim for $40,000, notwithstanding Mr. Bandesha's repeated assertions to the contrary at trial.

[78] Mr. Cowper again inquired about finalization of the settlement with Mr. Perrin in January 2014. Mr. Bandesha replied that he had been "trying to get a settlement and we have been trying for a year." He asked for Mr. Cowper's help and to leave the file open because he had not received his money. In July 2015, Mr. Cowper wrote to Mr. Watkins about the settlement because Mr. Bandesha was pressing him to resolve the matter.

Daniel Byma

[79] Mr. Byma was another lawyer at FMD. Mr. Byma's testimony included detail similar to Mr. Cowper's recollection of events. He worked on this file in 2015 and prepared a letter intended for delivery to Mr. Piamonte, reviewing the events and facts that had been reported by Mr. Bandesha. A draft of this letter was sent to Mr. Bandesha and he was asked to confirm the accuracy of its contents and to report any inaccuracies. Mr. Byma recalled a conversation with Mr. Bandesha during which Mr. Bandesha confirmed the contents of the letter were accurate.

[80] Notably, the contents of the letter included the following:

> (c) You [i.e. Mr. Piamonte] were not retained to act for Shortreed, nor had you met with Mr. Bandesha, a principal of Shortreed, nor any other principal or representative of Shortreed. Further, you did not have any instructions to act for Shortreed with respect to this matter.

Alicia Kent

[81] Ms. Kent is a market operations manager for RBC and had been an assistant manager at the RBC New Westminster Main Branch. She had been employed with RBC since May 2010. In that time, she had been a field operations specialist with the bank, supporting a number of branches of RBC in a capacity that sometimes included training on bank procedures. She had worked in various roles, including staff training on issues of customer service, operations and procedures.

[82] Although Ms. Kent had no personal knowledge about the details of the deposit of the cheque to the Oasis account, she was familiar with bank policies and rules extant in 2012, including the processes of how the bank would deal with a cheque presented for a deposit to one entity/individual's account when the payee on the cheque was a different entity.

[83] Ms. Kent explained that RBC's standard banking practice when depositing cheques requires RBC staff to deposit those cheques only into accounts of the payees. The usual practice requires tellers to ensure that the account identified by the person depositing the cheque is in fact an account in the name of the payee. In the usual course, when a cheque was presented for deposit, the funds could not be deposited to any other account except a payees account. Cheques must be examined by staff and the financial responsibility of the depositor must be established.

[84] Ms. Kent explained that exceptions may be made when there are extenuating circumstances approved by the manager on duty. Tellers are not permitted to make exceptions. In this case, the manager of the branch was D. Jackson; Ms. Jackson's initials appear on the deposit.

[85] Ms. Kent explained that exceptional circumstances could include situations where the person depositing the cheque holds any other products or services with

RBC or permission is obtained from an authorized representative of the payee. She suggested that an exception might be permitted if the payee was present at the branch at the time of the deposit and gave directions for deposit to another account. Alternatively, if the bank had the authorization of some other individual who could be verified as an authorized representative the payee, the bank may allow the deposit into a third-party account.

[86] Ms. Kent agreed that in order for the deposit of the cheque payable to Shortreed into an account not owned by it, someone from Shortreed would most likely have been present to authorize such a deposit. Thus, the payee or a verified agent for the payee would have been required to endorse the cheque at the time of deposit. However, Ms. Kent examined the cheque payable to Shortreed and confirmed there was no endorsement on the cheque. The endorsement would be written on the cheque, although it was possible there was an oral authorization without an endorsement.

[87] Ms. Kent explained that, as above, exceptions to this usual practice must be approved by the manager on duty. That person would note on the right side of a deposit slip that there had been an exception to the usual practice and that exception would be described more fully in a “cash book” kept at the bank. Thus, additional information would be recorded to explain the basis of the exception.

[88] In this case, the deposit slip has the words written “see cash book”, and therefore the exception allowing the cheque to be deposited to the Oasis account would likely have been recorded in the “cash book”. RBC conducted a search for the cash book extant in December 2012 without success. More broadly, the bank was unable to find any documentation on the client profile in its internal system related to the deposit of this cheque.

Mr. Bandesha

[89] Mr. Bandesha’s credibility and reliability are important to several issues in this trial. I intend to review Mr. Bandesha’s evidence and address questions of his reliability and credibility that will influence my conclusions.

[90] Mr. Bandesha is 60 years of age and came to Canada from India in July 1991. He has a bachelor’s degree from an Indian institution. In Canada, he began doing farm labour and eventually worked in construction and started a siding

business. In 1996, he began building houses and moved into land development and house construction. Shortreed was incorporated by Mr. Bandesha and his two brothers-in-law, Gurdip Sidhu and Agarbir Sivia, and became the vehicle through which they developed three- to four-lot subdivisions including the land involved in the foreclosure action.

[91] Mr. Bandesha said that decisions regarding the business of Shortreed were made by consensus between the three shareholders. However, neither of the brothers-in-law testified at the trial.

[92] Mr. Bandesha met Mr. Guvi in 1997. Mr. Bandesha described Mr. Guvi as an important person in the Maple Ridge community. Mr. Guvi assisted Mr. Bandesha in acquiring the land where he constructed his first home and obtaining Home Protection Warranties. Mr. Guvi continued to assist Mr. Bandesha in the acquisition of other properties prior to acquiring the land from Mr. Perrin. Mr. Guvi negotiated with Mr. Perrin for the purchase of that property and advised on the potential for subdivision of the lands.

[93] In the 20 years Mr. Guvi and Mr. Bandesha were acquainted, Mr. Bandesha said he came to consider Mr. Guvi “like a family member”. They and their families socialized and had lunches and dinners together. He said he trusted Mr. Guvi at the time and would not have been concerned or worried that, if Mr. Guvi had received the $422,923 payable to Shortreed in his realtor’s trust account (the Oasis account), he might pay it to people to whom it did not belong.

[94] Mr. Bandesha said that, after the Court of Appeal judgment, he continued communications with FMD about obtaining the money Shortreed had paid into court. He said that from 2009 until 2012, Mr. Cowper repeatedly said that Mr. Perrin was not “signing”. He knew that the money could not be paid out until Shortreed proved it had been unable to obtain subdivision approval for the minimum density development as required in the mortgage. However, he said FMD did not advise him of the need to litigate the claim if Shortreed could not achieve a settlement with Mr. Perrin. He said FMD did not inform him that Mr. Perrin’s lawyer was seeking to examine him for discovery.

[95] At the same time, contrary to Mr. Cowper’s evidence that he had informed Mr. Bandesha of the option to settle the foreclosure action by dividing the funds

between the parties, Mr. Bandesha was insistent that a potential settlement was never discussed in the interval between 2008 and 2012. He never felt he might be able to come to terms of settlement with Mr. Perrin and insisted he was never advised by FMD to set the remaining issues for trial or that Mr. Perrin might agree to dividing the funds in court with Shortreed to resolve the dispute.

[96] Mr. Bandesha initially denied informing Mr. Cowper he had settled the dispute with Mr. Perrin. He testified that Mr. Cowper misinterpreted his communication, and that he only told Mr. Cowper he was trying to settle. Under cross-examination, Mr. Bandesha acknowledged that Mr. Cowper's note that Mr. Bandesha believed the dispute had been settled was correct, but testified that he later informed Mr. Cowper that while he had reached a settlement it did not complete.

[97] Mr. Bandesha testified that, by late 2011 or January 2012, he knew that settlement had not been achieved and Shortreed would be required to go to court to prove the land could not support a subdivision at the levels set out in the mortgage. He was unhappy that Shortreed had not yet received any money back from court and decided that resolution of the dispute had taken too much time. He sought assistance from Mr. Guvi to facilitate a settlement and receipt of funds in court and told Mr. Cowper to put his file in abeyance

[98] Mr. Bandesha understood from Mr. Guvi that he was continuing in his efforts to obtain Mr. Perrin's consent to a settlement (a signature to documents). He did not say what documents he was expecting Mr. Perrin to sign.

[99] In or about February 2012, Mr. Guvi spoke to Mr. Bandesha about the potential of settling the claim with Mr. Perrin. Mr. Bandesha said Mr. Guvi suggested that Shortreed should give him $110,000, payable to Oasis Realty in Trust, on February 20, 2012. He said that Mr. Guvi recommended this sum because Mr. Guvi believed Mr. Perrin would be prepared to negotiate a settlement if he had some type of assurance that Shortreed was serious about wanting to settle the claim to the money in court. Mr. Bandesha testified that he gave this money to Mr. Guvi on the expectation it would lead to a settlement.

[100] Mr. Bandesha said that the $110,000 was deposited by Mr. Guvi into an Oasis Realty trust account (different from the Oasis account into which he put the

$422,923 cheque payable to Shortreed), but it was not to be used without Mr. Bandesha's express directions. As above, he said that he did not mistrust Mr. Guvi to hold the money pending his instructions. He expected the money would remain in the Oasis Realty account. He said he had no discussions with Mr. Guvi about paying a specific sum of money to Mr. Perrin.

[101] In Shortreed's reply to RBC's response to civil claim, it asserted that this $110,000 paid to Oasis Realty in trust was paid in respect of an independent transaction.

[102] At trial, Mr. Bandesha was cross-examined on the February 20, 2012 payment to Oasis Realty against his evidence at examination for discovery in November 2018, where he said that the $110,000 (or some portion) would be paid to Mr. Perrin and that the $110,000 cheque was paid toward a different transaction. He said he could not remember giving those answers and that there was "no clear conversation with [Mr. Guvi] how much money has to be given." When pressed on the differences between his evidence at trial and his 2018 testimony that some of the money might be paid to Mr. Perrin, he answered "actually I don't have an answer for that." Nor did he explain the contradiction between his trial testimony and earlier statement that the money was paid to Oasis Realty in trust for an independent transaction.

[103] Mr. Bandesha's evidence was worryingly inconsistent on many important points. For example, as seen above, he provided directly contradictory statements concerning events related to settlement. Throughout his testimony he denied there had been any settlement with Mr. Perrin or that there was any agreement that Mr. Perrin would receive some of the monies held in court. He said there had not been any discussion of settlement. Later, he said there had been a settlement but the settlement was not implemented, only to then repeat his position that there had been no settlement reached. He denied details of discussions with Mr. Cowper concerning settlement, but this denial was contrary to his statements to Mr. Cowper as reflected in documents and testimony.

[104] Mr. Bandesha was cross-examined against his contradictory examination for discovery evidence in which he gave the following answer:

> Q. Mr. Bandesha, the settlement with Perrin I understand happened in February 2012?

A. Yes

Q. And from then on it was then a case of getting the payment out-of-court, is that correct, the next stage?

A. Yes

[105] At one stage in his testimony, Mr. Bandesha identified some of what he agreed were his signatures on the documents, but said other signatures had been forged. Later, he recanted that allegation and said he thought some documents were forged because he could not remember signing them.

[106] Mr. Bandesha's credibility was successfully challenged when he testified that, following the Court of Appeal decision, he had discussions with Mr. Cowper that continued until the end of 2011 in which Mr. Cowper told him that "Mr. Perrin's family had not signed", thus implying that Mr. Cowper was conversing with Mr. Perrin's lawyer who had not been able to secure his client's agreement to abandon or negotiate his claim for payment under the mortgage. This testimony was quite inconsistent with Mr. Cowper's recollection of the events at that time and their exchanges.

[107] Mr. Bandesha also testified that the Mutual Release had been prepared by FMD but he had not signed it at their office. However, he also said FMD told him it had been prepared, but he was not given a copy. In contrast, Mr. Watkins said he likely prepared the Mutual Release and Mr. Cowper testified he did not prepare the release and did not see that document until 2015.

[108] Mr. Bandesha said Mr. Guvi told him that Mr. Perrin would consent to the release of the money in court but wanted Shortreed to deposit money into Mr. Guvi's trust account to demonstrate their seriousness in resolving the dispute.

[109] This exchange described by Mr. Bandesha is inconsistent and incredible in light of the circumstances. If Mr. Perrin had agreed that Shortreed could receive the entire $400,000 then in court, there was no reason or rational purpose for Shortreed to give Mr. Guvi $110,000 as a demonstration of their seriousness. Moreover, payment representing a good faith approach to negotiation would more likely have been set at an even $100,000 rather than the odd amount of $110,000. The fact that $110,000 was paid is, in my view, supportive of Mr. Perrin's assertion that under the settlement he was to receive $110,000 (including Mr. Guvi's portion) and Shortreed would receive the balance of the funds.

[110] More generally, during his examination and cross-examination, Mr. Bandesha frequently avoided giving answers to the questions asked, prevaricated with his answers, or simply declined to answer. He often spoke about his poor memory and inability to explain inconsistencies in his evidence. Overall, I found the substance and manner of his responses to questions on cross-examination undermined his credibility.

The Parties' Positions

The Plaintiff

[111] Shortreed began submissions with a wholesale attack on the credibility of Mr. Perrin and Mr. Watkins, Mr. Perrin's lawyer in the foreclosure action, relying on the well-known authorities of *Faryna*, *Hardychuk v. Johnstone*, 2012 BCSC 1359, and *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186.

[112] Shortreed denies Mr. Perrin's testimony that he met Mr. Bandesha at Mr. Guvi's office or that it was agreed that Mr. Perrin should receive $100,000 from the funds then held in court and that $10,000 be given to Mr. Guvi. Shortreed contends this was a concocted story without any truth.

[113] Shortreed contends a finding that no such agreement will flow from Mr. Perrin's evasiveness and reluctance to provide direct answers to some questions. It contends Mr. Perrin "concocted this entire story about an agreement with Mr. Bandesha in an attempt to protect his daughters from a perceived future litigation that may arise against them as a result of the cheques being made payable to them."

[114] Shortreed contends that the settlement allegedly reached between the parties is not supported by reliable evidence, in part because there was no written confirmation of the term that Mr. Perrin would receive $100,000 from the funds in court. Shortreed contends that there was no reason or need for it to deposit $110,000 to Mr. Guvi's trust account immediately before the parties signed the Mutual Release. Shortreed contends that it was kept in the dark about the settlement and the efforts to obtain payment of the funds out of court.

[115] Shortreed contends that Mr. Bandesha met with Mr. Guvi only twice: on the first occasion, he signed the first Consent Order for payment out-of-court; on the

second he signed the Consent Order prepared by Mr. Piamonte. He explicitly denied meeting with Mr. Guvi and Mr. Perrin in Mr. Guvi's office and making any settlement agreement or compromise. He contends there was never an agreement to settle the foreclosure action.

[116] By inference, Shortreed contends the only settlement would have been on terms that Mr. Perrin receive no money from the funds in court and Shortreed receive the entire proceeds.

[117] Shortreed also argues that Mr. Watkins did not know that the claim had been settled before he received Mr. Cowper's inquiry about the proceeds in court in 2015. Shortreed suggested that, because Mr. Watkins did not inform FMD that the case had been settled in 2015, his testimony lacked reliability and credibility.

[118] Shortreed also argues the fact that Mr. Cowper opined that a $40,000 settlement with Mr. Perrin might be reasonable underscores the fact that the plaintiff was not ready to pay Mr. Perrin $100,000.

[119] Shortreed contends that it was Mr. Piamonte's client throughout the process, relying on the definition of "client" in Rule 3-91(1) of the *Law Society Rules*, 1998. It argues that, because Shortreed was receiving the ultimate benefit of Mr. Piamonte's services, Mr. Piamonte owed a fiduciary duty to Shortreed and the failure to protect its interest in the cheque was a breach of that fiduciary duty.

[120] Shortreed also argued that the standard of care owed by solicitors to clients was applicable to its relationship with Mr. Piamonte. It contends that although Mr. Piamonte viewed Mr. Guvi as his client, he knew Mr. Guvi was acting as an agent for Shortreed because it was ultimate beneficiary of the money represented by the cheque. Shortreed argues Piamonte was negligent in failing to apply "his mind to this question and how the other errors that occurred may have been avoided."

[121] Shortreed argues that this Court can reliably determine the standard of care owed by the law firm to Shortreed because it is a non-technical matter on which ordinary persons could be expected to have knowledge: *Zink v. Adrian*, 2005 BCCA 93 at paras. 44–45.

[122] In the alternative, Shortreed argues that the law firm's actions in delivering the cheque to Mr. Guvi was such a marked departure from any reasonable standard of conduct that the law firm's negligence can be assessed without relying on precise parameters of the standard of care: *Odobas v. Yates*, 2021 BCSC 2320 at paras. 30–40.

[123] Overall, Shortreed contends the law firm failed in its obligation to supervise staff to ensure procedures and rules were in place to ensure the standards of practice would be followed. It contends that the obligation of a reasonably competent lawyer is not diminished because the scope of work is less demanding: *Thind v. Smith-Gander*, 2022 BCSC 1167.

[124] Shortreed contends that the law firm is jointly and severally liable with RBC for its losses stemming from Mr. Piamonte's negligence. In the result, Shortreed contends that its loss is $47,923, together with legal fees incurred for work performed to obtain the funds from court without any benefit received.

[125] Finally, Shortreed seeks judgment for a separate $110,000 plus interest stemming from monies it paid to Oasis Eco Realty in February 2012.

The Defendants

[126] The defendants contend there was neither a contractual relationship nor solicitor-client relationship between Mr. Piamonte and Shortreed. Rather, Shortreed relied only on Mr. Guvi to negotiate settlement of the foreclosure action and obtain money out-of-court, and to bring about that settlement.

[127] The law firm defendants contend there was an insufficient relationship of proximity between the parties, and that it was not foreseeable that harm could come to Shortreed by reason of the law firm's actions. Moreover, the law firm argues that there was no compelling policy reason to extend the duty of care owed by the law firm to Shortreed (as a non-client) beyond the established list of exceptions, which it contends do not apply in this instance.

[128] The law firm submits that Shortreed's clear and only remedy is against RBC for negotiating the cheque without authority from Shortreed.

[129] The law firm contends that if a duty of care could be established as between the law firm and Shortreed, Shortreed has failed to show that Mr. Piamonte fell short of that standard of care or that any such failure caused a loss to Shortreed. It argues that Mr. Piamonte's conduct did not fall below the appropriate standard of care: Mr. Piamonte had been consulted by Mr. Guvi, who was acting on behalf of Shortreed, and Mr. Guvi provided the law firm the documents necessary to obtain payment of the funds out-of-court, which had already been signed by the parties.

[130] The law firm contends that the settlement between Shortreed and Mr. Perrin was negotiated by Mr. Guvi and reflected the importance of his role in acting for Shortreed. Mr. Guvi also apparently arranged for the signing and delivery of the Mutual Release and Consent Orders to the law firm, further illustrating Shortreed's reliance on him.

[131] The law firm argues that Mr. Bandesha's insistence that Shortreed made no agreement that would have resulted in payment of money to Mr. Perrin cannot be believed. Absent a settlement between those parties, no order could have been made releasing the money from court and neither party would have been entitled to the money. Moreover, if there was a settlement and Mr. Perrin was entitled to $110,000, then the maximum loss to Shortreed would have been $180,000, which was less than its settlement with RBC.

[132] The law firm points out that, in its release agreement with RBC, Shortreed expressly waived the right to recover from Mr. Piamonte and the law firm any portion of Shortreed's loss attributable to the "fault, tort, negligence and/or breach of any equitable or common law or statutory duty of RBC and for which any of the Non Settling Defendants might reasonably be entitled to claim from RBC under the *Negligence Act*, R.S.B.C. 1996, c. 333". Shortreed also waived the right to recover any portion of its loss that the court may apportion to the fault of RBC: see amended notice of civil claim paras. 36–37.

[133] The law firm underscored the agency relationship between Mr. Guvi and Shortreed as evidence of the reasonableness of its decision deliver the cheque to Mr. Guvi.

[134] The law firm says that it had no interest in the funds represented by the cheque and it acted reasonably in accepting that Mr. Guvi was acting as agent for Shortreed. It had no reason to believe the cheque should not be delivered to Mr. Guvi for conveyance to Shortreed. In that respect, Mr. Piamonte contends the transfer of the cheque from his office to Mr. Guvi was similar to the common practice of lawyers using couriers to deliver cheques without concern that a courier might convince a bank to deposit the funds into an account belonging to someone other than the payee.

[135] Further, the law firm points out that there was no specific evidence that Mr. Bandesha had authority to pick up the cheque himself to the exclusion of other directors of Shortreed, neither of whom testified at this trial. The defendants also contend that it was likely Shortreed approved the deposit of the cheque to the Oasis account. They also argued that without testimony from the other directors that they were not involved with the deposit of the cheque it should not be assumed that Mr. Guvi had misappropriated funds.

[136] Finally, Mr. Piamonte argues that, at all times, he reasonably believed Mr. Guvi was acting as agent for Shortreed. It is not believable, he says, to suggest that Mr. Bandesha would have chosen to travel from his residence in Maple Ridge to New Westminster to collect the cheque rather than relying on Mr. Guvi to collect and deliver it to Shortreed. The law firm contends Mr. Bandesha's bald assertions that he would have taken this different option to obtain the cheque and avoided the loss cannot be believed and do not survive the test in the "crucible of reason".

Discussion

[137] While the parties addressed whether there was a settlement of the dispute between Shortreed and Mr. Perrin as the first issue, I have opted to address the existence of a settlement agreement as part of my analysis of the plaintiff's claim in negligence, followed by its claim for breach of fiduciary duty.

Negligence

[138] Before setting out and addressing the legal framework applicable to Shortreed's claim in negligence, I wish to make a few comments about the evidence at trial relevant to said claim.

[139] The evidence that Mr. Guvi was the individual who received or deposited the cheque or dispersed the funds is gleaned from inferences stemming from correspondence and bank records retrieved after Shortreed began raising questions with FMD.

[140] I draw the inference from those documents and records that the law firm delivered the cheque to Mr. Guvi on October 29, 2012, when it wrote to Oasis Realty (attention: Archie Guvi), enclosing the cheque. The deposit of the cheque occurred December 11, 2012, and three payments were made from that account between December 12 and December 14 (totaling $110,000).

[141] There is no first-hand evidence concerning RBC's involvement in the negotiation of the cheque. Ms. Kent gave evidence of standard bank practices and confirmed documents recovered concerning the deposit of the cheque, but no bank personnel actually involved were called as witnesses.

[142] As noted above, Mr. Perrin's two daughters each received funds paid out of the Oasis account, however, neither of them was called to give evidence. Further, Shortreed made no effort or attempt to pursue these people who Mr. Bandesha contends wrongfully received the funds derived from the cheque payable to Shortreed.

[143] Throughout Mr. Bandesha's testimony, he confirmed that he was only one of three directors of Shortreed, yet he was the only person to testify on Shortreed's behalf and signed documents purportedly on behalf of Shortreed without confirmation from the other directors.

[144] The absence of the evidence from the other directors limited the court's ability to accurately construe the surrounding circumstances and events that took place in 2012 and 2013 concerning the deposit of the cheque.

[145] I find that there were two possible series of events that preceded the Province of British Columbia Cheque being deposited to the Oasis account on December 11, 2012. First, the banking staff at the time failed to adhere to its own banking procedures prohibiting them from depositing a cheque payable to one entity into an account of another entity without confirming permission of the payee. Second, on presentation of the cheque, bank staff, including the bank manager

Ms. Jackson, obtained satisfactory confirmation from an authorized representative of Shortreed to make the deposit into the Oasis account.

[146] There is some evidence indicating that this deposit was approved by the RBC manager. Most notably, the bank's policy would not have permitted the cheque to be deposited to the Oasis account without approval from the payee or some other direction from more senior bank officials The parties were unable to locate or call witnesses who were involved in this transaction at the bank's branch at 626 6th Avenue, New Westminster, B.C. That said, the evidence is simply insufficient to enable me to make that finding on this possibility.

[147] Although, absent testimony from the other directors who would have had the same authority as Mr. Bandesha to deal with the cheque payable to Shortreed, there is a lacuna in the evidence. about how the deposit of these funds to the Oasis account was accomplished. Mr. Bandesha, for his part, said he had not authorized the deposit of the cheque to Mr. Guvi's real estate trust account.

[148] In the result, I accept that Mr. Bandesha did not approve of the deposit of the funds to the Oasis account. Mr. Guvi deposited the cheque to the Oasis account and then issued cheques to Shortreed for $110,000 and to each of Mr. Perrin's daughters for $50,000. It is likely that Mr. Guvi distributed the balance of the money deposited to the Oasis account to entities not entitled to the money (i.e. not including Mr. Perrin's daughters and Mr. Guvi). I decline to make a finding requested by the defendants that the other directors of Shortreed could have approved the deposit of the funds to the Oasis account.

[149] Although this conclusion does not address the ultimate question of where the other money went, it is clear from the evidence that $187,923.30 was paid to a company BCLD Holdings Ltd. with an address at # 405 – 555 Sixth Street, New Westminster, BC.555 Sixth Street, New Westminster, BC.

Legal framework

[150] It was common ground at trial that a lawyer is liable for the negligent acts of his or her employees including lawyers, clerks, paralegals, secretaries and other support staff, whether or not he or she knew of or approved said acts: see *Aetna Roofing (1975) Ltd. v. Conradi*, [1984] A.J. No. 1031, 52 A.R. 369 (Q.B.); *McKay v. Cowan*, [1989] B.C.J. No. 1736, 1989 CanLII 2808 (B.C.S.C.); Stephen Grant,

Linda Rothstein & John Adair, *Lawyers' Professional Liability*, 4th ed. (Markham: LexisNexis), at ch. 5.2.

[151] As a result, the analysis below, like the arguments before me, addresses Mr. Piamonte's liability in negligence in light of his own acts as well as those of his staff.

[152] The legal framework for deciding negligence claims was succinctly summarized by the Supreme Court of Canada in *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63 [*Livent*], where the Court explained that for a successful negligence action a plaintiff must demonstrate that:

(1) the defendant owed him or her 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.

(See *Livent* at para. 77; citing *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 at para. 3; *Saadati v. Moorhead*, 2017 SCC 28 at para. 13.)

Did Mr. Piamonte owe Shortreed a duty of care?

[153] The first step in analyzing Shortreed's negligence claim is to consider whether it has demonstrated that Mr. Piamonte owed it a duty of care. As the Supreme Court of Canada explained in *Nelson (City) v. Marchi,* 2021 SCC 41:

> [16] In Canada, the *Anns/Cooper* test provides a unifying framework to determine when a duty of care arises under the wide rubric of negligence law, including for allegations of negligence against government officials. But as *Cooper* and subsequent cases make clear, the framework applies differently depending on whether the plaintiff's claim falls within or is analogous to an established duty of care or whether the claim is novel because proximity has not been recognized before.
>
> [17] In novel duty of care cases, the full two-stage *Anns/Cooper* framework applies. Under the first stage, the court asks whether a *prima facie* duty of care exists between the parties. The question at this stage is whether the harm was a reasonably foreseeable consequence of the defendant's conduct, and whether there is "a relationship of proximity in which the failure to take reasonable care might

> foreseeably cause loss or harm to the plaintiff" (*Rankin's Garage*, at para. 18). Proximity arises in those relationships where the parties are in such a "close and direct" relationship that it would be "just and fair having regard to that relationship to impose a duty of care in law upon the defendant" (*Cooper*, at paras. 32 and 34).
>
> [18] If there is sufficient proximity to ground a *prima facie* duty of care, it is necessary to proceed to the second stage of the *Anns/Cooper* test, which asks whether there are residual policy concerns outside the parties' relationship that should negate the *prima facie* duty of care (*Cooper*, at para. 30). As stated in *Cooper*, at para. 37, the residual policy stage of the *Anns/Cooper* test raises questions relating to "the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally", such as:
>
> > Does the law already provide a remedy? Would recognition of the duty of care create the spectre of unlimited liability to an unlimited class? Are there other reasons of broad policy that suggest that the duty of care should not be recognized?
>
> [19] When the duty of care at issue is *not* novel, there is generally no need to proceed through the full two-stage *Anns/Cooper* framework. Over the years, courts in Canada have developed a body of negligence law recognizing categories of cases in which a duty of care has previously been established (*Cooper*, at para. 41; *Childs v. Desormeaux*, 2006 SCC 18, [2006] 1 S.C.R. 643, at para. 15; *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, [2008] 2 S.C.R. 114, at para. 5). In such cases, "the requisite close and direct relationship is shown" and the first stage of the *Anns/Cooper* framework will be complete, as long as the risk of injury was reasonably foreseeable (*Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63, [2017] 2 S.C.R. 855, at para. 26). The second stage of the *Anns/Cooper* test will rarely be necessary because residual policy concerns will have already been taken into account when the duty was first established (*Cooper*, at paras. 36 and 39; *Livent*, at paras. 26 and 28; see also *Edwards v. Law Society of Upper Canada*, 2001 SCC 80, [2001] 3 S.C.R. 562, at paras. 9-10).

[154] If a relationship falls within a previously established category, or is analogous to one, then the requisite close and direct relationship is shown: *Livent* at para. 26. As the Court explained in *Nelson* at para. 27, in determining whether a previously established category of duty applies, I must be attentive to the particular factors which justified recognizing that prior category in order to determine whether the relationship at issue is, in fact, truly the same or analogous to that which was previously recognized.

[155] In this case, I am satisfied that a previously established category of duty applies to establish the requisite close and direct relationship between Mr. Piamonte and Shortreed.

[156] It is trite that a solicitor owes a duty of care to his or her clients. That is, the solicitor-client relationship is one where sufficient proximity to give rise to a *prima facie* duty of care has been recognized: see *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41 at para. 25.

[157] I am satisfied that Mr. Piamonte and Shortreed were in a solicitor-client relationship and that Mr. Piamonte was acting as Shortreed's solicitor in securing payment of the funds held in court. While I acknowledge that it was Mr. Guvi that retained and instructed Mr. Piamonte and the law firm for that purpose, I find that he did so on behalf of, and as agent for, Shortreed. In this respect, Shortreed referred me to the *Law Society Rules*, 1998, in effect at the relevant time, which provide at Rule 3-91 that for the purposes of client identification and verification:

> **"client"** includes
>
> (a) another party that a lawyer's client represents or on whose behalf the client otherwise acts in relation to obtaining legal services from the lawyer…

[158] Of course, there is an important distinction between rules of professional conduct and the law of negligence. However, while rules of professional conduct are not binding on this Court and do not necessarily describe the applicable duty of care in negligence, they are of importance in determining the nature and extent of duties flowing from a professional relationship: *Galambos v. Perez*, 2009 SCC 48 at paras. 28–29.

[159] In this case, I find that Mr. Piamonte knew or ought to have known that Mr. Guvi was acting on Shortreed's behalf in retaining the law firm's services. The services sought were to secure payment of funds out of court *to Shortreed*. Mr. Guvi's only interest and role was to assist in securing said payment (and perhaps receive compensation for doing so), which he did at Mr. Bandesha's request.

[160] Mr. Piamonte's letter to the court requesting payment of the funds to Shortreed is another indication that he knew his efforts were focused on advancing Shortreed's interests. Although he resiled from the part of his letter indicating he had been instructed by Shortreed, there was no doubt that he was aware Shortreed was the only beneficiary of the law firm's services. In such circumstances, I conclude that Mr. Piamonte and the law firm were providing

services to Shortreed, as principal, on instructions from its agent, Mr. Guvi, and therefore that Shortreed was Mr. Piamonte's client.

[161] I would add that, even if I found that Mr. Piamonte and Shortreed were not in a solicitor-client relationship, my conclusion that a previously established category of duty applies to establish the requisite close and direct relationship between them would not have changed. As Justice Newbury explained in *Esser v. Luoma*, 2004 BCCA 359 at para. 32, another established category exists in circumstances where a solicitor assumes a contractual duty to one person to do something for the benefit of a third party. While I acknowledge that such a category has been recognized in the specific context of claims for purely economic loss, in my view its application to the present case stands. For one thing, as Newbury J.A. noted in *Esser*, claims for purely economic loss are more circumscribed and the duty of care analysis more strict. I do not see why an established category of duty in such cases ought not apply to the present case where the duty of care analysis is not similarly circumscribed. Further and more importantly, I am satisfied, as the Court in *Nelson* instructed at para. 27 that I must be, that the relationship at issue is truly analogous to that recognized in the category referenced by Newbury J.A. in *Esser* because Mr. Piamonte was retained by and therefore under a contractual duty to Mr. Guvi to do something for the benefit of Shortreed: see e.g. *Canmerica Mortgage Corporation v. Yu*, 2015 BCSC 773 at para. 204.

[162] I am therefore satisfied that Mr. Piamonte and Shortreed were in a relationship of sufficient proximity to give rise to a *prima facie* duty of care. Such is not, however, the end of the analysis at this stage. In order to establish a duty of care, Shortreed must also establish that the injury suffered was a reasonably foreseeable consequence of the Mr. Piamonte's actions: *Livent* at paras. 26, 32; *Nelson* at para. 19.

[163] The proper inquiry with respect to foreseeability of harm at this stage is not whether the loss suffered by *a particular plaintiff* could have been foreseen, but whether *the type of injury* to *a class of persons*, *within which the plaintiff falls*, could have been foreseen: *1688782 Ontario Inc. v. Maple Leaf Foods Inc.*, 2020 SCC 35 at para. 26 (emphasis in original); *Rankin* at para. 24. As Madam Justice Fenlon explained in *McCormick v. Plambeck*, 2022 BCCA 219, leave to appeal to

SCC ref'd, 40407 (30 March 2023), foreseeability of the "type" or "class" of harm requires foreseeability of the general mechanism by which that harm was caused:

> [30] The duty of care analysis is a search for the connection between the alleged wrong (here, letting minors who have been drinking walk home on their own), and the harm (here, personal injuries sustained in a car crash). Reasonable foreseeability, like proximity, is a crucial limiting principle that ensures liability will only be found when the defendant ought reasonably to have contemplated the type of harm the plaintiff suffered: *Rankin* at para. 22. It is a practical impossibility to assess whether a class of harm could potentially occur without considering general mechanisms of injury. It follows that the foreseeability analysis asks whether someone in the defendant's position, prior to the incident occurring, ought reasonably to have foreseen the class of harm, to the class of plaintiff, through the general mechanism that caused the injury.
>
> [Emphasis added.]

[164] In this case, I am satisfied that there is a connection between the alleged wrong (here, delivering a cheque to an agent without specific instructions from the principal) and the harm (here, loss of funds by misappropriation). That is to say, someone in Mr. Piamonte's position ought reasonably to have foreseen the class of harm suffered by Shortreed, as a client of the law firm, and the general mechanism by which that harm was caused. To paraphrase Fenlon J.A.'s framing of the issue at para. 38 in *McCormick*, in the circumstances of this case, loss of funds through misappropriation was foreseeable.

[165] Finally, given my conclusion above that the relationship between Mr. Piamonte and Shortreed falls within a previously established category, I need not engage with the residual policy concerns at the second stage of the *Anns/Cooper* test which, in my view, have already been taken into account when the duty was first established: see *Nelson* at para. 19.

[166] In sum, I find that Mr. Piamonte owed Shortreed a duty of care.

Did Mr. Piamonte's behaviour breach the standard of care?

[167] The standard of care owed by a solicitor was summarized by Madam Justice Adair in *Fong v. Lew*, 2015 BCSC 436, aff'd 2016 BCCA 67, as follows:

> [17] …The general standard of care applicable here is that of a reasonably competent and diligent solicitor: see, e.g., [*Central Trust Co. v. Rafuse,* 1986 CanLII 29 (S.C.C.)*, [1986] 2 S.C.R. 147*], at pp. 208-209.

> [18] In an action against a solicitor for negligence, it is not enough to say that the solicitor has made an error in judgment or shown ignorance of some particular part of the law. However, the solicitor will be liable if his or her error or ignorance was such that than an ordinarily competent solicitor would not have made it. See, for example, ***Banyay v. Christie and Co.***, 2001 BCSC 1165, at para. 24 (citing ***Brenner v. Gregory***, 1972 CanLII 420, 30 D.L.R. (3d) 672 (Ont. H.C.J), at p. 677). On the other hand, a solicitor is not an insurer of the client's commercial success: see ***Midland Mortgage Corp. v. Jawl & Bundon***, 1999 BCCA 183, at para. 13.
>
> [19] In ***Tiffin Holdings Ltd. v. Millican*** (1964), 1964 CanLII 637 (AB KB), 49 D.L.R. (2d) 216 (Alta. S.C.), at pp. 218-219, aff'd 1967 CanLII 102 (SCC), [1967] S.C.R. 183, Riley J. expressed these views on the standard of care expected of a solicitor:
>
> > The standard of care and skill which can be demanded from a lawyer is that of a reasonably competent and diligent solicitor.
> >
> > It is not enough to prove that the lawyer has made an error of judgment or shown ignorance of some particular part of the law; it must be shown that the error or ignorance was such that an ordinarily competent lawyer would not have made or shown it.
> >
> > . . .
> >
> > In this case I have not had the advantage of evidence tending to show what an ordinarily competent lawyer would have done.
> >
> > > 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.

[168] As Adair J. pointed out in *Fong*, the list of a lawyer's obligations provided by Justice Riley in *Tiffin Holdings Ltd. v. Millican,* 1964 CanLII 637, 49 D.L.R. (2d) 216 (Alta. S.C.) [*Tiffin SC*] aff'd 1967 CanLII 102 (S.C.C.), [1967] S.C.R. 183 has been cited with approval a number of times by courts in British Columbia: see e.g. *Zink v. Adrian*, 2005 BCCA 93 at para. 23; *Newton v. Marzban*, 2008 BCSC 328 at para. 605; *Duckett v. McKinnon*, 2012 BCSC 2147 at para. 37; and *Linten Developments Ltd. v. Kirschner Mountain Estates Ltd.*, 2022 BCSC 1470 at para. 207.

[169] Importantly, the standard is that of a reasonably competent and diligent solicitor, not a first-rate lawyer: *Fong* at para. 116. That standard is not confined to services in the nature of professional advice but applies to any act or omission in the performance of the services for which the solicitor is retained: see *Central Trust Co. v. Rafuse,* [1986] 2 S.C.R. 147, 1986 CanLII 29 (S.C.C.) at para. 53. I accept that the handling of the cheque in this case was such a service.

[170] Here, as in *Fong*, there was no expert opinion evidence on the specific standard of care applicable in the circumstances of this case. The defendants objected to the admissibility of the report of Shortreed's expert and, in the result, I ruled that the report was inadmissible.

[171] I note that in *Zink*, Southin J.A. cautioned judges against opining on a solicitor's duty of care in the absence of expert evidence as to the standard of a competent solicitor conducting the business in question. She stated, however, that a judge can properly do so if the matter is one of "non-technical matters or those of which an ordinary person may be expected to have knowledge": *Zink* at para. 44. I accept that this case raises such a matter. That is, the handling and delivery of a cheque payable to a client is a non-technical matter of which an ordinary person may be expected to have knowledge.

[172] Shortreed argued that Mr. Piamonte was negligent in failing to determine the identity of his client, and if he had turned his mind to Shortreed's status as client, his errors in failing to protect Shortreed's interest would have been avoided. It argued that Mr. Piamonte failed to supervise his staff to ensure that procedures and rules were followed to "the standard practice of a solicitor's office". More specifically, Shortreed contended that the standard of care included the principle that "you should not hand over someone's property to someone else". It argued that Mr. Piamonte's duty of care was to safeguard the cheque and not deliver it to Mr. Guvi without specific instructions from Shortreed. In that respect, it argued Mr. Piamonte's actions constituted a marked departure from any standard of reasonable conduct as measured against a simple application of common sense and basic diligence. As a result, it says, Mr. Piamonte allowed Mr. Guvi to use Mr. Piamonte and the law firm as a vehicle to commit fraud, embezzlement, misappropriation and/or defalcation.

[173] Mr. Piamonte contends that his actions were reasonable in the circumstances. Mr. Piamonte had no intention that the cheque be delivered to him but, once it was, it was reasonable for his staff to issue said cheque to Mr. Guvi as the individual that had retained and instructed him in securing payment of the funds out of court. Up to that date, all communications had been with Mr. Guvi and there was nothing to suggest he did not have authority to accept the cheque on behalf of, and deliver the cheque to, Shortreed. Mr. Piamonte and his staff were not provided any information concerning Shortreed's address, contacts, or contact information, even when Mr. Bandesha attended the firm's office.

[174] I note at the outset that this is not a case involving the payment of money to or from a law firm's trust account or the distribution of money between competing interests. The only issue in this case is whether Mr. Piamonte's conduct in allowing the delivery of a cheque payable to Shortreed to Mr. Guvi without specific instructions from Shortreed fell below the standard of a reasonably competent and diligent solicitor. For the reasons that follow, I conclude that it did not.

[175] First, there was no evidence whatsoever to support the suggestion that Mr. Piamonte or his staff knowingly allowed or assisted Mr. Guvi to misappropriate the funds.

[176] Second, I find that it was reasonable for Mr. Piamonte and his staff to conduct themselves on the basis that RBC could only deposit the cheque payable to Shortreed into Shortreed's account or another account expressly authorized by Shortreed. As Ms. Kent's testimony illustrates, cheques can generally only be deposited into the account of the payee. In this respect, it is not accurate to suggest, as Shortreed does, that this was simply a case of Mr. Piamonte or the law firm "handing someone's property to someone else". The property "handed over" in this case was a cheque and, unlike cash or other valuable property, it could only have had value to Shortreed, as payee, or anyone authorized by Shortreed, except in the hands of a forger and thief. As a result, I do not agree that the Mr. Piamonte lacked care or failed to safeguard Shortreed's interest in allowing the delivery the cheque to Mr. Guvi.

[177] Third, I find that it was reasonable for Mr. Piamonte to conclude that Mr. Guvi was acting as Shortreed's agent and had the authority to accept and deliver the cheque on its behalf, and that it was therefore reasonable for

Mr. Piamonte to allow the delivery the cheque to Mr. Guvi without specific instructions from Shortreed to do so.

[178] Shortreed concedes, and I have found above, that Mr. Piamonte, Mr. Guvi and Mr. Bandesha were conducting themselves on the basis that Mr. Guvi was acting on behalf of, and as agent for, Shortreed in securing payment of the funds out of court. Mr. Guvi did not claim any right or interest in the cheque. Although Mr. Piamonte said in his letter to the court requesting the funds that he had been consulted by Shortreed, it was clear that he knew the request for assistance came from Mr. Guvi on behalf of Shortreed.

[179] The *Law Society Rules* in force at the time required lawyers to make reasonable efforts to obtain information about individuals who retain the law firm, which in this case was Mr. Guvi. The information to be obtained included business address, business telephone number, and the name, position and contact information for individuals who give instructions with respect to the matter. I note that, while the point was not argued before me (and I therefore make no finding to this effect), to the extent that a solicitor is retained by one client to perform services on behalf of another, Rule 3-93 did not appear to require the identification information from both clients; it is the client retaining a law firm whose information is essential. Moreover, Law Society Rule 3-93 further provided that a lawyer was not required to obtain verification of identity when the transaction involves receipt of money pursuant to the order of the court.

[180] In this case Mr. Guvi, not Shortreed, was the client retaining the lawyer. The law firm acquired the information from Mr. Guvi, who operated as the sole point of contact between the law firm and Shortreed. Mr. Piamonte and his staff received all instructions from Mr. Guvi and had virtually no contact with Shortreed or its directors. Because Mr. Piamonte was retained by Mr. Guvi to provide legal services for Shortreed, and Mr. Piamonte considered Mr. Guvi to be his client, it is clear to me that all contact was intended to be between Mr. Guvi and Mr. Piamonte and his staff. Such was at the very least implicitly confirmed by Mr. Bandesha when he attended the law firm’s office to execute the Consent Order without ever seeking to provide instructions to or engage directly with Mr. Piamonte or his staff.

[181] In *Sinclair v. Smith*, 41 B.C.L.R. 374, 1982 CanLII 675 (B.C.S.C.), McLachlin J. (as she then was) considered whether a solicitor retained and

instructed by an agent (in that case a real estate agent and mortgage broker) is required to go behind the agency relationship to personally assure himself that the agent has conveyed to the agent's principals the appropriate warnings. She explained that a person dealing with an agent acting within the scope of his authority may treat the agent as having authority to represent and bind the agent's principals: *Sinclair* at para. 14. Applying this principle to solicitors, she concluded that, as a general rule, solicitors dealing with agents of clients are not obliged to communicate directly with the principals: *Sinclair* at paras. 15–16; citing *Midland Bank Executor & Trustee Co. Ltd.*, [1971] 1 Q.B. 113, [1970] 2 All E.R. 471. She added that a solicitor may exceptionally be obliged to communicate directly with the principal if the circumstances are such that it would have been apparent to a reasonably prudent solicitor that the agent was incapable of properly representing his principals, was improperly representing his principals, or was failing to convey to them the solicitor's advice: *Sinclair* at para. 17.

[182] In *B.S.A. Investors Ltd. et al. v. Mosly et al.*, 2004 BCSC 1706 at paras. 86–87, rev'd on other grounds, 2007 BCCA 556, leave to appeal to SCC ref'd, 32148 (24 January 2008), Justice Williams cited *Sinclair* in concluding that a solicitor's knowledge of the history of the relationship between the principal and the agent informs the reasonableness of the solicitor relying on the agent and his instructions: at paras. 86–87.

[183] Here, I find that it was reasonable for Mr. Piamonte and his staff to conclude that Mr. Guvi had authority to communicate Shortreed's instructions and requirements, and to collect the cheque on its behalf.

[184] I was not directed to evidence of any conduct by Mr. Guvi that ought reasonably to have alerted the law firm to any issues with his loyalty to Shortreed or his authority to act on its behalf. I am therefore not satisfied that the circumstances were such that it would have been apparent to a reasonably prudent solicitor that Mr. Guvi was incapable of properly representing Shortreed, was improperly representing Shortreed, or was failing to convey Mr. Piamonte's advice: *Sinclair* at para. 17. To the contrary, the indicia of Mr. Guvi's relationship with Shortreed strongly supported Mr. Guvi having the authority to collect and deliver the cheque without specific instructions from Shortreed.

[185] In particular, Mr. Piamonte was retained by Mr. Guvi to perfect his unsuccessful application for payment of the funds out of court in circumstances where Mr. Guvi had already been trusted and instructed by Shortreed to make such an application. Mr. Guvi communicated with and provided the law firm the documents necessary to perfect the application, which had been signed by Mr. Bandesha on behalf of Shortreed. Mr. Bandesha then attended the law firm's offices to sign the draft Consent Order prepared by Mr. Piamonte. At no point (prior to the commencement of this litigation) did Shortreed or Mr. Bandesha suggest that Shortreed had to sign off on Mr. Guvi's instructions or grant permission for any role he played in securing the payment of the funds out of court. In such circumstances, the law firm was not obliged to seek instructions directly from Shortreed.

[186] Finally, Mr. Piamonte's duty to Shortreed cannot, in my view, have extended to taking precautions to prevent losses caused by the criminal acts of third parties. More specifically, I find that Mr. Piamonte cannot be found to have been negligent simply on the basis that he failed to anticipate what Shortreed argues were the criminal acts of Mr. Guvi: see *Tiffin SC* at 220; citing *Imperial Bank of Canada v. Bank of Hamilton*, 1901 CanLII 9 (S.C.C.), 31 S.C.R. 344 at 349, aff'd [1903] A.C. 49.

[187] In reaching this conclusion, I acknowledge that while the Supreme Court of Canada in *Tiffin* overturned the Alberta Court of Appeal and reinstated the decision of the trial judge, it did not specifically or expressly disagree with the Court of Appeal's statements that the solicitor-client relationship was a sufficiently "special and exceptional relationship" to generate a duty to anticipate the criminal acts of third parties in certain circumstances, or that "it is a question of fact depending on the terms of the retainer and the standard set by ordinary, competent solicitors whether criminal acts by others should be anticipated and guarded against": *Tiffin Holdings Ltd. v. Millican et al.*, 1965 CanLII 549 (Alta. C.A.), 53 D.L.R. (2d) 674 [*Tiffin CA*] at 677; citing *Imperial Bank of Canada* at 349.

[188] However, even accepting those statements as good law, the circumstances of this case can be easily distinguished from those relied on by the Court of Appeal in *Tiffin* to justify the imposition of liability on the solicitor in that case. More specifically, the Court of Appeal in *Tiffin* was satisfied that there could be "no doubt that the solicitor knew he was dealing with a possible rogue"; that the solicitor

"should have anticipated that [the third party] might try to defraud the appellant"; that the solicitor had been "employed to prevent the very thing that happened"; and that the solicitor had been "put on his guard" by the third party by virtue of that party's acts and the fact that the solicitor's "own client and at least one other person had warned him about [the third party]": *Tiffin CA* at 677–679. As I have concluded above, none of those circumstances existed in the case before me. There was no evidence to suggest Mr. Piamonte was warned about Mr. Guvi, that he knew he was dealing with a possible rogue, or that there was anything to suggest that Mr. Guvi might try to defraud Shortreed. Mr. Piamonte was not employed to prevent the very thing that happened; he was employed *by Mr. Guvi* to assist Mr. Guvi to obtain payment of the funds out of court in favour of Shortreed, which he did.

[189] In sum, I am satisfied that, in allowing the cheque to be delivered to Mr. Guvi without specific instructions from Shortreed, Mr. Piamonte conducted himself to the standard of a reasonably competent and diligent solicitor.

[190] It was reasonable in the circumstances to believe the cheque could only be deposited into Shortreed's account (or any account into which Shortreed authorized a deposit) and that Mr. Guvi had the authority to, and would in fact, deliver the cheque to Shortreed. Absent any indication that Mr. Guvi would behave the way he did, Mr. Piamonte cannot have been obliged to seek instructions directly from Shortreed and cannot be liable for a failure to anticipate Mr. Guvi's criminal acts.

[191] In the result, I conclude that Mr. Piamonte's behaviour did not breach the standard of care. That being said, in the event I am wrong, I will continue to address the remaining stages of the negligence analysis.

Did Shortreed sustain damage?

[192] Even if I were satisfied that Mr. Piamonte's behaviour breached the standard of care, Shortreed must demonstrate that it sustained damage: *Livent* at para. 77. The existence of such damage depends, in my view, on whether or not there was a settlement of the foreclosure action.

[193] As above, Shortreed rejects that there was any settlement of the foreclosure action. It denies Mr. Perrin's testimony that he met Mr. Bandesha at

Mr. Guvi's office or that it was agreed that Mr. Perrin should receive $100,000 from the funds then held in court and that $10,000 be given to Mr. Guvi. It contends that the settlement allegedly reached between the parties is not supported by reliable evidence, in part because there was no written confirmation of the term that Mr. Perrin would receive $100,000 from the funds in court. Shortreed contends that there was no reason or need for it to deposit $110,000 to Mr. Guvi's trust account immediately before the parties signed the Mutual Release. Rather, Mr. Perrin "concocted this entire story about an agreement with Mr. Bandesha in an attempt to protect his daughters from a perceived future litigation that may arise against them as a result of the cheques being made payable to them."

[194] Shortreed contends that Mr. Bandesha met with Mr. Guvi only twice: on the first occasion, he signed the first Consent Order for payment out-of-court; on the second he signed the Consent Order prepared by Mr. Piamonte. It argues that it was kept in the dark about the settlement and the efforts to obtain payment of the $422,000 out of court. By inference, it contends the only settlement would have been on terms that Mr. Perrin receive no money from the funds in court and Shortreed receive the entire proceeds.

[195] As a result, while Shortreed recognizes that the $110,000 it received came from the Oasis account into which the $422,923.30 had been deposited, it contends that, after settlement with RBC, its has suffered damages in the amount of $47,822, plus interest.

[196] Mr. Piamonte and the law firm submit that that the existence of a settlement agreement between the parties to the foreclosure action is the only logical explanation of the events leading to the payment of the funds out of court. That is, absent a settlement between those parties, no order could have been made releasing the money from court and neither party would have been entitled to the money. More specifically, Mr. Piamonte and the law firm assert that Mr. Perrin and Mr. Bandesha agreed that Mr. Perrin would receive $100,000 and Mr. Guvi $10,000 of the funds held in court, that those sums would be paid together to Oasis Realty in Trust as security and, on that basis, Mr. Perrin would sign the Mutual Release granting Shortreed exclusive rights to the funds held in court.

[197] Relying on the existence of such an agreement, Mr. Piamonte and the law firm submit that Shortreed has suffered no damage. That is, taking into account

the $110,000 paid to Mr. Perrin and Mr. Guvi on the basis of the settlement agreement, the $110,000 paid from the Oasis account, and the $275,000 settlement reached with RBC, Shortreed has proven no recoverable loss or damage.

[198] For the reasons that follow I find that, in early February 2012, Mr. Bandesha and Mr. Perrin reached an agreement to divide the money held in court on the terms that Mr. Perrin would receive $100,000, Mr. Guvi $10,000, and the balance would be payable to Shortreed. I therefore agree with Mr. Piamonte and the law firm that, in light of said agreement. Shortreed has proven no damage.

[199] In *Oswald v. Start Up SRL*, 2021 BCCA 352, our Court of Appeal discussed the legal test apposite to determining whether the parties to the foreclosure action reached a binding and enforceable contract (i.e. settlement agreement), as follows:

> [33] On a fair reading of the judgment, it is apparent the judge applied the correct legal test to determine whether the parties entered into a binding and enforceable contract. As the Supreme Court of Canada has recently confirmed, a contract is formed when the parties "have indicated to the outside world, in the form of the objective reasonable bystander, their intention to contract and the terms of such contract", and the surrounding circumstances may be considered: G.H.L. Fridman, *The Law of Contract in Canada*, 6th ed. (Toronto: Carswell, 2011) at 15; *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*, 2021 SCC 22 at paras. 36–37 [*Ethiopian Orthodox*]. The court must consider "how each party's conduct would appear to a reasonable person in the position of the other party": *Owners, Strata Plan LMS 3905 v. Crystal Square Parking Corp.*, 2020 SCC 29, at para. 33. "The question in every case is what intention is objectively manifest in the parties' conduct": *Ethiopian Orthodox* at para. 38.
>
> [34] The applicable legal principles to determine whether an enforceable contract has been formed were succinctly set out in Mr. Mhamunkar's factum at para. 67 as follows:
>
> > (a) there must be an intention to contract;
> >
> > (b) the essential terms must be agreed to [by] the parties;
> >
> > (c) the essential terms must be sufficiently certain;
> >
> > (d) whether the requirements of a binding contract are met must be determined from the perspective of an objective reasonable bystander, not the subjective intentions of the parties; and
> >
> > (e) the determination is contextual and must take into account all material facts, including the communications between the parties and the conduct of the parties both before and after the agreement is made.

[200] Regrettably, as between Mr. Perrin and Mr. Bandesha, one or the other has been untruthful in their assertions concerning the settlement. In my view, Mr. Bandesha's assertions that there was no settlement and that he never authorized payment to Mr. Perrin of any portion of the money is simply not credible. More specifically, it is inconsistent with all of the facts surrounding the events leading to the successful application to have the money paid out of court.

[201] The immediate question raised by Shortreed's submissions is that, if no settlement was reached with Mr. Perrin, then Shortreed would not have been entitled to any of the money in court except after a favourable trial decision. Mr. Bandesha did not explain how Mr. Guvi could have obtained Mr. Perrin's consent to payment of the money out of court absent agreement to divide the money, particularly in light of his discussions with Mr. Cowper that allowing Mr. Perrin to keep $40,000 would have been a reasonable solution to their dispute. Shortreed's submissions do not explain the basis on which the Mutual Release of and Consent Order securing payment out-of-court of the funds could have been signed by either party in the absence of this settlement.

[202] Mr. Bandesha testified that he had extensive dealings with Mr. Guvi in the years before February 2012 and after which he requested Mr. Guvi's assistance in negotiating a settlement with Mr. Perrin. I find that Mr. Bandesha instructed Mr. Guvi to negotiate a resolution of the foreclosure action with Mr. Perrin with an expectation that Mr. Perrin would receive some portion of the money in court. I also find that Mr. Guvi arranged a meeting between Mr. Perrin and Mr. Bandesha at Mr. Guvi's office at which point the parties came to this agreement.

[203] Shortreed gave Mr. Guvi the $110,000 cheque on February 20, 2012, the day after which the parties signed the Mutual Release agreement. Such timing makes it clear, in my view, that Shortreed knew the $110,000 paid to Oasis Realty in trust on February 20, 2012 was a prerequisite to achieving the settlement.

[204] Shortreed did not address the question of Mr. Perrin's vulnerability in the period following execution of the Mutual Release but before funds could be paid out of court. It is obvious that, until the money could be obtained from the court, the $110,000 paid to Oasis Eco Realty by Shortreed stood as the guarantee that Mr. Perrin would receive that amount as his share of the funds without the intervention of Shortreed.

[205] There is no reasonable possibility that Mr. Perrin would abandon his right to litigate his entitlement to the funds in court without negotiating a division of the money. Mr. Guvi was negotiating this settlement and held the initial deposit of $110,000 in the real estate trust account and was authorized to pay some of those funds to obtain a settlement. I reject Mr. Bandesha's assertion that there were no discussions about an amount to be paid to Mr. Perrin.

[206] Additionally, by February 2012 Mr. Bandesha had directed FMD to stand-down its efforts to obtain the funds in court because he believed Mr. Guvi could be successful in negotiating a settlement of the claim. Although he denied giving Mr. Guvi authority to settle the dispute without his approval, Mr. Guvi was given authority to negotiate on behalf of Shortreed. I find Mr. Bandesha was always expecting that Mr. Perrin would receive some of the funds held in court as demonstrated by Mr. Perrin's evidence about the terms of the settlement.

[207] I accept Mr. Perrin's version of events concerning the settlement meeting at Mr. Guvi's office and reject Mr. Bandesha's testimony about this event. I conclude there was a meeting at Mr. Guvi's office attended by Mr. Perrin and Mr. Bandesha wherein it was agreed that Mr. Perrin would receive $110,000 from the funds in court (with $10,000 to go to Mr. Guvi).

[208] I accept that Mr. Perrin's expectations were met with a guarantee he would receive $110,000 on the terms noted above and was then prepared to abandon all other claims to the money in court. By February 2012, Mr. Guvi was in possession of that amount of money received from Shortreed and was able to pay Mr. Perrin that sum, with the balance to be received from the court payable to Shortreed. Entering the Consent Order on March 15, 2012 operated a declaration of the final settlement of all claims. Although the order did not express state that the foreclosure action was at an end, it brought the action to a conclusion.

[209] As the foregoing makes clear, I do not accept Shortreed's allegations that Mr. Perrin's testimony lacked credibility and reliability, and I reject its submissions that "he concocted this entire story about an agreement with Mr. Bandesha in an attempt to protect his daughters from a perceived future litigation that may arise against them as a result of the cheques being made payable to them."

[210] To the contrary, as set out above, Mr. Perrins testimony was consistent with the circumstances surrounding the events that resulted in the law firm obtaining

the cheque from the court. More specifically, I find Mr. Perrin's testimony that he signed the Mutual Release extinguishing his claim to the money in court on condition that Mr. Guvi would have control of the settlement funds is the only reasonable explanation for the execution of the Mutual Release and consequent application for the funds in court to be payable to Shortreed only.

[211] Taking into account the legal principles in Oswald, all of the material facts surrounding the payment of the funds out of court, I find that an objective bystander would conclude that the parties to the foreclosure action, and in particular Mr. Bandesha and Mr. Perrin, were agreed that the funds in court would be divided between the litigants on the basis described by Mr. Perrin.

[212] Mr. Bandesha conceded that he knew that the money could not be paid out of court until Shortreed proved it had been unable to obtain subdivision approval for the minimum density development as required in the mortgage, or settled the matter with Mr. Perrin. As a result, and after some delay, he instructed Mr. Guvi to negotiate a settlement with Mr. Perrin. In doing so, I find that Mr. Bandesha expected that Mr. Perrin would receive payment representing a portion of the funds held in court, as consideration for releasing any claims he had to those funds.

[213] The oral agreement made by Mr. Bandesha and Mr. Perrin at Mr. Guvi's office reflected their objective intentions that Mr. Guvi would hold the $110,000 paid to Oasis Realty in February 2012 until the money was paid out of court, at which time the money in court would be paid to Shortreed less $100,000 to be paid to Mr. Perrin's two daughters as per Mr. Perrin's instructions and $10,000 to be paid to Mr. Guvi.

[214] As a result, I find that Shortreed has failed to demonstrate that it suffered damage. More specifically, on the terms of the settlement I have found existed, from the $400,000 (plus interest) paid into court, Shortreed was entitled to $290,000 (plus interest) after deducting Mr. Perrin's share of the money. As noted above, Shortreed received $110,000 from the Oasis account in 2013, thus limiting its loss to $180,000 plus $22,023.30 for interest, totalling $202,023.30. Shortreed conceded that it received $275,000 by way of its settlement with RBC; when this sum is deducted from the total loss sustained, Shortreed has suffered no loss.

Was Shortreed's damage caused by Mr. Piamonte's breach?

[215] Even if Mr. Piamonte breached his duty of care to Shortreed and Shortreed suffered damage, it must still prove the damage was caused, in fact and in law, by that breach: *Livent* at para. 77.

[216] It is well-established that a defendant is not liable in negligence unless their breach caused the plaintiff's loss. As the Supreme Court of Canada explained in *Nelson*, the causation analysis involves two distinct inquiries:

> [96] … First, the defendant's breach must be the factual cause of the plaintiff's loss. Factual causation is generally assessed using the "but for" test (*Clements v. Clements*, 2012 SCC 32, [2012] 2 S.C.R. 181, at paras. 8 and 13; *Resurfice Corp. v. Hanke*, 2007 SCC 7, [2007] 1 S.C.R. 333, at paras. 21-22). The plaintiff must show on a balance of probabilities that the harm would not have occurred but for the defendant's negligent act.
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> [97] Second, the breach must be the legal cause of the loss, meaning that the harm must not be too far remote (*Mustapha*, at para. 11; *Saadati*, at para. 20; *Livent*, at para. 77). The remoteness inquiry asks whether the actual injury was the reasonably foreseeable result of the defendant's negligent conduct (*Mustapha*, at paras. 14-16; *Livent*, at para. 79). Remoteness is distinct from the reasonable foreseeability analysis within duty of care because it focuses on the actual injury suffered by the plaintiff, whereas the duty of care analysis focuses on the type of injury (*Livent*, at para. 78; Klar and Jefferies, at p. 565).

[217] As Adair J. explained in the solicitor's negligence context in *Fong*:

> [33] The traditional test for determining causation in negligence cases is the "but for" test, which requires the plaintiff to prove on a balance of probabilities that his or her loss would not have occurred but for the negligence of the defendant: see ***Newton v. Marzban***, 2008 BCSC 328, at para. 749 (citing ***Athey v. Leonati***, 1996 CanLII 183 (SCC), [1996] 3 S.C.R. 458, at para. 14 and ***Resurfice Corp. v. Hanke***, 2007 SCC 7, at paras. 21-22).
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> [34] A finding of breach of duty is a separate factual issue from that of causation: see, for example, ***Graybriar***, at p. 181. Causation cannot be assumed from breach of duty. There must be proof that the breach of duty caused damage or loss to the plaintiff. A plaintiff who proves duty, breach of the standard of care and damages will still be unsuccessful in the action unless the plaintiff proves a causal link between the breach of the standard of care and the damage: see ***Graybriar***, at p. 181.

[218] I am not satisfied that Mr. Piamonte's conduct was the cause, in fact or in law, of Shortreed's loss.

[219] Shortreed argues that if Mr. Piamonte or his staff had sought instructions directly from Shortreed, as it says they were required to do, Mr. Bandesha would have refused permission for the law firm to deliver the cheque to Mr. Guvi and the funds would not have been lost. Mr. Bandesha testified that he would have travelled to New Westminster from his home in Abbotsford to collect the cheque rather than permit Mr. Guvi to take delivery of it.

[220] As explained in *Fong* at para. 35, causation issues in cases such as these are often based on the assertion that the client would have behaved differently (and avoided a loss) if only the client had received proper legal help. In addressing such a claim, I agree with Adair J. that the following observation by Neilson J. (as she then was) in *Newton v. Marzban*, 2008 BCSC 328 is apt:

> [761] . . . I adopt the view of Groberman J. in ***Sports Pool Distributors Inc. v. Dangerfield***, 2008 BCSC 9 at para. 97, that in cases of professional negligence a bare assertion that a client would have behaved differently if he or she had received proper advice should be viewed with some scepticism. Like Mr. Justice Groberman, I endorse this observation of Southin J.A. in ***Hong Kong Bank of Canada v. Touche Ross & Co.*** (1989), 1989 CanLII 2737 (BC CA), 36 B.C.L.R. (2d) 381 at 392 (C.A.):
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> > It is always easy for a witness to say what he would have done and for a judge to say he accepts that assertion. But such evidence is, in truth, not evidence of a fact but evidence of opinion. It should be tested in the crucible of reason.
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> [Emphasis added.]

[221] In this case, Mr. Bandesha's assertion that he would have behaved differently if Mr. Piamonte had provided proper service does not survive the crucible of reason. Mr. Bandesha provided neither an explanation for why he would not have trusted Mr. Guvi to deliver the cheque to Shortreed nor any support for his retrospective assertion that he would have insisted on collecting the cheque himself. To the contrary, he testified that Mr. Guvi was "like a family member" and someone that he trusted. Mr. Bandesha even went so far as to concede that, at the relevant time, he would not have been concerned or worried that, had Mr. Guvi received the $422,923 in the Oasis account, he might pay it to people to whom it did not belong. In such circumstances, I cannot accept Shortreed's assertion that Mr. Bandesha would have refused permission for Mr. Guvi to accept delivery of the cheque or insisted on picking it up from the law firm himself.

[222] As a result, I find that Shortreed has failed to prove on a balance of probabilities that if Mr. Piamonte or his staff had sought specific instructions from Shortreed on the delivery of the cheque the result would have been different or that the harm would not have occurred in any event. In other words, Shortreed has failed to establish that its loss was caused in fact by Mr. Piamonte's actions.

[223] I am also of the view that Shortreed has failed to demonstrate that Mr. Piamonte's actions were the legal cause of Shortreed's loss as such loss was not reasonably foreseeable: *Nelson* at para. 97. More specifically, in the circumstances of this case, Mr. Piamonte could not have foreseen either that RBC would allow Mr. Guvi to deposit the cheque payable to Shortreed into the Oasis account absent express permission to do so from Shortreed, or that Mr. Guvi would then abscond with a portion of the funds.

[224] As noted above, there was nothing to suggest to Mr. Piamonte or his staff that a bank would (or could) deposit the cheque into any account other than Shortreed's without Shortreed's permission. Further, I was not directed to any evidence of conduct on Mr. Guvi's behalf that ought reasonably to have alerted Mr. Piamonte to an issue with Mr. Guvi's loyalty to Shortreed or his authority to act on its behalf, or provide any basis on which it could have anticipated him absconding with the funds.

[225] Put simply, on the evidence before me, the conduct by RBC and Mr. Guvi was not a reasonably foreseeable result of Mr. Piamonte's allegedly negligent conduct: *Jack v. Tekavec*, 2011 BCCA 464 at paras. 21–27, leave to appeal to SCC ref'd, 34604 (24 May 2012); citing Lewis Klar, *Tort Law*, 4th ed (Toronto: Thomson Canada Limited, 2008) at 491–492; and *Garratt v. Orillia Power Distribution Corporation*, 2008 ONCA 422, leave to appeal to SCC ref'd, 32767 (20 November 2008). Thus, assuming that Shortreed did not permit the deposit of the cheque to the Oasis account, any loss suffered by Shortreed was solely attributable to the acts of RBC and/or Mr. Guvi.

[226] In the result, I find that even if I had been of the view that Mr. Piamonte breached its duty of care, Shortreed has failed to prove the damage it sustained was caused, in fact or in law, by that breach. Shortreed's claim in negligence against Mr. Piamonte and the law firm is therefore dismissed.

Breach of Fiduciary Duty

[227] In this case, Shortreed's first claim was that Mr. Piamonte owed Shortreed a fiduciary duty and breached that duty by failing to "inform any directors, officers or authorized signatories of the plaintiff about either receiving the Shortreed cheque or that he had released the Shortreed cheque to Guvi".

[228] I have concluded above that Mr. Piamonte and Shortreed were in a solicitor-client relationship. It is clear that the solicitor-client relationship is a *per se* fiduciary relationship and thus that solicitors have always been subject to the duties and obligations imposed by courts upon fiduciaries: see e.g. *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 at 461–462, 1994 CanLII 70 (S.C.C.).

[229] That being said, even though Mr. Piamonte was in a fiduciary relationship with Shortreed, not every potential breach of duty is a breach of fiduciary duty: see *Meng Estate v. Liem*, 2019 BCCA 127 at paras. 33–34. As Justice Harris explained in *Meng*:

> [33] Even though Mr. Liem was in a fiduciary relationship with the Mengs, not every potential breach of duty is a breach of fiduciary duty. As Madam Justice Southin (as she then was) reminded us in *Girardet v. Crease & Co.* (1987), 1987 CanLII 160 (BC SC), 11 B.C.L.R. (2d) 361 at 362 (S.C.), a fiduciary may breach duties owed in contract or negligence without those breaches being transformed into breaches of fiduciary duty:
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> > Counsel for the plaintiff spoke of this case in his opening as one of breach of fiduciary duty and negligence. It became clear during his opening that no breach of fiduciary duty is in issue. What is in issue is whether the defendant was negligent in advising on the settlement of a claim for injuries suffered in an accident. The word "fiduciary" is flung around now as if it applied to all breaches of duty by solicitors, directors of companies and so forth. But "fiduciary" comes from the Latin "fiducia" meaning "trust". Thus, the adjective, "fiduciary" means of or pertaining to a trustee or trusteeship. That a lawyer can commit a breach of the special duty of a trustee, e.g., by stealing his client's money, by entering into a contract with the client without full disclosure, by sending a client a bill claiming disbursements never made and so forth is clear. But to say that simple carelessness in giving advice is such a breach is a perversion of words. The obligation of a solicitor of care and skill is the same obligation of any person who undertakes for reward to carry out a task. One would not assert of an engineer or physician who had given bad advice and from whom common law damages were sought that he was guilty of a breach of fiduciary duty. Why should it be said of a solicitor? I make this point because an allegation of breach of fiduciary duty carries with it the stench of

> dishonesty — if not of deceit, then of constructive fraud. See *Nocton v. Lord Ashburton*, [1914] A.C. 932 (H.L.). Those who draft pleadings should be careful of words that carry such a connotation.
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> …
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> [35] The soundness of the proposition found in *Girardet* is not in doubt. It is not necessary to canvass the principles that serve to distinguish between breaches by a fiduciary that are breaches of fiduciary duty rather than an act of negligence or a breach of contract. Typically, a breach of fiduciary duty captures circumstances in which there is a breach of the duty of loyalty owed by the fiduciary and includes circumstances involving acting in the face of a conflict, preferring a personal interest, taking a secret profit, acting dishonestly or in bad faith, or a variety of similar or related circumstances. This is not an exhaustive list. But however the criteria for distinguishing a breach of fiduciary duty from negligence might be articulated, I am satisfied that the undisputed facts in this case do not permit treating Mr. Liem's breach as anything other than negligence. I can see no proper basis on which it can be said that Mr. Liem failed to discharge his duty of loyalty; the problem is that he was negligent in how he attempted to fulfil it.
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> [My emphasis added.]

[230] I reach the same conclusion here. As noted above, there is no basis in the evidence to suppose that Mr. Piamonte or his staff acted dishonestly or in the face of a conflict of interest, thwarted the wishes of Shortreed, preferred their interest to Shortreed's, or in any way benefitted from delivering the cheque to Mr. Guvi without specific instructions from Shortreed: *Meng* at para. 37.

[231] Rather, the gravamen of Shortreed's complaint is that Mr. Piamonte failed to exercise the care, diligence and skill of a reasonably competent lawyer; a complaint that, for the reasons articulated above, I have dismissed. In the result, then, Shortreed's claim for breach of fiduciary, like its claim in negligence, must be dismissed.

Claim Against Mr. Guvi for $110,000

[232] The plaintiff also seeks damages against Mr. Guvi for $110,000 plus interest in repayment of the money paid by Shortreed to Mr. Guvi in February 2012.

[233] Taking into account that Mr. Guvi requested this sum of money in an effort to facilitate performance of the terms of the oral agreement to settle the foreclosure action, including the terms of the Settlement and Mutual Release, this cheque was deposited to an Oasis account on February 20, 2012 . This sum was

paid by an “Official Cheque” from Aldergrove Credit Union and deposited to an account 104-469-2. This was a different account than the Oasis account (104-470-0) used for the deposit of the $422,923 cheque payable to Shortreed.

[234] The funds paid to Mr. Perrin’s daughters, to Mr. Guvi and to Shortreed were taken from the $422,923. There was no evidence concerning the payout of the funds from the “Official Cheque” from the Aldergrove Credit Union.

[235] Although Mr. Guvi was instrumental in depositing these two cheques to different accounts, he was not the recipient of those payments. Moreover, the notice of civil claim against Mr. Guvi refers only to his “fraud, embezzlement, misappropriation and\or defalcation” by converting the cheque representing the funds paid out of court, payable to Shortreed. No mention was made in the claim for funds paid directly by Shortreed to the Oasis account and, in my view, judgment cannot be granted in this proceeding for a claim not mentioned in the notice of civil claim.

Conclusion

[236] The plaintiff’s claims against Mr. Piamonte and the law firm for damages for negligence and breach of a fiduciary duty are dismissed.

[237] As decided above, I have also concluded that if the law firm was liable for any part of Shortreed’s loss, then after taking into account the RBC contribution of $275,000 to those losses and the repayment of $110,000 to Shortreed, it has suffered no loss.

[238] The parties may make submissions as to costs within 30 days failing which, the defendants are entitled to costs of this proceeding.

“Armstrong J.”