

Real estate agent's “imperfect” conduct was not negligent (*Duad Inc. v. Shi*)

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In disputes between a buyer and seller arising from an aborted transaction, the real estate professionals involved may be dragged into the dispute for their roles in the circumstances at issue. Real estate agents have a duty to act in accordance with the applicable standard of care and may be liable for damages when their conduct fails to meet this requirement. However, conduct may be imperfect or sloppy without amounting to negligence, as demonstrated by the trial decision in *Duad Inc. v. Shi*, 2025 ONSC 5258 (CanLII).

The litigation arose from the aborted sale of a farm property in Hamilton, Ontario, which the buyer had agreed to purchase for \$1.8 million pursuant to the terms of an “as is, where is” Agreement of Purchase and Sale (“APS”). The buyer claimed that two gas wells located on the property were not licenced and could not be legally operated. The buyer refused to complete the purchase, taking the position that the seller had breached an environmental warranty in the APS.

The seller sued the buyer for forfeiture of the deposit of \$250,000 and consequential damages. The seller's position was that the environmental warranty in the APS did not cover the gas wells and that the buyer was simply looking for an excuse to refuse to complete the transaction. Even after the transaction failed to close, the seller offered to address any issues with the gas wells, but the buyer refused to revive the deal.

The buyer and the seller also sued the real estate brokerage and agent, who had represented both parties in the transaction. The buyer claimed that the agent breached his duties as a realtor by failing to follow instructions in respect of the wording of the APS and failing to disclose that he was also the agent for the seller, whose interests the agent was alleged to have preferred. Among other things, the buyer claimed that the agent inserted the “as it is, where it is” clause without his consent and misled him about the status of the wells. In turn, the seller sought contribution and indemnity from the agent for any liability to the buyer.

At trial, the court found in favour of the seller. The trial judge reviewed the wording of the warranty and found that it was intended to address “environmental matters” and not the gas wells. Immediately below the environmental warranty in the APS was a clause obliging the seller “To terminate all free use of well gas for neighbor houses”. Below this clause, both sides agreed that the property would be sold “as it is, where it is”.

While there was a specific term in the APS that addressed disconnecting gas to the neighbouring properties, there was no reference in the environmental warranty to the gas wells. Further, in the trial judge's view, there was no evidence that the seller had breached any warranty regarding the state of the gas wells.

The seller was therefore entitled to the deposit and was awarded consequential damages relating to the costs of \$287,296.57 incurred before re-selling the property, to which the deposit would be credited. The seller did not incur a loss from having to sell the property at a lower price but rather incurred significant costs to carry and maintain the property before the resale.

As for the claim against the real estate agent, the trial judge noted that the agent had been subject to a disciplinary warning decision by the Real Estate Council of Ontario (RECO), arising from the transaction. RECO found that the agent erroneously used outdated forms from a previous transaction of the subject property to produce the offer and he had forgotten to delete a name from an earlier Confirmation and Co-operation form, which he had used as a precedent. The warning also noted that while the brokerage was identified as both the listing and the co-operating brokerage in the APS, he failed to provide a written disclosure of the nature

of his relationship to each party prior to the offer.

This did not amount to negligence, however. The trial judge accepted the opinion of a standard of care expert for the agent who opined that the RECO decision was essentially a "slap on the wrist" for sloppy paperwork. In the circumstances, there was no indication that the buyer was misled by the agent's role in representing both parties to the transaction and the buyer failed to substantiate his claims concerning the terms in the APS. Among other things, the court noted that the buyer continued to work with the agent to try to complete the deal after it initially failed to close. In the trial judge's view, the agent's conduct, "while clearly imperfect, did not fall below the relevant standard of care."

The trial judge referred to *Charter-York Ltd v. Hurst* (1978) 2 R.P.R 272 (Ont. H.C.), where a vendor's real estate agent incorrectly advised a purchaser that the acreage being sold was contiguous. The purchaser was allowed out of the transaction, and the agent was liable to the vendor for the loss of an opportunity to sell the land prior to a decline in market value caused by the introduction of land speculation legislation. The misrepresentation in that case was a consequence of the agent's failure to make adequate inquiries about the land. The buyer failed to establish that the agent in this matter had breached the standard of care by failing to make any required inquiries about the farm property when acting for the parties.

Of note, the issue of the gas well licences was only raised by the buyer for the first time at closing, which supported the agent's position that the buyer either did not have the funds to close or he had a change of heart about the purchase. Further, the buyer did not adduce any expert evidence that the agent fell below the standard of care required of a realtor to refute the expert evidence that the agent fulfilled his duty to his respective clients. There was no indication that the buyer was misled by the agent's role. The agent tried to make the deal work for both parties, preparing four amendments to the original APS.

The claims of the buyer and seller against the agent were therefore [dismissed](#).

The case underscores the fact that imperfect or sloppy conduct may not amount to professional negligence, even where a formal regulatory warning has been made. The Supreme Court of Canada has affirmed that there is an important distinction between the rules governing professional conduct and the law of negligence as breach of one does not necessarily involve breach of the other: *Galambos v. Perez*, 2009 SCC 48, at paragraph 29. What could have been a narrow dispute between a buyer and seller over a deposit was complicated by the additional claims made against the professional involved, which may result in cost consequences for the parties who pursued those allegations through trial. A PDF version is available for download [here](#).

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