IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Shortreed Joint Venture Ltd. v. Guvi,* 2024 BCSC 1610

Date: 20240830
Docket: S179979
Registry: New Westminster

Between:

Shortreed Joint Venture Ltd.

Plaintiff

And

Echiford Guvi aka Archie Guvi, John S. Piamonte, John S. Piamonte Law Corporation and Royal Bank of Canada Banque Royale du Canada

Defendants

Before: The Honourable Justice Armstrong

Reasons for Judgment re: Admissibility of Expert Report

Counsel for the Plaintiff:	D. Gautam
Counsel for the Defendants John S. Piamonte and John S. Piamonte Law Corporation:	J.G. Dives, K.C. P. Williams
Place and Dates of Hearing:	New Westminster, B.C. April 5, 8–9, 2024
Place and Date of Judgment:	New Westminster, B.C. August 30, 2024

Introduction

[1] The plaintiff, Shortreed Joint Venture Ltd., was involved in a commercial dispute concerning a 2008 property transaction in which it was assisted by its realtor, Echiford Guvi. The plaintiff had been successful in its appeal of a foreclosure order obtained by Brian Perrin, the mortgagee after which $400,000 was paid into court subject to a further agreement; see *Perrin v. Shortreed Joint Venture Ltd.*, 2009 BCCA 478.

[2] By May 25, 2012 the parties to that dispute reached a settlement that involved payment out of court of $400,000 to the plaintiff. The defendants, John S. Piamonte and his law firm (collectively, “Mr. Piamonte”) prepared an application for payment out of court of the $400,000 plus interest to the plaintiff, on instructions from the defendant, Mr. Guvi. On October 25, 2012 the Minister of Finance issued a cheque payable to the plaintiff in the sum of $422,923.30 (the “cheque”) and sent it to Mr. Piamonte.

[3] Mr. Piamonte then delivered the cheque to Mr. Guvi.

[4] The notice of civil claim in this case claims that Mr. Guvi fraudulently deposited the cheque to an RBC bank account in the name of his company, Oasis Echo Realty Ltd., and proceeded to pay funds out of that account without the authority or permission of the plaintiff.

[5] The central issue in this case is whether Mr. Piamonte breached a duty of care to the plaintiff when he handed the cheque to Mr. Guvi. The plaintiff contends that the Mr. Piamonte’s delivery of the cheque to Mr. Guvi fell below the applicable standard of care of a prudent, skilled and qualified solicitor. The plaintiff says Mr. Piamonte is liable to the plaintiff in negligence for its loss.

[6] This action proceeded to trial in April 2024 but did not complete within the schedule. Shortly before the April adjournment, the plaintiff proposed to tender a February 17, 2022 expert report authored by Timothy Lack, a British Columbia solicitor (the “Lack report”), in support of its claims.

[7] Mr. Piamonte contends the Lack report is inadmissible at this trial; these reasons address this question.

The Issues

[8] Mr. Piamonte says the Lack report is inadmissible because it:

1. does not set out documents relied upon in forming the opinion;
2. does not set out the facts assumed to be true on which he relies in forming the opinion;
3. does not set out the reasons for the opinion having regard to the documents and assumed facts relied on;
4. is not necessary;
5. is not an opinion, in substance, but is more in the nature of argument in favour of the plaintiff's case;
6. makes findings of fact and conclusions of law, neither of which fall within his role as expert; and
7. purports to make conclusions as to the ultimate issue (findings of fact and law) which are within the exclusive jurisdiction of trial judges.

The Report

[9] The Lack report comprises 11 pages with responses to four questions proposed by plaintiff's counsel.

[10] Mr. Piamonte concedes that Mr. Lack is a real estate law practitioner with extensive experience in the area of real estate transactions.

[11] However, Mr. Piamonte says that the Lack report does not address the "normal and usual standard of care of real estate law practitioners based upon his experience". Rather, it relies on a summary of case law, statutes, professional

guidelines and Continuing Legal Education Society of British Columbia ("CLEBC") programs as a basis for his opinion on the question of the applicable standard of care.

[12] Mr. Lack began the report by saying:

> You have asked me to provide you with my expert opinion as to the responsibilities and standard of care that a legal professional, such as a solicitor, in British Columbia would be required to bring to a trust cheque payment/disbursement transaction, and in particular, in verifying the appropriateness of delivering such trust cheque to an individual who purports to be the good and proper recipient of such cheque.

[13] Before Mr. Lack was cross-examined on his report, plaintiff's counsel asked that Mr. Lack be qualified as an expert to give opinion evidence on the standard of care applicable to a competent lawyer on the issues of:

1) standards of client identification and verification; and

2) receiving and dispersing or delivering of trust funds, trust property and other property of clients and non-clients.

[14] Mr. Lack set out a list of nine items under the caption "Facts and Assumptions" that he understood represented "the relevant scenario" he was to consider. However, he did not adopt these as facts he was assuming to be true in forming his opinion. For example, Mr. Lack was instructed to assume Mr. Piamonte considered Mr. Guvi to be his client, but he proceeded to give his opinion based on a different view of the facts, namely that he could not accept that Mr. Piamonte considered Mr. Guvi as the client to the exclusion of the plaintiff. He went on to discuss other features of his view of the facts to reach a contrary conclusion.

[15] Mr. Lack outlined that his understanding of the standard of care owed by a lawyer to a client on the question of client identification and verification comes from the articles, checklists, Rules and materials he reviewed before preparing this opinion.

[16] I will now provide an overview of the four questions posed to Mr. Lack prior to determining whether Mr. Lack's report is admissible.

Question 1

[17] The first question in the Lack report asks: "What is the applicable standard of care for a solicitor in Mr. Piamonte's situation?"

[18] Mr. Lack begins with a lengthy reference to authorities in the context of his discussion about the standard of care lawyers owe to clients: that of the "reasonably competent lawyer—no more—no less. He summarized the standard as "reasonable competence and diligence" to be tested by what a" reasonably informed and competent practitioner" would have done.

[19] On page 6, he poses a question: would a reasonably competent lawyer, on the instruction of his client have attempted to verify the relationship between Mr. Guvi and the plaintiff? His answer to this question was, "I assert that the answer is a 'hard' yes as it appears to me Mr. Guvi was directing the lawyer to the exclusion of anyone else". Mr. Lack made no assumptions supporting the proposition that Shortreed had not directed Mr. Guvi to obtain the cheque from Mr. Piamonte.

[20] Mr. Lack goes on to say that although Mr. Piamonte considered Mr. Guvi to be his client, the value of those services was going to the plaintiff. He concludes that Mr. Piamonte ought to have looked at the parties and persons involved to ascertain his authority.

[21] Also on page 6, Mr. Lack describes a lawyer's duty to protect a client's interest indicating that reasonably competent lawyers would confirm who was directing the file. He says, "my experience is that despite this expected alignment of purpose, a realtor and the client may still have somewhat competing interests". He adds, "the realtor appears to have fully supplanted Shortreed and as such the lawyer became vulnerable to the fraud being perpetrated". That is an opinion based on an inference (the appearance that the realtor supplanted Shortreed) that was not included in the facts Mr. Lack was asked to assume.

[22] Again on page 6, he says a competent lawyer “could” have avoided being a participant in the fraud if he had undertaken steps to properly verify who the client was. He asserts this “ought to have been done”.

[23] In the next paragraph, Mr. Lack steps aside from the assumptions he was given in concluding that he cannot accept that Mr. Piamonte considered Mr. Guvi as his client to the exclusion of the plaintiff. This was not the assumption or the question posed in the instructing letter form plaintiff’s counsel. In the end, the assertion set out in that paragraph contains a conclusion that must be made by the court and is not helpful to assessing his opinion in this case.

[24] He conceded clients may be assisted by others who will give partial, substantial or even significant directions to the lawyer. However, the duty to protect the client’s interest would dictate that a reasonably competent lawyer would confirm who was directing the file.

[25] Mr. Lack opines on the applicable standard of care for solicitors after taking into account some legal research he had undertaken and LSBC Rules. He said he did not know what other firms do regarding the withdrawal of trust funds but assumed others conform to those rules.

[26] He reiterated in cross-examination that he could not accept that Mr. Piamonte considered Mr. Guvi his client in the work done to secure payment of funds from court, in spite of his assumption that Mr. Guvi asked Mr. Piamonte “to assist him in obtaining monies out of Court”. he did not know whether Mr. Guvi was ever asked by the plaintiff to act for the plaintiff to obtain the cheque. Moreover, he did not know if Mr. Piamonte had been asked to act for the plaintiff nor whether he had ever communicated with Harry Bandesha, one of its three directors.

[27] Mr. Lack says that the standard of care concerning identification and verification of clients appearing on page 5 of the report comes from checklists and materials and his review of several cases decided on the issue and the LSBC Rules. In cross examination, he was asked where he derived his view of the standard of

care concerning the delivery of client and non-client property; he said, “I don’t answer this specifically but there are rules about handling property”.

Question 2

[28] The second question in the Lack report asks: “What client identification rules applied to Mr. Piamonte?”

[29] He said lawyers must identify and confirm that the client is who they say they are. In this case, there was no question about the identity of Mr. Guvi. There was some uncertainty concerning Mr. Guvi’s status as a director or agent for the plaintiff, but he was not an officer.

[30] Under this category, the only opinion given is Mr. Lack’s assertion of his own practices and an anecdotal reference to another client of his involvement in a case dealing with a questionable signature to a document.

[31] In my view, there is nothing in the issues described under question 2 that are relevant to the facts in this case.

[32] Mr. Lack then says that the Law Society of British Columbia (“LSBC”) had set the standards of a reasonably competent lawyer. He said in his practice, he takes steps that exceed the LSBC Rules in the area of identification and verification because of the nature of his practice, nature of the flow of funds and urgency.

[33] He then referred to federal government efforts to regulate suspicious and fraudulent transactions under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c. 17 and the subsequent litigation and amendments to the acts setting out actions a prudent lawyer would take in the normal course of verifying and identifying a client.

[34] He then opines on Mr. Piamonte’s responsibility to identify the organization by obtaining information recorded at the time the plaintiff and Mr. Piamonte entered a solicitor-client relationship.

[35] After a lengthy description of the client verification process, Mr. Lack said lawyers that know (or ought to know) they are or would be assisting a client in fraud or other illegal conduct must withdraw from representation of the client. There was no suggestion in the assumptions or facts given to Mr. Lack suggesting Mr. Piamonte knew or ought to have known of any fraudulent plan or other illegal conduct contemplated by Mr. Guvi.

[36] He then asserts that in his own practice, he requires information consistent with the LSBC Rules and legislation to identify clients. He refers to a past personal circumstance where a client refused to attend at his office and sign a real estate document. He had obtained a copy of the persons driver's license taken at the time of the document execution and put a stop to fraud the client was attempting to perpetuate.

[37] Overall, Mr. Lack confirms that his personal practice is at a higher standard than the normal level of the competent solicitor, particularly in the area of client identification and verification. On the question of identification and verification of clients, Mr. Lack includes a section of the LSBC Rules on these subjects, as they appeared at the time of the events in issue. He refers to LSBC Rule 3-93 concerning client identification and 3-95 referring to verification with the observation that Rules 3-95 to 3-99 do not apply in circumstances where a lawyer receives money pursuant to a court order or as a settlement of any legal or administrative proceeding.

[38] In Mr. Lack's opinion, lawyers need specific instructions from authorized representatives in order to determine the identity of the members of the corporation and ascertain the authority of persons giving instructions.

Question 3

[39] The third question in the Lack report asks: "What step should a solicitor/lawyer take when receiving instructions from a person who purports to act on behalf of another party?"

[40] Mr. Lack describes problems that can arise in receiving instructions from a corporate client and the determination and verification of client identities. He discussed the need for a lawyer to have clear instructions from corporate clients "receiving funds" to ensure those funds are dealt with in accordance with the clients instructions. He refers to the LSBC's Professional Conduct Handbook which requires a lawyer to guard against becoming a dupe in a transaction.

[41] He goes on to assert that Mr. Piamonte may not have perceived Mr. Guvi as intent on wrongdoing but he did not take "steps to assist the client receiving the benefit of the lawyer's services".

[42] Mr. Lack then goes on to further discuss the flawed assumption that Mr. Piamonte considered Mr. Guvi to have been his client rather than the plaintiff. He says that even if Mr. Guvi was not identified as a fraudster, as a person with competing interests, or even just another party, "the good and proper principals of Shortreed ought to have been considered as the client and consulted as to the role of Mr. Guvi in this matter".

[43] Mr. Lack discusses the differences between individual shareholders and corporations in the receipt of instructions to act for a company. He said that the CLEBC makes clear that lawyers need to confirm instructions, particularly where direction is coming from someone without an obvious and direct association to the corporation.

[44] He says lawyers should determine who the members of the corporation are through verification of identification steps. He said that "they can be sure of who they are acting for and that they are the correct instructions given on behalf of the client".

Question 4

[45] The fourth question in the Lack report asks: "What steps or care should a lawyer take when handling funds belonging to a corporate client?"

[46] Mr. Lack discusses generally how clients' funds are to be handled, particularly in view of the fiduciaryduty owed by a lawyer to a client. He said handling of trust funds demands attention to receipt, disbursement and record keeping.

[47] Mr. Lack reviewed some facts not included in the assumptions he was asked to make. Mr. Lack makes bald assertions about amounts of money that lawyers in BC will have under their control or in trust accounts. He says some amounts of money can be quite substantial and it ought not to become casual for lawyers handling trust funds or other funds flowing through his office.

[48] Mr. Lack asserts again that the plaintiff was the client whether or not Mr. Piamonte considered it to be. He then says, "I assert that the lawyer's delivery of funds to Mr. Guvi proved to be a regretful error and was an error that would been avoided if the lawyer had better determined that Shortreed was the beneficiary of his services, and hence, his client. Based on this determination, he contends the lawyer "should have taken the good and proper(?) to identify and verify Shortreed." If Mr. Guvi was permitted to direct the lawyer, that approval should have come from the directors of Shortreed.

[49] Mr. Lack then says that the circumstances surrounding the delivery of funds required Mr. Piamonte's full attention and how the funds are physically delivered is a ready concern. He says:

> I will readily admit that my clients will send colleagues, assistants, spouses, children, couriers or others to collect checks from my office. I will further admit that funds are couriered or mailed and the receptionist at the other end may very well be unknown. I will state that such individuals picking up the funds usually do so only after I have discussed the delivery with the client.

[50] On this point, he offers no opinion.

[51] Mr. Lack discussed his personal practice of delivering funds by courier, mail or other means and states he "usually" discusses delivery of funds with the client before an intermediary is involved.

[52] At pages 10–11, Mr. Lack discussed “good and proper best practices with respect to handling trust funds and being the fiduciary of those funds”. He said he provided his expert opinion in the context of the life and daily office procedures concerning picking up and handling of trust funds and cheques. He asserts that the delivery of the fund to Mr. Guvi proved to be a regretful error that could have been avoided if he had “better determined that Shortreed was the beneficiary of his services, and hence, his client.”

[53] He said that if “Mr. Guvi was permitted to direct the lawyer, approval should have come from the directors of Shortreed”.

[54] Mr. Lack summarizes his responses and opinions as follows:

a) Best practices dictate that Mr. Piamonte should have determined that the plaintiff was the beneficial recipient of his services and ought to have been considered as his client.

b) Client identification and verification rules and practices ought to have been followed and Mr. Piamonte ought to have turned his mind to who the directors (or officers) of the plaintiff were.

c) Mr. Piamonte ought to have taken his direction only from the directors of the plaintiff.

d) Failure to receive those directions allowed Mr. Guvi to perpetuate the wrongdoing.

e) Mr. Piamonte was unlikely to have foreseen this outcome, but “good and proper practices would likely have avoided the nasty result”.

Discussion

Legal Framework

[55] Expert opinion is admissible when a trier of fact is unable, due to the technical nature of the facts, to draw appropriate inferences: *Neudorf v. Nettwerk Productions Ltd*., [1998] B.C.J. 2690 at para. 2, 1998 CanLII 6643 (S.C.). Expert evidence is admissible to furnish the court with information which is likely to be outside the experience and knowledge of the judge and jury: *R. v. Abbey*, [1982] 2 S.C.R. 24 at 42, 1982 CanLII 25 [*Abbey* SCC].

[56] Trial judges have important gatekeeping responsibilities in deciding questions of the admissibility of expert's opinions. Expert opinions are presumptively inadmissible unless the tendering party establishes admissibility on the balance of probabilities: *R. v. Abbey*, 2009 ONCA 624 [*Abbey CA*] at para. 71, leave to appeal to SCC ref'd, 33656 (8 July 2010).

[57] The court should not default to admitting expert opinion evidence without a critical analysis when the report is proffered on the basis that most issues can be dealt with in the context of deciding what weight might be given to it. In *R. v. J.-L.J.*, 2000 SCC 51, Justice Binnie stated:

> [28] … the Court has emphasized that the trial judge should take seriously the role of "gatekeeper". The admissibility of the expert evidence should be scrutinized at the time it is proffered, and not allowed too easy an entry on the basis that all of the frailties could go at the end of the day to weight rather than admissibility.

[58] Where an expert affirms the duty of independence and impartiality in the preparation of their opinion, "the burden is on the party opposing the admission of the evidence to show that there is a realistic concern that the expert's evidence should not be received because the expert is unable and/or unwilling to comply with that duty": see *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 at paras. 47–49 [*White Burgess*].

[59] The admissibility of expert evidence, depends on whether the report, taken as a whole, is capable of providing the court with the assistance that is required and is

sufficiently reliable to merit consideration by the trier of fact: *Maras v. Seemore Entertainment Ltd.*, 2014 BCSC 1109 at para. 19; *Keefer Laundry Ltd. v. Pellerin Milnor Corporation*, 2007 BCSC 899 at para. 18.

[60] Rule 11-6 sets out the requirements that must be met for the admission of expert opinions and reports:

> Requirements for report
>
> (1) An expert's report that is to be tendered as evidence at the trial must be signed by the expert, must include the certification required under Rule 11-2 (2) and must set out the following:
>
> (a) the expert's name, address and area of expertise;
>
> (b) the expert's qualifications and employment and educational experience in the expert's area of expertise;
>
> (c) the instructions provided to the expert in relation to the proceeding;
>
> (d) the nature of the opinion being sought and the issues in the proceeding to which the opinion relates;
>
> (e) the expert's opinion respecting those issues;
>
> (f) the expert's reasons for the expert's opinion, including
>
> (i) a description of the factual assumptions on which the opinion is based,
>
> (ii) a description of any research conducted by the expert that led the expert to form the opinion, and
>
> (iii) a list of every document, if any, relied on by the expert in forming the opinion.

[61] The four criteria necessary to assess the threshold for admissibility of expert opinion, as set out in *R. v. Mohan*, [1994] 2 S.C.R. 9 at 20, 1994 CanLII 80, are:

1. relevance;
2. necessity in assisting the trier of fact;
3. the absence of any exclusionary rule; and
4. a properly qualified expert.

[62] Experts must be impartial and independent. It is a threshold requirement that experts give fair, objective and non-partisan opinion evidence: *White Burgess* at para. 10.

[63] The admissibility of expert's opinions involves a two-step process including preconditions to admissibility and exercise of the court's gatekeeper function.

[64] First, the plaintiff must establish the threshold requirements of admissibility from *Mohan*. Exclusion at the threshold stage should occur only in very clear cases in which the proposed expert is unable or unwilling to provide the court with fair, objective and non-partisan evidence. Anything less than clear unwillingness or inability to do so should not lead to exclusion but is taken into account in the overall weighing of the costs and benefits of receiving the evidence.

[65] If admitted, at the second stage, the court undertakes a "gatekeeper function" and balances the potential benefits and risks of admitting the evidence. The court must weigh the probative value against the prejudicial effect of the opinion: *R. v. Bingley*, 2017 SCC 12 at paras. 14, 16.

[66] Mr. Lack adopted the conclusions of the Supreme Court of Canada in *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147 at 208, 1986 CanLII 29 [*Central Trust*]. There, the Court summarized a solicitor's duty of care as follows:

> A solicitor is required to bring reasonable care, skill and knowledge to the performance of the professional service which he has undertaken... The requisite standard of care has been variously referred to as that of the reasonably competent solicitor, the ordinary competent solicitor and the ordinary prudent solicitor….

[67] The requirement of professional competence that was particularly involved in this case was reasonable knowledge of the applicable or relevant law. A solicitor is not required to know all the law applicable to the performance of a particular legal service, in the sense that he must carry it around with him as part of his "working knowledge", without the need of further research, but he must have a sufficient knowledge of the fundamental issues or principles of law applicable to the particular

work he has undertaken to enable him to perceive the need to ascertain the law on relevant points.

[68] The Court in *Central Trust* at 208 also commented on the distinctions between the standard of care of ordinary competent solicitors as opposed to specialists:

> … Hallett J., in referring to the standard of care as that of the "ordinary reasonably competent" solicitor, stressed the distinction between the standard of care required of the reasonably competent general practitioner and that which may be expected of the specialist. It was on the basis of this distinction that he disregarded the evidence of one of the expert witnesses concerning the practice in real estate transactions involving corporations.

[69] In *Surrey Credit Union v. Willson* (1990), 45 B.C.L.R. (2d) 310 at 313, 1990 CanLII 1983 (S.C.) the Court said:

> This type of evidence can take two forms: a statement of opinion based upon hypothetical facts or a statement of opinion regarding facts or assumptions of facts concerning the case which have been communicated to him. In either case he is bound to communicate to the Defendants the sources of those facts or assumptions of fact. They need not be (indeed in my view are not required to be) part of the opinion itself. What he cannot do is to make findings of fact himself. That is the exclusive role of the trial judge….

[70] The criteria for the admissibility of expert reports dictates that experts not be permitted to usurp the function of the court. In *R. v. D.D.*, 2000 SCC 43 the Court said:

> [53] The primary danger arising from the admission of any opinion evidence is that the province of the jury might be usurped by that of the witness. This danger is especially prevalent in cases of expert opinion evidence. Faced with an expert's impressive credentials and mastery of scientific jargon, jurors are more likely to abdicate their role as fact-finders and simply attorn to the opinion of the expert in their desire to reach a just result. See *Mohan*, *supra*, *per* Sopinka J. ….

[71] The Court in *Murray v. Galuska*, 2002 BCSC 1532 at para. 15 provided that the following exclusionary rules applying to expert reports:

1) experts are not permitted to make findings of fact or rulings of law; this is the role of the trial judge;

2) experts cannot make findings of law as that is also within the role of the trial judge; and

3) experts should not make arguments in the guise of opinions.

[72] In *White Burgess* at para. 2, the Court said "[e]xpert witnesses have a special duty to the court to provide fair, objective and non-partisan assistance".

[73] The Court also highlighted that "[r]ecent experience has only exacerbated these concerns; we are now all too aware that an expert's lack of independence and impartiality can result in egregious miscarriages of justice": *White Burgess* at para. 12. Further, "it is 'for the jury to form opinions, and draw inferences and conclusions, and not for the witness'": *White Burgess* at para. 14.

[74] The Court in *D.D.* "underlined that the necessity requirement exists 'to ensure that the dangers associated with expert evidence are not lightly tolerated' and that '[m]ere relevance or 'helpfulness' is not enough'": *White Burgess* at para. 21.

[75] Expert evidence will be admissible where it is necessary to allow the judge to appreciate the facts due to their technical nature, or to assist the court to form a correct judgement on a matter if ordinary persons are unlikely to do so without assistance of those with special knowledge: see *D.D.* at para. 47.

[76] In *Rogers v. Rogers Communications Inc*., 2021 BCSC 2184, Justice Fitzpatrick said:

> [113] Lawyers giving opinions intended to be relied upon by a court often walk a fine line. At times, an opinion can stray into the objectionable territory of recommending to the judge, with the force of "expertise", how the issue should be decided (commonly described as addressing the "ultimate issue"): *Walsh v. BDO Dunwoody LLP*, 2013 BCSC 1463 at paras. 58-62.

Analysis

[77] The analysis begins with the prerequisites to admission of expert reports set out in Rule 11-6(1). In this case, Mr. Piamonte opposes admissibility because of the absence in the report of:

a) the mandatory statement of the nature of the opinion and the issues in the proceeding to which the opinion relates;

b) Mr. Lack's opinion respecting those issues;

c) Mr. Lack's reasons for his opinion, including a description of the factual assumptions on which the opinion is based;

d) a description of any research conducted by Mr. Lack that led him to form the opinion; and

e) a list of every document relied on by Mr. Lack in forming the opinion.

[78] Mr. Lack included the letter of instruction from plaintiff's lawyer with his opinion.

[79] Interestingly, there is a significant between the plaintiff's counsel's instructing letter dated October 20, 2021 and Mr. Lack's understanding of the opinion he was asked to provide. In his report, Mr. Lack contends he was asked to opine on the responsibilities and standard of care that a legal professional, such as a solicitor, in BC would be required to bring to a trust cheque payment/disbursement transaction. In particular, he says he was asked to explain the standard that applies to a solicitor in delivering a trust cheque to an individual who purports to be the good and proper recipient of it. Nevertheless, the report answers the questions set out in the instructing letter.

Rule 11-6 Requirements

[80] In *Mazur v. Lucas*, 2010 BCCA 473, the Court discussed the Rule 11-6 requirements:

> [42] New Rule 11-6 expands on what an expert was required to state under old Rule 40A, but does not alter the general principle that it is essential for the trier of fact to know the basis of an expert opinion so that the opinion can be evaluated. The Rule has a dual purpose. The second purpose is to allow the opposing party to know the basis of the expert's opinion so that they or their counsel can properly prepare for, and conduct, cross-examination of the expert, and if appropriate, secure a responsive expert opinion.

[81] In *Maras*, the Court said it must be able to refer to the expert's factual assumptions as distinct from their opinions, otherwise the report may be inadmissible: see paras. 29, 66.

[82] Mr. Piamonte raised several issues stemming from Mr. Lack's failure to provide the factual assumptions upon which the opinion was based. Mr. Lack began a portion of his opinion entitled "Facts and Assumptions" without stating in his opinion that these were "the factual assumptions on which the opinion is based". He had been asked to assume that Mr. Piamonte considered Mr. Guvi to be his client. In his opinion, he inferred that because the plaintiff was the payee on the cheque for $422,925 that the plaintiff was the "real client" of Mr. Piamonte.

[83] Mr. Lack seems to have assumed, without explicitly saying so, that the plaintiff did not authorize Mr. Guvi to obtain the funds out of court and deliver those funds to the plaintiff. Thus, although Mr. Lack makes that assumption in his opinions, there is no factual basis set out in the report to this effect. Accordingly, the report in my view does not comply with Rule 11-6(f)(i).

[84] I assume that Mr. Lack did not state the factual assumptions on which his opinion was based for a specific reason and his careful reference only to his understanding of the "relevant scenario" does not meet the threshold requirements.

[85] In the instructing letter, the plaintiff's solicitor did not ask Mr. Lack to make an assumption about the communications between the plaintiff and Mr. Guvi.

[86] Mr. Lack was required to describe research he conducted that led him to form his opinion. He referred to a number of authorities of different courts concerning the standards of care for BC solicitors. He referred extensively to case law, but also to LSBC and CLEBC materials regarding best practices. He verified with CLEBC that relevant manuals and practice materials (apparently limited to the 'Advising British Columbia Businesses Manual' were available in October 2012).

[87] It is unclear whether the reference to these manuals and practice materials are those set out in the Secondary Materials described on page 3 of the Lack report.

Without his confirmation, I assume that he relied only on the Advising British Columbia Businesses Manual.

[88] Nonetheless, Mr. Lack also referred to his attendance at the Vancouver Courthouse Library where he reviewed multiple books and materials on the subjects of professional liability, best and effective practice and professional conduct, and specifically those library materials that speak to the issue of client identification. Contrary to Rule 11-6(1)(iii), he did not provide any list or identifying information concerning the materials he reviewed or relied on.

[89] Mr. Lack asserted that the CLEBC materials are an invaluable daily reference for him and "so ought to be for every transactional lawyer in British Columbia". He relied on these materials throughout his career and stated that they would have been standard in 2012 as well. He said the materials "are both the best practices laid out clearly and are also the daily immediate reference for individual situations".

[90] He also opined that every lawyer in BC would be familiar with the necessity of bringing reasonable care, skill and knowledge to the legal task asked of them and would distill what that means in the context of that specific task. Interestingly, this statement appears to be more speculation about a fact rather than an opinion based on a proven fact or assumed fact. It does not address the standard of care of a reasonably competent and diligent solicitor in dealing with a government cheque payable to the corporation.

[91] Mr. Lack acknowledged that the facts he was asked to assume to be true included that Mr. Piamonte considered Mr. Guvi to be his client. He said he did "not distill" these assumptions.

[92] Mr. Lack was questioned about his statement that he believed the plaintiff was Mr. Piamonte's client because the plaintiff was the payee on the cheque that had come to Mr. Piamonte.

[93] Mr. Lack did not know or was not told whether the plaintiff communicated to Mr. Piamonte or if Mr. Piamonte ever communicated with Mr. Bandesha. He said he did not know if the plaintiff ever asked Mr. Piamonte to act for it.

[94] Mr. Piamonte contends that in answer to the questions posed by plaintiff's counsel, Mr. Lack did not give reasons for the opinions he gave other than to point to the LSBC materials and CLEBC manuals. Moreover, Mr. Lack's propensity to frame his opinion as "I assert" various facts, gives his opinions an impression that he was attempting to persuade readers about his conclusions rather than providing fair, objective and non-partisan opinions: *White Burgess* at para. 50.

[95] In *Pichugin v. Stoian*, 2014 BCSC 2061, Justice Skolrood (as he then was) dealt with this point:

> [15] With respect to the February 6, 2014 report, I note, as submitted by the plaintiff, that the requirements of rules 11-2(2) and 11-6(1) are mandatory in that in order for an expert report to be admitted, those requirements must be complied with. That said, under Rule 11-7(6), the court has a discretion to permit an expert to testify where the rules have been breached, provided that there is no prejudice to the opposing party or the interests or justice require it.
>
> [16] In *Perry v. Vargas*, 2012 BCSC 1537, Mr. Justice Savage held that this discretion must be exercised sparingly and that the interests of justice as referred to in Rule 11-7(6)(c) are not a licence to ignore the requirements set out elsewhere in the rules.

[96] I am satisfied that the Lack report does not comply with Rule 11-6(1)(f)(i), (ii) and (iii) because it:

1. does not describe all factual assumptions on which the opinion is based;
2. includes factual assumptions contrary to those set out by counsel;
3. does not list every document relied on in forming the opinion; and
4. does not describe the details of the research that led to the formation of the opinion or the sources reviewed in preparation for forming the report and listing documents apparently reviewed in forming the opinion.

[97] Mr. Lack's failure to include this information in his report goes to the heart of his opinion that Mr. Piamonte owed a duty to the plaintiff to contact its directors and obtain specific instructions to accept Mr. Guvi's involvement in receiving the cheque and delivering same to him. Non-compliance with Rule 11-6 can render an expert report inadmissible.

Qualifications

[98] In Mr. Lack's report, he described his experience in residential and commercial real estate transactions. His practice is heavily oriented to private lending transactions, which he described as fast paced, high volume and involving disbursing funds to many parties on a continuous basis. He has acted for clients in over 10,000 real property and business transactions.

[99] He described his experience by reference to CLEBC papers, lectures and advising other lawyers. He said, "I take that I am being sought to provide these expert opinions (in this case) as a testament to my experience as a busy and seasoned solicitor practitioner". He contends that he is well aware of issues surrounding the disbursement and delivery of trust funds during his 28 years of practice.

[100] On cross-examination, Mr. Lack said that he and his firm employ policies dealing with trust funds whereas other firms are guided by the mandated rules of the LSBC. He does not know what other firms do, but assumes that they conform to the LSBC Rules. He said he relies on other lawyers to follow those rules in his dealings with them.

[101] Mr. Lack was asked about his expertise in dealing with the delivery and receipt of trust funds. He said that in 30 years of acting for private lending clients, an increased sense of urgency and worry about fraud has developed. He said in his business, he adheres to a higher level of care and responsibility than the ordinarily competent solicitor because of his private lending work. He noted that litigators often do not have trust accounts because they often pay funds directly to clients instead.

However, in his practice, all funds coming into the firm, except for fees, are deposited to multiple trust accounts.

[102] Mr. Lack has not been involved with litigators and is not familiar with their practices concerning the handling of funds. His limited experience with litigators has been in foreclosure proceedings although he believed that generally, litigators follow the same LSBC Rules but have fewer trust fund transactions.

[103] Mr. Lack is not familiar with how litigators might disburse money to others on behalf of their clients. However, he is aware of some litigators who do not use trust accounts and are not subject to the same practical consequences as solicitors. He has never had discussions or spoken at seminars dealing with receipt of third-party cheques by solicitors. He may have been involved in situations where he was custodian of a cheque subject to conditions but is not familiar with how other lawyers deal with such things and has never considered these possibilities.

[104] Mr. Lack recognized that his clients will send an array of different people (including couriers) to collect cheques from his office. He admitted that funds couriered or mailed may be sent to an unknown individual. He said this scenario is such a small point he has never dealt with how lawyers deal with cheques payable to third parties.

[105] This comment by Mr. Lack is fundamental to the issues in this case but he does not set out any opinion concerning the standard of a reasonably competent and diligent solicitor.

[106] The plaintiff relied on *Tiffin Holdings Ltd. v. Millican* (1964), 49 D.L.R. (2d) 216 at 219, 1964 CanLII 637 (Alta. S.C.) [*Tiffin*], aff'd [1967] S.C.R. 183, 1967 CanLII 102, setting out the obligations owed by lawyers. In *Lau and Aptex Canada Corporation v. Ogilvie*, 2010 BCSC 1589, Justice Masuhara summarized the standard of care owed by a solicitor retained to prepare and explain the effect of an agreement, as follows:

> [32] The obligations of a lawyer were defined in *Tiffin Holdings Ltd. v. Millican* (1964), 49 D.L.R. (2d) 216 at 219, 50 W.W.R. 673 (Alta. S.C.), aff'd [1967] S.C.R. 183, and have been adopted by many decisions in this province: *Zink v. Adrian*, 2005 BCCA 93; *Chaster (Guardian ad Litem of) v. LeBlanc*, 2007 BCSC 1250; *Olenga v. Sisett & Co.*, 2010 BCSC 271:
>
> 1. To be skilful and careful;
>
> 2. To advise the client on all matters relevant to the retainer, so far as may be reasonably necessary;
>
> 3. To protect the interest of the client;
>
> 4. To carry out the client's instructions by all proper means;
>
> 5. To consult with the client on all questions of doubt which do not fall within the express or implied discretion left to the lawyer; and
>
> 6. To keep the client informed to such an extent as reasonably necessary, according to the same criteria.
>
> [33] In *Tiffin*, it was also said at para. 7:
>
> It is not enough to prove that the lawyer has made an error of judgment or shown ignorance of some particular part of the law; it must be shown that the error or ignorance was such that an ordinarily competent lawyer would not have made or shown it.
>
> [Emphasis added.]

[107] In *Tiffin* at 218, the Court said there was no "evidence tending to show what an ordinarily competent lawyer would have done". Here, Mr. Lack focused on the solicitor-client relationship on the question of the lawyer delivering a cheque to someone other than the payee. Mr. Lack's opinion does not address the principal issue of the actions of a reasonably competent and diligent solicitor.

[108] Moreover, the Court in *Tiffin* at 220 concluded that negligence was not proved because the lawyer had failed to anticipate the criminal acts on the part of the borrower.

[109] This issue is accentuated because Mr. Lack described his level of practice in the area of private lending as a specialty of sorts, and he practices at a level above the ordinarily competent lawyer. He said solicitors in his firm try to lead the profession in responsible management.

[110] He testified that his goals and CLEBC's goals are to inform lawyers about the best practices that inform real estate practitioners. He said the CLEBC checklists are invaluable but he could not comply with all of those recommendations in his practice.

[111] It appears that Mr. Lack concludes that the LSBC's requirements for identifying individual or corporate clients represent generally the standards of reasonably competent lawyers in BC.

[112] Having made that statement in his opinion, Mr. Lack discusses identification, verification, record keeping and withdrawal of representation contained in the LSBC Rules. Other than his statement that LSBC Rules set standards for reasonably competent lawyers, he provides no opinion. He "asserts" what he does in his own practice and what is common in real estate and private lending transactions, but he does not comment on the standards of reasonably competent lawyers.

[113] If the report simply informs trial judges what should have occurred applying the LSBC Rules, he has not demonstrated his qualifications to give this opinion. Moreover, professional guidelines are not equivalent to a standard of solicitor's negligence.

[114] As noted above, Mr. Lack went to the library to refresh his memory about principles of a lawyer's standard of care. Mr. Lack said that any lawyer or judge could investigate the standard of care of a solicitor by reading these cases and material.

[115] Mr. Lack testified that in his years of acting for lenders he is often required to ascertain which individual or other party was to receive the loan proceeds his clients were advancing.

[116] On another topic, Mr. Lack has no experience in obtaining money out of court nor does he know what other lawyers do when obtaining money paid into court.

[117] Mr. Lack did not have any experience dealing with a situation where a cheque payable to one party is deposited to an account of another party. He said that

whenever he is asked to deliver a cheque to a person other than the payee he turns his mind to whether the lawyer is "comfortable" that the cheque will arrive at the right place.

[118] Mr. Lack was asked about delivering funds to individuals collecting those funds from his office; he said he would "usually do so only after I have discussed the delivery with the client".

[119] In his answer to Question 4 he described "good and proper practices with respect to handling trust funds and being the fiduciary of those funds". These are not the facts set out in the plaintiff's lawyer's instructions concerning preparation of this report because Mr. Piamonte was not handling "trust funds" but a cheque payable to the plaintiff. Mr. Lack recognized that many clients send colleagues assistance family or couriers to collect cheques from his office or courier funds where the recipient may be unknown. Dealing with his own practice, he said individuals picking up cheques from his office usually do so after he has discussed delivery with the client. Although he described his personal practice, he did not opine on the care to be taken by reasonably competent and diligent lawyers.

[120] Mr. Lack also went on to assert that Mr. Piamonte's "delivery of funds to Mr. Guvi proved to be a regretful error and was an error that would have been avoided if the lawyer had better determined that the plaintiff was a beneficiary of his services, hence, his "client". His opinion is given in the context of "duties and daily real life practice". It was unclear if he was referring to his personal practice or the practice of a reasonably competent and diligent solicitor.

[121] Again, the Facts and Assumptions in the report do not refer to any handling of trust funds by Mr. Piamonte, nor what he meant when he said that Mr. Piamonte should have "better determined" that the plaintiff was beneficiary of his services.

[122] On page 11, Mr. Lack speculated that if Mr. Guvi was permitted to direct the lawyer, that "approval should have come the directors of Shortreed". On this point, he may have inferred that the directors of the plaintiff had not permitted Mr. Guvi to

direct the lawyer but no such assumption was made in his report. The foundation of any conclusion in his opinion on Question 4 is not established.

[123] Mr. Lack said that he focuses on risks of fraud that can occur when cheques are sent out by lenders' lawyers. He could not say that he had never released a cheque to a person for delivery without express instructions. He said that other lawyers make cheques available at their front desks for delivery to couriers or through other means of pickup. The best practices involve seeking direction from the payee on the cheque but this does not happen in every case. He does not know if other lawyers follow the same rigorous standard used in his office.

[124] Mr. Piamonte contends Mr. Lack does not have an understanding or awareness of the standard practices of normally competent lawyers for several reasons. He practices at a much higher level of practice standards, in the nature of an expert. Except for what he takes from the LSBC Rules, Mr. Lack has no knowledge of the standards of care exercised by other practitioners in circumstances similar to this case other than assumptions about their knowledge of the Rules. He had no knowledge of the standards to be applied when "reasonably competent lawyers" might come into possession of cheques payable to third parties and how such a cheque should be dealt with.

[125] *Midland Bank Trust Co. v. Hett, Stubbs & Kemp*, [1979] Ch. 384, [1978] 3 All E.R. 571 has often been quoted in this Court and the Court of Appeal on the question of professional standards. For instance, Justice Newbury (as she then was), noted in *Marbel Developments Ltd. v. Pirani*, [1994] B.C.J. No. 135 at para. 30, 1994 CanLII 652 (S.C.) [*Marbel Developments*]:

> With all due respect to Ms. Vogt, I must say that her testimony reminded me of the comments of Oliver, J. in **Midland Bank, supra**:
>
> > "I must say that I doubt the value, or even the admissibility, of this sort of evidence, which seems to be becoming customary in cases of this type. The extent of the legal duty in any given situation must, I think, be a question of law for the court. Clearly, if there is some practice in a particular profession, some accepted standard of conduct which is laid down by a professional institute or sanctioned by common usage, evidence of that can and ought to be received. But evidence which

> really amounts to no more than an expression of opinion by a particular practitioner of what he thinks he would have done had he been placed, hypothetically and without the benefit of hindsight, in the position of the defendants is of little assistance to the court, whilst evidence of the witnesses' view of what, as a matter of law, the solicitor's duty was in the particular circumstances of the case is, I should have thought, inadmissible, for that is the very question which it is the court's function to decide." [at 582]
>
> [Emphasis added.]

[126] In the words of Newbury J., reliance on publications or checklists widely circulated in the profession may indicate a standard “sanctioned by common usage” and useful in a judge’s analysis. However, expert evidence indicating what a competent diligent solicitor should have done is not helpful.

[127] In *Esser v. Luoma*, 2004 BCCA 359, Newbury J.A. said:

> [41] With respect, this amounts essentially to a statement that 'Because an additional step would have foiled the scheme, Ms. Luoma was negligent in failing to take that step.' This cannot be the correct standard, or a legally correct inference. The question is what a reasonably competent notary would have been expected to do in the circumstances in which Ms. Luoma found herself. Further, I must say that Mr. Youngson's evidence reminded me of the comments of Oliver J. in ***Midland Bank Trust Co. Ltd. v. Hett, Stubbs & Kemp (a firm)*** [1978] 3 All E.R. 571 (Ch. Div.)…
>
> > As I stated in ***Marbel Developments Ltd. v. Pirani*** (1994) 18 C.C.L.T. (2d) 229 (B.C.S.C.), I do not go so far as to conclude that Mr. Youngson's opinion was inadmissible, but like Oliver J., I suggest that a publication or checklist widely circulated in the legal profession, indicating a standard "sanctioned by common usage", would have been more useful and more persuasive. (See also ***Clark v. Poje*** (1989) 38 B.C.L.R. (2d) 110 (B.C.C.A.), at 117; ***De Yong v. Weeks*** (1984) 33 Alta. L.R. (2d) 338, [1984] A.J. No. 2518 (Alta. C.A.), at para. 47.)

[128] In *R. v. Aitken*, 2012 BCCA 134 at para. 73, leave to appeal to SCC ref’d, 35071 (7 March 2013), the Court confirmed that the primary requirement for qualifying an expert is that the expert must be shown to have acquired special or peculiar knowledge through study or experience in respect of the matters on which the opinion is based; see also *Mohan* at 25.

[129] While I accept that Mr. Lack has experience in standards of practice for lawyers acting for lenders in high pressured and complex cases, he candidly conceded having no knowledge or experience in the handling of cheques received from court and payable to clients or stemming from litigation settlements. He does not know what a reasonably competent lawyer's standard of practice might be in those circumstances other than in regard to his reliance on LSBC Rules and CLEBC checklists. His opinions are not beyond the court's experience in this area.

[130] Mr. Piamonte properly points out that Mr. Lack referred in his opinion to a CLEBC publication because of its importance to lawyers acting for businesses or corporations. This publication appears to refer to the Advising British Columbia Businesses Manual. He did not set out or describe what portions of this document he relied on in coming to a conclusory opinion about the standard of a competent lawyer in BC. He suggested that these materials regarding "best practices for a lawyer" are daily reference material for him and "ought to be for every transactional lawyer in British Columbia". He did not provide any statement or summary of what parts of this document he relied on, although he appended nine pages without articulating what "best practice" he gleaned from the CLEBC manual. Absent Mr. Lack's application of the CLEBC manual, it does not appear to address the circumstances faced by Mr. Piamonte when he gave the cheque to Mr. Guvi.

[131] Further, Mr. Lack's opinion turns on his belief that Mr. Piamonte should have made an inquiry with the payee of the cheque before delivering it to Mr. Guvi pursuant to the LSBC Rules. To the extent that this might be set out in the LSBC Rules and CLEBC manuals, those standards *per se* do not establish the standard of care owed by Mr. Piamonte.

[132] Moreover, where the practice of an expert is at a high level, that person's normal practice is of little assistance in determining the standard of reasonable competence of a solicitor. See the comments of Newbury J. in *Marbel Developments* at para. 34:

> From this I take it that any solicitor taking on a task for a client must bring reasonable care and skill to that task, regardless of his geographical location and practising environment. In other words, the extent of the solicitor's duty is determined by the work undertaken, rather than by his or her particular circumstances. Further, and subject to any different standard of care imposed by the terms of the retainer, the standard is only one of reasonable competence: it is not a standard of perfection - which usually seems eminently reasonable in hindsight - or of strict liability. To quote yet again from **Midland Bank, supra**:
>
> > "Now no doubt the duties owed by a solicitor to his client are high, in the sense that he holds himself out as practising a highly skilled and exacting profession, but I think that the court must beware of imposing on solicitors, or on professional men in other spheres, duties which go beyond the scope of what they are requested and undertake to do. It may be that a particularly meticulous and conscientious practitioner would, in his client's general interests, take it on himself to pursue a line of enquiry beyond the strict limits comprehended by his instructions. But that is not the test. The test is what the reasonably competent practitioner would do having regard to the standards normally adopted in his profession, and cases such as **Duchess of Argyll v. Beuselinck, Griffiths v. Evans** and **Hall v. Meyrick** demonstrate that the duty is directly related to the confines of the retainer." [at 583]
>
> In this regard, I do agree with Mr. Abrioux that insofar as Ms. Vogt may be regarded as a "particularly meticulous" practitioner, her normal practice is again of limited assistance in formulating the standard of reasonable competence.
>
> [Emphasis added.]

[133] In any event, the LSBC Rules and CLEBC manuals can be placed before the court without the necessity of relying on the Lack report. Justice Newbury in *Marbel Developments*, after quoting from *Midland Bank*, said at para. 30:

> I do not go so far as to conclude that Ms. Vogt's opinion was inadmissible in this case, but like Oliver, J. I suggest that a publication or checklist widely circulated in the legal profession, indicating a standard "sanctioned by common usage", would have been more useful.

[134] In *Galambos v. Perez*, 2009 SCC 48, Justice Cromwell discussed the impact of rules of professional conduct and the law of negligence:

> [29] However, two points must be made with respect to this rule of conduct. The first is that there is an important distinction between the rules of professional conduct and the law of negligence. Breach of one does not necessarily involve breach of the other. Conduct may be negligent but not

> breach rules of professional conduct, and breaching the rules of professional conduct is not necessarily negligence. Codes of professional conduct, while they are important statements of public policy with respect to the conduct of lawyers, are designed to serve as a guide to lawyers and are typically enforced in disciplinary proceedings. They are of importance in determining the nature and extent of duties flowing from a professional relationship: *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, at p. 425. They are not, however, binding on the courts and do not necessarily describe the applicable duty or standard of care in negligence: see, e.g., *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235, at pp. 1244-45; *Meadwell Enterprises Ltd. v. Clay and Co.* (1983), 44 B.C.L.R. 188 (S.C.); S. M. Grant and L. R. Rothstein, *Lawyers' Professional Liability* (2nd ed. 1998), at pp. 8-10.
>
> [Emphasis added.]

[135] In this case, Mr. Lack appears to have relied solely on the publications to opine on the duty of care owed by Mr. Piamonte in this case. As noted, these publications provide important information to the profession and govern certain behaviours of lawyers. However, Mr. Lack said these documents describe "best practices" to lawyers at the highest level, not ordinary competent lawyers. Moreover, these rules did not address the issue faced by Mr. Piamonte when he handed the cheque to Mr. Guvi.

[136] Mr. Lack does not set out his opinion concerning the standard of ordinary competent and diligent solicitors concerning the handling of the cheque by Mr. Piamonte.

[137] Furthermore, Mr. Lack appears did not recognize that LSBC Rule 3-94(iv) (verification); Rule 3-95, Rule 3-96 (identifying directors shareholders and owners); Rule 3-97 (client identification and verification in non-face-to-face transactions); Rule 3-98 (timing of verifications for individuals); and Rule 3-99 (timing of verification for organizations) do not apply when a lawyer receives money paid pursuant a court order or as settlement of any legal or administrative proceedings. This omission further undermines my assessment of the reliability of his opinion and its admissibility in this trial.

[138] For these reasons, I conclude that Mr. Lack has not demonstrated that his special skills obtained through study or experience qualify him to opine on the

standards of care for a lawyer in Mr. Piamonte's circumstances, keeping in mind the comments in *Mohan* at 25:

> … the evidence must be given by a witness who is shown to have acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify.
>
> [Emphasis added.]

Necessity

[139] Necessity is measured by whether the opinion is outside the experience and knowledge of a judge or jury. It must be assessed in light of its potential to distort the fact-finding process. This is not a strict standard; however, experts cannot be permitted to usurp the functions of the trier of fact: *Mohan* at 23–24.

[140] It is not sufficient that the evidence be helpful—it must be outside the experience and knowledge of a judge. The evidence must be necessary to enable the court to appreciate the issues due to their "technical nature": see *Mohan* at 23.

[141] Taking into account the facts noted above, and the comments in *Marbel Developments* and *Midland Bank*, I am satisfied that the substance of Mr. Lack's conclusions are not necessary to inform this Court on the central issue of the standard of care that governed Mr. Piamonte. Mr. Lack's opinion falls into the category of doubtful value or admissibility because it speaks to his opinion of what he thinks should have been done rather than describing a practice in the profession of accepted conduct: *Marbel Developments* at para. 30; *Midland Bank* at 582.

[142] I do not accept the plaintiff's submissions that the objection to the report is based simply on Mr. Lack's articulation of his opinion and how it is worded. The shortcomings in this report go to the necessity of the opinion based on his confusing explanation of his own practice, the Rules and manuals, and shortcomings in his personal grasp of the standards of the competent and diligent lawyer compared with his personal practice.

[143] I accept the plaintiff's claim that the application of legal profession standards by a Law Society can inform a court about practice standards but are not binding as standards in and of themselves: *Galambos* para 29.

[144] Mr. Lack's apparent reliance on CLEBC materials and the LSBC Rules in formulating his opinion are available to the Court for assessment of the standard of care of a reasonably competent solicitor in BC. To the extent Mr. Lack formed his opinion with the help of these the sources, I am satisfied the Court is able to form its opinion on those issues without reliance on his opinion.

Ultimate Issue

[145] It is well understood that expert opinions are not refused admission in trials simply because they address the ultimate issue.

[146] However, expert opinion must provide information beyond the trial judge's experience or knowledge and it must meet that test as a condition of admissibility: *Abbey* SCC at 42.

[147] Experts should not be permitted to make findings of fact or rulings of law that fall within the role of trial judges: *Murray* at paras. 12–15.

[148] In answering Question 1, Mr. Lack made a finding of fact concerning the handing over of the cheque to Mr. Guvi contrary to the facts and assumptions he was asked to make. Mr. Lack concluded Mr. Piamonte was acting for the plaintiff, notwithstanding that he was instructed to assume Mr. Piamonte believed he was acting for Mr. Guvi.

[149] Mr. Lack then gave an opinion on the ultimate issue as follows:

> The lawyer may not have expected that a realtor was about to commit a wrongful act, but a reasonably competent lawyer could have avoided being a participant in this fraud if good and proper "know your client" verification and communication had been undertaken with Shortreed. I assert that that ought to have been done, but, unfortunately, was not done by the lawyer to the standard expected and required."
>
> [Emphasis added.]

[150] In responding to Question 4, Mr. Lack expressed his opinion, again on the ultimate question. He said:

> I provide my expert opinion in that context of defined duties and daily real life practice. In that regard, I assert that the Lawyers delivery of funds to Mr. Guvi proved to be a regretful error and was an error that would have been avoided if the lawyer had better determined that Shortreed was the beneficiary of his services, and hence, his client. From that determination the lawyer should have taken the good and proper(?) to identify and verify Shortreed. If Mr. Guvi was permitted to direct the lawyer, that approval should have come the directors of Shortreed.

[151] As noted above, there are no facts or assumptions in Mr. Lack's opinion suggesting that the plaintiff did not authorize Mr. Guvi to act on its behalf or in its stead to receive the cheque from the court. In the opinion, Mr. Lack referred to only one director, Mr. Bandesha, notwithstanding that the plaintiff had three directors.

[152] In *Mohan* at 24, Justice Sopinka said that the rule excluding opinion evidence that usurps the function of the trier of fact is no longer generally applied but concerns underlying opinions that are close to deciding an ultimate issue remain. Nevertheless, questions of relevance and necessity may still lead to exclusion of that evidence.

[153] In my view, Mr. Lack's objectivity was obscured by his use of assertions of his own practice or conclusions that ought to follow from his observations. For example, he says:

> I assert that the Lawyer's delivery of funds to Mr. Guvi proved to be a regretful error and was an error that would have been avoided if the Lawyer had better determined that Shortreed was the beneficiary of his services and hence his client.

[154] I have considerable concern regarding the parts of Mr. Lack's opinion which appear to be argument disguised as opinion which combined with his opinion on the ultimate issue that the loss could have been avoided if the lawyer had acted differently are comments in the nature of argument or submission. When coupled with his words "I assert" he belies a misunderstanding of the role he was engaged in. His statement that Mr. Piamonte should have taken "good and proper to identify and

verify Shortreed" constitutes a conclusion should be decided by the court and not the expert.

[155] Mr. Lack was asked to: (a) describe the applicable standard of care for a solicitor in Mr. Piamonte's situation; (b) set out rules regarding client identification; (c) outline steps that a lawyer should take when receiving instructions from a person who purports to act for another party; and (d) describe the care that should be taken when handling funds belonging to a corporate client. He was not asked to identify "regretful" errors or comment on avoidance possibilities. He concluded "good and proper practices would likely have avoided the nasty result" without engaging a consideration of the standard of a reasonably competent and diligent lawyer. On this point, his conclusion cannot be helpful.

[156] Mr. Lack's opinion about what Mr. Piamonte "should have done" in those unique circumstances without specifying the standard of the reasonably competent lawyer led Mr. Lack to express his own legal conclusions not based upon or within the purview of his experience.

[157] In the admissibility analysis, I must decide whether the proposed opinion evidence will be of assistance because it provides helpful evidence on relevant matters that are outside of the judge's own experience and knowledge.

[158] I have taken into account the comments of Justice Southin in *Zink v. Adrian*, 2005 BCCA 93 at paras. 42–43 that trial judges should avoid findings of negligence against solicitors in the absence of expert opinions as to the standard of competent solicitors in area of law at issue. She believed that trial judges should restrict findings to non-technical matters or those of which an ordinary person may be expected to have knowledge include. See also, *Odobas v. Yates*, 2021 BCSC 2320.

[159] Although the general rule accepts that trial judges should avoid making findings on the standard of care of reasonably competent diligent solicitors, the rule cannot support admission of the expert's opinion that is otherwise found to be inadmissible.

[160] Moreover, Mr. Lack's opinion was to a large measure based on the LSBC Rules and CLEBC manuals which can be put into evidence to inform the court on the question of accepted standards laid down by the legal profession. This fact reinforces my view that the Lack report is unnecessary and prejudicial to the defendant.

Stage Two

[161] The second stage of the admissibility analysis deals with the gatekeeping function in which the court must decide whether the opinion evidence meets the preconditions to admissibility and are sufficiently beneficial to the process in spite of some harm to the trial process that may flow from the admission of the evidence: *Abbey CA* at para. 76.

[162] As I have concluded the Lack report does not meet the threshold requirements for admissibility set out in *Mohan*, I will not address the second stage also bearing in mind that the trend in jurisprudence is to "tighten the admissibility requirements and to enhance the judge's gatekeeping role": see *White Burgess* at para. 20.

Conclusion

[163] In summary, the Lack report does not meet the threshold requirements for admissibility. It was not presented in accordance with Rule 11-6, and is not necessary. Mr. Lack's opinion was based on the LSBC rules and CLEBC publications but not on a standard of conduct emanating from common usage. His opinion was premised on his standard of practice that is well above the standard of the common competent and diligent solicitor. His opinions were replete with descriptions of what he would have done in the circumstances. However, his background experience was insufficient to qualify him to give the opinions set out in his report concerning the standards of care of a reasonably competent and diligent solicitor in the shoes of Mr. Piamonte.

[164] Mr. Lack continually made findings of fact and findings of law that went beyond his instructions and gratuitously answered several questions that the court must deal with after hearing all of the evidence. Moreover, in the drafting of his report, he approached answers to the questions in much the same way counsel will likely argue the case after the evidence is concluded.

[165] Shortcomings in his conclusions such as "… approval should have come the directors of Shortreed" and his actions were a "regretful error and was an error that would have been avoided if the Lawyer had better determined that Shortreed was the beneficiary of his services, and his client" were more in the nature of argument rather than providing information that could have been helpful to the court.

[166] Even if the Lack report had met the threshold requirements, I would nevertheless exercise my discretion to preclude its admission, because it makes findings of fact and conclusions of law, presented in an argumentative manner coming close to usurping the function of the court. Although this type of the opinion does not always lead to exclusion of the opinion, I am satisfied his opinions in this case are not helpful or necessary.

[167] Counsel for the plaintiff argued that amendments or revisions could be made to render the report admissible. In my view, the cumulative flaws noted leave no way of saving this report by way of revision or amendment. The defendant's objections to the report have been known for a long time and were not met with any effort to revise the report. The defendant correctly objects because it is simply too late and he would be prejudiced.

[168] In the result, I find that Mr. Lack's opinion will not be admitted into evidence in this trial.

"Armstrong J."