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Realtor cannot serve as expert damages witness for own client (*Ambria (Bloomington) Limited v. Esmaeili*)

By James R.G. Cook

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

Expert witnesses have a fundamental duty of independence and impartiality towards the parties in litigation. If a proposed expert is inextricably tied to the facts at issue in the case, their opinion may be inadmissible, as demonstrated by *Ambria (Bloomington) Limited v. Esmaeili*, [2025 ONSC 6505 \(CanLII\)](#).

The case arose from an Agreement of Purchase and Sale (APS), entered into by the plaintiff developer and the defendant buyers for a home to be built in Aurora, Ontario for \$4,009,990. The APS required an initial deposit of \$30,000, which was paid by the defendants, along with further deposits.

When the third deposit was due in August 2022, the defendants advised that due to the current market situation, they could not sell their current property and did not have the funds for remaining deposits. The defendants' cheques for the second and third deposits were returned due to insufficient funds.

On November 14, 2022, the plaintiff gave the defendants until November 21, 2022, to remedy their default under the APS. They did not do so.

On November 30, 2022, the plaintiff provided written notice to the defendants that the APS was terminated effective immediately and that all monies previously paid to the plaintiff were "forfeited in full" as liquidated damages, without prejudice to the plaintiff's other rights and remedies available at law.

The plaintiff then sued the defendants for damages for breach of contract and brought a motion for summary judgment, seeking damages exceeding \$1 million.

In support of its motion, the plaintiff sought leave to rely on the opinion evidence of a registered real estate agent, who also happened to be the General Manager, Sales and Marketing Director for the company acting as exclusive realtors for the plaintiff.

The defendants opposed the admission of the opinion evidence of the agent on the grounds that she was not independent or a "properly qualified expert" as required by the Supreme Court of Canada's decision in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, [2015 SCC 23](#), at paragraphs [19](#) and [53](#).

In *White Burgess*, the Supreme Court cautioned that “impartiality, independence, and absence of bias” underscore expert evidence and that these criteria go not just to the weight of the evidence but also to its admissibility. The defendants had the onus to establish that there is a realistic concern about the realtor’s expert evidence.

The motion judge noted that the proposed expert was the point of contact between the plaintiff and the defendants until the date of the breach and commencement of the litigation. She personally sold the property to the defendants. Further, she gave the plaintiff strategic advice on how to mitigate damages and opined on her own brokerage firm’s mitigation efforts, which she described as “reasonable and consistent with accepted industry practice”.

While the realtor had provided the requisite Acknowledgment of Expert’s Duty form required by the Ontario *Rules of Civil Procedure*, this did not immunize her evidence from challenge, particularly where the factual record supported a legitimate concern that she lacked independence and had a potential for bias due to her relationship with the plaintiff.

The proposed expert opinion was based on the realtor’s own personal experience with the development project and the very property that was at the heart of the litigation. The motion judge agreed with the defendants’ submission that “this is an opinion borne out of an echo chamber”.

Further, the motion judge was not satisfied that the realtor was properly qualified as an expert on the valuation of properties, which is typically done through a qualified appraiser or valuator, or that she had the requisite “special” or “peculiar” knowledge to qualify her as an expert in this area, citing *Dulong v. Merrill Lynch Canada Inc.*, [2006 CanLII 9146 \(ON SC\)](#), at paragraph [20](#).

The agent’s expert report was lacking in analysis, detail and sources, and referred to “market conditions” without any evidence as to what those “market conditions” were at the time. The valuation was based on “comparable sales” while simultaneously stating that there was an “absence of comparable data”, and that there are no “direct comparables”.

Essentially, the proposed expert was opining on her own work while being inextricably tied to the litigation and its result. The motion judge was not satisfied that the proposed opinion evidence was sufficiently independent and impartial, or properly qualified. Accordingly, the opinion evidence was not admitted.

In addition to the expert opinion issue, the plaintiff failed to establish that it was entitled to *any* damages. The APS provided that it was terminated upon default by the buyers, and that the seller was released from further obligations, while deposits were forfeited to the seller. The plaintiff elected to accept the defendants’ repudiation on November 30, 2022. From that point forward, the contract was terminated and the plaintiff was relieved of its obligations to construct the property, while the defendants forfeited their deposit.

In the motion judge’s view, by accepting the repudiation, the plaintiff exercised its contractual and legal right to terminate the APS, keep the defendants’ deposit, and pursue any other rights or remedies available at law. However, what the plaintiff had failed to recognize is, by accepting the defendant’s repudiation and terminating the APS, it no longer had the right to pursue further damages.

In other words, by explicitly stating that it was terminating the APS, the plaintiff relieved both itself and the defendants from any further

obligations. While the deposits were forfeited, the plaintiff could not seek damages as if the APS had been completed. The property was never built, the plaintiff gave notice that the APS was terminated, and the defendants were provided with a release. The plaintiff had no entitlement to damages.

Further, the motion judge found that the plaintiff failed to provide any evidence in support of its claim for damages exceeding \$1 million. The affidavit in support of its claim consisted of “bald, unparticularized, and unsubstantiated assertions” with no calculations or supporting documentation to justify the amounts sought.

Since the plaintiff failed to establish that it was entitled to any damages, the motion judge dismissed its motion for summary judgment and granted judgment in favour of the defendants, [dismissing](#) the action.

The decision demonstrates that a plaintiff must take care to establish evidence of their damages based on admissible expert or other evidence, before moving for summary judgment. Even where there has been a clear breach of contract, a plaintiff must prove the quantum of damages flowing from the breach. As noted by the Court of Appeal for Ontario in *Martin v. Goldfarb* [1998 CanLII 4150 \(ON CA\)](#), referred to by the motion judge, “reliance on guesswork is not appropriate”.

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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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