

KEEPING CURRENT

August 6, 2024

Claim against lawyer dismissed following borrower's default in asset sale (*899755 Alberta Ltd v Herter*)

By James R.G. Cook

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James R.G. Cook
Partner
416.865.6628
jcook@grllp.com

When a client sues their former transaction lawyer for professional negligence, the issue is often the extent or scope of the duty owed to the client at the time of the lawyer's retainer. The mere fact that a transaction went poorly for the client does not necessarily mean that the lawyer breached the standard of care that was applicable in the specific circumstances, as illustrated by the trial decision of the Court of King's Bench of Alberta in *899755 Alberta Ltd v. Herter*, [2024 ABKB 427 \(CanLII\)](#).

The plaintiff in the case was a successful entrepreneur who sold a moving business for \$650,000 by way of an asset sale. A portion of the sale price in the sum of \$220,000 was provided to the buyer as a vendor loan, to be paid over ten years at 4% interest.

The plaintiff contacted his long-time lawyer to review the agreement he had negotiated with the buyer. The lawyer drafted a new asset sale agreement that included a general security agreement (GSA) on the sale assets in second priority to a bank, and an unsecured personal guarantee from the buyer.

A year after the closing, the buyer defaulted on the vendor loan and eventually filed for bankruptcy. The plaintiff considered whether to buy back the assets from the bank which had priority over his GSA. However, he was not prepared to pay as much as the bank wanted. The plaintiff never recovered the full vendor loan.

The plaintiff then sued the lawyer for professional negligence alleging that he breached his professional duty of care by failing to secure the buyer's personal guarantee.

To establish professional negligence, the plaintiff was required to prove on a balance of probabilities that the lawyer owed him a duty of care, that the standard of care was breached, that he suffered a resulting loss, and that the lawyer's conduct was the cause of that loss: *Boland v. Sean Schaefer Professional Corporation*, [2020 ABQB 551](#), at paragraph [36](#).

Generally, a lawyer must act with reasonable care, skill, and knowledge in their professional duties. The standard of care is not "perfection" but that of a

reasonably competent or ordinarily prudent lawyer: *Central Trust Co. v. Rafuse*, 1986 CanLII 29 (SCC), at paragraph 58; *Boland*, at paragraph 41.

There was no dispute that the lawyer owed the plaintiff a duty of care. Rather, the main issue at trial was the scope of the duty owed in the circumstances and whether the applicable standard of care meant that the lawyer ought to have provided different advice to the plaintiff at the time of the transaction.

The standard of care is viewed in the context of the lawyer-client relationship and the circumstances of the retainer. Among other factors this includes the level of experience and sophistication of the client, the nature and extent of the plaintiff's instructions, and any time constraints placed on the retainer: *Pilotte v. Gilbert*, 2016 ONSC 494 at paragraph 39.

As noted by the trial judge, in deciding whether the lawyer breached his professional obligations, "the focus must be on the words and actions at the time the sale was unfolding" rather than by assessing the lawyer's performance after the fact or through the perspective of the transaction that ended badly for the plaintiff.

The evidence at trial was that the lawyer was on holiday, driving in his car, when the plaintiff called him about the deal. While the lawyer did not make any notes of the discussion, the plaintiff was a well-known and longstanding client for whom he acted many times. In the trial judge's view, the lawyer's (unwritten) retainer to close the asset sale was straightforward, clear, and instruction-driven, and reflected the nature of his ongoing professional relationship with the plaintiff.

The plaintiff attempted at trial to minimize his business acumen while exaggerating his reliance on the lawyer's legal expertise. However, the trial judge did not accept this characterization of the relationship. Rather, the plaintiff was a

highly competent entrepreneur who was in full control of the asset sale. He brought the lawyer into the deal to complete it, did not expect a written retainer, and did not require one. What he expected and required was quick attention to his instructions.

Further, the evidence was that the plaintiff specifically told the lawyer not to ruin the deal by complicating matters. The plaintiff was eager to sell the business as he had been trying to do so for some time, had reduced the original sale price from \$1.2 million, and had agreed to the lengthy ten-year vendor loan. The lawyer suggested the GSA and personal guarantee in the face of these instructions. Although the lawyer did not specifically discuss obtaining security on the buyer's personal guarantee, the plaintiff was aware that the personal guarantee was unsecured and gave no instructions to negotiate something to the contrary.

Both parties proffered expert evidence on the standard of care required in the circumstances. The trial judge agreed with the opinion of the lawyer's expert that, in the circumstances of this case, the standard of care did not require the lawyer to obtain a secured personal guarantee taking into account the actual steps taken by the lawyer, the unique lawyer-client relationship, the lawyer's previous experience with the plaintiff, and the enhanced involvement of the plaintiff in negotiating the terms of the sale before he brought the deal to the lawyer.

On the other hand, the evidence of the plaintiff's expert depicted an overly exacting standard that was grounded in best banking practices rather than in the steps the reasonably competent lawyer would do in the circumstances. The opinion also assumed the client was unsophisticated.

Overall, looking at the steps actually taken, the trial judge determined that the lawyer properly balanced the plaintiff's desire to sell the assets with the potential risks and his overarching instructions to not ruin the deal. The plaintiff

calculated his business risks and assumed those risks based on the potential for the loan to default. He also believed he could start his lucrative business again if the need arose. The lawyer contemplated what would happen if the loan was defaulted and discussed this with the plaintiff who was content with the risks involved. He confirmed his instructions in writing via email and kept his client advised.

The trial judge therefore concluded that the lawyer did not fail in his professional duties to the plaintiff and [dismissed](#) the claim. The plaintiff's position that the lawyer was retained to secure the plaintiff's personal assets was, in the trial judge's view, an "after the fact calculation" that had no connection to the lawyer's performance of his professional duties in the circumstances.

The decision shows that a claim that a lawyer should have provided different advice is not to be assessed with the acuity of hindsight based on developments that actually occurred. While a lawyer must raise available options with a client, it is the client's decision to select the preferred course of action. A lawyer's duties do not include acting as a type of insurance policy for the client. The fact that the transaction went poorly does not necessarily mean that the lawyer breached the standard of care at the time of the retainer.

Contact us

If you have a litigation matter and are in need of legal advice, please do not hesitate to contact [James Cook](#), at 416.865.6628 or jcook@grllp.com.

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