COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Stanley v. Grech,*
2023 BCCA 348

Date: 20230905
Docket: CA47943

Between:

Byron Stanley

Appellant
(Defendant and Plaintiff by way of Counterclaim)

And

Derek Grech and Angell Hasman & Associates Ltd.

Respondents
(Plaintiffs and Defendants by way of Counterclaim)

Before: The Honourable Mr. Justice Groberman
The Honourable Madam Justice Horsman
The Honourable Justice Skolrood

On appeal from: An order of the Supreme Court of British Columbia, dated November 12, 2021 (*Grech v. Stanley*, 2021 BCSC 2169, Vancouver Docket S188364).

Counsel for the Appellant:	J.C. McKechnie K.H. Yee
Counsel for the Respondents:	S. Twining S. Gladders
Place and Date of Hearing:	Vancouver, British Columbia June 6, 2023
Place and Date of Judgment:	Vancouver, British Columbia September 5, 2023

Written Reasons by:
The Honourable Justice Skolrood

Concurred in by:
The Honourable Mr. Justice Groberman
The Honourable Madam Justice Horsman

Summary:

The appellant, Mr. Stanley, appeals the trial judge's dismissal of his negligence action against his listing agent and broker, Mr. Grech and Angell Hasman & Associates Ltd. The appellant sought to sell his property, which was subject to the limitation that it could not be redeveloped without the consent of the owner of the adjoining strata. The issue before the trial judge was whether the respondents were negligent in not properly advising Mr. Stanley about the limitation, which neither party understood well. Mr. Stanley sued Mr. Grech and AHA in negligence for failing to understand the nature of the property and its development limitations, failing to seek and recommend legal advice, and suggesting an inordinately high list price. Mr. Stanley alleges that as a result of those negligent acts, the property took longer to sell than it should have. Mr. Stanley incurred significant interest charges, which he now claims as damages. The judge concluded that Mr. Grech breached his standard of care by failing to obtain and recommend legal advice, but held that this breach did not cause Mr. Stanley's damages.

Held: Appeal dismissed. Mr. Stanley has failed to identify a legal error in the judge's reasons. His appeal relies on the alleged improper list price of the property as the source of his damages, but Mr. Stanley has not appealed the judge's finding that Mr. Grech's was not negligent in recommending the list price. Second, Mr. Stanley claims that, had he obtained legal advice about the limitations sooner, he would be in a better economic position, is mere speculation. There was no evidence to substantiate that possibility.

Reasons for Judgment of the Honourable Justice Skolrood:

[1] This appeal arises out of a contract entered into between the appellant, Mr. Stanley, and the respondents, Mr. Grech and Angell Hasman & Associates Ltd. ("AHA"). The contract provided that the respondents would act as listing agent and broker for real property being sold by Mr. Stanley. Mr. Stanley alleges that the respondents were negligent in carrying out their duties and that, as a result, he suffered damages.

[2] As I will discuss in more detail below, the property in question was subject to certain limitations on development that were not well understood by either party and that adversely impacted the price that could be obtained on a sale.

[3] A central issue before the trial judge was whether the respondents were negligent in not properly advising Mr. Stanley about those limitations. Once the import of the limitations was discovered, it became clear that the list price was too high. Mr. Stanley sued Mr. Grech and AHA in negligence for failing to understand the nature of the property and its limitations, failing to seek and recommend legal advice, and suggesting an inordinately high list price. Mr. Stanley alleges that as a result of those negligent acts, the property took longer to sell than it should have. During this time, Mr. Stanley was incurring significant interest charges, which he now claims as damages.

[4] Mr. Stanley's action was dismissed below, in reasons indexed at 2021 BCSC 2169. The judge held that Mr. Stanley failed to prove breaches of the standard of care for some of his negligence claims, and failed to show causation for another.

[5] For the reasons that follow, I would dismiss the appeal.

Background

The property

[6] The property in issue is referred to as “SL1”. It is one lot of a two lot residential strata property. The other strata lot is referred to as “SL2”. SL1 was formerly owned by a close family friend of Mr. Stanley, Ms. Reid, who died in January of 2016. In February 2017, Mr. Stanley purchased SL1 from Ms. Reid’s estate pursuant to an option to purchase granted to him under her will.

[7] SL1, as described by the trial judge, is a somewhat unusual property. It is located in the Southlands area of south Vancouver, which is characterized by large properties, many of which have luxury homes constructed on the properties as well as equestrian facilities.

[8] The original property that now comprises the two strata lots is about 3.15 acres (the “Original Property”). It was formerly owned in its entirety by Ms. Reid and her husband. There was a modest house of approximately 2000 square feet at one end of the Original Property. The Reids developed the remaining area into a small equestrian facility with stables, a riding ring, and paddocks. At some point in the 1990’s, Ms. Reid’s goddaughter built a house at the other end of the Original Property.

[9] In the mid-2000’s, in order to facilitate the sale of the goddaughter’s house, Ms. Reid converted the Original Property into the two strata lots, SL1 and SL2. By 2016, SL2 was owned by Mr. Chechik and Ms. Schonbach.

[10] The governing strata plan identifies both SL1 and SL2, as well as limited common property (“LCP”) attached to each lot. Under the *Strata Property Act*, S.B.C. 1998, c. 43 [*SPA*], LCP is a type of common property that is designated for the exclusive use of a strata lot. Like other forms of common property, however, it is not part of the strata lot but is owned by all strata lot owners as tenants in common in proportion to their unit entitlement (*SPA* s. 66).

[11] Under the strata plan, SL1 comprises only the footprint of the original 2000 square foot house. That footprint, combined with the LCP for SL1 total about 2.3 acres and take up approximately the western three quarters of the Original Property. SL2 comprises the other house built on the Original Property which, combined with the LCP for SL2, totals about .85 acres and is approximately the eastern quarter of the Original Property.

[12] Although LCP is designated for the exclusive use of a particular strata lot, the owner of the strata lot does not have exclusive control over the LCP. For example, it cannot be developed or altered without amending the strata plan, which requires the unanimous consent of all strata lot owners. This is again because LCP is a type of common property owned by all strata owners through the strata corporation. A useful discussion of the nature of LCP can be found in *Stratton v. Richter*, 2022 BCCA 337 at paras. 85–88.

[13] With respect to SL1, this requirement meant that the property, including the SL1 LCP, could not be redeveloped without the consent of the owner of SL2. It is this specific limitation that I referred to at para. 2 above, that was not well understood by either Mr. Stanley or Mr. Grech when Mr. Grech was retained to list and sell SL1. The judge referred to this as the "Strata Issue" and I will do the same.

Mr. Stanley's purchase of SL1

[14] The option under Ms. Reid's will provided that Mr. Stanley could purchase SL1 for 50% of its appraised value. The purchase price was $4.5 million, which represented 50% of the appraised value based on three different appraisals. Mr. Stanley made the purchase through a company, 1103947 B.C. Ltd. ("110"), which he incorporated specifically for the purpose of buying SL1, and of which Mr. Stanley was the sole shareholder and director.

[15] Mr. Stanley's exercise of the option and purchase of SL1 followed the settlement of litigation between Mr. Stanley and Ms. Reid's estate about which of three different wills governed his entitlement. That litigation was ultimately settled on

the terms described in the above paragraph. Mr. Stanley was represented by experienced counsel in the estate litigation.

[16] Mr. Stanley intended to purchase SL1 and then re-sell it for development purposes at a profit. As observed by the judge, the highest and best use of SL1 is for redevelopment with a large home (RFJ at para. 15). That highest and best use could only be realized if both SL1 and the associated LCP could be developed together, given the relatively small size of the LC 1 strata lot itself.

[17] Mr. Stanley could not afford to purchase the property without financing. He did not qualify for conventional bank financing, so he arranged to borrow money from a private lender.

[18] Shortly before purchasing SL1, Mr. Stanley and his partner, Ms. Vincent-Jones, met Mr. Grech at an open house. They discussed with Mr. Grech the impending purchase of SL1, as well as their intention to re-sell the property. It is common ground that Mr. Grech was not retained by Mr. Stanley at this juncture, nor did he advise Mr. Stanley, in respect of the purchase of SL1. He did, however, assist Mr. Stanley in obtaining the private financing and agreed to provide Mr. Stanley his thoughts on reselling SL1 for a profit after acquiring it.

The listing and pricing of SL1

[19] On December 11, 2016, before Mr. Stanley completed the purchase of SL1 through 110, Mr. Grech sent Mr. Stanley a draft listing agreement for the sale of SL1 with a listing price of $13.888 million. Subsequently, on February 27, 2017, the same day that 110's purchase of SL1 was completed, 110 entered into a listing agreement with AHA to list SL1 for sale for $13.888 million. The agreement identified AHA as the listing brokerage and Mr. Grech as the designated real estate agent.

[20] Both Mr. Stanley and Mr. Grech testified at trial about how the listing price was set. Mr. Stanley said that Mr. Grech suggested the $13.888 million price based upon Mr. Grech's own market analysis. Mr. Stanley's partner, Ms. Vincent-Jones gave similar evidence.

[21] Mr. Grech described the process of arriving at a list price as “collaborative”, with Mr. Stanley having input. He said that Mr. Stanley expressed that he wanted to net $12 million on a sale, which led Mr. Grech to believe they would have to set a higher list price. This is what resulted in the initial $13.888 million price.

[22] The judge found:

> [50] …I find that Mr. Grech opined that a listing price of $13.888 was a reach but not an unreasonable starting point from which Mr. Stanley could move down. I find this listing price was consistent with Mr. Stanley’s own independently held view of the value of SL1 which was that SL1 was worth significantly more than $10 million and in the $12 million range. I find that Mr. Stanley in part relied upon Mr. Grech for his expertise regarding value and listing price, but I also find that Mr. Stanley contributed to the discussion, and in part relied upon his own opinion of value. Mr. Stanley was uniquely placed: he had the benefit of three professional appraisals, and had retained Farris for the estate litigation and to settle the [fair market value] of SL1 to exercise the option to purchase. I accept Mr. Grech’s evidence that this was a collaborative approach.

Development limitations on SL1

[23] I have referred to the limitations on SL1 (the Strata Issue) resulting from the nature of the LCP attached to that strata lot (see paras. 11 and 12 above). Much of the evidence at trial focussed on what the parties knew about these limitations. As a general summary of her findings on this issue, the judge said:

> [7] The evidence establishes that both Mr. Stanley and Mr. Grech operated under misapprehensions. Neither of them understood the nature of SL1. When Mr. Grech was given information that there were restrictions on the redevelopment of SL1…he raised this with Mr. Stanley who told him this information was wrong. Mr. Grech did not recommend that Mr. Stanley obtain legal advice. Mr. Stanley ignored the information and did not seek legal advice because it did not accord with his independently formed opinion of his rights.

[24] Having made these general findings, the judge reviewed the evidence of the parties’ respective states of knowledge about SL1 and the information that came to their attention at various material times. Though I will not review the evidence in detail, it is useful to note the following:

a) When Mr. Stanley purchased SL1, he knew it was a strata lot, but he had his own understanding of what that meant. He believed that he had exclusive use of both the SL1 lot and the related LCP and that the entire property could be redeveloped without the consent of the owner of SL2 (RFJ at paras. 29–30);

b) Mr. Grech has been a licenced real estate agent since 2011. The majority of his work was in North and West Vancouver. Prior to the listing of SL1, he had never sold a property in Southlands. Mr. Grech initially accepted the information provided by Mr. Stanley and Ms. Vincent-Jones that SL1 comprised over 100,000 square feet and that the entire property could be sold without the agreement of the owner of SL2. When he first saw the strata plan, he did not notice the LCP designation and, in any event, would not have known what it meant (RFJ at paras. 36–37, 51–52);

c) In January 2017, Mr. Grech spoke to the listing agent for a property located across the street from SL1, Ms. Vrlak, which was a similar strata property to SL1. Ms. Vrlak advised that the property had been on the market for some time because the owner needed the approval of the neighboring strata owner to make any changes. Mr. Grech raised this information with Mr. Stanley who said that the situation with SL1 was different and that he did not need the permission of the SL2 owner to build on SL1 (RFJ at para. 54). The judge referred to this information as "Flag #1";

d) Mr. Grech retained Heather Johnston, an architect, to advise on what could be built on SL1 and to prepare a concept drawing. As part of her work, Ms. Johnston consulted the City of Vancouver ("City"), and on January 30, 2017, she received an email from a City planner confirming that in order to redevelop either SL1 or SL2, the approval of both owners was required. Mr. Grech passed this information along to Mr. Stanley who disagreed and reiterated his belief that he could redevelop SL1 without the

agreement of the owner of SL2 (RFJ at paras. 56–74). The judge referred to the information received from the City as “Flag #2”;

e) In March 2017, Mr. Grech met with Mr. Chechik, the owner of SL2, who expressed an interest in buying SL1. In an email exchange, Mr. Chechik expressed the view that the agreement of both strata owners was required in order to amend the strata lots, including any redevelopment of SL1 and its LCP. Mr. Grech forwarded Mr. Chechik’s email to Mr. Stanley, who again took the position that the owner of SL2 had no say on what could be built on SL1 (RFJ at paras. 84–86). The judge referred to the exchange with Mr. Chechik as “Flag #3”;

f) In March 2018, Mr. Grech received a copy of an email from the City to a Ms. Ferguson, who had expressed some interest in SL1, confirming that any changes to the strata plan, including a redevelopment of SL1 and its LCP, would require the agreement of both strata owners. Mr. Grech forwarded this email on to Mr. Stanley, who again expressed his disbelief (RFJ at paras. 105–107). The judge referred to this as “Flag #4”.

Events leading to the sale of SL1

[25] The four “Flags” identified by the judge were central to her analysis of the liability issues. In addition to the facts surrounding these “Flags”, there was evidence that, as a result of no offers being received, the list price for SL1 was reduced to $12.388 million on May 16, 2017. The evidence further disclosed that a couple of offers came in during the summer of 2017. These offers were not accepted. There were further reductions in the list price, and in September 2017, two realtors with experience on the West side of Vancouver were brought in to assist in the marketing and sale of SL1.

[26] In early 2018, further offers were received, but again they were not accepted. For example, Mr. Chan made an offer in January 2018 for $5.8 million. The offer had a number of subject clauses attached, including concerning land use and development potential. On Mr. Stanley’s instructions, Mr. Grech made a counter

offer of $10.6 million. Mr. Chan's realtor subsequently advised Mr. Grech that Mr. Chan would not be proceeding. Nonetheless, in February 2018, Mr. Grech forwarded an offer to Mr. Stanley, ostensibly from Mr. Chan, for $7.9 million. Mr. Grech acknowledged that this was a "false offer" made to appear as though there was interest in the property so as to motivate other potential buyers.

[27] On February 2, 2018, Ms. Ferguson made an offer of $8 million. Mr. Grech countered at $9.8 million, but there was no response. As noted above at para. 24(f), it was Ms. Ferguson's correspondence with the City that gave rise to Flag #4.

[28] In the spring of 2018, Mr. Stanley had a number of meetings with Mr. Chechik and his partner to discuss amending the strata plan to permit the construction of a 7000 square foot house on SL1. According to Mr. Stanley, Mr. Chechik did not say "no" to a new development, but he refused to sign anything without seeing plans.

[29] On April 21, 2018, Reliance Properties (Acquisitions) Ltd. ("Reliance") made an offer of $6.5 million. Mr. Stanley testified that the principal of Reliance, Mr. Stovell, was a friend of Mr. Chechik. Counter offers were exchanged. Ultimately, on May 13, 2018, 110, as registered owner of SL1, and Reliance entered into a contract of purchase and sale of SL1 for $7.5 million, with an option to purchase the shares of 110 for the same price. When the transaction closed on July 6, 2018, Reliance bought the shares in 110 and then transferred them to companies controlled by Mr. Chechik and his partner.

[30] This sale did not involve Mr. Grech and AHA.

The Judge's reasons

[31] This litigation was commenced by Mr. Grech and AHA by way of a notice of civil claim filed July 30, 2018, alleging that they were owed a commission of $285,795 in connection with the sale of SL1.

[32] Mr. Stanley filed a counterclaim on October 5, 2018 alleging that Mr. Grech and AHA were negligent in their representation of Mr. Stanley. Specifically, Mr. Stanley alleged that Mr. Grech and AHA breached their duty to:

a) Understand the nature and characteristics, both legal and physical, of SL1;

b) Recommend a fair listing price; and

c) Market SL1 without negligence and, in particular, without material misrepresentation.

[33] The claim of Mr. Grech and AHA for outstanding commissions was discontinued. Accordingly, the only claim that went to trial was Mr. Stanley's counterclaim in negligence and breach of contract. The counterclaim included a claim for breach of contract, but as the judge noted (RFJ at para. 6), the listing agreement was with 110, which Mr. Stanley no longer owned. Thus, the breach of contract claim was dismissed.

[34] With respect to the claim in negligence, the judge considered whether expert evidence was required to establish the applicable standard of care. She cited *Krawchuk v. Scherbak*, 2011 ONCA 352, leave to appeal ref'd [2011] S.C.C.A. No. 34359 where the Court held:

a) It is generally inappropriate for the court to determine the standard of care in a professional negligence case in the absence of expert evidence (at para. 130);

b) Unless the conduct in issue is particularly egregious, the court likely requires expert evidence of the usual or customary standard in the real estate industry regarding:

i) The kind of information that must be verified where it has not been demonstrated that the realtor had cause to doubt the information;

ii) A duty to take positive steps to confirm the nature, identify, and extent of the property being advertised; and

iii) A duty to recommend that the purchaser secure an inspection regarding the soundness of the premises, including any structural defects (at para. 131);

c) There are two recognized exceptions to the requirement for expert evidence to establish the standard of care:

i) Where the matter in issue is non-technical such that an ordinary person may be expected to have sufficient knowledge, (at para. 133) and

ii) The actions of the defendant are so egregious that it is obvious that the conduct falls short of the standard of care (at para. 135).

[35] As an example of a case in which expert evidence was not required to establish the standard of care, the judge referred to *Cosway v. Boorman's Investment Co. Ltd*., 2008 BCSC 1482, which was cited by Mr. Stanley. There, the court held that an investment broker was under a duty to check information that they were in doubt about, or should have been in doubt about, before passing it on to their client. The court did not require expert evidence to establish that the failure to do so breached the standard of care (at paras. 27, 34).

[36] In addressing the claim in negligence, the judge noted that Mr. Stanley advanced three principal grounds of negligent conduct on the part of Mr. Grech. Specifically, he alleged that Mr. Grech breached the standard of care by:

a) failing to recognize the nature of SL1 and the restrictions associated with it;

b) failing to recommend or obtain legal advice;

c) recommending a listing price for SL1 that was too high. This breach is alleged to flow from Mr. Grech's failure to understand the true nature of SL1 the Strata Issue.

[37] On the first argument, the judge noted that there was no expert evidence about the applicable standard of care and, specifically, on whether a reasonable real estate agent in Mr. Grech's position would have recognized the true nature of SL1 and the Strata Issue (RFJ at para. 151). She noted that while the *Real Estate Services Act,* S.B.C. 2004, c. 42 and materials published by the Real Estate Council of B.C. and the Canadian Real Estate Association contain statements about the duties and responsibilities of real estate agents, these are general principles that provide no guidance as to how they might apply in a given situation (RFJ at para. 155).

[38] The judge found that the circumstances of this case, specifically Mr. Grech's lack of understanding of the nature of SL1 and the Strata Issue, do not fall within either of the established exceptions to the principle that expert evidence is required to establish the standard of care. As to the first exception, she said:

> [157] …The breadth and depth of knowledge that would be expected of a reasonable real estate agent in interpreting strata plans, the implications of common property and LCP on this unique property, and how that would affect development potential through the *SPA*, is not a non-technical matter of a matter upon which an ordinary person may be expected to have knowledge. There is no expert evidence of the training real estate agents receive in this regard, and the level of knowledge they would be expected to have. The RECBC Manual provides general information only on the nature of different types of strata lots, common property, LCP and the *SPA*. Mr. Grech is not a lawyer or expert on amendments of strata plans.

[39] The judge then held that this was not a situation involving an obvious or egregious breach of the standard of care. She noted that none of the three appraisals which formed the basis for the price paid by Mr. Stanley identified the Strata Issue nor was that issue recognized by the experienced realtors brought in to help market the property. The issue was also not raised by the lawyers engaged by Mr. Stanley to assist him in the litigation with Ms. Reid's estate (RFJ at para. 158).

[40] The judge therefore found that Mr. Stanley had not established that Mr. Grech's failure to understand and advise on the nature of SL1 breached the standard of care.

[41] As to whether Mr. Grech was negligent in not recommending that Mr. Stanley obtain legal advice, the judge noted that there was also no expert evidence on this point (RFJ at para. 159). She considered whether any of the "Flags" identified in the evidence brought the case within one or both of the exceptions to the expert evidence principle. She found that Flags #2 and #3 (the emails from the City and from Mr. Chechik described at paras. 24(d) and (e) above) did so.

[42] The judge said:

> [162] In my view, once Mr. Grech received [the City's] and Mr. Chechik's emails, the circumstances of this case fell within both exceptions to the principle that expert evidence of the standard of care is typically required. Mr. Stanley and Mr. Grech were put on notice with some specificity that there might be a legal impediment to redevelopment. This was material as it went to the heart of what Mr. Grech was representing to other real estate agents and potential purchasers on behalf of his client. There is nothing technical about knowing that there are conflicting opinions as to whether Mr. Chechik's consent is required to redevelop the property, even if one does not understand all the legal technical reasons why that is so. Similarly, there is nothing technical about knowing that Mr. Chechik disagrees with Mr. Stanley's opinion. A reasonable real estate agent who is marketing SL1 and making representations regarding the ability to redevelop the property, as well as a reasonable lay person who owns and is selling SL1, and knowing Mr. Chechik's position, would recognize that this should be investigated. The reason is so that no misrepresentation is made to potential purchasers.
>
> [163] In my view, it is obvious that the standard of care required of Mr. Grech included that he should have either: recommended that Mr. Stanley seek legal advice despite Mr. Stanley's personal opinion…or, seek that legal advice himself … Mr. Grech knew Mr. Stanley was not a lawyer. He said he got the "impression" that Mr. Stanley had this "covered" because he had retained Farris. Given the importance of this information, in my view, an impression is not sufficient. I further find support for this in the comments of the Courts in *Krawchuk* and *Cosway* cited above. The representations Mr. Grech was making regarding the nature of and how SL1 could be redeveloped were material, and Mr. Grech had sufficient "cause to doubt the information" Mr. Stanley had provided to him.

[43] The judge found that Mr. Grech's failure to recommend or obtain legal advice breached the standard of care.

[44] With respect to the listing price, the judge held that in the absence of expert evidence, Mr. Stanley had not established that Mr. Grech breached the standard of care. She found that setting the listing price is not a non-technical matter or something within the knowledge of ordinary people, particularly given the unique nature of SL1 (RFJ at para. 167).

[45] Having found that Mr. Grech did not breach the standard of care when setting the listing price, the judge held that it was not necessary to address the issues of causation and damages with respect to this claim (RFJ at para. 169).

[46] The judge then addressed causation and damages with respect to the sole breach established by Mr. Stanley, namely the failure to recommend or obtain legal advice. The information that gave rise to Flags #2 and 3 was received in early 2017. The judge therefore considered what would have occurred if Mr. Stanley had obtained legal advice in March 2017 and discovered the Strata Issue at that time. She found that Mr. Stanley would have had three options (RFJ at para. 174):

a) Renegotiate with Mr. Chechik to amend the strata plan. The judge found there was no evidence to establish that Mr. Chechik would have agreed to do so;

b) List SL1 “as is” without the consent of Mr. Chechik. The judge found there was no evidence of the market value of SL1 as is or what doing so would have meant in terms of marketing time; or

c) Sell the property to Mr. Chechik. Again, however, the judge found there was no evidence that Mr. Chechik would have been willing to buy the property earlier than he did or at a different price. The judge noted the absence of any admissible evidence from Mr. Chechik.

[47] The judge therefore concluded that any argument that Mr. Stanley would have been in a better position had he received legal advice in March 2017 was speculation (RFJ at para. 176). Mr. Stanley thus failed to prove that Mr. Grech’s

breach of the standard of care in failing to recommend or obtain legal advice caused damage to Mr. Stanley.

Issues on Appeal

[48] Mr. Stanley submits that the judge erred by:

a) Requiring Mr. Stanley to prove two separate breaches of the standard of care in order to establish his claim in negligence—that Mr. Grech breached the standard of care (i) by failing to seek legal advice about SL1 himself and advising Mr. Stanley to do so; and (ii) by recommending an inordinately high listing price;

b) Failing to apply a "robust and pragmatic" approach to causation; and

c) Failing to consider whether there was a "real and substantial possibility" that Mr. Stanley suffered a loss as a result of Mr. Grech's negligence.

[49] Each of these alleged errors is simply a different formulation of the central issue on this appeal: did the judge err in finding that Mr. Grech's negligence did not cause Mr. Stanley to suffer damages?

[50] The judge's findings on causation are factual in nature and therefore reviewable only for palpable and overriding error: *Engman v. Canfield*, 2023 BCCA 56 at para. 117.

Analysis

[51] Respectfully, the first error alleged by Mr. Stanley misapprehends the judge's reasons. Contrary to Mr. Stanley's submission, the judge did not require him to prove two separate breaches of the standard of care in order to establish his claim in negligence.

[52] Rather, the judge considered each of the breaches alleged by Mr. Stanley and concluded that only one—Mr. Grech's failure to recommend or obtain legal advice—constituted a breach of the standard of care.

[53] She found that Mr. Stanley had not proven that Mr. Grech was negligent in recommending and setting an improper listing price. She noted that this allegation formed the principal basis for Mr. Stanley's claim that he suffered damages in the form of additional financing charges and a diminished sale price. Given her finding, she held that it was not necessary to consider causation and damages relating to this alleged breach (RFJ at para. 169).

[54] However, again contrary to Mr. Stanley's submission, the judge did not dismiss the entire claim based on her findings concerning the listing price. Having found that Mr. Grech's failure to recommend legal advice breached the standard of care, she then considered whether that breach caused Mr. Stanley to suffer damages.

[55] It is well established that the causation analysis involves two distinct inquiries. The plaintiff must first prove that the defendant's breach was the factual cause of the plaintiff's loss. Factual causation is generally assessed using the "but for test", which requires the plaintiff to establish on a balance of probabilities that the harm would not have occurred but for the defendant's negligent act: *Nelson (City) v. Marchi,* 2021 SCC 41 at para. 96; *Clements v. Clements*, 2012 SCC 32 at para. 8; *Engman* at para. 93.

[56] Second, the plaintiff must also establish legal causation, meaning that the harm must not be too remote. This requires an assessment of whether the actual injury sustained by the plaintiff was the reasonably foreseeable result of the defendant's negligent conduct: *Nelson* at para. 97, *Engman* at para. 93.

[57] Here, the judge cited the "but for" test for establishing factual causation (RFJ at para. 135), but Mr. Stanley argues that she misapplied the test in dismissing his arguments as speculative and by failing to consider whether a common-sense inference could be drawn from the available evidence that Mr. Grech's negligence caused him loss. He cites a number of facts that he says support the common-sense inference that had Mr. Grech properly understood the true nature of SL1, and contends that had Mr. Grech responded to Flags #1, 2 and 3 in early 2017,

it is likely that the listing price would have been much lower. Mr. Chechik would in turn have pursued his interest in purchasing SL1 sooner.

[58] The difficulty with Mr. Stanley's submission is that it continues to rely primarily on the alleged improper listing price of SL1 as the source of his damages. However, on appeal, he has not challenged the judge's finding that he failed to establish that Mr. Grech breached the standard of care in setting the listing price.

[59] The judge properly focussed her causation analysis on the breach that was established, that being Mr. Grech's failure to recommend or obtain legal advice. In my view, Mr. Stanley has not established that the judge erred in that analysis.

[60] In particular, Mr. Stanley has not demonstrated that the judge erred in her finding that, had Mr. Stanley obtained legal advice in March 2017 and discovered the Strata Issue, he would have had three options as described above at para. 46, none of which, if pursued, would have put Mr. Stanley in a better economic position (RFJ at paras. 174–175).

[61] Mr. Stanley submits that the judge should have inferred causation based upon a "robust, common sense analysis" of the facts before her. However, as this Court noted in *B.S.A. Investors Ltd. v. DSB*, 2007 BCCA 94 at para. 43, there is a difference between drawing an inference as to causation from circumstantial evidence and drawing such an inference from no relevant evidence at all. Similarly, in *Engman*, Madam Justice DeWitt-Van Oosten held (at para. 94): "[w]here factual causation is sought to be established by inference, any such inferences 'must be based on proven facts and cannot be simply guesswork or conjecture'" citing *Borgfjord v. Boizard*, 2016 BCCA 317 at paras. 55, 67, leave to appeal to SCC ref'd, 37210 (9 February 2017).

[62] In my view, the judge did engage in a robust causation analysis. She inferred from the evidence that Mr. Stanley would have sought legal advice earlier, had such a course of action been recommended by Mr. Grech (RFJ at para. 170). She also inferred that if legal advice had been sought, the Strata Issue would have been

identified at an earlier date (RFJ at para. 171). The judge identified various alternative paths that might have been open to Mr. Stanley if he had received legal advice in March 2017, and she turned her mind to the question of whether the evidence established that any of these alternative paths would have placed Mr. Stanley in a better economic position. Ultimately, the judge was not persuaded that the evidence established that Mr. Grech's breach of the standard of care caused Mr. Stanley any economic injury. She characterized Mr. Stanley's arguments to the contrary, including his arguments about what Mr. Chechik would, or might, have done in 2017 as "speculative" (RFJ at paras. 174–175). The only question for this Court is whether Mr. Stanley has demonstrated that there is any palpable or overriding error in the judge's findings. In my view, no such error has been shown.

[63] I would also decline to give effect to Mr. Stanley's third alleged error, namely that the judge erred in her assessment of damages by failing to consider whether there was a real and substantial possibility that the losses claimed by Mr. Stanley as a result of Mr. Grech's negligence would occur.

[64] The simple answer to this argument is that the "real and substantial possibility" test applies to the assessment of damages. The judge simply did not advance to the stage of assessing damages, and nor was she required to do so, because she found that Mr. Stanley had failed to establish that Mr. Grech's negligence caused him to sustain a loss.

[65] For the reasons set out above, Mr. Stanley has not established that the judge erred in coming to the conclusion that he failed to prove his negligence claim against Mr. Grech and AHA.

Disposition

[66] I would therefore dismiss the appeal.

"The Honourable Justice Skolrood"

I AGREE:

"The Honourable Mr. Justice Groberman"

I AGREE:

"The Honourable Madam Justice Horsman"