

Professional negligence claim dismissed against lawyer who acted on sale of insurance brokerage business, April 5, 2023

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Transaction lawyers often play a central role in the purchase or sale of a business, including the preparation of written agreements and related documentation. Not all aspects of a transaction involve legal issues, however, and some of the key terms may be negotiated or determined by the parties themselves. The calculation of the purchase price is one matter that may involve industry or business-specific knowledge that is not within the lawyer's expertise or scope of retainer, as demonstrated by the Ontario Superior Court of Justice decision in *Zabel v. Brechin*, **2023 ONSC 1784 (CanLII)**.

The plaintiff spouses (the Zabels) were the owners of a successful business which managed insurance brokers across the country. Mr. Zabel was a skilled and experienced businessperson, who had been qualified as a chartered professional accountant in 1978 and worked as a senior executive before building the business.

In 2011, the Zabels decided to sell the business and retained their long-time lawyer to act for them. Drafts of an agreement of purchase and sale were exchanged with the potential buyer over several weeks, culminating in an agreement of 11 July 2011.

One of the key issues was the purchase price which was not fixed as a set number but was based upon a calculation in the definitions and body of the agreement. After closing, Mr. Zabel and the buyer disputed how the calculation was to be determined. They could not agree on the methodology and eventually arbitrated their dispute.

In November 2013, an arbitrator determined that the buyer's methodology was correct. Ultimately, the parties agreed that the purchase price based on this result would be \$4.2 million.

The plaintiffs then sued their lawyer for professional negligence, breach of contract, and breach of fiduciary duty. They claimed damages of \$1,165,619 based upon the difference between what they expected to receive for the sale and what they actually received, as well as \$280,437 for costs of the arbitration, and the return of \$50,000 in legal fees.

The trial of the action took place in the Ontario Superior Court of Justice over seven days in January 2023. Each side had an expert witness on the standard of care for a lawyer acting in the circumstances of the transaction.

In order to establish professional negligence, the plaintiffs were required to demonstrate that: (1) the lawyer owed them a duty of care; (2) the lawyer's actions or omissions breached the standard of care; (3) they sustained damage; and (4) the damage was caused, in fact and in law, by the lawyer's breach.

There was no question that the lawyer owed the plaintiffs a duty of care and was expected to meet a standard of reasonable competence and diligence. However, a lawyer is not held to a standard of perfection and the lawyer's conduct is not to be judged with the benefit of hindsight. As noted by the trial judge, the fact that the lawyer could have done a better job, or another lawyer could criticize their work, does not mean that the lawyer fell below the standard of care (referring to *Odobas v. Yates*, **2022 BCSC 186**, at para. 127).

One of the central issues in the trial was whether or not the plaintiffs' lawyer met the standard of care with regard to advising the plaintiffs on changes to the definitions of "Net Service Fees" and "Net Investment Premiums" in the agreement which affected the purchase price. These definitions concerned managing general agency contracts that were peculiar to the insurance industry.

Significantly, Mr. Zabel testified that he was not expecting his lawyer to understand how the purchase price was to be calculated and, further, that the lawyer told him that it was important that he and his accountant understand the definitions in the agreement because they would affect the purchase price. The trial judge found that Mr. Zabel did not consult an accountant or tell his lawyer that he had not done so. Rather, the responsibility for the negotiations of the purchase price due to his confidence in his own accounting and business acumen, and his knowledge of the industry. In Mr. Zabel's own view, there was no one with a better understanding of the insurance business than himself.

The expert witnesses agreed that the lawyer had met the standard of care by flagging the issue regarding the calculation of the purchase price and urging Mr. Zabel to discuss the issue with his accountant. In the trial judge's view, the price formula in the agreement was fundamentally a "business term" rather than a legal one. While another lawyer might have done a better job of drafting the clause, this did not equate to a breach of the standard of care.

The plaintiffs further argued that their lawyer had failed to follow their instructions to draft a narrow objection provision in the agreement that would only be available to the buyer in limited, specified circumstances. However, the trial judge found as a fact that the plaintiffs never instructed the lawyer to ensure that the objection provision was narrow in scope. In that regard, notwithstanding that almost all of the communication between Mr. Zabel and the lawyer about this file took place over email there was no written record of such instructions being provided.

Further, the trial judge accepted the opinion of the expert witness on the lawyer's side that there was nothing unusual or inappropriate about the objection mechanism included in the agreement.

Lastly, the court found that the plaintiffs had failed to tender cogent evidence proving the damages claimed with respect to the purchase price. The plaintiffs did not obtain evidence concerning the price for the business from a qualified, independent accountant, but rather relied on a chart setting out the damages they claimed prepared by Mr. Zabel himself. The court did not accept that the chart was satisfactory proof of a claim for damages exceeding \$1 million, referring to *Martin v. Goldfarb*, (1998) **1998 CanLII 4150 (ON CA)**.

In the result, the court found that the lawyer was not negligent as he met the standard of care of a reasonably prudent solicitor in all of the circumstances of his retainer. The plaintiffs' claims for breach of contract and breach of fiduciary duty failed as the lawyer did not breach any contractual duties or duties of loyalty owed to the plaintiffs in the circumstances of his retainer. The action was therefore **dismissed** in its entirety.

The decision affirms that lawyers are not to be measured by a standard of perfection. As noted by the trial judge, the plaintiffs' lawyer could have met with them in person more often, had more telephone calls, and could have insisted on a three-way meeting with their external accountant to discuss the agreement and calculation of the purchase price. However, the experience and business acumen of the clients, and the role they play in the transaction, are key factors relevant to the issue of whether a lawyer breached the applicable standard of care. A PDF version is available to download [here](#).

For more information please contact: **James Cook** at **416.865.6628** or jcook@grllp.com

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Author



James R.G. Cook

Partner

416.865.6628

jcook@grllp.com



Bay Adelaide Centre — East Tower
22 Adelaide Street West, Suite 3600
Toronto, ON M5H 4E3

Phone: 416.865.6600
Fax: 416.865.6636
contactGR@grllp.com