KING'S BENCH FOR SASKATCHEWAN

Citation: **2024 SKKB 104**

Date: **2024 05 27**
Docket: QBG-SA-00920-2018
Judicial Centre: Saskatoon

BETWEEN:

FLOYD HEIDECKER AND SUSAN HEIDECKER

PLAINTIFFS

- and –

CARMEN CAMPBELL AND 100% REALTY ASSOCIATES LTD.

DEFENDANTS

Counsel:

Nikita B. Rathwell and Shelby A. Fitzgerald	for plaintiffs
Deryk J. Kendall	for defendants

JUDGMENT
May 27, 2024

HILDEBRANDT J.

INTRODUCTION

[1] The plaintiffs, Floyd Heidecker and Susan Heidecker, collectively [the Heideckers], now of Warman, Saskatchewan, have, by their amended statement of claim dated August 8, 2018, claimed damages in negligence and breach of contract against the defendants. The Heideckers now seek an order for summary judgment, pursuant to Rules 7-2 and 7-5 of *The King's Bench Rules*, on a joint and several basis, against the defendants, Carmen Campbell [Ms. Campbell] and 100% Realty Associates

Ltd. [100% Realty], together with pre-judgment interest and solicitor and client costs.

[2] 100% Realty is a real estate brokerage corporation with which Ms. Campbell, a real estate agent, was associated, albeit not employed. In May of 2016, the Heideckers lived in Ottawa, Ontario but wished to relocate to Saskatchewan to live closer to their adult daughter who, at the time, was single and lived in Osler, Saskatchewan. They retained Ms. Campbell to locate property for them, outlining certain criteria. When Ms. Campbell met with the Heideckers personally, over the course of several days, they viewed houses located in Osler, Warman, and Martensville.

[3] The plaintiffs made an offer to purchase a triplex property in Osler, 166 Alder Place [Alder property], on May 29, 2016. The Alder property was located in the same complex where the Heideckers' daughter resided at the time. After some negotiation, the offer was accepted, but was conditional on, among other things, the sale of the Heideckers' Ottawa home by August 15, 2016. Significantly, the contract included an option clause which enabled the sellers to continue to show the Alder property and receive offers from third parties. However, the sellers were obligated to give notice to the Heideckers if another offer was accepted. This would trigger a 48-hour period in which the Heideckers would have to remove the conditions to complete the purchase.

[4] The sellers of the Alder property did receive and accept another offer but Ms. Campbell, perhaps due to her father's health emergency, failed to open an email attachment on June 13, 2016 which provided the notice of this accepted offer. The Heideckers listed and sold their Ottawa property on June 16, 2016 and informed Ms. Campbell. When she contacted the seller's realtor, she discovered the 48-hour notice period on the Alder property had expired and the contract between the sellers and the Heideckers had been terminated.

[5] The Heideckers terminated their relationship with Ms. Campbell on June 27, 2016 and moved out of their Ottawa property August 22, 2016, coming to Saskatchewan. Through a different realtor, they purchased a larger standalone home in Warman [Warman home], taking possession of that property on October 16, 2016. In the interim period, the Heideckers resided with their daughter in Osler. In 2020, the plaintiffs' daughter, together with her partner, daughter, and two stepchildren, also moved to Warman.

[6] The plaintiffs incurred expenses following termination of the contract on the Alder property, all of which they assert are the responsibility of the defendants. The Heideckers also claim considerable damages. While not acceding to the quantum of the damages or expenses claimed, Ms. Campbell has admitted liability, as noted at paras. 3 and 4 of the statement of defence, in the contract context, in failing to inform the plaintiffs that the 48-hour clause to remove conditions had been triggered on June 13, 2016. Indeed, she accepted responsibility as soon as she became aware of the missed notice, as outlined in her email to the Heideckers of June 16, 2016. 100% Realty maintains that it is not vicariously liable for the actions of Ms. Campbell. However, the plaintiffs assert that they have a direct claim of negligence against 100% Realty for breach of duty to exercise reasonable skill and care in the period following termination of the contract regarding the Alder property.

[7] Along with the issue of the validity of the damages claimed, there is a question of the potential liability on the part of 100% Realty. However, in terms of the context in which these legal issues are to be considered, the only factual disagreement pertains to whether there were other comparable properties available in Osler at the pertinent time.

[8] With this background, I turn now to consideration of the issues pertaining to the application for summary judgment.

PRELIMINARY ISSUE

[9] The Heideckers, as noted, seek summary judgment against the defendants. In this context, there is an initial question of whether summary judgment is appropriate in the circumstances of the case, recognizing the provisions of Rule 7-5(1) and (2), which state:

> 7-5(1) The Court may grant summary judgment if:
>
> (a) the Court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or
>
> (b) the parties agree to have all or part of the claim determined by summary judgment and the Court is satisfied that it is appropriate to grant summary judgment.
>
> (2) In determining pursuant to clause (1)(a) whether there is a genuine issue requiring a trial, the Court:
>
> (a) shall consider the evidence submitted by the parties; and
>
> (b) may exercise any of the following powers for the purpose, unless it is in the interest of justice for those powers to be exercised only at a trial:
>
> (i) weighing the evidence;
>
> (ii) evaluating the credibility of a deponent;
>
> (iii) drawing any reasonable inference from the evidence.

[10] The parties are on common ground that there are no genuine issues requiring a trial, an assessment with which I agree. Counsel for the plaintiffs, at para. 32 of the brief filed on behalf of the Heideckers, summarized the circumstances well:

> 32 … This matter is largely document-driven, and the documents involved are limited and uncontentious. The matter in dispute is not complex, as it deals with basic principles of negligence and breach of contract. Furthermore, there are a limited number of witnesses providing evidence, and the same evidence would be presented if there

> were a trial of the matter. The factual evidence provided is largely not in dispute; it is the parties' interpretation of the meaning of that evidence, and the result of applying the law to that evidence to determine damages, that is in dispute. …

[11] With respect to the factual disagreement noted earlier, pertaining to whether there were other comparable properties in Osler, the fact-finding powers of the court noted in Rule 7-5(2) assist. In this regard, the Supreme Court of Canada in *Hryniak v Mauldin*, 2014 SCC 7, [2014] 1 SCR 87 [*Hryniak*], which reviewed Rule 20.04 of Ontario *Rules of Civil Procedure*, from which Rule 7-5 is, in part, derived, noted, at paras. 49 and 50:

> [49] There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.
>
> [50] These principles are interconnected and all speak to whether summary judgment will provide a fair and just adjudication. When a summary judgment motion allows the judge to find the necessary facts and resolve the dispute, proceeding to trial would generally not be proportionate, timely or cost effective. Similarly, a process that does not give a judge confidence in her conclusions can never be the proportionate way to resolve a dispute. It bears reiterating that the standard for fairness is not whether the procedure is as exhaustive as a trial, but whether it gives the judge confidence that she can find the necessary facts and apply the relevant legal principles so as to resolve the dispute.

[12] In *Tchozewski v Lamontagne*, 2014 SKQB 71 [*Tchozewski*], Barrington-Foote J. (as he then was) echoed these comments, at para. 30. The *Hryniak/Tchozewski* approach has been applied in numerous Saskatchewan cases since then. For instance, this shift toward expeditious resolution of legal disputes was recognized in *Shermet v Miller*, 2015 SKQB 34 at para 34, 468 Sask R 228:

> [34] In *Hryniak* the court very clearly directs trial courts to interpret summary judgment provisions broadly to allow for an

> expeditious resolution of legal disputes between parties. In the words of Karakatsanis J. at para. 28, "[t]his requires a shift in culture". The shift in culture requires a movement from a presumption that matters must proceed to trial on disputes to an understanding that those disputes can and should be resolved summarily in the appropriate circumstances.

[13] Finally, Rule 1-3 of *The King's Bench Rules* encourages resolution of claims in a cost-effective fashion, with a view to identifying "the real issues in dispute".

[14] On the affidavit and other documentary evidence available, this court is able to draw the necessary findings of fact and apply the law to those facts. It would not be cost effective to require the matter to proceed to trial. Accordingly, for the reasons noted above, this matter may be determined by way of summary judgment. I turn now to the substantive questions of liability and damages.

SUBSTANTIVE ISSUES

[15] Although there are several sub-issues pertaining to each of the questions of liability and damages, which will be addressed below, the general questions are:

1. Are either of the defendants liable in negligence or breach of contract?

2. What are the plaintiffs' damages?

[16] For the reasons which follow, I find that only the defendant, Ms. Campbell, is liable to the plaintiffs, in keeping with her admission of liability. Accordingly, judgment may be entered against her. However, the action must be dismissed as against 100% Realty. Further, regarding damages, the award to the plaintiffs cannot be as high as what the Heideckers have claimed as they are not entitled to be put in a better position, by an award of damages, than they would have been but for the breach of contract or negligence of the defendant.

ANALYSIS

1. Are either of the defendants liable in negligence or breach of contract?

a) Ms. Campbell

[17] Regarding the defendant, Ms. Campbell, it is not disputed that she had been engaged by the Heideckers to assist them in locating and purchasing a home in Saskatchewan. They had signed an agency disclosure agreement with her on May 29, 2016. Also on that day, the Heideckers had placed an offer on the Alder property, the end unit of a triplex. This offer was, among other things, subject to the Heideckers' sale of their Ottawa home. An option clause form was also agreed upon, which permitted the sellers of the Alder property to continue to show the property and, if they wished to accept another offer, the plaintiffs would have 48 hours to remove all conditions and finalize their offer.

[18] Late in the evening of June 13, 2016, the listing agent for the venders of the Alder property sent Ms. Campbell an email providing notice that the sellers had accepted another offer, which was subject to the plaintiffs' right to remove their conditions within 48 hours. As Ms. Campbell acknowledges in her affidavit sworn October 12, 2022, at para. 7, this "time sensitive email was missed".

[19] On June 16, 2016, the plaintiffs advised Ms. Campbell that their Ottawa home had been sold and, therefore, the only outstanding matter on the Alder property was the home inspection. Shortly thereafter, Ms. Campbell learned that the 48-hour time limit had lapsed. Despite her pleas to the vendor's listing agent, the Alder property was ultimately sold to the subsequent purchasers. Ms. Campbell immediately notified the Heideckers and, in her email of June 16, 2016, accepted full responsibility, stating,

"This is totally my fault. I will do anything I can at this point to try to fix".

[20] At paras. 3 and 4 of the statement of defence dated August 29, 2018, Ms. Campbell's liability is again accepted:

> 3. The Defendant Campbell admits that she misinterpreted the e-mail sent to her in the evening of June 13, 2016, and, as a result, did not inform the Plaintiffs that the 48-hour clause to remove conditions started on that date and at that time.
>
> 4. The Defendant Campbell states that her duty to the Plaintiffs is properly described as a contractual one and not a fiduciary one.

[21] This admission by Ms. Campbell is grounded in contract. The agency disclosure agreement entered into between Ms. Campbell and the Heideckers, Exhibit "A" to Susan Heidecker's affidavit sworn August 11, 2022, includes in the description of professional services the statement that the Heideckers could "expect service that is loyal to your interests, obedient to your instructions, confidential, accountable, honest and forthcoming when dealing with you and others". Ms. Campbell, as she has acknowledged, breached this obligation.

[22] I also accept that Ms. Campbell owed a duty of care to the Heideckers, which was breached in this case. In *Charter-York Ltd. v Hurst*, [1978] OJ No 2734 (Ont H Ct J)(QL) at para 28, leave to appeal to SCC refused [1979] SCCA No 2 (QL), the court applied the duty and standard of care on insurance agents to real estate agents:

> 28 I turn now to the vendor's claim against the agent, W. Frank Real Estate Limited, for breach of its obligations as agent under the exclusive listing agreement it had with the vendor. Grant J. had an opportunity to consider the legal obligation of agents under contract, albeit insurance agents, in *Menna v. Guglietti*, [1970] 2 O.R. 146, [1970] I.L.R. 1-308, 10 D.L.R. (3d) 132. At p. 150 [O.R.] he cited with approval from Halsbury's Laws of England, 3rd ed., Vol. 22, pp. 47-8, para. 80, the following standard of conduct that may be implied to such contract. **I find it equally applicable to the present case involving contracts with real-estate agents**:
>
> > All agents, whether paid or unpaid, skilled or unskilled, are under a legal obligation to exercise due care and skill in performance of

> the duties which they have undertaken, a greater degree of care being required from a paid than from an unpaid, and from a skilled than from an unskilled, agent. **The question in all such cases is whether the act or omission complained of is inconsistent with that reasonable degree of care and skill which persons of ordinary prudence and ability might be expected to show in the situation and profession of the agent**.
>
> [Emphasis added]

[23] In failing to review the email remitted by the vendor's realtor and inform the Heideckers of the 48-hour notice period triggered therein, Ms. Campbell breached the relevant standard of care. This view is reinforced in her admission to the Saskatchewan Real Estate Commission and the consent order flowing therefrom, a copy of which is Exhibit "A" to the affidavit of Susan Heidecker sworn November 2, 2022.

[24] While I accept that the Heideckers did suffer some damages as a result of this breach, thus demonstrating the requisite causal link necessary for a finding of negligence, the compensation to which they are entitled is not nearly as extensive as they claim, as will be discussed further below.

b) 100% Realty

[25] With respect to 100% Realty, the position of the defendants is that there can be no liability, given that Ms. Campbell was not an employee but an independent contractor. Counsel for the plaintiffs, in response, submit that they are not claiming vicarious liability on the part of 100% Realty, but asserting a proximate relationship grounding a duty of care to the Heideckers given the contact in the period following the failed purchase of the Alder property.

[26] On the question of vicarious liability, I accept the defendants' position. This cannot ground liability *vis-à-vis* the Heideckers. The independent contractor agreement found at Exhibit "A" to Ms. Campbell's affidavit of October 12, 2022, as well as her description of the arrangement and the independence she had in setting her

own hours and receiving and reporting her income to the Canada Revenue Agency [CRA], set out at para. 2 of her affidavit, confirm her status and satisfy the factors set out in *Warren v 622718 Saskatchewan Ltd.*, 2004 SKQB 346 at paras 14 and 19, [2005] 2 WWR 376:

> [14] The Federal Court of Appeal, in *Wiebe Door Services Ltd. v. Canada (Minister of National Revenue - M.N.R.)*, [1986] 3 F.C. 553 (F.C.C.) explored the distinction between the status of "independent contractor" and "employee" saying that an agreement as to status is not determinative of the relationship between the parties and a court must carefully examine the facts in order to come to its own conclusion. The best synthesis found in the authorities suggests that the fundamental test to be applied is this: "is the person who has engaged himself to perform the services performing them as a person in business on his own account?" There is no exhaustive list of considerations, and no strict rules exist as to the relative weight each consideration should carry. Control will have to be considered, as well as who provides the equipment and the helpers, what degree of financial risk is undertaken, what degree of responsibility is assumed for investment and management, what opportunity exists for profit, and is the individual already established in a business of his own?
>
> …
>
> [19] The Supreme Court has made it clear that the central question is whether the worker is "in business on his own account".

[27] A similar analysis and conclusion were reached in *McKay Career Training Inc. v Baker*, 2016 SKQB 215 at paras 206-208, 50 MPLR (5th) 271, where the realtor, Baker, was considered independent and therefore no liability was found against the defendant brokerage Royal LePage. Other aspects of the judgment were subject to appeal, at 2018 SKCA 83, 80 MPLR (5th) 183, but not this conclusion.

[28] Considering the evidence provided by Ms. Campbell in light of the case authorities, a claim against 100% Realty on the principle of vicarious liability for the actions of Ms. Campbell cannot be sustained. Again, however, the plaintiffs have indicated that their claim against 100% Realty is a direct claim in negligence. The Heideckers' position on this issue is summarized at paras. 41-44 of their brief of law:

> 41. The Heideckers submit that the Defendant Brokerage was also negligent.
>
> 42. Around June 23, 2016, the Heideckers spoke with the Defendant Realtor and Larry Stewart, a representative of the Defendant Brokerage, via telephone to discuss what had happened. When Mr. Heidecker expressed how stressed and anxious, they were feeling about the situation given the sale of the Ottawa Property, Mr. Stewart told them that they should back out of the sale of their Ottawa home. As the Heideckers already had signed the contract with the purchasers of the Ottawa Property, they would have been breaching their contract with the purchasers and opening themselves up to legal liability had they followed Mr. Stewart's advice. As such, and [*sic*] they declined to follow Mr. Stewart's suggestion.
>
> 43. While the Heidecker's [*sic*] contract was with the Defendant Realtor, when the Defendant Realtor failed to act on the X-Hour Notice and the sale of the Alder Property fell through, the Heideckers were in contact with the Defendant Brokerage as well as the Defendant Realtor. The Defendant Brokerage and the Heideckers therefore were in a sufficiently proximate relationship at that point to ground a duty of care.
>
> 44. At that point, the Defendant Brokerage owed the Heideckers a duty to exercise reasonable skill and care. Counselling the Heideckers to cancel the contract for the purchase of the Ottawa property is inconsistent with the reasonable degree of care and skill which real estate brokers of ordinary prudence and ability might be expected to show in the situation at hand. As such, the Heideckers submit that the Defendant Brokerage was negligent in its dealings with the Heideckers.
>
> [Footnotes omitted]

[29] The evidence relied upon for this position is found at paras. 5-7 of Floyd Heidecker's affidavit sworn August 11, 2022 and falls short of establishing a foundation for the submissions of counsel:

> 5. I communicated my disappointment and anxiety to both the Defendant Realtor and to Jeffrey Seager, the manager of the brokerage 100% Realty Associates Ltd. (the "Defendant Brokerage"). My text messages with Mr. Seager are attached hereto as Exhibit "A".
>
> 6. Around June 23, 2016, Susan and I spoke with the Defendant Realtor and Larry Stewart, a representative of the Defendant Brokerage, via telephone to discuss what had happened. When I

> expressed how stressed and anxious we were feeling about the situation given the sale of our Ottawa home, Mr. Stewart told Susan and I that we should back out of the sale of our Ottawa home. As we already had signed the contract with the purchasers of our Ottawa home, **I did not feel that backing out of that sale was something we could so, and we declined to follow Mr. Stewart's suggestion.**
>
> 7. Beyond the meeting referenced above, we also had to continue to follow up with the Defendant Brokerage because we had provided a $5,000.00 deposit to the Defendant Realtor and the Defendant Brokerage for the Alder Property that was not returned to us after the sale fell through. We eventually had to retain legal counsel to demand that the deposit be returned.
>
> [Emphasis added]

[30] A mere "suggestion" on the part of Larry Stewart [Mr. Stewart], as described by Mr. Heidecker, is very different than the "counselling" suggested by counsel. Further, although there is no evidence regarding the nature of the conditions on the sale of the Ottawa home, para. 23 of Exhibit "A" to Susan Heidecker's affidavit sworn November 2, 2022 indicates it was a conditional offer. The possibility of exploring the Heideckers' position *vis-à-vis* that conditional offer also does not equate with counsel's conclusion that the Heideckers would have been in breach and open to legal liability. The evidence of Floyd Heidecker is only that he "did not feel" they could back out of the contract. There is no indication that he sought legal advice on this matter.

[31] As to the text messages referenced by Floyd Heidecker, Jeffrey Seager [Mr. Seager] notes that, "Carmen will be working to find a property that fits your needs or the needs of the new buyer". There is no suggestion that the brokerage firm would be involved in that search. Mr. Seager also expresses that he is "sorry this has happened" and "cannot imagine" what the Heideckers must be feeling. Mr. Seager further indicates that he "will be arranging a meeting with Carmen and the broker owner". Although not entirely clear from the evidence, it may be inferred that this is the meeting of June 23, 2016 referred to by Floyd Heidecker.

[32] I am not persuaded that these interactions between the Heideckers and

either Mr. Seager or Mr. Stewart can be viewed as establishing a sufficient proximate relationship to ground a duty of care on the part of 100% Realty as suggested by counsel for the Heideckers. While I appreciate that the Heideckers were upset at the situation and looking to anyone for assistance or advice, it is, as noted, apparent from Mr. Seager's response texts that it would be Ms. Campbell who would continue working to locate a property. There was no undertaking on the part of 100% Realty to do so.

[33] Indeed, the situation appears to be akin to venting and seeking ideas from a neighbour or an acquaintance. The circumstances do not give rise to a duty of care on the part of 100% Realty.

[34] Further, even if I am incorrect in finding that 100% Realty was not in a sufficient proximate relationship to ground a duty of care, there is no causal link between the suggestion by Mr. Stewart and any alleged damages on the part of the Heideckers. It is apparent that whatever suggestions Mr. Stewart made were neither followed nor relied upon by the Heideckers. There is, thus, no reasonable connection or causally relevant element which is necessary for a finding of negligence against 100% Realty.

[35] For the reasons outlined in the foregoing, I find that only the defendant Ms. Campbell is liable to the Heideckers and the action against 100% Realty must be dismissed.

2. What are the plaintiffs' damages?

[36] With liability on the part of Ms. Campbell acknowledged, the question arises as to what damages the Heideckers may be awarded. Regrettably, the Heideckers have chosen, perhaps in their anger and disappointment, to punish Ms. Campbell and pursue a windfall for themselves rather than merely seeking to be put in the position

they would have been but for the breach, in keeping with the legal principles governing damages. The various aspects of the Heideckers' claim will be addressed under separate headings in the following, recognizing that the issues of betterment, mitigation, and remoteness of damage, as raised by the defendant, are operative in this case.

[37] To illustrate the approach taken by the Heideckers, in the amended statement of claim, at para. 26(d), the plaintiffs include rental accommodation as part of their damages claim. However, from the excerpts filed from the transcript of the questioning conducted March 8, 2021, it is apparent the Heideckers did not incur rental accommodation costs during the period between moving from Ottawa and taking possession of their Warman home. They were seeking to collect monies from the defendants although they lived briefly with their daughter free of charge and, in the five years that had elapsed since the events giving rise to this action, had paid her nothing for providing them with this temporary accommodation. While this particular aspect of the damage claim was not vigorously pursued in the plaintiffs' brief or oral argument, perhaps due to the recognition that it is entirely without merit, its initial pursuit demonstrates a desire to penalize the defendant, Ms. Campbell, rather than merely seek appropriate compensation.

[38] This approach by the Heideckers of chasing a bonanza is clearly shown in their claim relating to the cost of their Warman home.

a. Increased purchase price of Warman home

[39] When the purchase of the Alder property could not proceed, the Heideckers purchased a larger, more expensive home in Warman and now seek to recover the additional cost from Ms. Campbell. In support of their position, the Heideckers rely on *Khullar v Lee,* 2011 BCSC 1648 [*Khullar*], a case in which the contract for the purchase of a home was terminated and the purchaser was required to

buy a different home. Like the Heideckers, the purchasers in *Khullar* commenced their search for a home with specific criteria in mind, which included, *inter alia*, proximity to a certain elementary school as they had young children. However, the circumstances of the two cases diverge considerably when the additional unique facts of *Khullar* are considered.

[40] In *Khullar*, the breach by the vendor, who was also a licensed realtor, was described by the court, at para. 125, as duplicitous, high-handed, and outrageous. This in no way describes the conduct of Ms. Campbell, as will be considered further in relation to the plaintiffs' request for costs. Specifically in the context of considering the damages to which the plaintiffs were entitled, *Khullar* is readily distinguished from the current situation. As a result of Mr. Lee's breach of contract, the Khullars were forced to purchase an *inferior* property—with fewer bedrooms, bathrooms, and fixtures—at a considerably higher cost. In assessing the damages, the court noted, at paras. 121 and 122:

> [121] As a result of Mr. Lee's breach of contract, the Khullars lost their opportunity to purchase their desired home. They purchased alternative property in the same neighbourhood which was inferior in terms of space and features. The opportunity loss and comparative functional difference between the two homes according to the appraiser, Mr. Cheng, is $81,000, which I accept and fix as part of the damage award.
>
> [122] The Khullers also incurred an additional sum of $177,000 to purchase their present alternative home. This is a consequential loss arising also from the breach of Mr. Lee. Total damages is therefore fixed at $258,000.

[41] On behalf of the Heideckers, it is submitted that *Khullar* supports their entitlement to the increased purchase price, as the cost of the Warman home was $125,000 higher than the Alder property. The Heideckers have also claimed costs, including the mortgage cost of borrowing, pertaining to the $80,000 mortgage applied to purchase of the Warman home. However, the evidence demonstrates that the

Warman home is superior to the Alder property. As such, the defendants submit that the principle of betterment ought to be applied to either eliminate or significantly reduce the Heideckers' claim *vis-à-vis* purchase of the Warman home. The defendants contend that the plaintiffs made a choice to purchase the superior property in the alternate community and merely wish to pass on the additional cost to Ms. Campbell.

[42] With respect to the superior nature of the Warman home, Ms. Campbell, at paras. 13 and 16 of her affidavit sworn October 12, 2022 avers:

> 13. In my experience as a realtor, Warman is considered a more desirable location than Osler. Osler has a population of approximately 1,200 whereas Warman is a city with a population of slightly more than 12,000. Osler has very limited amenities whereas Warman has full amenities, such as sports facilities, elementary and high schools, stores, restaurants and other amenities.
>
> …
>
> 16. I have been a realtor licensed to carry on the practice of real estate since 2012 and have taken all of the classes and updates necessary to maintain my licence. Part of my practice is to do comparables for clients when assisting them with either selling their own property or purchasing a new one. The new home purchased by the plaintiffs is significantly superior to the property they intended to purchase in Osler. Some of the significant differences are as follows:
>
> a) The home at Faldo Crescent is a stand-alone, private residence whereas the Alder Crescent home in Osler is one unit attached to two other units (a triplex).
>
> b) The home at 420 Faldo Crescent is approximately 155 square feet larger, being a 1443 square foot, 4-bedroom, 3-bathroom bungalow as opposed to the Osler unit, being a 1288 square foot, 3-bedroom, 3-bathroom unit.
>
> c) The home at 420 Faldo Crescent backs onto a green space whereas the Osler property backs onto an alley and residential properties.
>
> d) For reasons earlier stated, and the fact that Warman is a more desirable location than Osler, given its proximity to Saskatoon resulting in higher property values.

[43] The affidavit of Sandy Antonini [Ms. Antonini], filed on behalf of the

plaintiffs, to which two appraisals are attached, supports Ms. Campbell's evidence. Ms. Antonini, in Exhibit "A", describes the Alder property as "a 1,288 square foot attached bungalow townhouse build in 2013", which is "located at the west end of a building with three dwellings". Ms. Antonini also notes that "Osler is 5 kms from the City of Warman . . . which has most amenities". At the time of her appraisal on August 2, 2022, this Alder property had a market value of $355,000.

[44] In contrast, Exhibit "B" notes that the Warman home is "a 1,439 square foot bungalow build in 2010" and, as of August 2, 2022, had a market value of $490,000. It is located on a "quiet residential crescent" and "the site backs a linear park with pathway to larger parks".

[45] The affidavit of Kristene Johnson, filed on behalf of the defendants, confirms that the Warman home is superior to the Alder property and the two would not be considered as comparable. She states, at paras. 3 and 4 of her affidavit sworn October 12, 2022:

> 3. When appraising properties, an appraiser seeks properties that are reasonably comparable to the subject properties being appraised. Attempts are then made to adjust the value of the comparable properties taking into consideration any features of such comparables that are either superior or inferior to the subject properties.
>
> 4. In valuing the property at 166 Alder Place in Osler, the property located at 424 Faldo in Warman would not be used as a comparable and vice versa. The differences in these properties are too significant to be used as comparables to each other. The property at 424 Faldo is **superior in both style and location**, and, in particular:
>
> a) The Osler property is a row house in a small town (population 1,251 based on 2021 Census), which town has limited amenities. The Warman property is a detached bungalow in a city and all amenities within city limits (population 12,419 based on 2021 Census).
>
> b) The Osler home backs residential property whereas the Warman home backs green space.
>
> [Emphasis added]

[46] In choosing the Alder property, as Susan Heidecker notes at para. 8 of her affidavit sworn August 11, 2022, the most important consideration was that it "was not only close to our daughter in Osler, but was on the same street and in the same complex as our daughter's home". However, after the loss of the contract to purchase the Alder property, the Heideckers chose a home in Warman rather than Osler.

[47] In argument, the divergence of views on whether there were comparable properties in Osler following the failed purchase, along with questions regarding which party bore the onus of demonstrating whether such were present or not, were emphasized. Ms. Campbell, at para. 14 of her affidavit sworn October 12, 2022, asserts that she had done "some research in relation to other properties that were available" and found that, "There were other comparable properties located in Osler at that time". This is disputed by Susan Heidecker in her reply affidavit sworn November 2, 2022.

[48] However, it is not necessary for me to resolve this dispute for several reasons. Firstly, the plaintiffs would effectively be receiving double compensation if they were to be granted both their travel costs, as discussed in sub-heading d., below, as well as the increased cost of purchase of the Warman property. Secondly, upon terminating their relationship with Ms. Campbell, the Heideckers did not look at any properties in Osler with their new realtor. He had suggested Warman, as confirmed by Floyd Heidecker in the excerpts from his questioning. Thus, it appears that the previously expressed most important consideration, proximity to their daughter, was no longer in play. Thirdly, in relation to the Heideckers' choice to live in the alternate community, they have provided no indication that there were properties in Warman comparable to the Alder property. As discussed earlier, the Alder property and the Warman home cannot be considered as comparable. Accordingly, the view that the plaintiffs simply elected to buy the superior home and are seeking to pass on the cost to the defendants, is supported by the evidence.

[49] This choice by the Heideckers renders the increased purchase price and the mortgage related costs too remote and calls into question their efforts at mitigating their loss. The plaintiffs, unforeseeably, moved away from their expressed prime consideration—close proximity to their daughter—and chose a home that was not comparable with their previous selection. In such circumstances, Ms. Campbell cannot reasonably be required to pay the increased purchase price and related costs.

[50] The choice the Heideckers made also represents a potential basis for the extension of the betterment principle to situations, such as here, where property is lost as opposed to damaged.

[51] The principle of betterment generally applies in the context of claims for property damage. As noted by J. Berryman in "Betterment Before Canadian Common Law Courts" (1993), 72 Can Bar Rev 54, 1993 CanLIIDocs 169, "Betterment is a measure of the extent to which a plaintiff has been placed in a position more advantageous than the position enjoyed by the plaintiff, before the breach of contract or commission of the tortious wrong, in respect of an injury to the plaintiff's property". This may arise, for example, where a roof with 20-year-old shingles is damaged. While the roof requires replacing, new shingles, with a further 25-year life expectancy, would place the homeowner in an improved position rather than merely providing compensation for the breach.

[52] In *Malton v Attia*, 2021 ABQB 503 at para 110, a case regarding repairs necessary due to a faulty home inspection, the court noted:

> 110 … **Betterment is a question of fact to be determined on the evidence and with regard to what is reasonable in the particular case**. The onus to establish betterment is on the defendant. As noted by the Ontario Court of Appeal in ***James Street Hardware & Furniture Co v Spizziri,*** 1987 CanLII 4172, 62 OR (2d) 385 (CA) **the assessment of damages should be practical and should prioritize the justice between the parties** (***Yi*** at para 49).
>
> [Emphasis added]

[53] If the principle of betterment is extended to the circumstances of this case, I consider that the defendant has met her onus and it is reasonable and just to decline to award the increased purchase price of the Warman home, along with other related costs as will be discussed below, to the plaintiffs.

[54] The Heideckers submit that even though the Warman home is a higher value property than the Alder property, they had to take out a mortgage to purchase the Warman home. This, they say, "eliminates any argument" that they have obtained a windfall. This position, however, ignores the element of their choice. The argument is also not sustainable on the evidence as no indication has been provided that there were no properties in Warman comparable to the Alder property. The Heideckers further suggest that had the purchase of the Alder property been completed, they would have been living in a new property very close to their daughter. Therefore, they say, they have not been left in a better position. Again, this view is not supported by the evidence discussed earlier regarding the superior nature of the Warman home.

[55] The betterment principle, as mentioned, has generally been applied in the property repair cases. Whether it is necessary to extend the principle to circumstances like the present is unclear, given the concerns with respect to remoteness of the damage and uncertainty regarding the Heideckers' mitigation efforts. However, it would not be unjust to extend the principle in this context.

[56] Consider, for example, an analogous situation where plaintiffs have booked off time from work and made flight and accommodation reservations through a travel agent to attend the destination wedding of a friend in Mexico, for which the celebrations will extend over a two-week period. Despite ample lead time, the travel agent fails to secure the requisite confirmations and the chosen hotel and airline are no longer available. Upon learning of this breach of contract and duty, the plaintiffs would reasonably seek a flight to the Mexico location with a different airline and a reservation

with a nearby hotel, and then claim from the defendant travel agent the increased costs, including perhaps, travel between the alternate hotel and the wedding site. However, rather than taking this reasonable course of mitigation, the plaintiffs elect not to attend the friend's wedding, take an additional week away from work, and fly to Paris, France. The plaintiffs then claim the considerably higher cost of the replacement holiday from the travel agent. To grant such an award to the plaintiffs in that scenario would not be reasonable. The damages would be too remote and the mitigation efforts would be non-existent. The plaintiffs' vacation would put them in an improved or bettered position and it would be unjust for the defendant to be required to pay the cost thereof.

[57] The situation is similar in the case at hand. Whether grounded on the damages claimed being too remote, the mitigation efforts being misguided and resulting in a choice to purchase a superior property, or on an extension of the betterment principle, it would not be reasonable for this court to direct that the increased purchase price, and costs related thereto, be paid by the defendant, Ms. Campbell.

[58] Accordingly, the plaintiffs shall not be entitled to recover the $125,000, which represents the increased purchase price of their Warman home as compared to that of the Alder property.

b. Increased transfer fees

[59] For the reasons discussed above in relation to the increased purchase price of the Warman home, the increased transfer fees, calculated at 0.3% of $125,000, are likewise not recoverable by the plaintiffs.

c. Mortgage registration cost and mortgage cost of borrowing

[60] At para. 8(a) of the affidavit of Floyd Heidecker sworn August 11, 2022, he asserts that, "Because of the increased purchase price . . . Susan and I had to take out

a mortgage. We would not have needed a mortgage to purchase the Alder property". This mortgage, as indicated at Exhibit "B" to his affidavit, is for the principal amount of $80,000.

[61] In relation to this mortgage amount, the plaintiffs claim reimbursement of the $160 mortgage registration cost and $9,558.94 as the mortgage cost of borrowing. This latter amount is set out on page 4 of the mortgage found at Exhibit "B" to the affidavit of Floyd Heidecker.

[62] As discussed previously, the evidence supports the view that the Heideckers made a choice to purchase a superior property at a higher price. Indeed, no evidence of property in Warman comparable to the Alder property has been provided, which may well have been at a price point which did not require the plaintiffs to take out a mortgage. Thus, neither the mortgage registration cost nor the cost of borrowing may be recovered from the defendant. Further, in relation to the cost of borrowing, this assumes "no prepayments". As such, it is an uncertain amount as the Heideckers' ability and intention regarding prepayment is not in evidence.

d. Travel between Warman and Osler

[63] Ms. Campbell, at para. 5 of her affidavit sworn October 12, 2022, notes that, when she initially met with the Heideckers, they viewed "a number of houses located in Osler" as well as "a few others located in Warman and Martensville". Thus, at that juncture, the Heideckers were not staunch in their requirement that their new home be in Osler. This was confirmed by Floyd Heidecker in questioning where he indicated that they were "not opposed" to Warman and had not been opposed to purchasing in Warman when they were dealing with Ms. Campbell.

[64] The evidence of Susan Heidecker contradicts her husband's statements to some degree. She avers, at para. 5 of her November 5, 2022 reply affidavit, that they

preferred to live in Osler and "only began seriously considering homes outside of Osler" when they were confident no homes in Osler met their requirements. Earlier, in her affidavit of August 11, 2022, at para. 8, Susan Heidecker, as mentioned previously, had stated that the most important consideration in relation to the Alder property was that it "was not only close to our daughter in Osler, but was on the same street and in the same complex as our daughter's home".

[65] In considering the plaintiffs' claim in relation to the increased purchase price of the Warman home, I noted that they ought not to be doubly compensated. To, for example, be awarded damages for the lost opportunity of living on the same street as their daughter, particularly as they subsequently chose to live in Warman, and to also be reimbursed for their travel expenses between Warman and Osler during the period prior to their daughter's move to Warman would be unreasonable and unjust. As damages for the increased purchase price have been declined, travel costs may be entertained.

[66] In this regard, at para. 8(e) of his affidavit, Floyd Heidecker sets out the basis for the claim of travel expenses:

> (e) travel between Warman and Osler to visit our daughter, equalling $5441.47. We had moved to Saskatchewan to be closer to our daughter, and we would visit her approximately three times per week for the two hundred and one (201) weeks that our daughter continued to live in Osler while we lived in Warman. A true copy of a printout from Google Maps showing the distance between our daughter's home and the Warman Property, as well as the standard rates for travel in Saskatchewan, are attached hereto as Exhibit "F".

[67] The evidence of the Heideckers' 16 kilometre roundtrips from Warman to Osler is only approximated to have occurred three times per week for the 201 weeks prior to their daughter moving to Warman. As well, the travel rates included at Exhibit "F" are for 2022, a time after the plaintiffs' daughter had moved to Warman. Further, it is unclear how the figure of $5,441.47 was calculated. Even accepting that

there were three trips per week for 201 weeks, and accepting the rate of 50.78 cents per kilometre, the total would be $4,899.25 (calculated as 201 x 3 x 16 x .5078).

[68] In the circumstances, the plaintiffs shall be entitled to recover the travel costs of $4,899.25 from Ms. Campbell.

e. Lawnmower, snowblower, and freezer

[69] The plaintiffs have claimed the cost of a lawnmower at $360.75, a snowblower at $550, and a freezer at $300, for a total amount of $1,210.75. As Floyd Heidecker explains at para. 8(f) of his affidavit, the Alder property had these items included in the purchase price while the Warman home did not. It is evident from the receipts that the lawnmower and snowblower purchased were new. It is unclear whether the freezer is new or not as no receipt is in evidence, although Floyd Heidecker states it was “purchased through a private sale”. There is, however, no indication that it was a used freezer. Nor is there any indication of the size or model.

[70] Applying similar principles as those discussed earlier in relation to betterment, I accept the submissions by counsel for the defendant that a deduction is in order as the lawnmower, snowblower, and freezer included in the Alder property purchase would not have been new items. However, reducing the cost of these new items purchased by 50% may not be reasonable. Accordingly, the $1,210.75 shall be reduced by 25%, yielding an amount of $908.06 to be reimbursed to the plaintiffs from Ms. Campbell.

f. Extra packing and storage

[71] At para. 8(g) of his affidavit sworn August 11, 2022, Floyd Heidecker explains the claim for extra packing and storage, as follows:

> (g) extra packing and storage, equalling $3,303.06. We required

> packing and storage beyond what we had originally planned for our move between Ottawa and Saskatchewan because our items had to be kept in storage for an extra month due to the later possession date of the Warman Property. Further, as we left Ottawa without knowing the layout of the home we would eventually move into, we kept some furniture that we were not planning to keep had we moved into the Alder Property. As such, our packing and moving costs increased. A true copy of the communications and receipts from the storage company is attached hereto as Exhibit "H".

[72] A review of Exhibit "H" clarifies that the storage cost was $2,437.68 but it is not entirely clear how the additional $865.38, to achieve the total of $3,303.06, was calculated. However, as no objection to the calculation has been raised on behalf of Ms. Campbell, I will accept that the additional storage costs and transport of the extra furniture totalled $3,303.06 and the defendant shall be required to pay this amount by way of reimbursement to the Heideckers.

g. Canada Post

[73] At para. 8(h) of this affidavit sworn August 11, 2022, Floyd Heidecker outlines the claim for the post office box rental and mail forwarding during the transition period:

> (h) P.O. box rental and mail forwarding, equalling $290.92. We had to rent a P.O. Box as we had no new address to forward our mail onto. A true copy of our receipts from Canada Post are attached hereto as Exhibit "I".

[74] The need for this post office box in Osler was unclear to me, as noted in my questions to counsel during oral submissions, particularly given that the Heideckers had limited their house search to Warman and had stayed with their daughter for the six-week period as they awaited possession of their Warman home. Nonetheless, the defendant has not raised objection to this claim of $290.92. Accordingly, this shall form part of the amount to be reimbursed to the plaintiffs from Ms. Campbell.

[75] In addition to the above-noted claims for reimbursement, the Heideckers

have claimed general damages and their claim is considered in the following.

h. Mental and emotional distress

[76] By para. 26(d1) of their amended statement of claim, the Heideckers claim "mental and/or emotional distress upon and after learning" that their realtor had "failed to advise" them of the notice provided by the sellers on June 13, 2016. Relying on *Odhavji Estate v Woodhouse,* 2003 SCC 69 at para 74, [2003] 3 SCR 263 [*Odhavji*], counsel for the Heideckers submits that it is generally sufficient that the pleadings allege some form of negligently caused mental injury. However, the court in *Odhavji* did distinguish the pleadings stage from trial, clarifying that the magnitude of injury is a matter requiring proof:

> 74 As discussed in the context of the actions for misfeasance in a public office, courts have been cautious in protecting an individual's right to psychiatric well-being, but it is well established that compensation for psychiatric damages is available in instances in which the plaintiff suffers a "visible and provable illness" or "recognizable physical or psychopathological harm". At the pleadings stage, it is sufficient that the statement of claim alleges mental distress, anger, depression and anxiety as a consequence of the defendant's negligence. **Causation and the magnitude of psychiatric damage are matters to be determined at trial**.
>
> [Emphasis added]

[77] The evidence regarding the degree and duration of the alleged distress is meager. For instance, at para. 4 of his affidavit affirmed August 11, 2022, Floyd Heidecker avers that:

> 4. After the sale of the Alder Property fell through, I was **very upset**. Susan and I had just sold our home in Ottawa, thinking we had purchased and would be able to move into the Alder Property. Now we had to move out of our Ottawa home, with no home waiting for us in Saskatchewan. **I recall feeling very stressed and anxious.**
>
> [Emphasis added]

[78] Floyd Heidecker commented further, at para. 9 of his affidavit, noting that the plaintiffs are settled in their Warman home and intend to stay there:

> 9. While **we are now settled at the Warman Property**, the ordeal of losing the Alder Property was a significant source of stress for myself and Susan. The Warman Property was not the home we intended to purchase, and it did not meet all the criteria we had outlined to the Defendant Realtor at the beginning of our search for a home in Saskatchewan given its distance from our daughter, who resided in Osler at the time, and the lack of a fully open concept living, dining, and kitchen space. Further, the Warman Property has seven (7) stairs to enter the Property, and the backyard landscaping was in rough shape and required significant work to fix. That being said, **we do intend to stay at the Warman Property for the foreseeable future**.
>
> [Emphasis added]

[79] Susan Heidecker, at para. 26 of her affidavit affirmed August 11, 2022, states:

> 26. The loss of the Alder Property was a significant cause of **stress and anxiety** for both myself and Floyd **at the time the sale fell through, as well as for months afterward**. **I recall being very upset and crying many times when we learned** that the Defendant Realtor had failed to respond to the X-Hour Notice, because we had already sold our home in Ottawa and had to move without a home in Saskatchewan to move into.
>
> [Emphasis added]

[80] On this evidence, although not quantified in the amended statement of claim, the plaintiffs, by the brief filed on their behalf, claim $10,000 in damages. Notably, the stress and anxiety are not described in the affidavits as significant, although the loss of the Alder property was seen as "a significant cause" of such stress. Further, while Susan Heidecker recalls this lasted "for months" after learning of the failed purchase, it is evident that the impact was not long-term.

[81] On behalf of the Heideckers, the Supreme Court of Canada decision in *Saadati v Moorhead,* 2017 SCC 28 at para 31, [2017] 1 SCR 543 [*Saadati*], is cited in support of the view that a medical diagnosis is not required to recover damages for

mental or emotional distress:

> [31] Confining compensable mental injury to conditions that are identifiable with reference to these diagnostic tools is, however, inherently suspect as a matter of legal methodology. While, for treatment purposes, an accurate diagnosis is obviously important, a trier of fact adjudicating a claim of mental injury is not concerned with diagnosis, but with symptoms and their effects . . . the trier of fact's inquiry should be directed to the level of harm that the claimant's particular symptoms represent, not to whether a label could be attached to them. …

[82] In *Saadati*, however, unlike the current case, the mental injuries were both apparent and significant. The plaintiff's claim related to an accident, which was the second in a series of five motor vehicle collisions. Mr. Saadati sued Mr. Moorhead in negligence and the trial judge's finding that the second accident had caused psychological injuries, including personality change and cognitive difficulties, was restored by the Supreme Court of Canada. These findings did not rest on an identified medical cause or expert evidence but were based on the testimony of the plaintiff's friends and family to the effect that Mr. Saadati's personality had changed for the worse after the accident. At para. 37 of *Saadati*, the court emphasized that mental injury is not established by mere demonstration of psychological upset or unhappiness.

> [37] None of this is to suggest that mental injury is always as readily demonstrable as physical injury. While allegations of injury to muscular tissue may sometimes pose challenges to triers of fact, many physical conditions such as lacerations and broken bones are objectively verifiable. Mental injury, however, will often not be as readily apparent. **Further, and as *Mustapha* makes clear, mental *injury* is not proven by the existence of mere psychological *upset*.** While, therefore, tort law protects persons from negligent interference with their mental health, **there is no legally cognizable right to happiness. Claimants must, therefore, show much more — that the disturbance suffered by the claimant is "serious and prolonged and rise[s] above the ordinary annoyances, anxieties and fears" that come with living in civil society** (*Mustapha*, at para. 9). To be clear, this does not denote distinct legal treatment of mental injury relative to physical injury; rather, it goes to the prior legal question of what constitutes "mental injury". **Ultimately, the claimant's task in establishing a mental**

> **injury is to show the requisite degree of disturbance** (although not, as the respondents say, to show its classification as a recognized psychiatric illness).
>
> [Emphasis added]

[83] While Susan Heidecker says she cried "many times", and both the Heideckers aver that they were upset, stressed, and anxious, I am not satisfied that the evidence demonstrates that this was sufficiently serious or prolonged to ground an award of damages for mental and emotional distress. While I appreciate that the plaintiffs were disappointed and angry as a result of the situation, such does not, on the evidence before me, constitute a mental or emotional disturbance which "rises above the ordinary" encountered in the challenges of life. Indeed, as counsel for the defendants commented, "there was inconvenience, not mental distress". Therefore, I find that the plaintiffs are not entitled to damages for the purported mental or emotional distress claimed.

CONCLUSION ON DAMAGES

[84] For the reasons discussed, the plaintiffs' damages are in the total amount of $9,401.29, for reimbursement of costs incurred due to the breach by the defendant, calculated as $4,899.25 (travel) + $908.06 (snowblower, etc.) + $3,303.06 (extra packing and storage) + $290.92 (Canada Post costs).

JUDGMENT

[85] For the reasons outlined in the foregoing, I make the following judgment:

a. The action against the defendant 100% Realty Associated Ltd. is dismissed.

b. The plaintiffs' application for summary judgment as against the defendant Carmen Campbell is granted and judgment may be entered by

the plaintiffs against her for special damages in the amount of $9,401.29, together with pre-judgment interest pursuant to *The Pre-judgment Interest Act,* SS 1984-85-86, c P-22.2.

COSTS

[86] The plaintiffs, by their amended statement of claim, are seeking costs on a solicitor and client basis. Guiding principles in relation to an award of costs on this basis are set out in *Siemens v Bawolin*, 2002 SKCA 84, [2002] 11 WWR 246, by Justice Jackson at para. 118:

> [118] These are the principles, relevant to this appeal, which I take from my review of the above authorities:
>
> 1. solicitor and client costs are awarded in **rare and exceptional cases only;**
>
> 2. solicitor and client costs are awarded **in cases where the conduct of the party against whom they are sought is described variously as scandalous, outrageous or reprehensible**;
>
> 3. solicitor and client costs are not generally awarded as a reaction to the conduct giving rise to the litigation, but are intended to censure behaviour related to the litigation alone;
>
> 4. notwithstanding point 3, solicitor and client costs may be awarded in exceptional cases to provide the other party complete indemnification for costs reasonably incurred.
>
> [Emphasis added]

[87] As mentioned earlier, this situation is not at all like that in *Khullar*, where the conduct of the realtor-vendor was egregious. Ms. Campbell, at para. 11 of her affidavit, explains the circumstances she was in at the time the 48-hour notice, which she did not open and read, was remitted to her email inbox. She had taken her father, who is now deceased, to the emergency ward. Her father had been diagnosed with bladder and stomach cancer and was informed that he had only a short time to live.

Further, immediately upon learning of her error, Ms. Campbell accepted full responsibility for her error, as she notes at subpara. 11(f) of her affidavit sworn October 12, 2022:

> f) Despite this explanation, I do not now nor have I ever denied taking responsibility for this error. I accepted responsibility when I filed my Statement of Defence in this action and when there was an investigation by Saskatchewan Real Estate Commission.

[88] These statements accepting her role and responsibility are further supported at para. 17 of Ms. Campbell's affidavit, where she states that her affidavit has been made "in support of . . . a reasonable resolution of the plaintiffs' claim".

[89] In light of this evidence, I do not see that an award of costs in favour of the plaintiffs on a solicitor and client basis would be appropriate. However, at the request of counsel my decision regarding costs shall be deferred pending further submissions.

[90] In this regard, when the matter was heard, counsel for the defendants requested that following my decision, I remain seized of the matter in order to hear argument on costs. In the circumstances, I am of the view that this could best be dealt with by written submissions.

[91] Therefore, leave is granted to both parties to make brief written submissions to me, each of no more than three pages in length, regarding costs. The plaintiffs' submissions are to be served and filed by 4:00 p.m. on June 17, 2024, and the defendant's submissions are to be served and filed by 4:00 p.m. on June 21, 2024.

J.
B.R. HILDEBRANDT