Date: 20010119
Docket: CA 165211

NOVA SCOTIA COURT OF APPEAL

Cite as: MacCulloch v. McInnes Cooper & Robertson, 2001 NSCA 8

Freeman, Bateman and Cromwell, JJ.A.

BETWEEN:

McINNES COOPER & ROBERTSON, a registered partnership, and STEWART McINNES, Q.C.

Appellants
(Respondents on cross-appeal)

- and -

PATRICIA B. MacCULLOCH

Respondent
(Appellant on cross-appeal)

REASONS FOR JUDGMENT

Counsel:	John P. Merrick, Q.C. for the appellants Respondent in person
Appeal Heard:	November 29, 2000
Judgment Delivered:	January 19, 2001
THE COURT:	Appeal and cross-appeal dismissed per reasons for judgment of Bateman,J.A.; Freeman and Cromwell, JJ.A. concurring.

BATEMAN, J.A.:

[1] This is an appeal from a decision of Justice Douglas MacLellan of the Supreme Court (reported as **MacCulloch v. McInnes, Cooper and Robertson** (2000), 184 N.S.R. (2d) 40). He found the appellants, Stewart McInnes, Q.C. and McInnes Cooper and Robertson (MCR), the firm of solicitors in which Mr. McInnes is a partner, negligent in the manner in which they provided legal services to the respondent, Patricia B. MacCulloch. Mrs. MacCulloch cross-appeals the damage award.

I. BACKGROUND:

[2] The events that led to this matter began with the death on October 4, 1979 of Charles E. MacCulloch, husband of the respondent. An inventory of his Estate filed on October 17, 1979, showed that he had assets of more than 10 million dollars. The Estate consisted primarily of a farm property on Grand Lake known as Monte Vista Farm, a Toronto condominium known as Unit 819, an art collection, some accounts receivable, a mortgage on a Caribbean property and shares in several companies that Mr. MacCulloch had operated before his death, including MacCulloch & Company Ltd. and Oakwood Holdings Ltd. The Estate also claimed title to a second Toronto condominium property known as Terrace House. Mr. MacCulloch had made an agreement to buy this condominium before his death. Title was to have been taken in the names of both him and Mrs. MacCulloch as joint tenants. He had died before the transaction closing. The Estate completed the purchase, acquiring title to the property. It was Mrs. MacCulloch's belief that the condominium was hers and, therefore, not part of the Estate assets. Litigation about title between Mrs. MacCulloch and the executors had commenced but not concluded at the time relevant to this action.

[3] Under Mr. MacCulloch's will, his widow, Patricia B. MacCulloch, Henry B. Rhude, Peter Classon and Central and Eastern Trust Company were appointed executors. The will directed the payment of taxes and debts out of the capital of his Estate. Mr. MacCulloch then gave certain personal articles to Mrs. MacCulloch. He made bequests totaling $850,000.00 to relatives, charities and churches, including a gift to Mrs. MacCulloch of $300,000.00. As an additional bequest, Mrs. MacCulloch was to have the exclusive use of Monte Vista Farm, as her principal residence. The executors were to pay all taxes and upkeep to ensure that it was a suitable place for her to reside. A one million dollar trust fund was to be established and invested with the net income therefrom paid to Mrs.

MacCulloch during her lifetime. If Mrs. MacCulloch were still alive on the tenth anniversary of Mr. MacCulloch's death she was to receive $500,000.00. The residue of the Estate was left to the executors in trust to convert into cash and to divide between the children of his first marriage.

[4] The executors administered the Estate, but by 1981 there were serious liquidity problems. Mr. MacCulloch and his companies owed a substantial amount of money to The Bank of Nova Scotia. Due in part to high interest rates, the Executors were finding it increasingly difficult to service the debt. Additionally, they were finding the maintenance of Monte Vista Farm, as had been directed in the will, a significant financial burden.

[5] In the fall of 1981, Mrs. MacCulloch made a proposal to the Estate to purchase the farm property and to obtain uncontested title to the Toronto condominium, Terrace House, for a total price of $500,000.00. As part of the consideration she relinquished her right to be maintained by the Estate in Monte Vista Farm. The Estate accepted her offer. The purchase was completed and Mrs. MacCulloch immediately resold the farm property to German purchasers for $1,350,000.00. Both the purchase and sale transactions closed on December 30, 1981. In 1982 she sold Terrace House for $485,000.00.

[6] Mrs. MacCulloch retained Stewart McInnes, Q.C. of MCR to act for her on this transaction. He prepared the agreement with the Estate regarding the purchase of Monte Vista Farm and Terrace House. In addition he completed the purchase and resale of Monte Vista Farm. A Toronto solicitor was retained to act on the purchase of Terrace House. Mr. McInnes had acted for Mrs. MacCulloch in other matters which included providing independent legal advice on a pre-nuptial agreement and sorting out a customs duty claim in relation to her engagement ring. He acted for her, as well, in her ongoing dispute with the executors of the Estate concerning her maintenance at Monte Vista Farm.

[7] On June 7, 1982, The Bank of Nova Scotia petitioned the Estate of the late Charles E. MacCulloch into bankruptcy. Price Waterhouse Limited was appointed trustee under the **Bankruptcy Act**, R.S.C. 1970, c. B-3. Although the Estate itself and the other beneficiaries had, to that point, made no objection to the purchase and resale of Monte Vista Farm and the Toronto condominium, the trustee in bankruptcy reviewed the transaction.

[8] On June 28, 1984, the trustee brought action against Mrs. MacCulloch seeking an accounting for the proceeds from the resale of the properties. The matter was tried before Justice Richard who, by decision dated June 12, 1985 (reported as **Price Waterhouse Ltd. v. MacCulloch** (1985), 69 N.S.R. (2d) 167(S.C.T.D.)), found that Mrs. MacCulloch had breached her duty as a trustee by purchasing Estate property. He concluded, however, that she owed no duty to creditors of the Estate, represented by the trustee and therefore dismissed the claim. The trustee appealed.

[9] On January 20, 1986, the Nova Scotia Court of Appeal allowed the appeal from Justice Richard, found Mrs. MacCulloch liable to account for the proceeds on the resale of the properties and remitted the matter to the trial judge to quantify the accounting. (reported as **Price Waterhouse Ltd. v. MacCulloch** (1986), 72 N.S.R. (2d) 1 (C.A.)).

[10] On August 19, 1986, Justice Richard fixed the sum for which Mrs. MacCulloch was to account at $1,829,916.00, inclusive of prejudgment interest (reported as **Price Waterhouse Ltd. v. MacCulloch**, [1986] N.S.J. 540 (Q.L.)). This amount was not paid by Mrs. MacCulloch. Upon the closing of the Estate in 1996 Mrs. MacCulloch received the Estate's interest in this unpaid judgment as part of her entitlement under the will.

[11] Mrs. MacCulloch sued Mr. McInnes and his firm alleging that he was negligent in preparing the agreement by which she purchased the property from her late husband's estate and in completing the transaction in a manner that was voidable, without advising her of the risks and receiving her express instructions to proceed without court approval.

[12] Justice MacLellan found the appellant, Mr. McInnes, negligent in the manner in which he provided counsel to Mrs. MacCulloch in relation to the assets purchased from the Estate. He awarded related damages totaling $355,292.46, including prejudgment interest.

[13] MCR and Mr. McInnes have appealed the trial judge's decision as to the finding of negligence and their resulting liability to pay damages. They have not appealed the quantum of the damages. Mrs. MacCulloch has cross-appealed on the damage award.

[14] Mrs. MacCulloch was not represented by counsel at trial nor on the appeal.

II. ISSUES:

[15] The appellants state the following grounds of appeal:

> 1. When dealing with the issue of whether the Appellants were negligent, the Trial Judge erred in deferring to previous decisions that were not findings of negligence in the particular circumstances and erred in failing to assess and make his own determination of whether there was such negligence.
>
> 2. The Trial Judge erred in finding that in the particular circumstances the Appellants had breached any tort duty of care owed to the Respondent.
>
> 3. The Trial Judge erred in failing to find that the Respondent was fully aware of her fiduciary obligations and that accordingly the Appellants were under no obligation to inform the Respondent and that any such failure by the Appellants to inform the Respondent did not cause the Respondent any loss.
>
> 4. The Trial Judge erred in finding that there was insufficient evidence on which to find that the Respondent would have rejected any advice given to her by the Appellants and that it would be necessary to speculate in order to make such a finding.
>
> 5. The Trial Judge erred in failing to find that the Respondent would have rejected any advice given to her by the Appellants and that accordingly any such failure by the Appellants to provide such advice did not cause the Respondent any loss.

[16] They summarize the grounds as follows:

> There are three basic issues raised by the parties on this appeal. First, was MCR negligent as found by the trial Judge? Second, if so, did that negligence cause the damages to Mrs. MacCulloch as calculated by the Judge? Third, is Mrs. MacCulloch entitled to any further damages than as awarded to her by the trial judge?

III. STANDARD OF REVIEW:

[17] McLachlin, J., as she then was, in **Toneguzzo- Norvell et al v. Savein and Burnaby Hospital** (1994), 162 N.R 161, said at p 167:

> [13] It is by now well established that a Court of Appeal must not interfere with a trial judge's conclusions on matters of fact unless there is palpable or overriding error. In principle, a Court of Appeal will only intervene if the judge has made a manifest error, has ignored conclusive or relevant evidence, has misunderstood the evidence, or has drawn erroneous conclusions from it: see **D.P. v. C.S.**, [1993] 4 S.C.R. 141; 159 N.R. 241; 58 Q.A.C. 1, at pp. 188-89 S.C.R. (per L'Heureux-Dubé J.), and all cases cited therein, as well as **Geffen v. Goodman Estate**, [1991] 2 S.C.R. 353, 126 N.R. 241, at pp. 388-89 (per Wilson J.), and **Stein v. The Ship "Kathy K"**, [1976] 2 S.C.R. 802; 6 N.R. 359; 62 D.L.R. (3d) 1, , at pp. 806-8 (per Ritchie J.). A Court of Appeal is clearly not entitled to interfere merely because it takes a different view of the evidence. The finding of facts and the drawing of the evidentiary conclusions from facts is the province of the trial judge, not the Court of Appeal.
>
> . . .
>
> I agree that the principle of non-intervention of a Court of Appeal in a trial judge's findings of facts does not apply with the same force to inferences drawn from conflicting testimony of expert witnesses where the credibility of these witnesses is not in issue. This does not however change the fact that the weight to be assigned to the various pieces of evidence is under our trial system essentially the province of the trier of fact, in this case the trial judge.

[18] In **Canada (Attorney General) v. Dingle et al** (2000), 181 N.S.R. (2d) 302 Hallett, J.A. explained this statement when applied in the context of a finding of negligence. At p. 313:

> [48] This statement by McLachlin, J. does not mean that a court of appeal can only interfere with conclusions of the trial judge that involve consideration of both facts and the application of law to the facts, such as a finding that a defendant was or was not negligent, if there is palpable and overriding error. The statement in **Burnaby Hospital** simply means an appeal court is not to interfere with evidentiary conclusions made by a trial judge unless there is palpable and overriding error. A mere error by a trial judge in concluding that a defendant was negligent in the circumstances would warrant an appellate court interfering with such a finding. (underlining in original)

IV. ANALYSIS:

[19] Because any possible contractual remedies were statute barred by the time of commencement of the action, Mrs. MacCulloch’s claims were based solely in negligence.

[20] The trial judge characterized the claim as follows:

> [80] The plaintiff here argues that she has suffered damages because Mr. McInnes prepared an agreement by which she purchased property from her late husband's estate and which was subsequently overturned because she did that while being an executor of the estate. She alleges that he was negligent in not advising her that such an agreement could be attacked on that basis and that his efforts in getting the beneficiaries to sign off did not protect her when the agreement was challenged by the Trustee in Bankruptcy. She also alleges that he never told her to disclose to the other executors the fact of the re-sale of the property.
>
> . . .
>
> [85] The issue before me in this trial can be put simply as whether it was negligence on Mr. McInnes' part to prepare and have executed an agreement whereby the plaintiff, who was an executor of the estate, purchase estate assets. Involved in that determination is whether the plaintiff already knew her legal position and therefore did not have to be advised by Mr. McInnes and also whether even if advised she would have instructed him to proceed in any regard.
>
> [86] The second issue is if Mr. McInnes was negligent what are the plaintiff's damages.

(a) The Standard of Care:

[21] Mr. McInnes' role in the 1981 purchase and resale of Monte Vista Farm and Terrace House was described in an Agreed Statement of Facts tendered in this proceeding. That document had originally been prepared for the earlier action by the trustee in bankruptcy seeking to have Mrs. MacCulloch account for the profits from that transaction. The parties had provided the Agreed Statement of Facts to the court in that proceeding in lieu of Mr. McInnes giving *vive voce* evidence. Mr. McInnes had approved the document before its submission to the court. Justice MacLellan found that it accurately represented the circumstances in 1981. It provided, as relevant here:

> . . .
>
> 2. Stewart McInnes acted generally as solicitor for Mrs. MacCulloch since shortly after her husband's death until the Spring of 1983.

3. Specifically, Stewart McInnes acted as solicitor for Mrs. MacCulloch in the execution and closing of the agreement by which Monte Vista property was acquired by Mrs. MacCulloch, and on her behalf as Vendor in the sale of the Monte Vista property to M & M Developments Limited.

4. To the best of the knowledge of Stewart McInnes, Mrs. MacCulloch did not participate in any way in the decision making process by the other Executors in the settlement agreement or gain any advantage or opportunity by reason of her appointment as Executrix in the estate of her late husband.

5. Stewart McInnes at no time advised Mrs. MacCulloch to resign as Executrix by reason of her participation in the Monte Vista purchase transaction, this question or issue did not arise at any point in the course of the transaction and I did not direct my mind to this point.

6. Stewart McInnes at no time advised Mrs. MacCulloch to make any disclosure to the estate of the fact or terms of a potential or actual resale of the Monte Vista property, this question or issue did not arise at any point in the course of the transaction and I did not direct my mind to this point.

7. Stewart McInnes did not advise Mrs. MacCulloch at any time that her participation in the purchase transaction and resale might constitute a potential breach of a fiduciary duty or result in a liability to account for any profit shown to have been produced upon the resale, this question or issue did not arise at any point in the course of the transaction and I did not direct my mind to this point.

8. The agreement of settlement between the estate, the beneficiaries and Mrs. MacCulloch was executed by Mrs. MacCulloch in her capacity as Executrix solely as a matter of formality and not with the intention of giving rise to any fiduciary or trust obligations on the part of Mrs. MacCulloch.

9. To the best of the knowledge of Stewart McInnes throughout the transaction with respect to the conveyance of the Monte Vista property to Mrs. MacCulloch all parties, including the solicitors, were of the view that the settlement was in the best interests of all concerned. No question of any improprietary or disability on the part of Mrs. MacCulloch to acquire the property by reason of her appointment as Executrix was raised during the course of the transaction.

10. At no time from the involvement of Stewart McInnes in the transaction on behalf of Mrs. MacCulloch until he ceased to represent her in the matter in or about the Spring of 1983 was any complaint or objection brought to his attention from any party with respect to the sale of the Monte Vista property or its resale pertaining to the appointment of Mrs. MacCulloch as an Executrix.

[22] The appellants say that Mr. McInnes did not breach the standard required of a lawyer in acting for Mrs. MacCulloch on the Monte Vista/Terrace House transactions. On the applicable standard of care, they cite **Spence v. Bell**, [1982] 6 W.W.R. 385 (C.A.) at p. 396 where Haddad J.A. adopted the following passage of Riley J. in **Tiffen v. Millican et al**. (1965), 49 D.L.R. (2d) 216 (S.C.):

> The standard of care and skill which can be demanded from a lawyer is that of a reasonably competent and diligent solicitor. 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 ordinary competent lawyer would not have made or shown it.

[23] The appellants refer, as well, to the following passage from **Midland Bank Trust Co. Ltd. v. Hett, Stubbs & Kemp**, [1978] 3 All E.R. (Ch. D.) 571 at p. 583:

> . . . 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 inquiry 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*, [1972] 2 Lloyd's Rep 172; *Griffiths v. Evans*, [1953] 1 W.L.R. 1424 and *Hall v. Meyrick*, [1957] 2 Q.B. 455 demonstrate that the duty is directly related to the confines of the retainer.

[24] The appellants submit that Mrs. MacCulloch cannot succeed in her claim because she failed "to present sufficient evidence to permit the trial judge to find that MCR had not acted in accordance with the applicable standard of care."

[25] In the earlier court actions resulting in the accounting for profits both Justice Richard in the Supreme Court and Justice Jones in the Appeal Division agreed that the law was clear. A person in the position of an executor cannot purchase assets from an estate to which they owe a fiduciary duty. The trial judge erred, say the appellants, by focusing upon the fact that the law in this regard was clearly established rather than considering whether a reasonably competent solicitor, in 1981, would know that law.

[26] In assessing Mr. McInnes' conduct, it is necessary to consider the context of the 1981 transaction. It was upon Mrs. MacCulloch's initiative, in or around late 1979, that the Estate had agreed to sell to her the Toronto condominium known as

Unit 819, 33 Harbour Square in Toronto. This property had been owned by Mr. MacCulloch. Mrs. MacCulloch engaged Mr. Rodney Hull, Q.C. of Toronto to act for her on that purchase. The price was set at the appraised value of $120,000.00. The deal did not actually close until November 9, 1981. The lengthy delay was attributable to a difference of opinion between Mr. Hull and the representatives of the Estate about how the conveyance to Mrs. MacCulloch should be handled. Representing the Estate on that transaction was the Toronto firm of Smith, Lyons, Torrance, Stevenson & Mayer, their Halifax contact being lawyer David Stewart, Q.C., who was proctor for the Estate.

[27] Mr. Hull was concerned that the purchase of this Estate asset by Mrs. MacCulloch was problematic because she was an executor. His concern was two-fold (i) that on resale by Mrs. MacCulloch a purchaser might object to the title acquired in this manner with Mrs. MacCulloch being unable to force title upon the purchaser, and (ii) the remaining beneficiaries might challenge the transaction. His research indicated that there was an absolute prohibition which prevents an executor from purchasing assets of the Estate. He recommended that extra precautions be taken. Initially it was his position that there should be a court order approving the sale.

[28] The representatives of the Estate differed with Mr. Hull on this issue. There was a clause in the will which permitted the Estate to sell assets to a family member:

> 10(u) . . . my Executors shall have and may from time to time exercise the following powers: . . . To sell to any member of my family any part or parts of my estate, real or personal, either at public auction or by private contract, and such sale shall be at such price or prices and subject to such terms and conditions, and either for cash or credit or for part cash or part credit, as my Executors consider fair and reasonable.

[29] Mr. Stewart took the position that, because the price being paid was fair market value, the Estate could sell the asset to Mrs. MacCulloch without a court order. It was his view that the power of sale was sufficient to legitimize the transaction.

[30] The trial judge referred to the many pieces of correspondence exchanged on this issue. Mr. McInnes, who was acting for Mrs. MacCulloch on other matters at that time, had received copies of some of the correspondence between Mr. Hull and the Toronto solicitors for the Estate outlining the problems with an executor

purchasing an Estate asset. In addition, Mr. Hull, by letter dated May 22, 1980, asked Mr. McInnes, *inter alia*, to clarify the terms of the transaction with the representatives of the Estate. By letter dated July 8, 1980 Mr. Hull wrote to Mr. McInnes:

> "Re: MacCulloch purchase from MacCulloch Estate
>
> I confirm my telephone conversation with you on Monday, July 7, 1980, in which we discussed the current problem concerning the purchase of the condominium in Toronto.
>
> You and I have discussed the problem of Mrs. MacCulloch as a fiduciary purchasing the property in her personal right.
>
> As I have pointed out to you, I have always had some grave concern concerning this matter notwithstanding the provision in the will that the property can be purchased by a member of the family.
>
> This clause does not go far enough, in my view and a subsequent purchaser might well requisition either a Judge's Order or the Consent of all beneficiaries.
>
> I understand that all of the children are now over the age of 18 and accordingly could sign the document.
>
> As it is obviously in the best interests of the parties for them to sign, any differences of opinion between the children and Mrs. MacCulloch should not be a concern.
>
> I have notified the solicitors in Toronto of the problem and I would be pleased to hear how you have fared after having discussed the matter with Mr. Stewart.
>
> I look forward to hearing from you.
> (Emphasis added)

[31] Mr. McInnes discussed the issue with Mr. Stewart who wrote to Mr. McInnes in reply on July 8, 1980:

> I am not sure what Rodney Hull's concern is and I am also a little surprised that it comes to the surface at this rather late date. Clause 10(U) of the Will gives the executors the power to sell to members of the family and certainly Mrs. MacCulloch qualifies on that count.

> As mentioned to you I do not think the children should be asked to sign any form of deed as that will raise the question as to whether any of the wives should also sign. If the children are to sign anything, I think it would be preferable for them to simply join in the deed by way of evidencing their consent to the sale, rather than for the purpose of conveying any interest that they may have in the property. Title to the property is clearly vested in the executors and not only do the executors have a general power of sale but also a power to sell to the family members.
>
> I suggest that Mr. Hull work out with Ms. Charlotte D. Sloan of Smith, Lyons, Torrance, Stevenson, Mayer in Toronto the form of consent to be signed by the children.

[32] In the end, after protracted negotiation, and on the instructions of Mrs. MacCulloch, the Unit 819 purchase was concluded without a court order but with the residual beneficiaries consenting to the conveyance.

[33] Mr. McInnes acknowledged in his evidence at trial that he was alerted through the correspondence and dealings with Mr. Hull to the potential problems arising when an executor purchases an Estate asset. He was aware that there were conflicting opinions on the issue. It was as a result of this knowledge that the trial judge found that Mr. McInnes, on the Monte Vista Farm/Terrace House transactions, was put to an inquiry and should have researched the point in order to ascertain the steps necessary to effect the transaction properly, or, at least, to have advised Mrs. MacCulloch of the risk and to take specific instructions to proceed with the transaction in any event.

[34] Instead, Mr. McInnes elected to proceed by obtaining the consent of the beneficiaries to the transaction, which he wrongly concluded would protect it from challenge. This, he reasoned, was what Mr. Hull had eventually done on the Unit 819 transaction and thus should suffice here.

[35] In my view, contrary to the submission of the appellants, Justice MacLellan did not err by focusing upon the ease with which Mr. McInnes could have found a definitive answer to the issue. Lawyers are not called to account for reasonably mistaken advice. Had the question of the purchase of an Estate asset by an executor been an obscure point of law upon which learned works did not agree and had Mr. McInnes, after advising his client of the difficulties, chosen the wrong path, he would not be liable in negligence. On this distinction the court in

Bannerman & Co. v. Murray & Anor, [1972] N.Z.L.R. 411, at p. 421, approved the following statement from Halsbury's Laws of England, 3rd ed. 99:

> . . . A solicitor is not guilty of negligence if he has merely acted upon his client's instructions in the reasonable belief that they were correct, or if he has fully explained the position to his client and is nevertheless instructed to proceed; or merely because he has committed an error in judgment, whether on matters of discretion or of law such as, for instance, on points of new occurrence or of doubtful construction.

[36] The problem here was not simply that Mr. McInnes chose a solution which provided no protection to Mrs. MacCulloch. It was that, although he was aware of a potential problem, he failed to research the issue and advise Mrs. MacCulloch of her options. Had he properly investigated the problem, he would not have chosen the course that he did, in the absence of explicit instructions from Mrs. MacCulloch to do so.

[37] Mr. McInnes should have recognized that he could not rely upon Mr. Hull's solution for the Unit 819 purchase, or did so at his peril. That transaction did not involve a prearranged resale of the property at what appeared to be a substantial profit. Here, by contrast, Mrs. MacCulloch had agreed to resell Monte Vista Farm even before its purchase.

[38] Even had Mr. McInnes been correct in concluding that the consent of the beneficiaries was sufficient to insulate the purchase of Terrace House and Monte Vista Farm and the resale of the farm property, the beneficiaries' consent could only afford protection if it was fully informed. Mr. McInnes knew that the other beneficiaries were not aware of the agreement to resell Monte Vista Farm.

[39] The comments of the Supreme Court of Canada in **Central Trust Co. v. Rafuse** (1986), 75 N.S.R. (2d) 109 (S.C.C.), a case originating in the Supreme Court of Nova Scotia, are instructive. There, the principal issue was whether the liability of a solicitor could exist in both contract and in negligence. The Court confirmed that it could. In the course of that decision LeDain, J., for the Court, described a solicitor's duty of care in terms that are particularly relevant here:

> [58] A solicitor is required to bring reasonable care, skill and knowledge to the performance of the professional service which he has undertaken. See **Hett v. Pun Pong** (1890), 18 S.C.R. 290, at p. 292. 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. See Mahoney,

"**Lawyers -- Negligence -- Standard of Care**" (1985), 63 Can. Bar Rev. 221. 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. . . .

[59] 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. The duty in respect of knowledge is stated in **7 Am Jur** 2d, Attorneys at Law para. 200, in a passage that was quoted by Jones J.A., in the Appeal Division, as follows: "An attorney is expected to possess knowledge of those plain and elementary principles of law which are commonly known by well-informed attorneys, and to discover those additional rules of law which, although not commonly known, may readily be found by standard research techniques." See **Charlesworth and Percy on Negligence** (7th Ed. 1983), pp. 577-78 to similar effect, where it is said: "Although a solicitor is not bound to know the contents of every statute of the realm, there are some statutes, about which it is his duty to know. The test for deciding what he ought to know is to apply the standard of knowledge of a reasonably competent solicitor." The duty or requirement of professional competence in respect of knowledge is put by **Jackson and Powell, Professional Negligence** (1982), at pp. 145-46 as follows: "Although a solicitor is not 'bound to know all the law,' he ought generally to know where and how to find out the law in so far as it affects matters within his field of practice. However, before the solicitor is held liable for failing to look a point up, circumstances must be shown which would have alerted the reasonably prudent solicitor to the point which ought to be researched", citing **Bannerman Brydone Folster Co. v. Murray**, [1972] N.Z.L.R. 411. In that case, where a solicitor undertook on very short notice to prepare the necessary document to give effect to an oral agreement providing that a mortgagee would have an option to purchase, the New Zealand Court of Appeal held that it was not negligence to have failed to perceive that making the option to purchase a condition of the mortgage rendered it void or unenforceable as a clog on the equity of redemption. The point was referred to as a rather old and obscure principle which had not been the subject of judicial commentary for many years and was mainly a subject of academic interest. It is clear, however, that the determining considerations in the Court's conclusion were the time available to the solicitor and the fact that the client was already committed to the transaction in the form that proved defective. See Turner, J., at p. 427. The decision is nevertheless instructive concerning the duty of a solicitor to perceive problems and to warn the client of them. For a statement of the solicitor's duty "to identify problems and to bring their effect to the attention of the client", with reference to

> cases in which this duty has been applied, see Dugdale and Stanton, **Professional Negligence** (1982), p. 203.
> (Emphasis added)

[40] The appellants seem to suggest that in the absence of Mrs. MacCulloch calling expert evidence on the standard of practice, the trial judge erred in finding that Mr. McInnes had not met the standard. They say, as well, that there was expert evidence before the judge from which he should have concluded that Mr. McInnes did not fall short of the standard. They refer in particular to the evidence of David Stewart, Q.C. They say that the fact that he took the position that even the consent of the beneficiaries was not needed, provided evidence that a practitioner in Halifax in 1981 would not have known that an executor could not purchase Estate assets.

[41] On this issue the trial judge said:

> [111] Mr. McInnes also argues that the proctor of the estate David Stewart and Mr. Harry Rhude, one of the executors, who he considered senior counsel and well versed in estate matters didn't raise with him the issue of an executor buying from the estate.
>
> [112] In **Elcano Acceptance Ltd. et al. v. Richmond, Richmond, Stambler & Mills** (1991), 49 O.A.C. 17; et al 68 O.R. (2d) 165 (C.A.), the Court dealt with a claim of negligence against a lawyer. It was alleged by the plaintiff that the solicitor had drafted a number of promissory notes for the plaintiffs without taking into account the provisions of s. 4 of the **Interest Act** which mandated that the amount of interest on the note be stated as an annual amount. When the plaintiff attempted to collect on the notes he was restricted to a statutory amount of five percent instead of the intended 18 percent interest.
>
> [113] The argument at trial was that the solicitor was not aware that the **Interest Act** applied to promissory notes because the statute only made reference to contracts and not specifically to promissory notes. The trial judge found that the **Act** did apply to promissory notes. He also dealt with an argument by the defendant's lawyer that he had relied on the wording used in an earlier promissary note used by the client which had been prepared by a respected practicing solicitor and that he was entitled to simply repeat the wording. The trial judge commented. O'Leary, J. (p. 13).
>
> > "While a solicitor may be tempted to take a chance that the work of another solicitor has been done without error, he is not protected if in fact his gamble does not prove correct."

> [114] I am not prepared to excuse Mr. McInnes from his obligations to the plaintiff because other counsel not dealing directly with the plaintiff didn't raise an objection to the proposal made to the estate.

[42] The problem here was not that Mr. McInnes did not know the law, but that he did not clarify the law once put to his inquiry. In these circumstances, expert evidence on the standard of practice was unnecessary. On this issue **Cordery on Solicitors**, 10th ed., Vol. 1, London, Butterworths, at p. J/305 is instructive:

> [274] An allegation of professional negligence against a solicitor is serious and 'the onus of proving professional negligence over and above errors of judgment is a heavy one'. In that the trial judge is a lawyer himself, often he will judge negligence by what he perceives to be the standard of an ordinary competent solicitor. Indeed calling solicitors as experts has been criticised, it having been said:
>
> > '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 fact 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 that he would have done had he been placed . . . 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'.
>
> It is submitted that only in cases where judgement must be based on material peculiarly within the knowledge of the solicitor's profession, as opposed to the knowledge and expectation of lawyers at large, would such expert evidence be either helpful or admissible.

[43] The appellants did not call expert evidence suggesting that Mr. McInnes' failure to research the issue, in these circumstances, was consistent with his duty of care. At a minimum, Mr. McInnes should have been aware, as a result of the difference of opinion between solicitors Hull and Stewart, that caution was required. Had he looked he would have found, as did the courts on the later action attacking the transaction, that the law was not unsettled. I do not accept the

appellants' argument that because Mr. Stewart, on behalf of the Estate, took the position that neither a court order nor the consent of the beneficiaries was required, it was reasonable for Mr. McInnes to have acted as he did. Mr. Stewart was not guarding Mrs. MacCulloch's interests as purchaser, but those of the executors *qua* executors. As is clear from his evidence, Mr. Stewart's concern was to protect the Estate on the transaction, not to protect Mrs. MacCulloch. On examination by counsel for the appellants he testified:

> Q. Now, this view that was adopted by the executors that the estate had full power and authority to convey the property to Mrs. MacCulloch, do you know if that was the executors that had formulated that? Had they formulated it with advice from you? Had you participated in the formulation of the view? Whose view was it, and where did it come from?
>
> A. I don't know where it emanated. I was certainly asked for my view. Whether Mr. Rhude had arrived at an opinion by himself before asking me, I don't recall, if I ever knew. But I know I was asked at one point if it was necessary for executors to get the consent and I gave the opinion that it was not necessary in the circumstances for them to get consent for this transfer in order to protect themselves.
> (Emphasis added)

[44] It has long been accepted that a solicitor's duty to a client includes a duty to advise on the risks in a transaction. The Court said in **Groom v. Crocker**, [1939] 1 K.B 194 (at p. 222):

> . . . The relationship is normally started by a retainer, but the retainer will be presumed if the conduct of the two parties shows that the relationship of solicitor and client has in fact been established between them. The retainer when given puts into operation the normal terms of the contractual relationship, including in particular the duty of the solicitor to protect the client's interest and carry out his instructions in the matters in which the retainer relates, by all proper means. It is an incident of that duty that the solicitor should consult with his client in all questions of doubt which do not fall within the express or implied discretion left him, and should keep the client informed to such an extent as may be reasonably necessary according to the same criteria. ...

(Emphasis added

[45] On the solicitor's duty to warn of the risks in a transaction see also **Major v. Buchanan** (1975), 61 D.L.R. (3d) 46 (Ont. H.C.) at p. 69.

[46] The appellants further submit that Mr. McInnes was under no obligation to provide advice to Mrs. MacCulloch because she had negotiated the purchase of

Monte Vista and Terrace House before retaining Mr. McInnes to complete the transaction. In this regard, they cite the New Zealand case **Boyce v. Mouat**, [1993] J.C.J No. 33 (P.C.) (Q.L.) which the appellants say is based on facts with close similarities to the present. There, in 1988 Mr. R.G. Mouat wished to raise $100,000.00 to pay for alterations to his house and meet certain business expenses. Since his own house was fully mortgaged his mother agreed to mortgage hers for the required sum. Mrs. Mouat was the mortgagor, Mr. Mouat was the guarantor on the three year mortgage with interest of $4,065.00 payable quarterly. Mr. Mouat undertook to pay the interest. Mr. Mouat asked Mr. Boyce to act for him and his mother. On 9th November, 1988, Mrs. Mouat was taken by her son to Mr. Boyce's office where Mrs. Mouat signed the mortgage and ancillary documents with her son signing as guarantor. In 1989 Mr. Mouat's business deteriorated, he fell into arrears on the payment of interest on his mother's mortgage and eventually he became bankrupt. Mrs. Mouat was left with a liability to repay the principal sum of $110,250.00 together with arrears of interest. She sued the firm of solicitors alleging in her statement of claim that they were in breach of contract, *inter alia*, in the following respects: (a) failing to ensure that the Plaintiff had her own independent advice in respect of the transaction; and (b) failing to refuse to act for the Plaintiff in respect of the transaction when it was acting for R. G. Mouat.

[47] The evidence was that the solicitor, upon meeting with Mrs. Mouat, pointed out to her that her position as mortgagor providing the security was substantially different to that of her son as guarantor and recipient of the loan. He advised her to obtain independent legal advice and offered to arrange for her to see a lawyer at one of the neighbouring law firms if she so wished. Mrs. Mouat declined. The trial judge, Holland, J., was satisfied that "Mrs. Mouat knew at all times that the defendant was her son's solicitor, she knew the type of transaction that she was about to embark upon, and that having decided to support and trust her son she did not expect or require any legal advice as to the wisdom of her entering into the transaction." As to the claim that Mr. Boyce should have advised her that it was not in her interests to sign the mortgage, the trial judge concluded that:

> It was made quite apparent to Mr. Boyce that Mrs. Mouat knew what a mortgage was and that if her son defaulted she stood the risk of losing her home. It was obvious to her, as it was to everyone else, that it was not in her financial interests to sign the mortgage, but nevertheless she wished to do so. The circumstances were not such as gave rise to any obligation on Mr. Boyce to advise her against signing the transaction.

[48] Holland, J. was satisfied that Mrs. Mouat was not concerned about the wisdom of the transaction and was "merely seeking the service of the solicitor to ensure that the transaction was given proper and full effect by way of ascertaining questions of title and ensuring that by appropriate documentation the parties achieved what they had contracted for". This finding of fact by the trial judge was supported by the evidence. The decision was reversed on appeal. On further appeal to the Privy Council, the Law Lords found that the intervention of the Court of Appeal was unwarranted and restored the trial decision finding Mr. Boyce not negligent. In so holding the Court said:

> 10 Their Lordships are accordingly satisfied that Mrs. Mouat required of Mr. Boyce no more than that he should carry out the necessary conveyancing on her behalf and explain to her the legal implications of the transaction. Since Mrs. Mouat was already aware of the consequences if her son defaulted Mr. Boyce did all that was reasonably required of him before accepting her instructions when he advised her to obtain and offered to arrange independent advice. As Mrs. Mouat was fully aware of what she was doing and had rejected independent advice, there was no duty on Mr. Boyce to refuse to act for her. Having accepted instructions he carried these out properly and was neither negligent nor in breach of contract in acting and continuing to act after Mrs. Mouat had rejected his suggestion that she obtain independent advice. Indeed not only did Mr. Boyce in carrying out these instructions repeat on two further occasions his advice that Mrs. Mouat should obtain independent advice but he told her in no uncertain terms that she would lose her house if Mr. R.G. Mouat defaulted. One might well ask what more he could reasonably have done.
>
> 11 When a client in full command of his faculties and apparently aware of what he is doing seeks the assistance of a solicitor in the carrying out of a particular transaction, that solicitor is under no duty whether before or after accepting instructions to go beyond those instructions by proffering unsought advice on the wisdom of the transaction. To hold otherwise could impose intolerable burdens on solicitors.

[49] I do not agree with the appellants that the facts in **Boyce** are similar to those here. There, Mr. Boyce advised the client fully on her legal exposure and the fact that she should seek independent legal advice. He took the steps necessary to make the transaction effective according to his client's instructions. Here, Mr. McInnes gave Mrs. MacCulloch no advice on the risk of the transaction. He did not make her aware of her possible exposure and he authored an agreement and conveyancing documents that were ineffective to achieve their purpose.

[50] The evidence does not support the appellant's assertion that Mrs. MacCulloch had retained Mr. McInnes for the limited purpose of carrying out the transaction. The appellants provided no documentation confirming that his retainer was circumscribed. Mr. McInnes acknowledged in his evidence that he did not know that the transaction was vulnerable. The tenor of his evidence was not that he was carrying out a conveyance which he knew to be faulty, but on the express direction of his client. It was that he protected the transaction from challenge by obtaining the "consent" of the beneficiaries and that in doing so he met the standard required of him. The fact that he arranged for the beneficiaries to consent to the purchase, which was not at the request of Mrs. MacCulloch, belies any suggestion that the retainer was a limited one.

[51] The appellants say, in the alternative, that Mrs. MacCulloch did not require advice about the perils of an executor purchasing an Estate asset because she was already aware of the problem from the advice given by Mr. Hull on the Unit 819 purchase. The trial judge rejected that proposition. He said:

> [104] Mr. McInnes argues that the plaintiff was already aware that she needed to get a court order and that if he suggested that to her she would not have consented to have him do so. . .
>
> [106] I reject the argument advanced by the defendants. While it is clear that the plaintiff instructed her lawyer in Toronto to proceed without Court approval or even without getting the beneficiaries to sign off on that agreement does not mean that she would have taken the same approach in regard to the agreement about the farm property. The Toronto apartment purchase handled by Mr. Hull was a much simpler transaction. She was simply paying the market value for the apartment in circumstances where the estate clearly wanted to dispose of the estate asset.
>
> [107] It is also not clear in the evidence before me exactly what was said to the plaintiff by her lawyers in Toronto about getting court approval. . .
>
> [108] Mr. McInnes contends that since she was advised to get court approval about the first purchase that he did not have to explain to her to do that in regard to the purchase of the farm. I reject that argument. I find that Mr. McInnes had an obligation to give the plaintiff the option to reject his advice. He did not do so. I believe he had an obligation to make it very clear to her what the law was. I believe that Mr. McInnes did not do that because he obviously was not aware of the strict prohibition against her buying from the estate. I believe that while Mr. McInnes was somewhat aware of the issue, he never really directed his mind to the question because he felt that getting the beneficiaries to sign solved the

> problem. His evidence is that he didn't have to discuss that with her because he felt he was protecting her from attack by getting the beneficiaries to sign off. (emphasis added)

[52] The trial judge found that Mrs. MacCulloch was not sufficiently aware, from her dealings with the Toronto lawyer on Unit 819, of the risks of the Monte Vista Farm/Terrace House transaction. This factual inference is supported by the evidence. There were several factors distinguishing the two transactions. The Unit 819 purchase did not involve an immediate resale. Consequently, there was no high resale price which might cause the beneficiaries or the other executors to question the wisdom of the selling price. Unit 819 was located in Toronto. Some of the advice letters had referred to the particular requirements of the Ontario **Trustee Act** and of their Land Titles Office. From this Mrs. MacCulloch might have assumed that the advice was specific to that province. Most importantly, Mrs. MacCulloch was aware from the exchanges between Mr. Stewart and Mr. Hull that there were conflicting positions on the necessary precautions. She might well have concluded that no extra precautions were necessary. Finally, the correspondence from Mrs. MacCulloch to Mr. Hull on the purchase of Unit 819 reveals that she did not appreciate her position as a purchaser as distinct from that as an executor. For example, in a letter of October 22, 1980 to Mr. Hull she wrote in part:

> We discussed the matter concerning the deeds of Apartment 819 Harbour square. We consider that we do not need to ask the permission of the children, the Executors have full power to act. . . .

[53] And on October 30, 1980:

> At our last Executors' meeting, we discussed the question of your wanting the Childrens' [sic] signatures. We do not consider we need this and are not prepared to ask for it, also the lawyers for the estate are not prepared to ask for the signatures of the Children as they do not consider they are necessary. I do realise [sic] that you want to protect me but if we can't sort it out quickly and simply and soon, then I think I will seriously consider dropping the whole thing, I am becoming very weary of problems and just can't cope.

[54] While Mr. McInnes may not have been privy to this correspondence, it supports the judge's view that Mrs. MacCulloch was not adequately aware of the difficulties.

(b) Reliance/Causation:

[55] It was the further position of the appellants that Mrs. MacCulloch did not prove that if Mr. McInnes had given her the proper advice she would not have proceeded with the transaction without court approval. Accordingly, they say, his negligence was not causative of the damages. The trial judge rejected that submission as is clear from the passage quoted at § 50 above. Repeating, in part, the trial judge's comments on this issue:

> [106] . . . I reject the argument advanced by the defendants. While it is clear that the plaintiff instructed her lawyer in Toronto to proceed without Court approval or even without getting the beneficiaries to sign off on that agreement does not mean that she would have taken the same approach in regard to the agreement about the farm property.
>
> [107] It is also not clear in the evidence before me exactly what was said to the plaintiff by her lawyers in Toronto about getting Court approval. From the correspondence entered into evidence, it appears that she was being given two options, that is, either getting court approval or getting the beneficiaries to sign off.
>
> [108] Mr. Clark [a solicitor working with Mr. Hull in Toronto] in his evidence indicated that he felt the best method was to get a Court order and that he explained the problem to the plaintiff. He said that the problem was that she was dealing with herself and that the beneficiaries might object later.
>
> [109] If that was the advice given to her, it would seem to me that she could conclude that by getting the beneficiaries to sign the problem would be solved.
>
> . . .
>
> [115] I am not satisfied that if Mr. McInnes had advised the plaintiff to get a Court order that she would have rejected that advice. To suggest that is to speculate on what she might have done. Her decision I am sure would depend on how the problem was presented to her and how forcefully the argument was advanced. Since the problem was never clearly placed before her I am not prepared to speculate on what her reaction would be.
> (Emphasis added)

[56] A plaintiff suing for negligence must establish: (i) the existence of a duty of care; (ii) breach of that duty; and (iii) loss resulting from that breach. The appellants say that it was for Mrs. MacCulloch to affirmatively prove that she would not have proceeded with the transaction without court approval had the

advice been given. The trial judge erred, they say, in reversing the onus on this issue. The appellants refer to the underlined portion in the latter part of the following paragraph from the decision:

> [116] In summary I find that it was negligent on Mr. McInnes' part to arrange for the plaintiff to purchase estate assets without getting court approval. I believe he was not aware of the strict prohibition against that and was wrong to conclude that getting the beneficiaries to sign off would protect the plaintiff. I find that he has not shown that the plaintiff would have refused to follow his advice if he had given her advice in which he told her to get court approval. I find that he cannot rely on the advice given to the plaintiff by other counsel in regard to the Toronto apartment purchase.
> (Emphasis added)

[57] On this issue, the appellants cite **Canada Trust Co. v. Sorkos** (1992), 90 D.L.R. (4th) 265 (Ont. Gen. Div.). There, the real estate agents for Sorkos who was the vendor of the property concluded from descriptions of the 5 parcel piece of property that the acreage was 5.72. Sorkos had not mentioned that a part of the property had been expropriated. Sorkos accepted an offer based upon a per acre price. After acceptance of the offer a survey revealed that the actual acreage was less than the estimate of the agents, resulting in a lower selling price. Sorkos refused to pay the full real estate commission. The agents sued for the balance. Sorkos resisted payment, citing in defence the agents' negligent estimation of the size of the property. Granger, J. found that the agents had negligently misrepresented the acreage of the property. He then said at p. 272:

> Sorkos must establish that there is a causal link between the breach by Robinson and Simpson and the damage which he suffered. Sorkos suggests that due to the negligent misrepresentation of Canada Trust he failed to receive $4,900,000 for the property, and as a result of the price abatement clause and the inaccuracy on the size of the property he only received $4,850,314.65, amounting to a loss of $49,685.35. The onus is on the vendors to show it was probable that if they had received the "proper advice" they would have done something differently: See *Sykes v. Midland Bank Executor and Trustee Co*., [1970] 2 All E.R. 471 (Eng. C.A.); *Carieras v. Levy* [1970] E.G.D. 618 (Q.B.); *Canada Trustco Mortgage Co. v. Bartlett* (1991), 17 R.P.R. (2d) 190, 3 O.R. (3d) 642, 26 A.C.W.S. (3d) 1355 (Gen Div.).

[58] Granger, J. concluded that the vendors had contracted for a sale on a per acre price and got what they bargained for. He was not satisfied that the plaintiffs would not have accepted the offer had they known the true acreage. He commented that the plaintiffs may well have known that the acreage was less than

5.72. Additionally, it was plainly stated in the Agreement of Purchase and Sale, which had been fully explained to them, that if the acreage was less than stated the purchase price would be abated. He awarded no damages.

[59] **Sykes v. Midland Bank Executor and Trustee Co.**, [1970] 2 All E.R. 471 (Eng. C.A.), referred to by Granger, J. in **Sorkos**, is commonly cited for the proposition that, where negligent advice has been given by a solicitor, the clients who suffered damage must prove that had proper advice been given, they would not have entered into the transaction or would have entered it on different terms. In **Sykes**, the plaintiffs were partners in a firm of architects. In 1963 they entered into negotiations for a 10-year sublease of office premises in London. Rignall was their solicitor for this transaction. The lease contained a clause prohibiting further sublease without consent of the landlord. In 1965 the plaintiffs sought to sublease a part of their premises for the balance of the term. The landlord withheld consent. The plaintiffs sued Rignall. The court held that Rignall had been negligent in failing to advise the plaintiffs of the restriction on subletting. The plaintiffs sought damages equivalent to a percentage reduction in the rents that they had committed to pay over the term of the sublease. Their theory was that they would have negotiated lower rents had they known of the restriction. The trial court awarded only nominal damages. The plaintiffs had failed to prove that had they received proper advice they would not have entered into the subleases on the same terms. On appeal, Harman, L.J. characterized the absence of a warning about the restriction on subletting as tantamount to a representation that there was no problem to consider. However, in upholding the award of only nominal damages he said, at p. 476:

> Whether the plaintiffs are entitled to anything more than nominal damages remains to be considered. . . . it seems to me, it is necessary for the plaintiffs to prove something more, namely, that the solicitor's omission did make a difference to them and was at least one of the elements, though there may be others, which influenced their minds to enter into the underlease.

[60] Salmon, L.J., commented that the "degree of blame [on the solicitors] in the present case was slight". He agreed that the onus was on the plaintiffs to prove that the breach caused substantial damage. At p. 478 he said:

> It was for the plaintiffs to show that it was probable that if they had received proper advice they would not have entered into the underleases, at any rate not at the rents reserved. In my opinion they completely failed to prove anything of the kind. No doubt it would have taken very little evidence to establish this fact.

(Emphasis added)

[61] The decision, however, turned upon the balancing of the evidence as to what the plaintiffs would have done on the correct advice. Salmon, L.J. noted that one of the plaintiffs, although pressed by the judge to do so, would not say that it would have made any difference had the proper advice been given. The other plaintiff was not asked the question. Salmon, L.J. concluded that the trial judge, in denying substantial damages, was of the view that it was as likely as not that the plaintiffs would have entered the leases even if advised of the restriction on subletting. He continued at p. 478:

> In these circumstances, it seems to me impossible for a court . . . to hold that the plaintiffs would probably not have taken the risk of entering the underleases. Mr. Ronald Sykes would not say so. It might be different if there were any facts or contemporaneous documents pointing in the plaintiff's favour - but there are none. On the contrary, all the known facts and documents strongly suggest that the plaintiffs would have taken the risk of entering into these underleases even if they had been properly advised by Mr. Rignall.
> (Emphasis added)

[62] Karminski, L.J. agreed that the evidence supported the view that, even had they known of the requirement for the landlord's permission to sublet, the plaintiffs would have rented the premises. In this regard, he noted that because the premises were obviously very suitable in every way for the plaintiffs' London practice, the plaintiffs would have been very reluctant to lose these premises; that they occupied other premises the leases for which contained similar restrictive clauses; that they had no original intention of subletting; and, lastly, that even had they known of the restriction, the plaintiffs might have been prepared to take their chances that the landlord would ultimately consent should they wish to sublet. He was satisfied that there was evidence to support the trial judge's finding that the plaintiffs had not proved that they would not have leased the premises had they known of the restriction.

[63] While it is not enough to show that the damage was possibly caused by the defendant's conduct, it has been said that causation need not be determined with scientific precision. In **Snell v. Farrell** (1990), 72 D.L.R. (4th) 289 (S.C.C.) Sopinka , J. quoted with approval (at p. 300) the comment of Lord Salmon in **Alphacell Ltd. v. Woodward**, [1972] 2 All E.R. 475 (H.L.), at p. 490:

> . . . [causation is] essentially a practical question of fact which can best be answered by ordinary common sense rather than abstract metaphysical theory.

[64] Causation, particularly in cases of negligence through advice not given, is primarily a question of inference by the trial judge as was recognized in **Allied Maples v. Simmons & Simmons**, [1995] 4 All E.R. 907. There Allied Maples acquired assets of the Gillow Group. They complained that in the course of the acquisition the defendant solicitors had insufficiently advised them as to the "first tenant liabilities" that might and did eventuate from leases originally held by the Gillow company. The judge held that Allied Maple must prove on balance of probability that, had it received proper advice, it would have taken steps to negotiate with Gillow to obtain protection. There was ample evidence to support the judge's findings on this. The Law Lords agreed that where the complaint is one of advice not given, the hypothetical question of what the plaintiff would have done requires that the judge draw an inference. While such inferences are not as insulated from review by appellate courts as are findings of primary fact, deference is nonetheless due given the advantage enjoyed by the trial judge.

[65] Stuart-Smith, L.J. said at pages 914 - 915:

> 1. What has to be proved to establish a causal link between the negligence of the defendants and the loss sustained by the Plaintiffs depends in the first instance on whether the negligence consists on some positive act or misfeasance, or an omission or non-feasance. In the former case, the question of causation is one of historical fact. . . .
>
> 2. If the defendant's negligence consists of an omission, for example to provide proper equipment, or to give proper instructions or advice, causation depends, not upon a question of historical fact, but on the answer to the hypothetical question, what would the plaintiff have done if the equipment had been provided or the instruction or advice given. This can only be a matter of inference to be determined from all the circumstances. The plaintiff's own evidence that he would have acted to obtain the benefit or avoid the risk, while important, may not be believed by the judge, especially if there is compelling evidence that he would not. In the ordinary way, where the action required of the plaintiff is clearly for his benefit, the court has little difficulty in concluding that he would have taken it. . .
>
> Although the question is a hypothetical one, it is well established that the plaintiff must prove on balance of probability that he would have taken action to obtain the benefit or avoid the risk. But again, if he does establish that, there is no discount because the balance is only just tipped in his favour. In the present case

> the plaintiffs had to prove that, if they had been given the right advice, they would have sought to negotiate with Gillow to obtain protection. The judge held that they would have done so. I accept Mr Jackson's submission that since this is a matter of inference, this court will more readily interfere with a trial judge's findings than if it was one of primary fact. But even so, this finding depends to a considerable extent on the judge's assessment of Mr Harker and Mr Moore, both of whom he saw and heard give evidence for a considerable time. Moreover, in my judgment there was ample evidence to support the judge's conclusion. Mr Jackson's attack on this finding was, as I have explained, something of an afterthought and not, I think, undertaken with great enthusiasm. I am quite unable to accede to it.
> (Emphasis added)

[66] And Millett, L.J.. said at page 927:

> ¶ 71 . . . In order to obtain an order for the assessment of damages (in the Queen's Bench Division) or for an inquiry as to damages (in the Chancery Division), however, it is not sufficient for the plaintiff to establish a breach of duty on the part of the defendant. He must also identify some head of loss which is alleged to have resulted from the breach and, if it is not of a kind which would naturally result from the breach, establish a causal link between the breach and the loss. Only once he has done this is he entitled to have the loss quantified.
> (Emphasis added)

[67] The damage suffered by Mrs. MacCulloch arising from the challenge to the transaction was precisely the kind of damage which would result from Mr. McInnes' failure to advise her of the risk of purchasing an estate asset. There is a clear causal link.

[68] Similarly in **Brown v. KMR Services Ltd.**, [1995] 4 All E.R. 598 (C.A.) Lord Justice Stuart-Smith referred to the deference to be accorded the trial judge's finding on this issue. He said at p. 617:

> What the plaintiff would have done, if properly advised, can only be a matter of inference. The plaintiff may say what he would have done; but it does not follow that the judge will accept his evidence. In this case Mr Brown's evidence was that if properly advised he would not have been in any Category 3 syndicates. The judge did not accept that. There is therefore no acceptable evidence from Mr. Brown himself as to what he would have done. Where the advice which should have been tendered is clearly to the plaintiff's advantage, or the danger which should have been warned against is readily appreciated and understood once the warning is given, it is as a rule not difficult to infer that the advice would have been acted upon and the warning heeded. But in many cases it is not so clear. In

the present case the benefits in the form of high profits on LMX syndicates were apparent. The risk of heavy loss may in 1987 have seemed very remote.

What should the approach of this court be to the judge's finding on such a matter? Since the conclusion is a matter of inference, the Court of Appeal can more readily interfere than in the case of a finding of primary fact based in part upon the judge's view of the credibility of the witnesses. Nevertheless, the judge's conclusion will no doubt have been based at least in part on his assessment of the character of the plaintiff. In this case the judge saw the plaintiff for more than two days in the witness box and clearly formed a view of him, a view which was by no means entirely favourable. Moreover, this court should be reluctant to interfere with a conclusion such as this, namely as to the proportion of premium income which would have been invested, unless it is satisfied that the judge's reasoning is in some significant respect erroneous. The situation is not unlike apportionment of liability between tortfeasors, or the assessment of the degree of contributory negligence.
(Emphasis added)

[69] In her evidence Mrs. MacCulloch acknowledged that she could not say what path she would have taken had Mr. McInnes advised her of the risk associated with the transaction:

Q. Mrs. MacCulloch, based on all the information that we've just been going over I'm going to put it to you that if Mr. McInnes had said to you, in addition to getting the signatures of the beneficiaries, you should also get a court order, you would have told him, "Don't worry about it. I'm not interested in a court order." Is that not a fair conclusion?

A. No. The answer to that is, if I had been given advice, I would have had the opportunity to consider it and to make a decision.

Q. All right.

A. I was not afforded that opportunity.

Q. I'm putting it to you, though, that if you had been given the advice, you would have done exactly the same on the farm transaction as you did on Unit 819.

A. You're saying that. You have no basis upon which to state that.

Q. Well, let me ask you this. On the purchase of 819 for a year and a half your counsel gave you advice. That transaction closed within

> a month of the farm transaction closing. Do you have any evidence that you can give the court that would have suggested that if you had been given further advice by Mr. McInnes you would have acted differently?
>
> A. I'm afraid I can't [inaudible]. I can only deal with the advice I was given.

[70] As the trial judge said, Mrs. MacCulloch's response to the advice that there was risk to the transaction would depend upon the nature of the advice and the way in which the problem was presented to her.

[71] A first step in answering the hypothetical question of what Mrs. MacCulloch would have done had she received proper advice is to establish what advice ought to have been given. In **Bristol and West Building Society v. Mothew**, [1996] 4 All E.R. 698 Millett, L.J.. said at p. 705:

> Where a client sues his solicitor for having negligently failed to give him proper advice, he must show what advice should have been given and (on a balance of probabilities) that if such advice had been given he would not entered into the relevant transaction or would not have entered into it on the terms he did. The same applies where the client's complaint is that the solicitor failed in his duty to give him material information. In *Sykes v Midland Bank Executor and Trustee Co. Ltd.* [1970] 2 All E.R. 471, [1971] 1 QB 13, which was concerned with a failure to give proper advice, the plaintiff was unable to establish this and his claim to damages for negligence failed. In *Mortgage Express Ltd v Bowerman Partners* [1996] 2 All ER 836, which was concerned with a failure to convey information, the plaintiff was able to establish that if it had been given the information it would have withdrawn from the transaction and its claim succeeded.

[72] In order to establish what advice would have been given had Mr. McInnes investigated the issue, I have referred to Waters, *Law of Trusts in Canada*, 1974, Carswell Company Limited. That text has been since revised. However, this is the version which would most probably have been available to Mr. McInnes at the time. That text says, in relevant part, commencing at p. 627:

> The general principle was established in the seventeenth century that a trustee may not purchase any part of the trust property. The rubric is clear and beyond argument. Indeed, Lord Eldon's two famous judgments in *Ex parte Lacey* (1802), 6 Ves. J. 625, 31 E.R. 1228 and *Ex parte James* (1803), 8 Ves. J. 337, 32 E.R. 385 where he set out the deterrent rationale behind the conflict of interest and duty rule, were themselves concerned with purchases made by trustees. In *Ex p. James* he said, "the purchase is not permitted in any case, however honest the

circumstances; the general interests of justice requiring it to be destroyed in every instance; as no court is equal to the examination and ascertainment of the truth in much the greater number of cases." This authority was recently invoked by Cooper J.A. in *Re Mitchell* (1970), 1 N.S.R. (2d) 922 at 941 where a will gave a right of pre-emption over certain shares held by a trust to two classes of persons. The shares constituted half the issued stock in a company which the deceased and another owned in equal shares. The first class of persons with the pre-emptive right was the deceased's children, and the second the other shareholder. The widow was one of the trustees, and, on it becoming clear that the only adult child had not the means to buy, the other shareholder made an offer. The widow then offered the sum which the other shareholder was prepared to pay, a fair and reasonable price. No doubt her intention was to maintain her family's interest in the company, but the Nova Scotia Court of Appeal ruled against her. Not only was she a stranger to the preference, but as a trustee she was barred under the rule in *Ex p. James*.

All manner of fiduciaries are excluded from purchasing the property under their control for the purpose of their tasks. Company directors, agents, agents to sell, executors and administrators, mortgagees acting as trustees, trustees for the benefit of creditors and in bankruptcy, and inspectors in liquidation proceedings have been required by Canadian courts to surrender the property they have thus acquired or the personal profit that they have thereby made. But it is the trustee who above all is held most strictly to the rule, as *Re Mitchell* shows.

A will or instrument may of course enable a trustee or fiduciary to make such purchases, but the court will strictly construe the power thus given him. In *Rountree v. Sydney Land and Loan Co.* (1907), 39 S.C.R. 614, for example, where a company secretary was involved, the secretary was permitted to have a 5% commission on a sale of the company's bonds. Without authority the directors decided to convert certain preference shares into bonds, and to pay 5% to the secretary. The shareholders were later informed of the conversion, and ratified it, but, since they were not told of the interest the secretary had, he was required to surrender his gain. This was a case of consenting to a commission rather than a purchase, but the principle is the same.

There are also various ways in which the fiduciary may purchase, and the court will examine the transaction carefully in order to determine whether there has been a breach of the rule. Provided the trustee can show that a trust beneficiary knew all the facts and was at arm's length with the trustee, a trustee may purchase a trust beneficiary's interest. This avenue has been pursued by trustees in order to justify the acquisition of trust property, but the onus of proof on the trustee that that was indeed the character of the transaction is heavy. .....

[73] And commencing at p. 628:

But where a third party is involved as a purchaser of the trust property for himself, another issue would normally arise. Was he a bona fide purchaser? If he was, and he still retains the trust property, then he is entitled to retain it, and the trust beneficiaries can only follow the trustee for the proceeds of the sale. A trustee is acting in breach of trust if he disposes of the property as part of a roundabout manner of securing it for himself, but he also breaches the terms of the relationship between himself and the beneficiaries. As between the beneficiaries and the innocent third party who has given value, the law follows its usual rule of preferring the third party. It was for this reason that in *Parker v. Thomas* (1893), 25 N.S.R. 398 (C.A.) the third party acquired an unassailable title. At a foreclosure sale an executor bought estate property subject to a mortgage, and subsequently mortgaged it to the plaintiffs who, having themselves foreclosed on the executor, now brought an action of ejectment against the executor, the legatees, and all other interested parties. The plaintiffs were successful. Nor is the law concerned with any incapacity or ignorance of the true facts in the trust beneficiary. In *Ricker v. Ricker* (1882), 7 O.A.R. 282 where the trustee had bought and then sold to a bona fide purchaser, the beneficiary was an infant. Yet the preference for the bona fide purchaser remained, and the infant was left with his recovery against the trustee for the proceeds of sale.

In other words, whether the trustee has sold to the innocent third party with the intention of buying the property back, or he purchases the trust property and sells it later to such a third party, the rule preferring the bona fide purchaser for value gives good title to the third party.

[74] And at p. 630:

The purchase by a trustee of trust property, and the same applies to all fiduciaries, is not a void, but a voidable transaction. Until the beneficiaries or other interested parties succeed in obtaining an order setting the contract aside, the trustee can pass a valid title to the innocent third party who gives value. It was by this means that the third party acquired good title in *Parker v. Thomas* and *Ricker v. Ricker*. The onus of proof upon the trustee to show that his purchase of the property did not involve him in a conflict of interest and duty is heavy, and the great majority of trustees are not able to show that a possible conflict situation did not exist. Thereafter, if the contract is not to be set aside, the trustee must either show that the beneficiaries all knew of the full facts and understood the situation, or that he had earlier applied to the court and obtained its consent. As we have seen, if the trustee argues that he had the consent of the beneficiaries to the purchase, there is a heavy burden upon him to show that the beneficiaries were not only capacitated, but knew as much of the situation as he did. Reported cases suggest that few trustees succeed in this. If the trustee seeks proper court approval to the purchase, he will have to demonstrate that a sale is most necessary, that no other purchaser has been forthcoming or seems likely to come forward within a reasonable time, and that his own offer in the circumstances is a favourable one.

[75] (See also **Weagle v. Weagle**, [1955] 3 D.L.R. 58 (N.S.S.C. *en banc*) and the many authorities to the same effect cited by the Court of Appeal in **Price Waterhouse Ltd. v. MacCulloch**, (1986) 72 N.S.R. (2d) 1 (C.A.) referred to above.)

[76] In my view, Mr. McInnes should have advised Mrs. MacCulloch that in purchasing the properties she would be in breach of her duties as an executor. Mr. McInnes was aware that Mrs. MacCulloch took those duties seriously. He should have advised her that should she purchase the properties and there be objection, she would be called upon to account for the proceeds. He should have discussed with her the factors relevant to the risk that the transaction would be challenged. In this regard he would have advised her that, because the Estate was in poor financial shape, because she did not enjoy a good relationship with the beneficiaries, because she was often at odds with the other executors and because she was reselling at what appeared to be a substantial profit unbeknownst to the beneficiaries and other executors, the chances of an attack on the transaction were increased. He should have further advised her that it was at best doubtful that the will, by authorizing sale of an asset to a "family member", authorized her to purchase as an executor. He should have advised her that if the transaction were challenged, because the beneficiaries were unaware of the resale, she would not be able to satisfy the heavy burden upon her of establishing that in "consenting" to the transaction they were fully informed of all of the relevant circumstances. Finally, he should have advised her that, in these circumstances, the only way to proceed with the transaction was to obtain prior court approval.

[77] Mrs. MacCulloch was told none of this. Instead, she was led to believe that by obtaining the "consent" of the beneficiaries to the sale Mr. McInnes had protected the transaction. A distinguishing element of this case, as compared to those discussed above, is that the appellants' negligence consisted of more than a failure to give advice. By obtaining the beneficiaries "consent" to the sale, Mr. McInnes purported to insulate the transaction from attack. The negligence, therefore, consisted of both the failure to give advice and the negligent performance of a service.

[78] The appellants' arguments about causation are premised on negligence consisting simply of failure to give proper advice. In essence they argue that improper advice does not cause loss unless it is shown that proper advice would have been followed. In my view, this premise is incorrect. The trial judge did not

find that the negligence here was simply failure to give proper advice, as is clear from his remarks at §56 above. He found that the appellants were negligent in the manner in which the transaction was carried out. As he put it, they were negligent in arranging " . . . for the plaintiff to purchase estate assets without getting court approval."

[79] Viewed in this way, Mr. McInnes' duty was to take the proper steps which a reasonably competent solicitor would have taken to effect the transaction so that it would not be voidable. In this he failed. What would otherwise have been a breach of duty would not be so if Mr. McInnes, after properly warning his client of the dangers of proceeding, had received express instructions to proceed as he did. He gave no such advice and received no such instructions. The manner in which he completed the transaction resulted in it being voidable. This breach of duty caused the client's loss. Had he taken proper steps to effect the transaction, it would not have been voidable. In short, Mr. McInnes was negligent in proceeding with the transaction in the manner that he did without express instructions from his client to do so, obtained after she had been properly advised. Causation was established. Speculation about what his client would have instructed him to do had she been given proper advice and asked for instructions does not interrupt the causal link.

[80] In any event, the trial judge inferred that Mrs. MacCulloch would have accepted Mr. McInnes' advice, had it been given. There was evidence from which he could make that inference. In this regard, the record reflects that Mrs. MacCulloch had previously retained Mr. McInnes to act on her behalf in other matters with no indication that she had not followed his advice; she had accepted his advice to obtain the consent of the beneficiaries to the Monte Vista Farm/Terrace House purchase; she had consulted him when she was asked to sign the 1981 Agreement in her capacity as executrix and had followed his advice to execute the Agreement. In drawing the inference the judge was entitled to consider, as discussed in **Allied Maples, supra**, and **Brown, supra**, that the advice which she was not given was for her benefit, easily understood and went to the root of the transaction. It was also relevant to drawing the inference that Mrs. MacCulloch's options were not limited to proceeding or abandoning the transaction. She might have been successful on an application for court approval. In this regard it is appropriate to consider the factors which would support her application: the Estate could not afford to maintain Monte Vista Farm as a residence for Mrs. MacCulloch; although the resale price of Monte Vista Farm negotiated by Mrs. MacCulloch was substantially higher than the purchase price,

the Estate could not sell that property to a third party unless Mrs. MacCulloch released her life interest; the will expressly permitted sale of an estate asset to a family member. In these circumstances, it is reasonable to speculate that a court might have looked favourably upon approving the transaction.

[81] As noted in **Toneguzzo-Norvell, supra**, although inferences are not entitled to the same level of deference as findings of primary fact, the weight of the evidence is for the trial judge. The trial judge's finding that Mrs. MacCulloch would have heeded the advice, although an inference, should be upheld by this Court unless we are satisfied that his reasoning was clearly erroneous. I am not persuaded that he erred in drawing the inference that he did.

[82] In **Schloss v. Koehler** (1978), 4 Alta. L.R. (2d) 85, the plaintiff had undertaken to loan a farmer, Mr. Koehler, $3,000.00 with interest at 30% per annum. The purpose of the loan was to enable Koehler to purchase more hogs to carry on a larger hog farming operation. After the parties had reached a verbal agreement with regard to the loan of $3,000.00 and the payment of the 30% interest, the plaintiff instructed Mr. Burgess, a young lawyer in the law firm of Knaut, Rolf, Cochrane & Burgess, to prepare documentation on the matter so as to secure his loan. The plaintiff did not give Mr. Burgess any serial numbers or details of the chattels on which he was to obtain security nor did he give him at that time a location where the chattels could be found. Mr. Burgess prepared the chattel mortgage without such details. The defendant, Koehler, died on January 27, 1970. The plaintiff did not receive payment from the Estate of the monies due and, therefore, commenced action against the solicitors. The trial judge found that deficiencies in the chattel mortgage made the goods almost unascertainable and therefore the mortgage was unenforceable. There was, as well, a prior loan by the Canadian Imperial Bank of Commerce to the deceased, Koehler, which was covered by s. 88 security under the **Bank Act**, R.S.C. 1970, c. B-1 and on which a notice of intention to give security had been filed at the Bank of Canada in Calgary. The bank took possession of these chattels under its security. The judge was satisfied that Mr. Burgess' standard of conduct in preparing the chattel mortgage and in failing to discover the prior security did not meet that required of a barrister and solicitor.

[83] Counsel for the law firm argued that even if the plaintiff had known of the deficiencies, he would still have gone ahead and extended the loan. In rejecting that submission the trial judge said at p. 92:

> ... I do not think, in connection with the claim against the law firm, that this is the proper perspective from which to approach the problem. I think that the proper method would be that, by reason of the negligence of the law firm and Mr. Burgess the plaintiff was precluded from having the opportunity to decide whether to advance the moneys or not advance the moneys which he would have had had he known of the true situation with regard to the chattels. The actions of Mr. Burgess precluded the plaintiff from having the opportunity to make this decision.

[84] In upholding the decision on appeal (reported as **Schloss v. Knaut** (1979), 71 Alta. L.R. (2d) 399) McDermid, J.A. quoted the above remarks and said at p. 400:

> We agree that any uncertainty as to whether he would have gone on with the investment must be construed against the solicitors.

(see also **285614 Alberta Ltd. v. Burnet, Duckworth & Palmer** (1993), 8 Alta.L.R. (3d) 212 (Q.B.))

[85] Here, Mrs. MacCulloch completed the transaction in the manner in which Mr. McInnes advised. That transaction was successfully attacked for reasons that he ought to have foreseen and about which he ought to have given advice. *Prima facie*, the appellants' negligence was causative of the damages. It is my view that in stating the issue as he did, the trial judge was not shifting the burden to the appellants but found that, on all of the evidence, their negligence caused the loss. In this regard I would find that he did not err.

(c) Damages:

[86] Mrs. MacCulloch claimed the following damages:

> (a) Damages for unnecessary diminution of the value of the estate of Charles MacCulloch arising out of the litigation brought by the trustee-in-bankruptcy against the plaintiff;
>
> (b) Damages for loss of benefits under the Last Will and Testament of Charles MacCulloch relinquished by the plaintiff under the Agreement;
>
> (c) Damages for loss of benefits obtained by the plaintiff as a result of the Agreement;
>
> (d) Damages for loss of personal assets and effect;

> (e) Damages for emotional distress, mental anguish, physical illness, mental illness (including incarceration in the Nova Scotia Hospital), disruption of her life for ll years, loss of income earning capacity, loss of enjoyment of life;

[87] The trial judge awarded damages totalling $355,292.46, including pre-judgment interest. This represented, in part, reimbursement of Mrs. MacCulloch's legal fees expended defending herself on the trustee's successful effort to have her account for the proceeds of resale of Monte Vista Farm and Terrace House. The balance of the damage amount was compensation for the diminution in the value of the Estate as a result of the monies expended by the trustee in pursuit of the litigation against Mrs. MacCulloch. This is discussed more fully below. All other claims for damages were dismissed. The appellants do not challenge the award of damages if the finding of negligence is upheld.

[88] Mrs. MacCulloch has cross-appealed alleging that the damage award is inadequate. She says:

> ... the Respondent does appeal the lack of damages and certain legal costs NOT awarded in the decisions. AND the Respondent asks the Court to deal with items not addressed by the Trial Judge in his decisions.

[89] It is Mrs. MacCulloch's submission that the trial judge erred in failing to grant adequate compensation for the effect of the negligence upon the Estate and damages for its effect upon her health and for the loss of her inheritance and future earning ability.

(i) Diminution of the Value of the Estate:

[90] The judge accepted that the legal and trustees fees attributable to the trustee's pursuit of Mrs. MacCulloch to account for the proceeds on the resales of Monte Vista Farm and Terrace House represented a cost to the Estate, thereby diminishing its value. Mrs. MacCulloch as beneficiary, therefore, suffered a loss in an equivalent amount. He invited further submissions from the parties in fixing the amount of these damages.

[91] By supplementary decision dated June 20, 2000 (unreported) the judge quantified this damage claim. He noted that Mrs. MacCulloch, in prior litigation, had objected to the trustees' account and had succeeded in having it reduced from $356,028.00 to $231,000.00 (see **MacCulloch (Bankrupt), Re** (1991), 108 N.S.R. (2d) 130 (N.S.C.A.)). In addition to the trustees fees was the disbursement by the trustees for legal services in the amount of $219,000.00. The judge determined

that of the disbursement for legal fees, $169,385.00 was attributable to the action for the accounting. There were additional legal fees expended in attempts to enforce the judgment against Mrs. MacCulloch. The trial judge was not satisfied that Mrs. MacCulloch could not have responded to the judgment and, accordingly, concluded that she was not entitled to recover the amount necessitated by her refusal to pay the judgment. The total amount allowed by the court of appeal for trustees fees during the time of the litigation was $115,000.00. The judge accepted Mrs. MacCulloch's estimate that 25% of that amount or $28,750.00 would have been attributable to the conduct of the litigation. I would find no error by the trial judge on this account.

(ii) Lost Benefits Under the Will:

[92] Pursuant to the 1981 Agreement to purchase Monte Vista Farm and Terrace House, Mrs. MacCulloch paid $500,000.00 and gave up her rights under Clause 6 of the will. In this regard the Agreement provided:

> 9(A) The Purchaser agrees to release and does hereby release all her right, title and interest to Monte Vista Farm pursuant to clause 6 of the Last Will and Testament of the late Charles E. MacCulloch and agrees to execute such documents as may be reasonably required by counsel for the Vendors to give effect thereto.

[93] Clause 6 of the will granted Mrs. MacCulloch the right to be maintained in Monte Vista Farm for life, at the expense of the Estate. In addition to the Clause 6 bequest, pursuant to Clause 5(A) of the will, Mrs. MacCulloch was entitled to the sum of $300,000.00 and, pursuant to Clause 7, the income from a $1,000,000.00 fund for life and, if she survived for 10 years after Mr. MacCulloch's death, a payment of $500,000.00. These latter bequests were not relinquished in the Monte Vista Farm/Terrace House Agreement.

[94] When Mrs. MacCulloch was ordered to account for the proceeds from the resale of Monte Vista Farm she lost not only the benefit of that transaction, but could not regain the right to be maintained in the farm for life, because she had sold that property to a third party. Mrs. MacCulloch says that she should have received damages to compensate for that loss.

[95] According to the trial record, in 1991 Mrs. MacCulloch had retained an actuary, Ron Fletcher of Morneau Coopers and Lybrand, to value her interest under the will. At the time of settlement of the Estate (1996), Mr. Fletcher was asked to update that value. He valued Mrs. MacCulloch's entitlement to be maintained in the farm at $6,990,020.00 calculated by multiplying the estimated annual costs of

maintenance of $79,000.00 by the number of years that she would likely reside in the property. This, submits Mrs. MacCulloch, is the amount of her loss. That valuation is in dispute. On cross-examination by appellants' counsel, Mr. Fletcher agreed that another method of valuing this entitlement would be to fix a sum which, if invested in 1981, would generate sufficient annual income to pay the estimated expenses of the property. In a report prepared at the request of the executors of the Estate in October of 1981, the Clarkson Company Limited had estimated that the appropriate fund would be $600,000.00. At trial Mr. Fletcher could not say whether that sum would have been sufficient to generate the necessary annual maintenance costs. The Clarkson and Company had assumed the annual maintenance costs to be $60,000.00 not the $79,000.00 used by Mr. Fletcher. Mr. Fletcher also agreed with counsel for the appellants that if the Estate was unable to pay the annual maintenance costs, the bequest would have no value. The contingency that the bequest was without value was relevant because the Estate, unable to meet its obligations, was petitioned into bankruptcy in 1982. Notwithstanding the question of valuation of the life interest, Mrs. MacCulloch submits that the judge should have compensated her for that loss based upon the $6.9 million dollar value.

[96] On the claim for lost benefits under the will the judge said:

> [134] This claim appears to be based on the argument that when the plaintiff purchased the farm property she gave up her entitlement to a life interest in the farm along with the right to be maintained on the farm. The value of this item was estimated to be anything from sixty to $80,000.00 per year.
>
> [135] I reject this claim for damages. It is clear that following from the first trial decision, the Court of Appeal when dealing with this point raised by the plaintiff, indicated that it was not relevant to the accounting and would have to be addressed otherwise as against the estate itself. That was done when the estate was closed. Mr. Ronald A. Fletcher, an actuary hired by the plaintiff was asked to quantify the plaintiff's actual entitlement under the Will. He did so and his report (Exhibit 13) was accepted by the Court of Probate in its final decree (Exhibit 35). Mr. Fletcher in his report valued the plaintiff's right to be maintained on the farm at $6,990,000. This figure included the value up to April 1st, 1996, and the value of future payments. Therefore, the plaintiff has had this claim recognized in the Court of Probate and cannot advance it here as a loss to her.

[97] Mrs. MacCulloch in her notice of cross-appeal says that the judge misunderstood the nature of this damage claim. It is Mrs. MacCulloch's submission that because Mr. McInnes did not attribute a monetary value to her

"life interest" in the 1981 Agreement, she lost the value of that asset when the subsequent courts refused to offset it on the accounting. In other words, says Mrs. MacCulloch, had Mr. McInnes placed a value on the life interest in the Agreement, the Appeal Court would have recognized that she gave up in value more than she got on the resale of the properties and, therefore, that there were no profits for which to account. I cannot accept this submission. The Appeal Court was aware that Mrs. MacCulloch had given up her life interest in the farm, whatever its value, and was not prepared to permit a set-off. Jones, J.A. said in **Price Waterhouse v. MacCulloch** (1986), 72 N.S.R. (2d) 1 (N.S.C.A.) at pp. 10 - 11:

> . . . it seems to me that a calculation of the profits in this instance should be a relatively simple matter as I do not think that the respondent is entitled to offset any claims which she purportedly has against the estate as a beneficiary or otherwise. She used trust property which belonged to the estate and therefore any profit accumulating from the use of the property belongs to the estate.

[98] Similarly the issue of the set-off of the value of the life interest was before Justice Richard on the accounting (reported as **MacCulloch Estate (Trustee of) v. MacCulloch** [1986] N.S.J. No. 540 (Q.L.)). Following the above direction of the Appeal Court, he declined to consider in the calculation of the "profits" the value of Mrs. MacCulloch's life interest in Monte Vista Farm. He said at p. 3:

> This hearing concerning the accounting as ordered by the Appeal Division was held at Halifax on June 9, 1986. In spite of the fact that the defendant knew of this hearing at least two months in advance she appeared ill-prepared to deal with the matters in the manner directed by the Appeal Division. Much of the evidence which she gave on that day in no way related to the proving of her accounts but rather related to matters which were not properly before me. One could speculate that the defendant appeared unwilling to accept the rulings of the Appeal Division as being finally determinative of the matter. Indeed, counsel for the defendant in his post-hearing memorandum made the following and somewhat startling submission:
>
> > It will be argued in this Memorandum, with the greatest of respect to the learned judges on appeal, that the question of the manner in which the settlement agreement is to be set aside in the context of the accounting hearing is fully before this Honourable Court for adjudication. The jurisdiction of this Honourable Court would therefore include any allowance to be made for the capitalized value of the right to Mrs. MacCulloch to have been maintained for her lifetime and to occupancy (sic) the Monte Vista Farm property. The operation of *the Canadian Charter of Rights and Freedoms* is relied on in the preservation of those issues. This

> Memorandum is submitted expressly without prejudice, to the right of Mrs. MacCulloch to have adjudicated before a tribunal of competent jurisdiction, her right to ownership of the Harbour Square Condominium property and her absolute entitlement to the proceeds of resale of the condominium property. The adjudication of the ultimate ownership of the Harbour Square Property ought to be taken as a precondition of the entry of any judgment dealing with the proceeds and appropriate directions may be given by this Honourable Court in that respect.
>
> It is submitted that the jurisdiction conferred upon this Honourable Court by the decision of the Appeal Division is a general one with respect to the determination of the amount, if any, of net proceeds of the resale of the two properties accountable to the Plaintiff Trustee in Bankruptcy, including allowances for evidence, improvements and interests in the subject properties by way of resulting or constructive trust, whether or not interest accruing on the proceeds of disposition is to be awarded in favour of the Plaintiff and including the terms upon which the Plaintiff may execute any judgment obtained herein. It should be noted that the question of a resulting or constructive trust in favour of Mrs. MacCulloch for her work on the Monte Vista Farm property is an alternative to the allowance of a set off claim to the value of benefits under the will pertaining to that property.

The above appears to run counter to the clear directive of the Appeal Division. Clearly, any consideration of a set-off claim based on services allegedly performed by the defendant would be directly contrary to the directive of the Appeal Court Consideration of matters such as the capitalized value of the defendant's interest in Monte Vista farm or the application of the *Canadian Charter of Rights and Freedoms* could very well impinge upon the rights of others who are not parties to this action. The defendant holds the proceeds of the Monte Vista farm and the Toronto condominium in trust for the plaintiff/appellant. She must now account to the plaintiff/appellant for the profits made on the resale of these two properties. Whatever other rights the defendant may have against the plaintiff, the estate of the late Charles MacCulloch or any of the executors, trustees or beneficiaries will have to be dealt with in other proceedings. . . . (Emphasis added)

[99] In late 1989 the trustee in bankruptcy was discharged. At that time the only significant asset remaining in the trustees' hands was the judgment against Mrs. MacCulloch, which was assigned to the executors. On the closing of the Estate the Probate Decree, dated February 26, 1996, recited in relevant part:

> 6. **THAT** the claim of Patricia B. MacCulloch as widow in lieu of dower takes priority over the claims of all other beneficiaries of the Estate;
>
> 7. **THAT** on the basis of the uncontradicted actuarial evidence presented to the Court (as prepared by Ronald Fletcher of Morneau Coopers & Lybrand Limited), the claim of Patricia B. MacCulloch as widow in lieu of dower exceeds the value of assets remaining in the Estate (including the present value of the Judgments), and she is entitled to set off her claim against the Judgments, such that they are paid and satisfied.

[100] The Probate Court accepted 6.9 million dollars as representing the value of Mrs. MacCulloch's life interest. She was entitled to receive compensation for that foregone interest under the will. Accordingly, in satisfaction of that amount she was assigned the Estate's right to the judgment against her, which judgment was an asset of the Estate. In addition, she received all remaining Estate funds, which, according to the final decree, amounted to $240,720.72. Therefore, as the trial judge found, she received credit for the value of her "life interest", to the extent that the Estate had assets to respond to the value of that interest.

[101] Justice MacLellan had determined that Mr. McInnes was not negligent in failing to place a monetary value on the "life interest" in the 1981 Agreement. I would agree. Nor is the fact that he did not do so the cause of the Appeal Court subsequently deciding that Mrs. MacCulloch could not set off the relinquishment of that benefit as against the proceeds on the resale of Monte Vista Farm and Terrace House. I would agree with the trial judge that no compensable damages are attributable to the fact that the life interest was not quantified.

[102] Mrs. MacCulloch is of the view, as well, that the Agreement should have reflected that Terrace House was, and always had been hers, not an Estate asset. She faults Mr. McInnes for not drafting the Agreement to so reflect. Had he done so, in her submission, she would not have been required to account for any profits on the resale of that asset.

[103] It was a term of the 1981 Agreement that both parties agreed to end the legal dispute over the ownership of Terrace House. Mrs. MacCulloch would have title to that property as well as Monte Vista Farm. The record does not support Mrs. MacCulloch's assertion, however, that she had agreed with the Estate that they were to acknowledge that she had always had ownership of Terrace House. Accordingly, it was not negligent of Mr. McInnes not to include this as part of the agreement, and no damages flow.

(iii) Damages for loss of benefits obtained by Mrs. MacCulloch as a result of the purchase and resale:

[104] On this claim the trial judge said:

> [136] I reject this claim for damages. The plaintiff was ordered by courts to account for the profit it deemed she made on the two transactions involving the farm and the Toronto apartment. Once these amounts were determined and all appeals were either concluded or abandoned, the plaintiff refused to pay the trustee the amounts determined. As a result they filed judgments against her in the amounts of $1,829,916. If the plaintiff had paid the judgment at that time, she clearly would be entitled at this point to claim these amounts against the defendants. Because she did not pay them, I find that she has suffered no loss of benefits as a result of the order to account for the deemed profits.

[105] This claim overlaps with the damage claim discussed above. For the same reasons I find no error by the trial judge in declining to award damages under this head.

(iv) Loss of personal assets and effects:

[106] As to this claim the judge said:

> [137] I am not clear what this claim is about. The plaintiff did allege that when she sold the farm to M & M Development Limited she included some personal effects, furniture and vehicles which belonged to her at that time. No credit was given to her on the accounting for these items.
>
> [138] It does not appear that these items were used by Mr. Fletcher in determining the plaintiff's entitlement under the Will, however, I have no evidence before me as to the value of these articles, therefore, I can make no finding about them.

[107] Mrs. MacCulloch maintains that it was the judge's obligation to clarify the nature of this head of damages. Unfortunately, I am no clearer on the substance of this claim. In her written submission, Mrs. MacCulloch refers to personal possessions which were included in the Agreement. I can only presume that she is referring to some of the furnishings in Monte Vista Farm which were included in the sale to the third party. To these items Mrs. MacCulloch has assigned a value of $234,000.00. I assume her submission is that because those furnishings were personally owned by her and not, therefore, Estate assets, the value should have

been deducted from the “profit” for which she was called to account. This same claim for a set off was raised before Justice Richard on the accounting. He declined to allow a set-off. Again, I would find no negligence by Mr. McInnes in failing to reflect the value of these personal effects in the 1981 Agreement. It is Mrs. MacCulloch’s submission that the Court of Appeal was wrong in directing that there be no set-off’s on the accounting. Accordingly, she seeks to recover damages from the appellants for that alleged “judicial error”. Putting her position in its best light, in legal terms, her claim is too remote.

(v) Mental Anguish:

[108] The judge declined to award damages under this head. He said:

> [139] I am not satisfied that the plaintiff has proven this claim. She did present to me a number of medical reports (Exhibits 38, 39, 40, 53) which referred to medical problems she has encountered over the last number of years. However, I am not able to conclude that the medical problems, and in particular the admission to the Nova Scotia Hospital, was because of the action taken against her by the Trustee in Bankruptcy. Obviously, the plaintiff has suffered great stress since her husband died. She has had the strain of dealing with the attempt by Revenue Canada to collect taxes they felt were owing because of the re-sale of the farm and the Toronto apartment. She had problems with Canada Customs about her wedding ring. She challenged the trustee's fees and attempted to have one executor removed. She attempted to sue officials of the bank and trust company.
>
> [140] I simply cannot conclude that the medical problems she had during these years were caused by the litigation involved in the sale to her of the estate assets. To prove this claim, she would have to show a connection between the first action taken against her and her medical condition at the relevant time. I find she has not done so, therefore, I would reject her claim on this item.

[109] The weight of the evidence is for the trial judge. While the reports filed by Mrs. MacCulloch confirmed that her physical and mental health have suffered over the many years of litigation, the judge could not conclude that Mrs. MacCulloch met the burden of proving that such consequences were attributable to the attack on the 1981 Agreement as opposed to the aftermath of losing her husband and finding his Estate in disarray. Over the years, Mrs. MacCulloch has expended considerable time and energy in attempting to demonstrate that the affairs of the Estate were mishandled. She asserts that the trustee in bankruptcy acted improperly. She has alleged in her submissions on this matter that it was the stated mission of certain of Mr. MacCulloch's children to see that she got nothing. In her

view the executors of the Estate were continuously antagonistic to her and failed to properly guard the Estate assets. They allegedly sold personal possessions, such as the yacht, secretly. She notes that as late as 1982 the executor, Central Trust, told the trustee that the assets were "as yet undetermined". This, she says, amounted to handing the trustee a blank cheque. Additionally, there was conflict between Mrs. MacCulloch and the Estate over the ownership of Terrace House. Many of these events predated the 1981 Agreement. It is unnecessary for me to comment upon whether her many concerns were warranted. Some were the subject of litigation. Suffice to say, while I do not doubt Mrs. MacCulloch's conviction today that the appellants' negligence in handling the Monte Vista Farm/Terrace House transactions was the genesis of her problems, the record indicates that the Estate was in dire straits prior to that time. A significant factor motivating the Estate's agreement to sell the properties to Mrs. MacCulloch was its need for cash. It was thought, as well, that relieved of the requirement to maintain Monte Vista Farm, the Estate could better meet its ongoing financial obligations. Such was not the case, but not due to the challenge to the 1981 transaction. The bankruptcy of the Estate was unrelated to that action by the trustee. The Estate was petitioned into bankruptcy by The Bank of Nova Scotia on June 7, 1982. It was not until August of 1984 that the trustee challenged the 1981 transaction. In these circumstances, I do not find it to be error that the trial judge, on the evidence before him, was unable to conclude that there was a connection between Mrs. MacCulloch's ill health and mental anguish and the negligence of the appellants.

(vi) Miscellaneous Damage Claims:

[110] Mrs. MacCulloch maintains that she should have recovered damages on account of the negative tax ramifications of the 1981 transaction. In her pleadings Mrs. MacCulloch did not claim that Mr. McInnes was negligent in failing to give tax advice. There being no claim in this regard, the trial judge did not err in awarding no damages.

[111] Mrs. MacCulloch seeks compensation for the stress caused by her pursuit of this claim against Mr. McInnes and MCR. That is not a compensable head of damages.

[112] Mrs. MacCulloch's claim for loss of her professional career would be a part of the mental anguish head. The judge correctly decided that no damages were recoverable.

[113] Mrs. MacCulloch says that the judge erred in denying her damages for the judgment against her because he wrongly concluded that her refusal to pay the judgment was voluntary. She maintains the she was not in a financial position to respond. The evidence indicates, however, that over the course of many years, Mrs. MacCulloch was evasive and secretive when questioned on the state of her finances pursuant to the trustee's efforts to realize on the original judgment. There was evidence, for example, that she purchased property and put it in her sister's name yet professed to be without financial means. On the evidence, it was open to the judge to conclude that Mrs. MacCulloch had not established that she could not respond to the judgment. I would not find that the judge erred in refusing to award damages on this account.

[114] Mrs. MacCulloch says that as a result of the judgment against her she lacked credibility and was, therefore, helpless to object to the continued mismanagement of the estate by Central Trust and Price Waterhouse. She seeks compensation in this regard. In my view, this proposition, even if established on the evidence, which it was not, would be too remote for recovery.

[115] Mrs. MacCulloch further submits that certain of her legal fees were overlooked by the trial judge in calculating the damages payable. She refers to additional bills from her solicitor David Copp of $6000.00 and $6262.50 which were not referenced by the trial judge. According to the letter from Mr. Copp submitted as an exhibit in this proceeding, those charges relate to efforts to stay the execution by the trustee in bankruptcy against a motor vehicle and to the investigation of matters relating to the administration of the bankruptcy. Those fees are not referable to the negligence here and are not recoverable.

[116] There is a further disbursement by the Estate to the law firm Stewart McKeen and Covert for $62,992.12 for professional services running from January 18, 1988 to October 16, 1989. The timing of those fees occurs after the litigation surrounding the Monte Vista Farm/Terrace House transactions. Justice Richard's decision quantifying the accounting was dated August 19, 1986. The appeal from that decision was dismissed on April 15, 1987. I cannot relate that disbursement to this claim.

[117] Mrs. MacCulloch asks that we indemnify her for the fees of lawyer Tim Matthews, Q.C. in the amount of $50,942.25. Mr. Matthews represented Mrs. MacCulloch during parts of this legal proceeding. His fees in that regard are not

separately recoverable. She has received compensation for those fees, to the extent allowed, in the award of party and party costs ($13,676.96) by the trial judge.

[118] I am not satisfied that Mrs. MacCulloch, either before Justice MacLellan or in the material she has submitted to this Court, has satisfied the burden of proving that she is entitled to additional damages.

[119] In assessing the damages it is important to note that Mrs. MacCulloch did retain the proceeds from the resale of the two properties. Although she was called upon to account for the proceeds, and judgment was entered against her in that regard, she did not pay the judgment. The purpose of the damage award is to indemnify her for the foreseeable loss caused by the appellants' negligence. But for her legal fees expended in defending herself on the accounting and those trustee and legal fees spent by the Estate in that regard, she was in the same position, financially, as if there had been no negligence on the part of the appellants. I would note that the measure of damages for the negligence used by the trial judge was disputed only by Mrs. MacCulloch on the cross-appeal. The appellants not having appealed that aspect of the judge's decision. (in contrast see **Toronto Industrial Leaseholds Limited v. Posesorski et al**; (1994) 21 O.R. (3d) 1 (Ont.C.A.))

[120] Mrs. MacCulloch has asked this Court to order a full inquiry into the conduct of Price Waterhouse in the management of the Estate. That issue has already been considered by the courts. (See **MacCulloch Estate (Re)** (1989), 93 N.S.R. (2d) 226 (N.S.S.C.) as varied on appeal by **Re MacCulloch (Bankrupt)**, (1992), 108 N.S.R. (2d) 130 at §89.) In any event, we are without jurisdiction to make such an order.

V. DISPOSITION:

[121] I would dismiss the appeal and cross-appeal. Even though Mrs. MacCulloch was self-represented, I would order that the appellant pay costs of the appeal to her in the amount of $5470.00, representing 40% of the costs allowed at trial, plus her allowable disbursements, to be taxed or as agreed. There shall be no costs on the cross-appeal.

Bateman, J.A.

Concurred in:

Freeman, J.A.

Cromwell, J.A.