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COURT OF QUEEN'S BENCH OF MANITOBA

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	)	JUDGMENT DELIVERED:
	)	February 3, 2021

REMPEL, J.

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Part I – Framing the Dispute

1.0 Overview

[1] The estate of Edward ("Bud") McLeod is seeking damages of $2.9 million and other relief from lawyers and realtors, who accepted Bud's instructions to list and then sell three separate parcels of land (the "Land") prior to this death. In this decision I am referring to the defendants Jarett Kehler, his law corporation and his law firm as the "Defendant Lawyers", and the defendants Terry Cole (a professional realtor) and his broker Stuart James Cowie who owns a real estate brokerage, as the "Defendant Realtors." From time to time I will refer to Terry Cole as "Mr. Cole" and Jarett Kehler as "Mr. Kehler". The estate is also seeking other relief against the defendant Jaysukh Rudani and a numbered corporation he controls (the "Corporate Defendant").

[2] Bud retired from active farming in 2006 and lived alone on a rural property near Brandon, Manitoba until his death in 2010. Unfortunately, Bud did not enjoy good heath after his retirement and it became evident to his family and health care providers that he was experiencing some degree of memory loss. Bud was diagnosed with dementia and other dementia-related symptoms for which he was briefly hospitalized in 2007 and 2008. In 2010 Bud's health took a catastrophic turn and he died shortly after a surgical procedure failed to control some bleeding in his brain.

[3] The theory of the estate's claim, in broad terms, is that in 2009 when the Land was sold, Bud lacked the necessary mental capacity to engage in contracts of sale and the Defendant Lawyers should not have accepted his instructions to close the sale transactions. Further, the estate argues that the Defendant Realtors failed to grasp the

future development potential of three parcels of Land in question and as a result they persuaded Bud to list them for sale at a price far below their fair market value ("FMV").

[4] The Corporate Defendant purchased one of the three parcels of Land. In that particular transaction the Corporate Defendant retained the services of the Defendant Lawyers and the Defendant Realtors to "double end" the deal. Neither Mr. Rudani nor a representative of the Corporate Defendant attended the trial, although Mr. Rudani did attend the pre-trial conferences. The estate is seeking an order of rescission voiding the sale transaction to the Corporate Defendant or in the alternative that it continue to hold title to the Land in trust for the estate.

2.0 The Issues

[5] The key issues to be resolved in this litigation are as follows:

a) Did Bud have the necessary mental capacity to sell the Land?

b) Did the Defendant Lawyers and the Defendant Realtors act in a manner consistent with the prescribed standards of their professions?

c) Was the Land sold for less than FMV?

d) Is the sale transaction to the Corporate Defendant voidable due to suspicious circumstances that lead to a conclusion of undue influence or an unconscionable transaction?

3.0 Deep Issue

[6] The deep underlying issue in this case is the determination as to when the presumption of a person's mental capacity to perform a legal act, such as the sale of land, is extinguished. Tied closely to this deep issue is the question as to what the

appropriate standard of care is for realtors and lawyers who advise individuals with diminished mental capacity.

[7] As with most legal tests, there is no bright line that establishes exactly when the diminished mental capacity of an individual reaches a tipping point that precludes them from exercising their legal right to dispose of or sell their own property. Answering the question as to whether this critical point was reached requires a comprehensive analysis not only of all of the available medical evidence, but also the evidence of eye witnesses who saw or interacted with the compromised individual.

4.0 Decision

[8] I am dismissing all of the claims for relief sought by the estate. My reasons follow.

Part II – The Law

5.0 The Essential Features of a Contract

[9] In ***Matic et al v. Waldner et al***, 2016 MBCA 60 (CanLII), the Manitoba Court of Appeal describes the three essential requirements of a binding contract, at para. 57:

> [57] The principle that can be distilled from *Bawitko* and *Ghitter (Ron) Property Consultants Ltd v Beaver Lumber Co*, 2003 ABCA 221, 330 AR 353 (quoted by Fridman), is that there are three requirements for a binding contract—the intention to contract; the essential terms of the contract have been settled; and the terms are sufficiently certain. …
>
> [Emphasis mine]

6.0 Mental Capacity to Perform a Legal Act

[10] Mental capacity is the touchstone of every valid legal act. The common law does not permit or recognize actions taken by persons who lack the requisite mental capacity to form the intention to engage in legal acts. John E. S. Poyser, in a paper issued for the

Law Society of Alberta in 2019 entitled *Challenging Power of Attorney Documents and Acting for Partially Capacitated Donors*, notes that legal acts can only be undertaken by persons who have the requisite degree of mental capacity.

[11] In the above noted paper, Mr. Poyser comments on the inextricable link between legal capacity and mental capacity. Mental capacity touches on every legal act a person may engage in. "*That is true whether the act in question is to marry, to vote, to enter a contract or to sign a power of attorney"* (para. 1.1).

[12] Mental capacity gives rise to the ability to freely give consent, which has been deeply engrained in the law of contract from its very beginning. The common law has always acknowledged the fundamental principle that without freely given consent, it is impossible for a binding contract to come into existence. G.H.L. Fridman, *The Law of Contract in Canada*, 5th ed. (Toronto: Thomson Carswell, 2006), describes consent in the context of contractual capacity as follows, at p. 138:

> Since a contract is an agreement between two or more persons, and involves the idea of *consent*, only those who have the power to give consent can contract. This excludes those considered as lacking such power through being under the age of majority or through having a disordered mind. …

[13] At para. 1.1 of his paper, Mr. Poyser states the basic test with respect to the necessary mental capacity for a legal act was defined in 1829 in the Irish decision of ***Ball v. Mannin*** (1829) 3 Bli NS 1, 1 Dow & CL 380, 4 E.R. 1241, HL, 33 Digest (Repl) 592 (Irish Court of Exchequer). Mr. Poyser notes that in the ***Ball*** decision the court confirms the person must have been "*capable of understanding what he did by executing the deed in question when its general purport was fully explained to him*" (para. 21). Mr. Poyser also stated at para. 1.1 of his paper that:

> Later cases added the phrase "nature and effect" to the test. A person has the mental capacity to validly perform a juridical act if that person enjoys the powers of mind necessary to understand the nature and effect of the juridical act if given a proper explanation of its basic terms.

6.1 Mental Capacity to Contract

[14] Although the common law has often grappled with disputes in which one of the parties to a contract allegedly lacked mental capacity, Fridman notes that *"There appears to be no special common-law principles governing the contractual capacity of those affected in any way by age or physical disability"* (at p. 163).

[15] ***Ball v. Mannin*** and the later cases interpreting it have established that under the common law a person has the mental capacity to validly perform a legal act if that person enjoys the powers of mind necessary to understand the nature and effect of the juridical act if given a proper explanation of its basic terms. This fundamental principle lies at the heart of the legal test to be applied in any case where the mental capacity of a person to perform a legal act, such as entering into a contract, is at issue.

6.2 Mental Capacity to Make a Will

[16] In ***Lynch Estate v. Lynch Estate***, 1993 CanLII 7024 (AB QB), 8 Alta. L.R. (3d) 291 (Alta. Q.B.), the lawyers agreed that the mental capacity test for the *inter vivos* transfer of land or a gift of land was the same as the mental capacity for the making of a will set out in the common law.

[17] The seminal statement of the test is found in the case of ***Banks v. Goodfellow***, (1870), L.R. 5 Q.B. 549, at p. 565:

> It is essential to the exercise of such a power [of testamentary capacity] that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect;

> and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties — that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.

[18] However, it is also clear that the adoption of too strict a standard could result in the persons of advanced age being deprived of the right to dispose of their property. This is made clear in the ***Goodfellow*** case, at pp. 567-68:

> In the case of *Den v. Vancleve* [2 Southard, at p. 660] the law was thus stated:
>
> > By the terms 'a sound and disposing mind and memory' it has not been understood that a testator must possess these qualities of the mind in the highest degree; otherwise, very few could make testaments at all; neither has it been understood that he must possess them in as great a degree as he may have formerly done; for even this would disable most men in the decline of life; the mind may have been in some degree debilitated, the memory may have become in some degree enfeebled; and yet there may be enough left clearly to discern and discreetly to judge, of all those things, and all those circumstances, which enter into the nature of a rational, fair and just testament. But if they have so far failed as that these cannot be discerned and judged of, then he cannot be said to be of sound and disposing mind and memory.

[19] The modern restatement of the ***Banks v. Goodfellow*** test was articulated this way in ***Schwartz v. Schwartz***, 1970 CanLII 32 (On CA), [1970] 2 O.R. 61, at p. 78:

> The testator must be sufficiently clear in his understanding and memory to know, on his own, and in a general way (1) the nature and extent of his property, (2) the persons who are the natural objects of his bounty and (3) the testamentary provisions he is making; and he must, moreover, be capable of (4) appreciating these factors in relation to each other, and (5) forming an orderly desire as to the disposition of his property: see *Atkinson on Wills* (1953), 2nd ed., p. 232; 39 Hals., 3rd ed., pp. 855-6.

6.3 Mental Capacity to Sell Land

[20] In ***Zabolotney Estate Committee v. Szyjak***, 1980 CanLII 3132 (MB QB), 5 Man. R. (2d) 107, Kroft, J. of this court rejected the arguments that a farmer of advanced years was the victim of fraud or undue influence, who was induced to sell his

farmland at a point in his life where he was unable to appreciate the nature and consequences of his act. The court also rejected that the transaction was unconscionable due to inadequate consideration.

[21] The plaintiff advanced no arguments as to a lack of mental capacity, but despite this concession, the court made a point of noting the farmer "…*was completely able to operate his farm and manage his own business affairs*" (para. 7).

[22] The evidence in that case led Kroft, J. to conclude that the consideration paid for the land was so far below its fair market value that it amounted to a gift. Notwithstanding this fact, the court did not find that the farmer was taken advantage of unfairly by a stronger or more cunning party. In arriving at this conclusion Kroft, J. noted repeatedly that the farmer was *"able to manage his farm and look after his own affairs*" (para. 61) and that *"he had his wits about him, that he knew what he was doing, and that the arrangement which he made with the defendant, with the assistance of Bruce Miller was, in fact, fair, just and reasonable*" (para. 63).

[23] The lawyer in that case, Bruce Miller, acted for both sides of the transaction. Mr. Miller's recollection of his meeting with the two men about the transfer of land was limited and his meeting notes were not detailed. Kroft, J. noted that from all of the evidence, including the evidence that the farmer had mental capacity and lived independently, that there was no basis for Mr. Miller to have been concerned about mental capacity, fraud or undue influence and that no special precautions were called for prior to concluding the transaction:

> 30 Mr. Miller does not pretend that his memory of what transpired is perfect, nor that his notes are necessarily complete. He is quite positive, however, and this I accept, that it was Zabolotney, and not the defendant,

> who gave the instructions. Mr. Miller is certain that Zabolotney was cognizant of what he was doing, and that his mental capacity was beyond question. Mr. Miller did not suggest that Zabolotney obtain independent legal advice, nor that anyone else be present to explain the transaction to him. From this, Mr. Miller concludes that there was no doubt or concern in his mind. If the situation had been otherwise, he would, in accordance with his usual practise, have obtained such independent advice.

[24] Kroft, J. also found:

> 65 I don't want to be taken as necessarily endorsing Mr. Miller's practises. I am, however, completely satisfied that he received his instructions from Zabolotney, and that the defendant did not interfere. I am also satisfied that Mr. Miller in taking instructions from an elderly man for the conveyance of property and the preparation of a will, was well aware of his professional responsibility to make sure that the transactions were understood, and that the mental capacity was present. Mr. Miller testified that no special precautions were taken because he was confident that there was no problem or need.

[25] In the ***Lynch Estate*** case, the mental capacity of a transferor of land was very much in issue. Although the court accepted the agreement of the lawyers that the ***Banks v. Goodfellow*** test for mental capacity respecting a will also applied to the *inter vivos* transfer of land, the court applied a flexible scale in assessing mental capacity based on the circumstances and the nature of the transaction:

> [96] There is also authority, which says that the circumstances and the nature of the transaction are relevant when considering capacity. Nourse J. stated in ***Re Beaney; Beaney v. Beaney***, [1978] 2 All E.R. 595 (Ch.), at p. 601:
>
> > The degree or extent of understanding required in respect of any instrument is relative to the particular transaction which it is to effect. In the case of a will the degree required is always high. In the case of a contract, a deed made for consideration or a gift inter vivos, whether by deed or otherwise, the degree required varies with the circumstances of the transaction. Thus, at one extreme, if the subject-matter and value of a gift are trivial in relation to the donor's other assets a low degree of understanding will suffice. But, at the other, if its effect is to dispose of the donor's only asset of value and thus for practical purposes to pre-empt the devolution of his estate under his will or on his intestacy, then the degree of understanding required is as high as that required for a will, and the donor must understand the claims of all potential donees and the extent of the property to be disposed of.

[26] I am satisfied that this flexible scale acknowledges the reality that mental capacity for any legal act is time and task or situation specific and cannot be assessed without a complete understanding of the factual matrix in existence at the time a legal act was undertaken. ***Lynch Estate*** clearly echoes this principle during the analysis of the evidence as to mental capacity and how to ascribe weight to this evidence, at para. 98:

> [98] In this case a number of types of witnesses testified as to the capacity of John; lay, medical, and legal. Their testimony must be evaluated in terms of expertise, opportunity and extent of observation, perspective and objectivity. There is authority for the proposition that the evidence of a lay person may carry greater weight than that of a doctor. *Spence v. Price* (1945), 1945 CanLII 339 (ON CA), [1946] O.W.N. 80 (C.A.). What is important is the opportunity and extent of observations. As was stated in *Re Carvell Estate* (1977), 1977 CanLII 2387 (NB QB), 21 N.B.R. (2d) 642 (Prob. Ct.), at p. 651:
>
> > I am inclined to the view that the evidence of individuals who have known the testator throughout their lives and who have observed him, both before and after illness has occurred and up to the time of his death must be accorded greater weight than the testimony of those who do not have detailed knowledge of the testator and who have had only limited opportunities for observation.

[27] ***Lynch Estate*** also clearly sets out the legal principle that the presence of some degree of dementia is not necessarily fatal to the ability of a transferor to dispose of his or her land, at para. 100:

> [100] However, it is also clear that a person may be competent although there has been the appointment of another to manage his or her affairs. See, for example, *O'Neil v. Royal Trust Co.*, 1946 CanLII 13 (SCC), [1946] S.C.R. 622; *Pomerleau v. Fraser* (1988), 1988 CanLII 3812 (AB QB), 86 A.R. 104 (Q.B.). Also, a person may be competent although he has been diagnosed as suffering from Alzheimer's disease. See *Candido v. Ciardullo* (1991), 45 E.T.R. 99 (B.C.S.C). Even where a person who had entered into a contract has been found by a court not to be mentally competent he may be found to have capacity if it can be shown that the contract was fair and reasonable and was entered into when he had a lucid interval. See *Hunt v. Texaco Exploration Co.* (1955), 1955 CanLII 539 (AB QB), 14 W.W.R. 449 (Alta. T.D.).

[28] It is clear from the case law that perfection is not the standard when the adequacy of mental capacity to perform a legal act is at issue. In the context of the making of a

will, the British Columbia Supreme Court in ***Woodward v. Grant***, 2007 BCSC 1192 (CanLII) makes this point, at para. 125:

> [125] Such things as imperfect memory, inability to recollect names and even extreme imbecility, do not necessarily deprive a person of testamentary capacity. The real question is whether the testator's mind and memory were sufficiently sound to enable him or her to appreciate the nature of the property he was bequeathing, the manner of distributing it and the objects of his or her bounty: see *Field v. James, [1999] B.C.J. No. 1398* (B.C. S.C.), at para. 52, referring to *Banks v. Goodfellow (1870), L.R. 5 Q.B. 549* (Eng. Q.B.) at pp. 567-568.

[29] From these authorities I am satisfied that the analysis as to all of the circumstances surrounding the transfer of land, must demonstrate that the transferor had sufficient memory and understanding to comprehend the following essential elements pertaining to the sale of land:

a) Knowledge of the property to be sold (i.e. which property am I selling?)

b) The value of the land in general terms;

c) The proposed sale price; and

d) The consequences of the sale (i.e. the transferor could no longer use the property.)

[30] Further, I am satisfied that the necessary degree of understanding by a transferor can be attained with the assistance of professional advisors, such as realtors and lawyers, with regard to these essential elements.

[31] The party attacking the validity of a contract due to a lack of mental capacity to give consent must overcome the presumption in favour of mental capacity in the same way that a party attacking the validity of a will or power of attorney. A shifting onus only applies where suspicious circumstances or a breach of fiduciary duty are proven.

[32] There is no bright line in the case law that defines the tipping point when the facts necessary to prove the absence of mental capacity have been proven. As I have already noted, the entire constellation of facts arising from the evidence must be weighed and measured. I am satisfied that the description offered by Mr. Poyser in his text, *Capacity and Undue Influence*, 2nd ed., (Toronto: Thomson Reuters Canada, 2019), at p. 400, best applies to how evaluate evidence as to mental capacity where the validity of a contract is at issue:

> It is not a medical test. It is not a legal test. No legal or medical training is required in order to come to a legitimate lay view as to whether a person has the threshold capacity to perform a given juridical act. Such training is of undeniable use. The lawyer understands the questions to ask and threshold to be attained. The doctor understands the probable impact of underlying medical conditions. Ultimately, the only opinion that counts is that of a judge. Yet the opinions of others, whether neighbor, employee or friend, are still relevant if the person had had a legitimate opportunity to observe conduct on the part of the transfer-maker that is probative on point.

7.0 The Law – Burden and Onus of Proof

[33] There is a presumption in the common law that an adult has the mental capacity to enter into a contract. This presumption can only be overcome with evidence that meets the balance of probabilities standard (***Hittinger v. Turgeon***, 2005 ABQB 257 (CanLII), at para. 22; ***RMK v. NK***, 2020 ABQB 328 (CanLII), at para 131). The onus of proof is therefore on the plaintiffs to show that Bud lacked the mental capacity to sell the Land at the relevant times.

[34] The equitable remedies of undue influence and relief against unconscionable bargains often come into play in cases involving a party of advanced years or who appears to be vulnerable. Both of these equitable remedies are rooted in the fundamental principle that consent to a contract must be freely given and not obtained through

deception or connivance. Merely making a bad deal or an improvident bargain is not enough to engage the rules of equity to set aside a contract. Both of these equitable remedies involve a shifting onus.

[35] In ***Polish Combatants' Association Credit Union Ltd. v. Moge***, 1984 CanLII 3013 (MB CA), 9 D.L.R. (4th) 60, the Manitoba Court of Appeal described how contracts could be set aside under two distinct equitable remedies, namely undue influence and relief against unconscionable bargains. The Court of Appeal quotes a British Columbia decision with approval that describes a shifting onus in unconscionable bargain cases, at para. 34:

> [34] In *Morrison v. Coast Finance Ltd. et al.* (1965), 1965 CanLII 493 (BC CA), 55 D.L.R. (2d) 710, 54 W.W.R. 257, the Court of Appeal of British Columbia in a majority judgment by Davey J.A. drew a distinction between undue influence and a defence based upon unconscionable transaction. Davey J.A. wrote as follows [at p. 713]:
>
> > The equitable principles relating to undue influence and relief against unconscionable bargains are closely related, but the doctrines are separate and distinct. The finding here against undue influence does not conclude the question whether the appellant is entitled to relief against an unconscionable transaction. A plea of undue influence attacks the sufficiency of consent; a plea that a bargain is unconscionable invokes relief against an unfair advantage gained by an unconscientious use of power by a stronger party against a weaker. On such a claim the material ingredients are proof of inequality in the position of the parties arising out of the ignorance, need or distress of the weaker, which left him in the power of the stronger, and proof of substantial unfairness of the bargain obtained by the stronger. <u>On proof of those circumstances, it creates a presumption of fraud which the stronger must repel by proving that the bargain was fair, just and reasonable</u> ...
>
> [Emphasis mine]

[36] A shifting onus also arises in cases where the validity of an *inter vivos* gift is at issue or a dispute arises over the validity of a will or power of attorney. The common

thread running through the case law is the presence or absence of a person to freely consent to a legal act at a particular time.

[37] Suche, J. in ***Young v. Paillé et al.***, 2012 MBQB 3 (CanLII), confirms the presumption of mental capacity and the shifting onus in the context of the validity of a power of attorney this way, at paras. 33 and 34:

> [33] This case was argued on the basis that as with a testamentary document, the burden of proof rests with the party challenging the validity of a power of attorney. It is accepted that upon proof that a will was duly executed with the requisite formalities, after having been read over to or by a testator who appeared to understand it, it is generally presumed that the testator knew and approved of the contents and had the necessary testamentary capacity. I agree that the same rule should apply to a power of attorney.
>
> [34] However, it is also the case that where suspicious circumstances are present, the presumption is spent and the propounder of a will reassumes the legal burden of proving knowledge and approval. In addition, if the suspicious circumstances relate to mental capacity, the propounder of the will reassumes the legal burden of establishing testamentary capacity. Both of those issues must be proved in accordance with the civil standard of proof on a balance of probabilities.

[38] I will comment in detail about the onus for proving a failure to meet the professional standard of care later in these reasons but for now it is sufficient for me to state that this onus rests on the plaintiff as to proof of breach of the professional standard of care. This means that the plaintiffs must lead evidence from like-professionals as to both the required standard of care and that the conduct subject of the court action is in breach of that standard. The Supreme Court of Canada in ***Ter Neuzen v. Korn***, 1995 Can LII 72 (SCC), [1995] 3 SCR 674, confirms this at para. 38:

> 38 It is generally accepted that when a doctor acts in accordance with a recognized and respectable practice of the profession, he or she will not be found to be negligent. This is because courts do not ordinarily have the expertise to tell professionals that they are not behaving appropriately in their field. …

[39] The argument advanced by the plaintiffs that the sales of Land were significantly below FMV, holds at its core the notion that Bud was a vulnerable person who could be easily manipulated to act against his own best interests. If Bud's vulnerability was exploited by the Defendant Lawyers or the Defendant Realtors for their own advantage it would mean not only that the sale transaction took place in suspicious circumstances, but also that there was a breach of fiduciary duty.

[40] Proof of a breach of fiduciary duty shifts the onus to the Defendant Lawyers or the Defendant Realtors to prove that Bud, as the innocent victim in a reliance-based relationship, would have gone ahead with the sale transactions anyway. In practical terms, this means that the Defendant Realtors would have to prove that Bud would have accepted the offers for the Land in the same way and at the same prices, notwithstanding their breach of fiduciary duty. In ***Hodgkinson v. Simms***, 1994 CanLII 70 (SCC), [1994] 3 SCR 377, the Supreme Court of Canada stated, at pp. 441-442:

> What is more, the submission runs up against the long-standing equitable principle that where the plaintiff has made out a case of non-disclosure and the loss occasioned thereby is established, the onus is on the defendant to prove that the innocent victim would have suffered the same loss regardless of the breach; see *London Loan& Savings Co. v. Brickenden*, 1934 CanLII 280 (UK JCPC), [1934] 2 W.W.R. 545 (P.C.), at pp. 550-51; see also *Huff v. Price*, *supra*, at pp. 319-20; *Commerce Capital Trust Co. v. Berk* (1989), 1989 CanLII 4338 (ON CA), 57 D.L.R. (4th) 759 (Ont. C.A.), at pp. 763-64. This Court recently affirmed the same principle with respect to damages at common law in the context of negligent misrepresentation; see *Rainbow Industrial Caterers Ltd. v. Canadian National Railway Co.*, 1991 CanLII 27 (SCC), [1991] 3 S.C.R. 3, at pp. 14-17. I will return to the common law cases in greater detail later; it suffices now to say that courts exercising both common law and equitable jurisdiction have approached this issue in the same manner. …

[41] I will outline later in these reasons why I am satisfied that there is no basis to find that the sales of Land were unconscionable or arose from undue influence. There is no

basis to make a finding of suspicious circumstances on the facts before me. I will also comment later in these reasons as to why I am satisfied that breaches of fiduciary duty have not been proven.

Part III – The Evidence

8.0 Evidentiary Framework

[42] The events leading up to the sale of the three parcels of Land that gave birth to this litigation and the details of each individual sale, serve as a backdrop for all of the evidence offered at trial pertaining to both liability and damages. This makes it impossible to fairly weigh the testimony offered at trial without a fundamental understanding about the characteristics of each parcel of Land and the essential terms of each sale.

[43] For this reason I will now provide a brief description of each of the three parcels of Land and the key terms of each sale. I will then review the testimony offered by the eye witnesses who interacted with Bud prior to, during and after the three sales. Thereafter I will apply the facts to the applicable tests for the necessary degree of mental capacity to engage in the legal act of selling land, and weigh all of this evidence with the relevant tests in mind.

[44] The legal test for the necessary mental capacity to sell land includes an appreciation, in general terms, as to the value of the land that is sold. For that reason my conclusion as to mental capacity will touch on FMV as I weigh the evidence as to mental capacity. A more detailed review of FMV will follow when I address the evidence as to damages, but for now it will suffice to state my conclusion that the Land was sold for FMV.

[45] For the sake of clarity I will use the same terms or descriptors that counsel used at trial to describe the three parcels of Land. They are set out below.

8.1 The "City Lands"

[46] The City Lands had a "footprint" of about 11 acres under an "agricultural" zoning designation in the Rural Municipality of Cornwallis (the "RM") adjacent to the southern limits of the City of Brandon ("Brandon"). At the time of the sale in 2009, the City Lands were undeveloped and contained a natural drainage course or swale that provided overland drainage away from the southeast quadrant of Brandon.

[47] The City Lands were in a low lying area and the parcel was dubbed "alligator alley" by Mr. Cole, who testified Bud described it as "crap land" and he knew it was the Land with the lowest resale value of the three parcels of Land he wanted to sell. At the time of trial in 2020, the City Lands were not developed and are still used by Brandon for drainage purposes.

[48] No real estate agents or developers made any inquiries about the City Lands. Ultimately Brandon paid $66,776 for the City Lands with the stated purpose of the continued use of this land for drainage. The City Lands are not within the areas designated for future residential development.

[49] The Defendant Realtors agreed to list the City Lands for sale on August 19, 2008 at the price of $109,000, as per Bud's instructions and the listing remained on the market for about six months before it was sold in February of 2009. During the time the City Lands were marketed for sale, this parcel attracted very little interest from potential buyers other than Brandon, which was the only party that submitted an offer to purchase.

[50] The first offer Bud received from Brandon was for $85,000. Bud insisted that Mr. Cole make a counter-offer at $99,000. The counter-offer was accepted by Brandon on the condition that Bud could demonstrate he had legal ownership of the streets and lanes shown on the plan of subdivision that had been registered against title many years earlier. As part of its due diligence, Brandon discovered there was a "shadow subdivision" of the land, which created 124 separate individual plots of land divided by streets and lanes.

[51] After searching the relevant documents at the Brandon Land Titles Office, the Defendant Lawyers confirmed to Bud that he did not own the streets and lanes between the individual lots. In practical terms this meant that Bud was unable to sell what he thought was an 11-acre parcel of land, because the streets and lanes occupied some three acres of the total land area and legal title to these three acres belonged to a third party.

[52] After factoring in a discount because Bud did not own the streets and lanes, Brandon agreed to pay $66,776 for the City Lands with the stated purpose of using this land for drainage.

8.2 The "RTM Property"

[53] This particular property was described as the "RTM Property" by counsel, as Bud had arranged for a pre-built single family dwelling or "ready-to-move" (also known as "RTM") house placed on the land to increase its value. The RTM Property consisted of 2.97 acres located in the RM just south of the boundary that separates Brandon from the RM. Bud purchased a 1,324 square foot RTM house which he had moved onto the site

and placed over a concrete basement that contractors had previously excavated and poured according to Bud's instructions. Bud also arranged for the installation of hydro service and a septic field and he managed other aspects of construction at the site as well.

[54] The Defendant Realtors and the Defendant Lawyers were the only witnesses who attended at the RTM Property with Bud in 2009. Their evidence was that the RTM house remained largely unfinished at the time it was listed for sale. Those unfinished items included interior work, such as installation of cabinets, flooring, appliances, stairs to the basement, and landscaping. None of the witnesses for the plaintiffs were able to speak to the state of completion of the RTM house.

[55] The RTM Property was listed for sale on August 19, 2008 for $319,900 based on the completion of all unfinished construction prior to the possession date. The RTM Property remained on the market for about 6 months until it eventually sold on February 21, 2009 for $240,000 in "as is" condition.

[56] Subsequent to the sale, the new owners completed a number of improvements, including interior finishing and decorating, basement finishing including a full bathroom, two bedrooms and construction of both a double detached garage and a workshop.

[57] The first offer on the RTM Property, dated January 3, 2009, required that additional work be completed to the point that an occupancy permit would be issued. The evidence of the Defendant Realtors was that Bud did not want to be bothered with the completion of any additional work and that because the cost of bringing the RTM house to a stage where an occupancy permit would issue was unknown. Bud rejected this offer.

[58] About six weeks later a second offer was made on the RTM Property and it contained the unusual provision that "2 toilets to remain at property", which suggests the toilets had been delivered to the construction site but had not been installed. The Multiple Listing Service ("MLS") listing still recorded an unfinished basement and no landscaping. The Defendant Lawyers gave time-specific evidence that it was not complete. In addition, Bud's counter-offer to the second RTM Property offer makes two separate references to the purchasers buying the RTM Property in "as is" condition, which is consistent with Bud's decision not to complete any additional work in January 2009, and his acknowledgement that the RTM house was incomplete.

[59] The RTM Property remained on the market for about six months. Mr. Cowie testified that he stressed to Bud the disadvantages of keeping the property listed at $319,900 and explained that he was missing out on potential purchasers looking in the $280,000 to $290,000 range. Bud held firm on the listing price notwithstanding the advice of Mr. Cowie. The advice of Mr. Cowie was based on his experience that that after six months of exposure to the market, the absence of offers on a property suggests that it is overpriced or somehow flawed. Mr. Cowie testified that six months was a very long time to have a property on the market and that in 2009 most properties in the Brandon area could be expected to sell in 30 to 90 days.

8.3 The Northwest Quarter

[60] The largest and most valuable of the three parcels of land sold by Bud was the "Northwest Quarter" or "NW Quarter" because it is legally described as

Pt. NW ¼ 1-10-19 WPM. The NW Quarter was sold as undeveloped land by Bud to the Corporate Defendant on July 28, 2009 for the purchase price of $654,410.

[61] Prior to his retirement, Bud used the NW Quarter to pasture cattle. At the time of sale in 2009, the undeveloped land had an "AG80" zoning designation under the RM's zoning by-law.

[62] The NW Quarter is bisected by Provincial Trunk Highway 110 ("PTH 110"), which is marked as a dangerous goods route. As a result of the bisection, 67.46 acres of the NW Quarter lies to the north of PTH 110 (the "Northern Portion"), and 55.12 acres lies to the south of PTH 110 (the "Southern Portion"). The entirety of the NW Quarter is located in the RM.

[63] Both the Defendant Realtors testified that the Corporate Defendant arrived at a purchase price of $654,410 by pricing the Northern Portion and the Southern Portion differently. Specifically, the Northern Portion was priced at $8,000 per acre and the Southern Portion at $2,000 per acre. After taking title, the Corporate Defendant subdivided the Northern Portion and the Southern Portion into two separate legal titles, but took no steps to develop or improve it.

[64] Three residential lots border the Northern Portion of the NW Quarter to the northwest. The remainder of the northern boundary of the Northern Portion is defined by Patricia Avenue, which serves as the municipal boundary between the southern limits of Brandon and the RM. An easement from Manitoba Hydro limits land use at the southwest corner of the Northern Portion and the northeast portion of the Southern Portion.

[65] The area in the RM around the NW Quarter is predominantly used for agricultural purposes. The City Lands lie immediately to the east of the Northern Portion of the NW Quarter. There is an agricultural-industrial development located to the east of the NW Quarter at the southeast corner of Patricia Avenue and 17th Street East in Brandon.

[66] During the time Bud operated his cattle business and until his death, Bud lived in a house located on a 2.9 acre parcel of land located across the road of the Southern Portion of the NW Quarter (the "Homestead"). The sale of the Homestead is not at issue in this trial.

9.0 Evidence about Bud

[67] Bud was not born into an affluent family. Bud's son Gary McLeod ("Gary") testified that his father's upbringing was "tough" and that he was an "old school" guy who saw himself as the "boss" of his children. Gary recalled that his father did not tolerate non-compliance with the "orders" he gave to his five children as they were growing up.

[68] In 1974, when Gary was 15 years of age, Bud divorced his wife and took on the primary parenting role to Gary. Bud's four remaining children moved into a new home with Bud's ex-wife.

[69] Bud never remarried and lived on his farm property without a partner after his divorce. The children knew that Bud had a "lady friend" by the name of Doris who was at his house regularly but they had no real contact with her. A female friend of the family, who was hired by the children to make sure Bud was taking his medications and to check up on him, testified that she rejected Bud's invitation to engage in sexual activity.

It was not unknown for Bud to make inappropriate comments of a sexual nature to women.

[70] Gary could not recall a time his dad was not farming but it was a side-line to his main job as a self-employed trucker. In 1982 Bud ended his trucking business and went into cattle farming full time. Bud's cattle farming operation continued for about 25 years until his retirement in late 2006 or early 2007 when the last of his cattle were sold. At that time Bud was 74 years of age.

[71] The evidence from all of the witnesses who interacted with Bud, painted a portrait of a blunt spoken man who did not suffer fools gladly. Bud was also not shy about expressing opinions some might find offensive. Swearing and using expletives were not an uncommon feature of Bud's vocabulary.

[72] Throughout his working life Bud never forgot the lessons in frugality he learned as a child. Bud kept track of every dollar he earned and never spent money foolishly. Gary recalled that his father was "tight" with his money. Bud was also known to be a shrewd negotiator who drove a hard bargain. Whenever Bud received an offer on something he was selling, he would typically respond with a counter-offer in an effort to ratchet up the sale price. All of his children who testified, mentioned that Bud was extremely protective of his privacy when it came to his personal finances and he was not willing to share any details about his financial situation or investments with them.

[73] The relationship that Bud had with his children can best be described as strained. None of his children were particularly close to him and that seemed to suit Bud just fine. Gary, who had the closest connection to Bud of any of his children, mentioned that after

2008 he called Bud once every three months or so and that Bud was guarded and perhaps paranoid during their conversations. Gary was named as power of attorney by Bud in April of 2008 but he never acted on it.

[74] Greg McLeod ("Greg") also testified about his father and said after his parents divorced when he was a teenager, he saw Bud about once per year and that the frequency of visits did not increase after he reached adulthood. During these limited visits the conversations Greg had with Bud dealt with perfunctory matters or family history. There was no effort to get into personal matters or establish rapport.

[75] James McLeod ("James"), Bud's third child who testified at trial, mentioned that over a 20-year period ending in 2008 he had virtually no contact with his father. In 2008, as he noted an increased vulnerability in Bud, James made more of an effort to stay in touch with him. From September 2009 to late January of 2010 there were more frequent visits between James and Bud and their relationship was re-established but not to the extent that Bud spoke about his personal matters or financial affairs, which he continued to shroud in secrecy from all of his children.

9.1 Medical History

[76] In June of 2006 Bud complained to his family physician in Brandon, Dr. Uys, about memory loss and he was started on medication to treat dementia. On September 19, 2006, Dr. Uys performed a Mini-Mental State Examination ("MMSE") on Bud and he scored 18 out of 30 possible points. A public health nurse, Scott Minary (the "Public Health Nurse"), who was assigned to conduct in-home visits with Bud, performed an

MMSE on Bud on December 19, 2007, some 15 months later. An improved score of 20 out of 30 points were recorded by the Public Health Nurse at that time.

[77] The Public Health Nurse testified that Manitoba Health uses the MMSE to assess whether it will cover the cost of prescriptions that treat the symptoms of dementia. A score of less than 12 out of 30 points indicates that the level of impairment is too high for the cost of drugs to be covered by Manitoba Health. Although an MMSE result between 15 and 20 out of 30 points indicates only moderate cognitive impairment, the Public Health Nurse indicated it was still a basis for concern.

[78] In November of 2007 Bud left a pot unattended on a hot stove. This came to Gary's attention and he called Bud. During their call Bud indicated he needed to get "checked out" because he had headaches that made him feel like his brain was "on fire." Gary also noted that Bud talked about his now late ex-wife (Gary's mother) as if she was still alive.

9.2 First Admission to Hospital (2007)

[79] On November 23, 2007 Bud was taken by Gary to the Centre for Geriatric Psychiatry in Brandon (the "CGP") and he was admitted on a voluntary basis. The medical staff concluded Bud was capable of admitting himself as a voluntary patient for psychiatric assessment and treatment. Dr. Lint diagnosed "dementia of multiple etiology." The clinical chart note indicated Bud had an impaired ability to manage daily living activities and make reasonable life decisions. Bud's cognitive impairment evidence at that time pertained to short-term memory loss.

[80] At the CGP Bud was administered a different kind of cognitive test by Dr. Lint on November 26, 2007. This test is related to the assessment of dementia and is called the Montreal Cognitive Assessment ("MoCA"). Bud's MoCA score at that time was 18 out of a possible 30 points. After Bud's evaluation, Dr. Lint was satisfied Bud was competent to give instructions to a lawyer to sign a power of attorney. Bud did not follow through on that.

[81] On November 30, 2007, Bud was sent home on a three day pass and was not readmitted to the CGP. Bud was discharged into the care of his son Gary and was prescribed "Exelon" which is a drug that slows the progression of cognitive impairment in patients with certain kinds of dementia. A referral to the Public Health Nurse was also made at that time for illness education and supportive counselling. The discharge form issued by the CGP does not show any medical follow-up was contemplated. Gary took Bud back to the Homestead and stayed with him there for four days. After that Bud returned to his normal routine of living alone. Bud's grandson, who is a pharmacist in Brandon, took care of filling the prescriptions and delivering them to Bud.

[82] Gary testified the medication noticeably improved Bud's cognitive function and his mind was much sharper. Regrettably the medication could not completely reverse the noticeable decline in Bud's short-term memory and Gary observed Bud "continued to live in the past." No concerns about Bud's long-term memory were noted by any of the witnesses at this time and there was no concern about Bud continuing to live alone on his Homestead, driving his vehicle or operating the farm equipment he used to clear snow or maintain his yard.

[83] Bud adamantly refused homecare assistance and he continued to attend to his housekeeping, food preparation and personal hygiene needs on his own. Bud's grandson continued to deliver the medications to Bud every 30 days when the prescription ran out and the Public Health Nurse visited Bud's home on a monthly basis. Gary recalled a discussion with Bud about having a power of attorney prepared and Bud was not opposed to the idea. Bud was working with a lawyer in Winnipeg at the time on a subdivision of the NW Quarter. Gary arranged for Bud to see this lawyer in Winnipeg and he drafted a power of attorney but Bud never got around to signing it.

[84] The Public Health Nurse first made contact with Bud on November 30, 2007. During a phone call on December 4, 2007, the Public Health Nurse did not note any confusion or disorientation as to time or place in Bud's comments. During his conversations with Bud in December of 2007, the Public Health Nurse did not observe Bud making any delusional or paranoid comments or stating that he was anxious or agitated about anything. The majority of their conversations pertained to Bud's recitation of his success as an entrepreneur and his business deals both past and present. Bud was clearly proud of his success as a business person and he was not shy in griping about politicians and bureaucrats who allegedly made his business dealings more difficult.

[85] During a visit to the Homestead in December of 2007, the Public Health Nurse made a point of checking the fridge and the house for bottles of alcohol but he saw none and did not observe any signs that Bud was consuming alcohol. In fact, the Public Health Nurse never observed Bud to be under the influence of alcohol. The Public Health Nurse

did comment to Bud that he was concerned about the lack of cleanliness in the house but Bud did not share this concern.

[86] By late January of 2008 the Public Health Nurse noted a deterioration in Bud's condition. Bud only had minimal recall of their previous meetings and he thought his prescription for Exelon was for an earache. Bud did see a Dr. Duncan for a physical examination on January 17, 2008 and a Dr. Nasr for an earache on January 24, 2008. No evidence was led by the estate about the observations these doctors may have made about Bud's mental capacity or who may have booked these appointments. In my view it is reasonable to conclude from these facts that Bud sought out medical care on his own.

[87] When the Public Health Nurse phoned Bud on February 15, 2008 he showed concerning signs of short-term memory impairment and he had no recall of who Dr. Lint, who treated him at CGP, was. At the March 17, 2008 home visit the Public Health Nurse noted the presence of a foul odour in the house. It was evident to the Public Health Nurse that Bud had not taken his medications in the past three weeks, and Bud was adamant about not taking them again in the future.

[88] Bud lived independently on the Homestead from November 30, 2007, to March 28, 2008. During that time he operated motor vehicles, shopped for himself, saw his friend Doris, did his own banking, paid his bills, prepared his meals and cleaned his house. Bud also commenced or continued the supervision and management of the ongoing work at the RTM Property and preparing it for sale.

9.3 Second Admission to Hospital (2008)

[89] On March 28, 2008 Bud voluntarily attended at the emergency room ("ER") of a Brandon hospital due to chest pains. Bud showed signs of confusion at that time. After refusing to allow medical staff to admit him as a patient, Bud left the ER against medical advice and the RCMP were called to find him. The Public Health Nurse recounted later that Bud had a clear recollection of this event and he described to the Public Health Nurse that he "took off" from the ER and the RCMP officers located him nearby. A doctor on staff signed an involuntary admission form (Form 4) under ***The Mental Health Act***, C.C.S.C. c. M110, which mandates a psychiatric assessment. Bud was then re-admitted as a patient at the CGP on an involuntary basis and Dr. Lint was once again assigned as his primary physician. Later that week Bud's patient status was changed to "voluntary".

[90] The diagnosis at that time was "dementia of multiple etiologies" and memory impairment was evident. The prescription for Exelon was renewed. Notwithstanding this diagnosis, Bud was deemed by Dr. Lint to be competent to execute a power of attorney and he signed one in the presence of a lawyer on April 3, 2008. This particular lawyer was not called to testify and whatever notes he may have taken about his observations about Bud were not placed in evidence.

[91] Gary testified that after resuming his medication Bud's condition improved markedly and he was given day passes to leave the CGP after the power of attorney form was signed. On April 8, 2008 Bud was discharged into Gary's care and he took Bud to his home in Saskatchewan for one week where a big improvement in his condition became evident to Gary. By April 15, 2008 Bud was back at the Homestead and he returned to

his normal routine as a single person living alone. The only exception was that Gary arranged for a female family friend, Barb Ksiazek ("Barb"), to check on Bud daily to make sure he was taking his medication. Barb stopped those visits in August of 2008.

[92] Bud's Manitoba health patient history shows that he saw Dr. Benning on August 20, 2008, Dr. Halka on August 21, 22, 25, 29, September 12, October 14 and October 30, 2008. It appears to have been only the visit of August 21, 2008, that prompted Dr. Halka to refer Bud to Dr. Vipulananthan on September 12, 2008 for a psychiatric assessment. The letter from Dr. Halka to Dr. Vipulananthan of that date shows that Dr. Halka made no diagnosis of dementia, canceled all of Bud's dementia medication and described his long-term, mid-term and short-term memory as "within the normal range." The estate did not call Dr. Halka to testify.

[93] In August, 2008, Bud met with Mr. Cole and Mr. Kehler about the sale of the City Lands. In September of 2008, Bud saw Mr. Kehler about his power of attorney and in October, 2008, Bud formally revoked the power of attorney with Mr. Kehler's assistance. Bud then saw Dr. Vipulananthan for a consultation on November 4, 2008. Bud's Manitoba Patient Health History shows he saw three different physicians between January of 2009 and May of 2010, and that those doctors did not record any concerns about Bud's mental capacity in their notes. From February of 2009 through September of 2009, Bud accepted offers to purchase through the Defendant Realtors on all three parcels of Land and subsequently closed those transactions with the Defendant Lawyers.

9.4 Final Admission to Hospital (2010)

[94] Bud was hospitalized on June 5, 2010, due to a marked decline in his health over the preceding months. Medical tests showed a subdural hematoma (commonly referred to as a stroke) of uncertain age, and he was diagnosed with dementia from multiple causes. Doctors concluded that Bud was now mentally incompetent and his medical condition rapidly deteriorated due to a new large temporal hematoma on his brain. Bud was sent to Winnipeg for emergency neurosurgery and he died shortly after that surgery on September 11, 2010.

10.0 Evidence of Dr. Lint

[95] According to Dr. Lint who treated Bud at the CGP in November of 2007, the MoCA test revealed "challenges and deficits" in executive function. The term executive function encompasses a variety of cognitive skills and is a not a "one size fits all" description. Some cognitive skills can remain intact while others could be problematic.

[96] Dr. Lint was confident Bud had the requisite capacity to execute a power of attorney at the time of his admission to the CGP in 2007 and in his view Bud needed one as soon as possible. This opinion of Dr. Lint was based on his assessment that as a single person living alone, Bud needed help with his executive function deficits.

[97] Dr. Lint testified he was "reassured" based on his "limited time" with Bud in 2007 that Bud had a good plan for his power of attorney and it "needed to happen." Dr. Lint also testified the family needed to work this out with Bud.

[98] Dr. Lint confirmed Bud's medical records showed no evidence of alcohol consumption on Bud's part and that Bud was oriented as to time and place when he was

involuntarily admitted to the CGP in 2008. Further, Dr. Lint confirmed that Bud's condition improved after his admission to the CGP in 2008 to the point where he expressed his desire to receive medical treatment, which resulted in a switch of his patient status from involuntary to voluntary seven days after he was first admitted.

[99] In 2008 Dr. Lint noted some changes in Bud's symptoms since his earlier admission to the CGP in 2007. In particular he noted that Bud was guarded about his finances and he had fears of getting "ripped off." Further, Bud showed a lack of inhibition by holding hands with another male patient and making inappropriate sexual comments to female staff. Bud stopped this behaviour after staff asked him to refrain from it and he indicated an appropriate understanding as to why he should not do this in the future.

[100] Dr. Lint was satisfied Bud was not taking his prescribed medication (Exelon) which he prescribed to be taken twice daily along with a low dose of an anti-psychotic medication. During the course of his admission to the CGP Dr. Lint noted continued improvement in Bud's demeanour. Dr. Lint then confirmed Bud was competent to appoint a power of attorney and knew Bud did so on April 3, 2008, in the presence of a lawyer.

[101] Throughout his direct examination Dr. Lint was vague in describing how Bud met the legal test for mental capacity to execute a power of attorney. More than anything, Dr. Lint described a sense of urgency in the need for a power of attorney, which of course has nothing to do with the legal test. The sense of urgency in signing a power of attorney according to Dr. Lint had to do with Bud finding a trustworthy person to mitigate the risk he was facing.

[102] Dr. Lint expressed his understanding of the legal test for a power of attorney as a trusted person looking after your personal and financial affairs if you cannot manage them alone. In order to have that capacity Dr. Lint concluded a patient would have to understand that at some future point an individual could lose the ability to manage his or her affairs. Dr. Lint said nothing about the nature of the applicable legal test as it pertained to the necessary understanding for the sale of assets, such as land, or that the advice of professionals could assist a person in coming to a proper degree of understanding.

[103] At the time of his discharge from the CGP in 2008 Dr. Lint testified he was not satisfied that Bud could attend to the essential activities of daily living or manage his financial affairs without assistance, notwithstanding his opinion that Bud had the requisite mental capacity to execute a power of attorney.

[104] Dr. Lint also testified it was doubtful Bud would have had capacity to enter into real estate transactions in 2009, although he admitted he did not explicitly turn his mind to that issue at that time he treated Bud in 2008. Oddly, Dr. Lint drew this conclusion despite that fact that he was "reasonably optimistic" about Bud's future, based on his observations that Bud's demeanour was noticeably better at the time of his discharge from the CGP. Dr. Lint specifically acknowledged that no substantial treatment was possible for Bud's condition and that a "fluctuating course" was common in dementia patients. Due to the fact that there was no firm diagnoses of a vascular dementia, which unlike an Alzheimer dementia does not necessarily worsen progressively over time, Dr. Lint conceded things could go well or poorly for Bud. By this Dr. Lint meant that

although there could be no real overall improvement for Bud, he conceded his condition could remain stable.

[105] Dr. Lint admitted in cross-examination that in his view it was best to permit Bud to maintain his personal autonomy for as along and as best as possible. For that reason he did not consider revoking Bud's drivers licence.

[106] After his discharge from the CGP in 2008, Dr. Lint was not contacted by Bud or his son Gary, who held power of attorney. Accordingly Dr. Lint knew nothing of Bud's revocation of the power of attorney in October of 2008. No members of Bud's family contacted Dr. Lint either over the relevant period in 2009 when Bud sold the Land.

[107] During cross-examination Dr. Lint was unable to square the circle as to why he was "concerned" about Bud entering into real estate transactions in 2009 when he never turned his mind to that possibility in 2008 or why Bud did not have the capacity to enter into the legal act of sale of land in 2009 when he had sufficient mental capacity to sign a power of attorney in 2008. Dr. Lint refused to give a direct answer to the question as to whether he directed his mind to the legal act of sale of land in 2008 or if he formed his opinion as to the lack of such capacity retrospectively after he was contacted to be a witness in this litigation. I am satisfied he refused to give a direct answer to this because of the obvious contradiction he would have exposed himself to, given his position that Bud had the mental capacity to sign a power of attorney but not the mental capacity to sell land.

[108] Dr. Lint tried to nuance his answer by saying he was concerned about Bud's mental capacity "at day one" and by putting a power of attorney in place he would be protected

from financial abuse and the need to make "complex" decision in the future. Again, Dr. Lint made no mention of the role of professional advisors who might assist Bud in making decisions about the sale of land.

[109] Based on Dr. Lint's wholly unsatisfactory answers in cross-examination as to why he concluded Bud had the necessary mental capacity in 2008 to voluntarily consent to change his patient status to "voluntary" and instruct a lawyer to sign a power of attorney, but not to engage in the management of his financial affairs or sell land in 2009, it is clear to me that he never directed his mind to the possibility that Bud might engage in legal acts such as the sale of land without Gary's assistance.

[110] I am also satisfied on all the evidence that Dr. Lint indicated Bud had mental capacity to do certain legal acts in 2008 because Dr. Lint concluded Bud could voluntarily make those kinds of decisions. Dr. Lint clearly did not address his mind to Bud's mental capacity in 2009 when he last saw Bud in 2008, with a view to establishing if Bud had the necessary threshold mental capacity to engage in the sale of land. Further there was no effort by Dr. Lint to explain how he could project into the future as to Bud's mental capacity to sell land in 2009, when he himself indicated Bud's condition was variable and could have at a minimum remained stable after his discharge.

[111] To be blunt, I can give no weight to Dr. Lint's opinion as to Bud's mental capacity, given his contradictory assessment that Bud had the capacity to engage in the legal act of consenting to medical treatment and executing a power of attorney in 2008, but not selling land in 2009. Dr. Lint did not address his mind to the possibility of the sale of land in 2008 or 2009 as he did not make any inquires about that possibility or even ask

Bud specific questions about that possibility. Further, Dr. Lint had no way of assessing Bud's mental condition in 2009, as he had no facts to go on other than what he observed in 2010 when Bud's health was dramatically worse and he had no knowledge as to how Bud might have been assisted by professional advisors during the sale of the Land.

[112] In light of all this I can only conclude Dr. Lint was only speculating that Bud's medical condition could only have been worse in 2009 than it was in 2008 which contradicted his own prognosis of Bud's future medical condition. Dr. Lint did not engage in a proper time and task specific analysis of the legal test for mental capacity to engage in the legal act of selling land in 2009.

11.0 Evidence of Dr. Vipulananthan

[113] Dr. Vipulananthan is the psychiatrist who examined Bud after receiving the referral from Dr. Halka, who was Bud's family doctor. The majority of Dr. Vipulananthan's practice at the Brandon Regional Health Centre involves the treatment of geriatric patients.

[114] The notes that Dr. Vipulananthan took of his examination of Bud on November 4, 2008, show that Bud gave accurate information about his education and his earlier work as a farmer and a trucker. Bud also mentioned problems with his short-term memory and he remembered the circumstances leading to his involuntary admission to the CGP, which included him being placed in handcuffs by police officers.

[115] Dr. Vipulananthan administered a MoCA test, which yielded a score of 16 out of 30, and it was obvious to Dr. Vipulananthan that Bud had a short-term memory problem. Bud had no ability to recall five random words after 5 minutes but he was correctly

oriented as to time, date and place. Bud was agitated and either unwilling or unable to give Dr. Vipulananthan the name and number of his son Gary or his grandson. Dr. Vipulananthan knew that Bud's grandson was a local pharmacist from his work at the hospital.

[116] Bud's long-term memory did not appear to be compromised, according to Dr. Vipulananthan, as Bud was able to talk about his lifestyle and medical history. Bud was also able to remember his place of birth and details as to his education, occupation and former marriage. No psychotic symptoms were evident to Dr. Vipulananthan at the time of the examination and although Bud's thought processes were slow, they did follow sequentially. Dr. Vipulananthan observed no evidence of delusions or hallucinations in Bud, which might have indicated that there was an underlying mental health problem.

[117] Bud did express unhappiness to Dr. Vipulananthan about some land sales and issues surrounding his land subdivision. Bud was also unhappy about something his grandson did but it was not clear to Dr. Vipulananthan why this was the case.

[118] The conclusion of Dr. Vipulananthan was that Bud had dementia that "looks like" a mix of Alzheimer's plus vascular dementia and "perhaps" a frontal lobe pathology based on Bud's disinhibited behaviour, goal-oriented chatter about his land subdivision and the hostility he showed to his grandson. According to Dr. Vipulananthan, Bud's "filters were off" by which he meant that Bud used foul language, failed to show empathy and was hostile to family members. Bud presented as an obstinate person to Dr. Vipulananthan with a "my way or the highway" approach to his family and social interactions. I pause to note here that Dr. Vipulananthan did not know anything about Bud's personality prior

to this consultation and he never considered the possibility that Bud's behaviour, vocabulary and social skills never changed throughout his life.

[119] Dr. Vipulananthan concluded that Bud was anxious and needed medication to calm himself and he was concerned that short-term memory issues would eventually lead to Bud having future problems such as finding the destinations he was driving to or finding his way home. Dr. Vipulananthan also concluded that the dementia Bud had was progressive and although medications could improve Bud's quality of life by alleviating the symptoms he observed, there was no way to treat the dementia itself. Dr. Vipulananthan indicated in his view it was best to get a complete inter-disciplinary assessment at the CGP with a view to ensuring Bud could obtain the best quality of life possible going forward.

[120] Unlike Dr. Lint's assessment in April of 2008, Dr. Vipulananthan testified that he did not think Bud was competent at the time of his examination in November of 2008. Notwithstanding this conclusion, Dr. Vipulananthan did not record concerns about Bud's continued operation of motor vehicles or that an assessment for assisted living should be made. Nothing in Dr. Vipulananthan's notes indicated that Bud's family should be contacted about these kinds of concerns. Dr. Vipulananthan did not see Bud again until Bud's family started the process of obtaining a committeeship order in 2010.

[121] In cross-examination, Dr. Vipulananthan admitted that based on his billing records to Manitoba Health, his consultation with Bud in 2008 lasted 45 minutes at most and hedid not see Bud again until his health took a catastrophic turn in 2010, when he was admitted to hospital and diagnosed with a subdural hematoma. Due to Bud's "lack of

cooperation," Dr. Vipulananthan conceded his interaction with Bud in 2008 may have been of an even shorter duration, but notwithstanding the brevity of the meeting he insisted he had a specific recollection of this meeting with Bud after reviewing Bud's chart.

[122] Dr. Vipulananthan also noted Bud was cooperative during the MoCA he administered. Bud scored 17 out of 30 points on the MoCA test Dr. Vipulananthan administered. Question were put to Dr. Vipulananthan in cross-examination about previous test scores Bud had on his medical file; specifically an 18 out of 30 score on an MMSE in September of 2006 administered at the clinic of his family physician, a 20 out of 30 score on an MMSE performed by the Public Health Nurse on December 19, 2007, and an MoCA score of 18 out of 30 at the time of his CGP admission in 2007.

[123] Dr. Vipulananthan had to concede that variability in test results could result from the fact that a test could be administered on a day when a patient was having "a good day or bad day" and this kind of variability could depend on the kind of dementia the patient suffered from (vascular dementia v. Alzheimer dementia).

[124] Dr. Vipulananthan also knew that Bud was admitted to the CGP in late March of 2008 and that no MMSE or MoCA test was administered at that time. Further, Dr. Vipulananthan knew from Bud's chart that on April 3, 2008 Dr. Lint found Bud to be competent to consent to medical treatment and to sign a power of attorney.

[125] Dr. Vipulananthan conceded the following during cross-examination:

a) That the MoCA test results are harder to interpret than MMSE;
b) That the MoCA is more focused on the identification of mild cognitive impairment;

c) That both test results are like guides to establish if a clinical assessment is needed;

d) That neither test is diagnostic in nature – they are screening tests and not diagnostic tests of executive brain function; and

e) That poor results on a screening test amount to a signal, rather than a conclusion about mental capacity.

[126] Crucially, Dr. Vipulananthan also agreed during cross-examination that a mental capacity assessment is task and situation specific, because a person with partial capacity might have capacity to perform simple tasks but not necessarily complex ones. Therefore, when mental capacity is assessed, a psychiatrist must ask what task is expected or called for from a patient and in what circumstances that task is to be performed in. Dr. Vipulananthan also agreed with the proposition that the existence of mental competency or capacity is presumed unless there is continuous evidence that it is absent or lacking.

[127] Dr. Vipulananthan agreed that he only learned about Bud selling the Land after Bud's death in 2010 and that he never inquired or knew about Bud's plans to sell the Land when he spent some 45 minutes with him in 2008. Dr. Vipulananthan also admitted he never recorded anything in his notes about concerns he may have had about Bud's mental competence and he never communicated such a concern to Dr. Halka or to anyone else. The only recommendation Dr. Vipulananthan made in writing was for a multidisciplinary assessment at the CGP.

[128] Dr. Vipulananthan made no notes in 2008 about the opinion he expressed at trial that it was "most likely" that Bud did not have the mental capacity necessary to enter into a contract in 2009. It is also significant in my view that Dr. Vipulananthan did not articulate what he believed the legal test for the threshold capacity to enter into a contract to sell land actually was or that professional advisors can explain complex documents to assist clients in understanding what they mean.

[129] One of the facts relied on by Dr. Vipulananthan in support of his conclusion that Bud lacked the necessary mental capacity to sell land in 2009 was that he saw a decline in Bud's MoCA score in 2007 recorded by Dr. Lint and the score Bud had achieved in November of 2008. That point total drop was from 18/30 to 16/30. Dr. Vipulananthan concluded that this drop in points showed that Bud was a man going into a "decline" and he would not be compliant with instructions to take his medications as prescribed.

[130] Dr. Vipulananthan, just like Dr. Lint before him, had no credible way of avoiding an admission in cross-examination that during the course of the November 2008 consultation he had no idea Bud would sell the Land in 2009 with the assistance of a realtor and a lawyer. Notwithstanding this admission, Dr. Vipulananthan made a determined effort to say he directed his mind to the issue of Bud's capacity to enter into a contract to sell land because Bud's state of cognition was at issue during the consultation. As to why he never recorded such an opinion about Bud's apparent lack of mental capacity in his notes or his report, Dr. Vipulananthan improbably stated he was not asked directly about this by the referring family physician and felt there was no need to state his conclusion, which was obvious to him from Bud's MMSE score. Ultimately,

Dr. Vipulananthan hung his hat about directing his mind to the issue of the possibility of a future land sale on the fact that Bud mentioned a land subdivision of some kind and expressed his unhappiness about it, even though it was not clear to him why Bud was unhappy and he did not ask follow-up questions about this unhappiness.

[131] In explaining the absence in his clinical notes about the issue of mental capacity, Dr. Vipulananthan insisted he noted "comprehension difficulties" on Bud's part and this would negatively affect "legally involved expectations." The fact that he did not "focus" on the issue of mental capacity in his notes did not mean he failed to reach conclusions about this according to Dr. Vipulananthan.

12.0 Evidence of Dr. Silberfeld

[132] Dr. Michel Silberfeld was called to testify by the Defendant Lawyers as an expert in psychiatry. The qualifications of Dr. Silberfeld are extensive and include the founding of the mental competency clinic while he served on the medical staff at Baycrest Hospital in Toronto, which is dedicated to geriatric care.

[133] Prior to his retirement shortly before this trial started, Dr. Silberfeld worked in private practice. He was also registered as a specialist for the preparation of court ordered competency assessments in Ontario. Dr. Silberfeld has published over 60 articles, which cover not only the field of psychiatry but also legal and ethical issues. In addition to his academic work, Dr. Silberfeld has taught at the University of Toronto in the Faculty of Medicine and one course at Osgood Hall Law School. During his career, Dr. Silberfeld has been qualified as an expert in psychiatry at trial over 50 times in numerous provinces, including Manitoba.

[134] Unsurprisingly, counsel for the estate and the Defendant Realtors accepted the qualifications of Dr. Silberfeld as in expert in the field of psychiatry in general terms and specifically as to the assessment of mental competency and mental capacity.

[135] The medical report of Dr. Silberfeld was based on a review of all of Bud's medical files and records disclosed in this litigation. In his report, Dr. Silberfeld opined that he could not form an expert opinion as to the mental capacity of Bud to engage in the sale of the Land in 2009, as there was a serious gap in the medical records. In the absence of medical evidence over that particular span of time, he could only speculate as to what Bud's mental capacity could have been and in his view, speculation could not substitute for an expert opinion. Dr. Silberfeld further opined that speculation could not rebut the presumption of a patient's mental capacity to perform a legal act.

[136] The serious gap in the medical records, as far as Dr. Silberfeld was concerned, meant that there was no way for him to assess if Bud had the mental capacity to engage in the sale of the Land in 2009, which is a task and time specific legal act. For an expert opinion to have any value, Dr. Silberfeld was the of the view that a medical assessment to confirm mental capacity at the relevant time or times was essential and none of Bud's medical records contained notes of interactions with Bud or assessments by medical professionals over the period of time when the Land was sold.

[137] Although an MMSE score of 20 out of 30 possible points on December 19, 2007 was proof of some mental impairment, in Dr. Silberfeld's view, it was not enough to preclude a sale of land. Dr. Silberfeld acknowledged an understanding of the essential elements for mental capacity to engage in the sale of land, namely:

a) Knowledge of the property to be sold;

b) General value of the land;

c) The proposed sale price; and

d) The consequences of sale.

According to Dr. Silberfeld, there was no way for an expert to predict what an MMSE or MoCA score might have been in 2009, which was a year after the last test was administered and if any possible drop in cognition would have precluded the necessary mental capacity to engage in the legal act of selling land. The only acceptable basis for an expert opinion as to the necessary mental capacity would have been medical assessments that specifically addressed the essential components pertaining to the sale of land.

[138] The fluctuation in Bud's test scores and Dr. Lint's opinion that Bud had capacity to sign a power of attorney in 2008 suggested to Dr. Silberfeld that Bud's condition fluctuated over time and there was no reason to assume he would have lacked the requisite degree of mental capacity to sell land between been February and November of 2009. Mild dementia would not preclude the sale of land, according to Dr. Silberfeld, as it could be possible that a patient at that stage of the illness could still understand the essential elements of the sale of land with professional advice. The MMSE and MoCA tests do not address these four essential points or anything related to financial matters, as they are assessment tools used to establish the decline of cognition from a baseline. In cases of mild impairment, evidenced by Bud's fluctuating test scores, there was nothing to suggest that Bud would not have been able to understand these four essential elements of a sale of land if he was prompted to do so.

[139] The best medical evidence as of April 2008 indicated to Dr. Silberfeld that Bud had mental capacity to grant a power of attorney and that means he must have had the requisite mental capacity to understand these four essential points with respect to the sale of land with assistance from his realtors and lawyers. Further, there was no medical evidence from either Dr. Lint or Dr. Vipulananthan that Bud lacked the necessary mental capacity to execute a power of attorney in 2008 and that his condition was irreversible. Simply put, there was no medical basis to conclude that Bud was lacking in his mental capacity to sell land at the relevant times.

[140] Dr. Silberfeld remained firm in his conclusions as to the impossibility of drawing an expert opinion on mental capacity, as there was no certainty from the available medical records if the dementia was of an Alzheimer variety or if it was a vascular dementia. As already noted, Alzheimer dementia typically involves a steady decline in metal capacity but vascular dementia has a fluctuating course and involves periods where lucidity is evident. Medication can also lead to periods of improved lucidity in patients with vascular dementia.

[141] Dr. Silberfeld also pointed to the fact that Bud's condition seemed to improve after his 2008 discharge from the CGP and there was no evidence Bud was unable to handle his financial matters without assistance. The subdural hematoma that caused Bud's death in 2010 only became evident to medical staff after the real estate transactions were closed, so there was no way, in Dr. Silberfeld's opinion, to know if this affected his mental capacity. The CT scan at the CGP in 2008 showed no evidence of a subdural hematoma.

13.0 Analysis and Medical Evidence as to Capacity

[142] I agree with Dr. Silberfeld's assessment that the opinions of Drs. Lint and Vipulananthan as to Bud's lack of mental capacity to sell land in 2009 are of no value simply because in 2008 they never asked him relevant questions as to the essential elements involved in the legal act of selling land. By their own admissions, Drs. Lint and Vipulananthan also did not rule out the possibility that Bud may have had vascular dementia and his condition could have fluctuated over time and they gave no thought to the possibility that realtors and lawyers could assist Bud in understanding the essential elements of the sale of land

[143] Drs. Lint and Vipulananthan never asked these questions, as they had no idea when they examined Bud that he was intending to sell the Land in 2009. Without a time and task specific inquiry about the proposed land sales, at the proposed time of the sales, Drs. Lint and Vipulananthan could only guess about what Bud might have said in response to questions in 2009 related to the essential elements of selling land.

[144] Dr. Silberfeld concluded that the best evidence as to Bud's mental capacity to engage in the legal act of selling land would come from Mr. Kehler who spent about 15 hours in private meetings and phone calls with Bud at the relevant times. Dr. Silberfeld concluded that this was a lot of time for Mr. Kehler to form an opinion about Bud's mental capacity and his legal opinion on that point deserved some deference by medical experts.

[145] The total absence of any comments in Dr. Vipulananthan's clinical notes or his report to Dr. Halka about Bud's mental capacity is telling, in my view, as it indicates he never turned his mind to the key question in this litigation that he was asked to express

an expert opinion about. Further, Dr. Vipulananthan's actions in calling for a multidisciplinary assessment rather than plans for future medical or personal care are inconsistent with his other evidence at trial that he directed his mind to Bud's mental capacity and came to a firm conclusion that Bud lacked such capacity.

[146] Dr. Vipulananthan had no way of knowing Bud was going to sell the Land in 2009 and so he could not, and did not, ask the questions that are relevant to the performance of this legal act. Any assessment Dr. Vipulananthan believes he made was done without posing the relevant questions about the legal test for mental capacity to sell land.

[147] Dr. Vipulananthan placed significant value on Bud's global scores on the MMSE and MoCA tests but he did admit that these test results are variable depending on who administers the test, how the patient is doing that day and how hard the patient tries. Dr. Vipulananthan also failed to note, as Dr. Silberfeld did, that global test scores do not necessarily tell the whole story about a person with some degree of diminished mental capacity and an examination of the scores achieved in the individual sections of the tests are important. Dr. Silberfeld, obviously had superior qualifications in the field of geriatric psychiatry and the assessment of cognitive and neurological disorders, in my view, and his observations about these cognitive tests are important.

[148] Dr. Vipulananthan was recalled to testify on June 19, 2020, for the purpose of responding to Dr. Silberfeld's opinions but his report was basically a repetition of his earlier evidence about Bud and contained nothing in specific response to Dr. Silberfeld's evidence.

[149] Dr. Vipulananthan reversed course from his prior testimony when he said he recommended Bud go to hospital for an "assessment" and by that he did not mean a multidisciplinary capacity assessment but an assessment for "diagnosis and treatment." This change in testimony undermines the credibility of Dr. Vipulananthan in my view.

[150] Dr. Vipulananthan's new memory of his undocumented opinions about Bud's mental capacity at a time when he did not even know that Bud was planning to the Land also lacks credibility and is unreliable. If Dr. Vipulananthan really was concerned about a lack of mental capacity and treatment for Bud in 2008 he did not act in a manner consistent with such a conclusion, by for example:

a) Confirming this in writing;
b) Immediately ordering Bud to be admitted to hospital for diagnosis and treatment, rather than a multidisciplinary capacity assessment;
c) Re-prescribing medication for dementia;
d) Notifying the motor vehicle licensing authority; and
e) Advising the family to activate the power of attorney.

[151] I accept the evidence of Dr. Silberfeld that global scores on cognitive tests like the MMSE and MoCA are less telling than the scores achieved in the various different sections of the test, which evaluate different cognitive skills. One part of the MoCA addresses higher cognitive function and another part tests short-term memory. According to Dr. Silberfeld, Bud scored well in the higher cognitive function part of the test and lost points on the short-term memory part. According to Dr. Silberfeld, this higher cognitive function would mean that Bud could have followed sequences that were

explained to him and he would have been oriented as to time and place when the tests were administered. Dr. Silberfeld's opinion is bolstered by Dr. Vipulananthan's observation that Bud was orientated as to time and place when he observed him in 2008 that Bud and could follow sequences.

[152] Ultimately, I agree with Dr. Silberfeld's assessment that there is no evidentiary basis to conclude on the basis of probabilities that Bud did not have sufficient mental capacity to understand the essential elements of a contract for the sale of land. Bud's mental condition in 2008 was not catastrophically bad – he could attend to the essential tasks of daily living on his own and operate motor vehicles (including farm machinery). Further, no thought was given to taking away Bud's drivers licence, freezing his bank accounts or moving him to an assisted living facility. Gary never considered the need to act on the power of attorney was necessary or that he should warn the Defendant Realtors or Defendant Lawyers not to accept Bud's instructions to sell the Land.

[153] The medical evidence in and of itself is not sufficient to overcome the presumption Bud had mental capacity to engage in the legal act of the sale of land. I will now turn to the evidence of the eye-witnesses.

14.0 Evidence of Terry Cole

[154] Mr. Cole became a realtor in 2006 and moved to Brandon in 2008 to start working at the offices of Cowie Real Estate. The defendant Stuart Cowie was the broker who owned and operated the firm. During his nine years at Cowie Real Estate, Mr. Cole was one of two realtors working under Mr. Cowie.

[155] In general terms, Mr. Cole described his relationship with Bud as something that evolved from a business relationship into a friendship. Mr. Cole described the two men had frequent contact via phone and visits at Mr. Cole's office where they would chat over coffee. At times Bud would drop by the office up to twice a week. Typically these visits by Bud to the office were unannounced.

[156] Mr. Cole also attended to Bud's home to assist him with yard maintenance or to run personal errands. Despite the frequency of their face-to-face meetings, Mr. Cole testified he never recalled meeting or speaking with any of Bud's children or even seeing them at Bud's house.

14.1 July 2008

[157] Not long after his arrival in Brandon, Mr. Cole developed a business relationship with Mr. Kehler, who also acted as his personal lawyer. Mr. Cole also developed a friendship with Bud that began after their first meeting in July of 2008. Their first meeting ended badly, when Mr. Cole made a cold call to Bud's Homestead indicating that he was a realtor looking to buy land to stable some horses. Bud was not interested in that kind of arrangement and gruffly told Mr. Cole that he should leave the property without even bothering to open the front door.

[158] Undeterred, Mr. Cole returned a few days later and Bud reluctantly let him into the house. Mr. Cole noted about a dozen different business cards from various realtors in Brandon on the kitchen table and told Bud that he would add his card to the "pile." According to Mr. Cole, one of the business cards belonged to Jim McLachlan (the plaintiffs'

expert witness as to the professional standards of realtors) and he was not challenged on this recollection in cross-examination.

[159] Mr. Cole testified that he tried to steer the conversation towards the sale of some land for his horses, but Bud was coy and never responded directly to questions about the sale of land. The conversation between the two men that day revolved around mutual acquaintances and farm life. Mr. Cole was left with the impression that Bud was trying to figure out if he was a trustworthy person or not.

14.2 City Lands

[160] Several days later Bud called Mr. Cole and invited him to inspect one of his properties. After picking up Bud at his Homestead, in the truck Mr. Cole used for work purposes, the two men drove to a low lying "swampy" property which I have described as the "City Lands" in these reasons. Mr. Cole immediately concluded the City Lands would not be suitable for horses and Bud did not disagree. Bud confirmed he watered his cattle on the land before he retired. As a joke, Mr. Cole called that parcel of land "alligator alley" and the term stuck.

[161] The next order of business that day involved Bud asking Mr. Cole to take a short drive from the City Lands to the RTM Property. According to Mr. Cole, Bud told him that that he could not realize the full value of the RTM Property if he sold it as undeveloped land because it was only less than 3 acres in size and had an odd triangle shape. Bud informed Mr. Cole of his plan was to move an RTM house on the property to maximize its resale value.

[162] At that point in time Bud had already hired contractors to pour a foundation, install a septic field and then have an RTM house placed on the foundation. Bud's plans also included digging a well, connecting the building to the hydro grid and finishing the inside of the RTM house. Bud told Mr. Cole he "might" give him a chance to sell the RTM house once it was finished. Mr. Cole recalled that Bud expressed his frustration in hiring tradespeople at reasonable rates to complete the RTM house in advance of a possible sale.

[163] While Bud and Mr. Cole were on the RTM Property, Mr. Cole indicated Bud also pointed in an easterly direction and indicated he owned another parcel of land he wanted to tell Mr. Cole about. Bud indicated that he owned the NW Quarter. It was clear to Mr. Cole that Bud was proud of the land he had acquired during his lifetime and he came across as a "bit of a land baron" during their conversation according to Mr. Cole.

[164] About one week later Mr. Cole recalled that Bud contacted him about listing the RTM Property for sale. At that stage, Bud was frustrated about not having the RTM house finished and it was a "thorn in his side." Bud indicated to Mr. Cole that he wanted to realize $350,000 from the sale of the RTM Property, which Mr. Cole said was "unrealistic for a house that's not finished." The next day Mr. Cole returned to the RTM Property with his broker, the defendant Cowie ("Mr. Cowie") for an inspection. Mr. Cole recalled that he and Mr. Cowie initially met Bud at his home which was nearby and Bud then drove his own vehicle to the RTM Property, while they followed Bud in their own vehicle.

[165] Mr. Cole and Mr. Cowie noted that kitchen cabinets had not yet been installed, that the plumbing work was not finished and a ladder was the only means to access the

unfinished basement in the RTM house. The yard was not landscaped and a pile of dirt was noticeable beside the house. Both men told Bud the house needed a lot of work and a $350,000 asking price was not realistic in the circumstances. Bud suggested a price of $319,900 after he received this advice and when he was told that was also too high Bud mentioned to Mr. Cole and Mr. Cowie that they were not the only realtors in Brandon who would be prepared to list the property at that price.

14.3 August 2008

[166] After some further discussions and more research by Mr. Cowie, Bud signed a listing agreement with the Defendant Realtors for the RTM Property on August 19, 2008 at a list price of $319,900. By that time, Bud had disclosed his intentions to sell all three parcels of Land prior to his death to simplify his estate, which would go to his children. Bud also indicated to Mr. Cole that he intended to sell the Land in order from the lowest value to the highest value.

[167] On August 27, 2008 Bud signed a listing agreement for the City Lands with the Defendant Realtors. There is no dispute that this property had the lowest value of the three properties that are the subject matter of this litigation. Mr. Cole recalled Bud valued this at $10,000 per acre, but both he and Mr. Cowie thought a value of between $2,000 and $3,000 per acre was more realistic. Undeterred by the valuation of the professionals Bud insisted the property be listed at the price he was demanding and the listing agreement was signed showing a sale value of $109,000.

14.4 September 2008

[168] By mid-September of 2008, Bud invited Mr. Cole to come to his home for a discussion. Mr. Cole recalled that Bud used an insistent tone in demanding a meeting with him and expressed a sense of urgency that Mr. Cole should come immediately. At the meeting Bud showed Mr. Cole the power of attorney document he signed on April 3, 2008 in favour of his son Gary. Bud was upset about this document and mentioned to Mr. Cole that he would never sign his land and all his money over to anybody.

[169] The background story offered by Bud to Mr. Cole was that his sons got him drunk and forged his signature on the power of attorney. Given Bud's distress about the power of attorney, Mr. Cole called Gary and left a voice mail asking Gary to call him. Gary never replied according to Mr. Cole. Thereafter Mr. Cole told Bud that in his view they could not "do business" anymore until Bud talked to a lawyer and Bud's legal affairs were sorted out.

[170] Mr. Cole knew that Bud had a relationship with Mr. Kehler, so he suggested that Bud see him about what Mr. Cole perceived to be a legal impediment to the sale of his land. At that point, Mr. Cole testified it had never occurred to him that Bud had health problems of any kind and he never acted in a way that might suggest Bud had difficulties with his memory. All of the interactions he had with Bud up to that point left Mr. Cole with the impression that Bud had the mental capacity to manage his own affairs and there was nothing to be concerned about in that regard.

[171] A few days later Mr. Cole recalled that, he called Mr. Kehler to ask if Bud had seen him and Mr. Kehler apparently said Bud "might have to see a doctor." Mr. Cole's memory of how Bud got to the doctor is not clear. At one point in his testimony Mr. Cole said that Bud asked him for a ride to the doctor's office and Mr. Cole apparently agreed but he did not go inside the clinic and he had no memory of the name of the doctor or the date.

14.5 October 2008

[172] Not long after his first call with Mr. Kehler, Mr. Cole recalled getting a second phone call from Mr. Kehler confirming that Bud had revoked the power of attorney in Gary's favour and Bud was "good to go" with respect to the ongoing business matters he had with the defendant realtors. Mr. Cole could not recall the date of this call, but agreed it must have been shortly after Bud signed the revocation of the power of attorney on October 10, 2008.

[173] Mr. Cole was adamant that he did not communicate with Bud about business matters from the date he learned of the existence of the power of attorney until he got the "good to go" signal from Mr. Kehler. The evidence shows that Bud was not deterred by this and he took active steps to sell the City Lands during the time Mr. Cole placed the sale transactions in limbo.

[174] The evidence in support of this conclusion is a letter dated November 5, 2008, from Tanya Marshall ("Ms. Marshall"), a property administration officer in Brandon, to Bud regarding "Land Located South of Patricia Avenue." The contents of this letter are worth repeating in their entirely:

> Further to our meeting on October 7, 2008 and our subsequent telephone conversations with respect to the above matter, this will confirm that the City of Brandon would be interested in purchasing those portions of Blocks 1 to 4

> and 16, Plan 315 located south of Patricia Avenue and north of Highway #110 as illustrated on the attached map.
>
> It is our understanding that Plan 315 legally established these lots in 1913 and are not subject to an obsolete by-law. However, we believe a road closure would need to be completed before the sale of the property could take place. Therefore, it would be appreciated if your realtor and/or lawyer could contact us when you're in a position to sell the lands. The City would be prepared to negotiate a fair market value for this property at that time.
>
> Please note the property is currently accommodating land drainage and it is our intention to protect the drainage for this area. Please note that due to the existence of drainage on this property, residential development may not be permitted by the R.M. of Cornwallis (as you had suggested a private sale of this area in our meeting).
>
> We anticipate contact from your realtor and/or lawyer in the near future.
>
> Yours truly,
> Tanya Marshall
> Property Administration
> Enclosure
> c.c. Cowie Real Estate
> Mr. McPherson, City of Brandon Planning Department
>
> [Emphasis Mine]

[175] No questions about this particular letter were put to Mr. Cole or any of the other witnesses in direct or cross-examination. I will comment about the significance of this letter later in these reasons.

14.6 December 2008 – Sale of City Lands

[176] On December 9, 2008, Brandon submitted an offer to purchase to the Defendant Realtors at a sale price of $85,000. Both Mr. Cole and Mr. Cowie were impressed that this offer was as high as it was, given that it was for a parcel of "swampland" that they concluded had significantly less value that what Brandon was offering. Notwithstanding the opinion of the Defendant Realtors that the offer was very good, Bud insisted that they draft a counter-offer for the City Lands at $99,000 because Brandon had "lots of money."

[177] Brandon accepted Bud's counter-offer on December 17, 2008, subject to certain conditions, which included certain representations about the "shadow" subdivision registered against the title in 1913. This "shadow" subdivision plan contained an approval for the future creation of 124 individual lots that were separated by streets and lanes. The key condition imposed by Brandon in the counter-offer was confirmation from Bud that he held legal title to not only the 124 potential future lots but also the streets and lanes that separated the lots from one another.

[178] Mr. Cole recalled that he took Bud to Mr. Kehler's office to ascertain the legal status of the streets and lanes. Bud was disappointed to learn that in Mr. Kehler's opinion Bud did not hold legal title to the streets and lanes. According to Mr. Cole, Mr. Kehler told Bud that the 124 lots permitted by the subdivision had no value as distinct units of land because a third party owned the right-of-way for the streets and lanes shown on the shadow subdivision. In practical terms, this meant that although a bird's-eye-view of a map of suggested the parcel of land was 11.5 acres in size, Bud only held title to about 8 acres inside of the boundaries as marked.

[179] When this fact was disclosed to Brandon, the sale transaction fell through. Unsurprisingly Bud was undeterred by this set back and he instructed Mr. Cole to list the property for sale at the same price shown on the first listing in 2008, namely $109,000.

14.7 January – February 2009

[180] This second listing for the City Lands was signed in February of 2009. Mr. Cole testified that, apart from Brandon, only one other party expressed a verbal interest in buying the City Lands after the listing was originally signed on August 27, 2008 and placed

on MLS. Mr. Cole testified he received no written offers from other parties and he received no inquiries from other real estate agents about the listing. The reason for this minimal interest in the land according to Mr. Cole was that it was "quite a bit overpriced."

[181] In mid-February of 2009, Brandon submitted a second offer to buy the City Lands at a price of $66,776, without the condition as to proof of ownership of the streets and lanes. Mr. Cole believed Brandon arrived at the reduced price by prorating the price at the same value per acre for what was now a lower number of acres. True to form, Bud insisted on a counter-offer at $80,000, which Brandon declined.

[182] Brandon then submitted another offer on February 23, 2009 for $66,776, which Bud accepted. Mr. Cole testified he crunched the numbers with Bud who was happy to learn the offer amounted to about $7,000 per acre. Mr. Kehler acted on the closing of this transaction for Bud under the terms set out in the offer.

14.8 Sale of the RTM Property

[183] By early 2009 Mr. Cole recalled telling Bud that the RTM Property had been on the market for far too long and it was overpriced. In fact, Mr. Cole recalled that Mr. Cowie told him not to list the RTM Property for sale at the $350,000 Bud was insisting on, as it would make the Defendant Realtors "look silly." It took Mr. Cole some effort to persuade Bud to lower the listing price to $319,900 when it went to market in August of 2008.

[184] Bud received two offers on the RTM Property. The first offer for $250,000 was received in January of 2009 included several conditions, including that Bud complete the construction work on the RTM home and obtain an occupancy permit from the RM. Mr. Cole recalled that Bud was adamant that he would not spend another dollar on this

project and he found this condition to be unacceptable. Bud had no hesitation in rejecting the offer.

[185] The second offer was received in February of 2009 for $220,000 in "as is" condition and Bud authorized a counter-offer at $240,000 which was accepted.

14.9 Sale of the NW Quarter to Rudani

[186] The NW Quarter was clearly the most valuable of the three properties that Bud listed for sale with the Defendant Realtors. Mr. Cole recalled that Bud told him he thought his Homestead, where his personal residence was located, had an even higher value than the NW Quarter.

[187] Bud insisted that the Northern Portion be listed at $699,000 which was close to $10,000 per acre even though Mr. Cowie though a realistic price target was $4,000 to $7,000 per acre.

[188] Apart from the standard MLS listing, Mr. Cole had two four feet by eight feet "for sale" signs placed on the NW Quarter plus three or four smaller signs in the adjacent ditches. Mr. Cole also approached the largest real estate development firm in Brandon (J & G) shortly after the listing agreement was signed and the firm indicated they would not be willing to pay more than half of the asking price of $699,000 for this land.

[189] In October of 2008 an offer was received for the Northern Portion for $650,000. That offer was accepted but it collapsed as the proposed purchaser wanted to receive approval in advance of closing for a future residential subdivision on the land. This offer collapsed.

[190] Mr. Rudani submitted an offer to purchase the Northern Portion and the Southern Portion for $654,410 in July of 2009. The Defendant Realtors were shown as the selling and listing agents and Mr. Kehler was shown as the lawyer acting for both the purchaser and the vendor. Bud accepted this offer.

[191] The evidence of Mr. Cole was that Mr. Rudani came up with the number for the proposed purchase price of $654,410 by valuing the acres in the Northern Portion at $8,000 and $2,000 in the Southern Portion. This seemed logical to all concerned as the Northern Portion shared a boundary with Brandon and the Southern Portion was south of PTH 110, a designated dangerous goods route, and cut off from the boundary with Brandon.

[192] Mr. Cowie was of the view that Mr. Rudani's offer represented a "super deal" for Bud based on the comparable sales he had studied and the fact it was a cash deal without conditions. Bud, uncharacteristically, seemed happy with the price and declined to make a counter-offer, but he wanted to carve out a 5 acre parcel from the Northern Portion for his own use. Mr. Cole indicated that true to form, Bud always wanted to get "something a little extra" from the purchaser. Mr. Rudani rejected this proposal and the offer closed as written.

[193] I accept the evidence of Mr. Cole and Mr. Cowie that nothing Bud said or did suggested to them that he did not have a full and complete understanding about the Land or its value in general terms. Further, I accept their evidence that Bud never was confused about any of their discussions about the sale of the Land while it was on the market and when the deals were closed.

15.0 Evidence of Jarett Kehler

[194] Mr. Kehler was called to the Bar in Manitoba in 2007 and has primarily engaged in legal work as a solicitor since 2009 when he became a partner at the defendant law firm. The details of most of Mr. Kehler's interactions with Bud, whether they were office appointments, phone calls or visits at Bud's home, came from the sparse notes he kept on file or his time records.

[195] Mr. Kehler had no recollection of certain phone calls or conversations that other witnesses clearly recalled they had with him. Witnesses made notes of some of these conversations and Mr. Kehler had absolutely no memory of them. I am satisfied that in most circumstances, that I will outline below, the evidence of other witnesses about their interactions with Mr. Kehler are more reliable than his own.

[196] By noting all of this, I do not wish to imply that Mr. Kehler was less than truthful during his testimony or that his memory is somehow defective. From all of the evidence I am satisfied that Mr. Kehler was a busy lawyer with an active practice, who never twigged to the fact that Bud's short term memory issues that were "red flagged" to him by other witnesses should cause him real concern. As a result, Mr. Kehler never turned his mind to the fact he should tread with caution in giving legal advice to Bud or "papering" the file to ward off the type of legal challenge he is now embroiled in.

[197] I am satisfied that Mr. Kehler's failure to remember crucial conversations or interactions with certain witnesses are not of a sinister nature, but rather his naïve assumptions that there was nothing amiss and it would be a waste of his precious time to make detailed notes or make further inquiries. Without detailed notes to refresh his

memory or the involvement of an independent witness (such as his legal assistant) it is not surprising to me that a busy lawyer like Mr. Kehler would not have a clear recall of many details on any given file he was working on, particularly because nothing Bud said or did suggested to him Bud lacked the mental capacity to engage in legal acts.

[198] According to Mr. Kehler's file notes and time records, he first met Bud on August 15, 2008 and had his last interaction with him on April 20, 2010. Over that span of time, those notes and time records indicated that Mr. Kehler had some 15 interactions with Bud, which included face-to-face meetings and phone calls. Mr. Kehler testified that nothing in Bud's way of communicating or behaving during that time made him doubt the fact that Bud had the requisite degree of mental capacity to engage in the kinds of legal transactions that were discussed, notwithstanding the concerns about Bud's memories that others had raised.

[199] Mr. Kehler described his first meeting with Bud on August 15, 2008 as a "meet and greet," after Mr. Cole referred Bud to him. Mr. Cole also attended that meeting. The subject of the meeting was Bud's plan to dispose of the Land since he was no longer using it to raise cattle. Bud also articulated his plan to sell his various parcels of land in order of their value from lowest to highest at this meeting. This meant that the City Lands, which Bud described as "crap land," should be sold first.

[200] At the end of the meeting, Mr. Kehler agreed to do some research to see if the City Lands could be sold as a single piece of land that was not cluttered with the existing subdivision that showed individual lots, as well as streets and lanes. Bud expressed an interest to Mr. Kehler in collapsing the subdivision to create a "clean" title. Bud also

indicated to Mr. Kehler that he had already been in touch with a lawyer in Winnipeg to discuss the same possibility.

[201] Nothing about Bud's request to collapse the subdivision seemed unusual to Mr. Kehler and he agreed to take on the investigation about the title. Everything Bud said at the meeting conveyed the impression to Mr. Kehler that he was "clear and determined" to clear the title to the City Lands. There was also nothing unusual to Mr. Kehler about Bud's "grizzled and weathered" appearance, as it was consistent with a man in his mid-70s who had spent his working life outdoors. The overall plan to sell the land in a particular sequence, according to its value, seemed to be part of a shrewd business plan according to Mr. Kehler.

[202] Four days later, Mr. Kehler recalled Bud calling him about the return of his firearms that were seized by the RCMP. The seizure followed Bud's admission to the CGP and he wanted his firearms back as he had resumed independent living on the Homestead. Mr. Kehler agreed to investigate and attended at the local RCMP detachment, where he learned that Bud could only get the firearms back, if he applied for the necessary permits. Mr. Kehler then drove to Bud's home to break the news to him. Bud seemed more embarrassed than upset about this information, according to Mr. Kehler.

[203] Nothing about Bud's request for the return of his seized firearms piqued Mr. Kehler's curiosity about Bud's mental health and he returned to his research on Bud's request about a subdivision.

[204] On August 27, 2008, Bud attended at Mr. Kehler's office alone and was informed that the subdivision could not be collapsed without considerable cost and effort. It was

clear that Bud did not hold the title to the streets and lanes that crisscrossed the subdivision. Bud deemed the hassle involved in undoing the subdivision as too costly, so he indicated to Mr. Kehler that the City Lands would have to be sold "as is."

[205] The fourth interaction between Bud and Mr. Kehler occurred on September 4, 2008 when Bud asked what exactly a power of attorney was. After receiving an explanation from Mr. Kehler, Bud explained that he had granted a power of attorney to Gary, who was living in Saskatchewan. Bud also indicated that he only saw Gary once or twice per year and it did not make sense to him that Gary should be "in charge" of his affairs as power of attorney. It was obvious to Mr. Kehler that there was some tension in the father-son relationship based on Bud's comments.

[206] A few days later (September 8) Bud attended at Mr. Kehler's office alone to advise he wanted to revoke the power of attorney in Gary's favour. Mr. Kehler recalled he discussed Bud's options of simply revoking the power of attorney or revoking it and replacing it with a power of attorney in favour of a different person. According to Mr. Kehler, Bud was adamant about managing his own affairs independently and there was no need for a fresh power of attorney being prepared to replace it.

[207] Mr. Kehler did recall that Bud told him about how the power of attorney came to be signed at a lawyer's office, after he went for a ride in the country with Gary and unexpectedly wound up in a lawyer's office where the power of attorney was presented to him. The impression Mr. Kehler had was that Bud was caught off guard by the unexpected visit to the lawyer's office and he signed it to placate Gary. Again,

Mr. Kehler failed to make even the most basic inquiry about the unusual circumstances involved in Bud's account of the events leading to the signing of the power of attorney.

[208] Mr. Kehler said he knew the lawyer who witnessed Bud signing the power of attorney. Further, Mr. Kehler stated he could have had Bud sign a release, authorizing him to contact the lawyer to ask some basic questions which might have confirmed Bud's version of events. It is odd to me that Mr. Kehler never gave a second thought to Bud's strange account of how the signing of this power of attorney came about. The only evidence that Mr. Kehler had about this power of attorney was that it was prepared for Bud's signature as a fait accompli, based on instructions issued by his family and not Bud himself.

[209] The best evidence about the power of attorney came from Gary who testified that he (not Bud) arranged for a lawyer in Winnipeg to prepare a power of attorney for Bud's signature in 2007. At that time, Gary was assisting Bud with a subdivision plan. When Gary and Bud attended at the law firm in Winnipeg to sign some documents for the subdivision, the power of attorney was presented to Bud but he declined to sign it.

[210] Gary also testified that this same power of attorney was given to a lawyer who practiced in various rural communities north of Brandon and this particular lawyer met with Bud on April 3, 2008, at the end of his admission as a patient at the CGP, to sign the power of attorney. Gary's evidence was that he made the arrangements for the signing of this power of attorney and Bud had nothing to do with contacting the lawyer or instructing the lawyer who came to Brandon to witness Bud's signature. What if

anything that lawyer knew about Bud's thoughts or concerns about a power of attorney remain a mystery.

[211] I also find it odd that the estate never called the lawyers involved in the drafting or signing of the power of attorney to testify about Bud's mental capacity and what if any steps were taken to verify it or what inquiries were made of Bud while taking his instructions. At the very least, the file notes of these lawyers may have been of assistance to me in establishing what Bud's mental capacity may have been in April of 2008.

[212] Apart from knowing next-to-nothing about the mysterious nature of how the power of attorney came to be signed on April 3, 2008, the other risk Mr. Kehler took was giving advice to Bud about a power of attorney Mr. Kehler had not read. When Bud discussed a possible revocation of the power of attorney with Mr. Kehler at the meeting on September 8, 2008, he did not have either the original or a copy of the power of attorney with him. The discussion about revocation of the power of attorney was in the most basic of terms and Mr. Kehler never mentioned in his testimony or recorded in his notes that he warned Bud about the potential costs and delay involved in obtaining a committeeship order under ***The Mental Health Act*** if Bud might lose mental capacity before his death.

[213] Mr. Kehler eventually obtained a copy of the power of attorney from Gary by fax which was imprinted with Gary's name and phone number along with the sending date of September 10, 2008. Mr. Kehler had no recollection of whether he asked Gary to fax the document to his office or if Gary did that on his own accord.

[214] In his time sheets, Mr. Kehler recorded telephone conversations with Gary of 0.3 hours each on both September 10 and 11, 2008. The cryptic, point-form notes Mr. Kehler

kept on his file of these conversations confirmed that Mr. Kehler was informed about the following key points:

- He talked to Gary and possibly with the Public Health Nurse as well;
- Gary's son was a pharmacist in Brandon;
- Dr. Lint prescribed drugs to Bud;
- A friend packaged the pills and gave them to Bud on Gary's instructions;
- No formal or informal declaration of incapacity had been made by a physician;
- Bud was assessed at the CGP by Dr. Lint with signs of "early Alzheimer (and paranoia)";
- Bud was admitted to the CGP with confusion and paranoia and released by Dr. Lint; and
- RCMP returned Bud to the CGP.

[215] Mr. Kehler testified he had absolutely no recollection of any conversation he may have had with Gary, but for those notes, which he was somewhat surprised to learn about shortly before his examination for discovery. In response to Gary's recollection that Mr. Kehler used the phrase, "we will take care of this" after receiving the information in the phone calls, Mr. Kehler indicated he did not recall making such a statement and it did not sound like something he would say. I am satisfied that Gary's recollection of this conversation is accurate and reflects Mr. Kehler's determination to act on Bud's instructions to revoke the power of attorney without making independent inquiries with physicians about Bud's mental health status.

[216] Mr. Kehler also had no recollection of phone calls he made to the Public Health Nurse who made notes on his file about these calls. On September 9, 2008 the Public Health Nurse entered a note on his file about a voice mail Mr. Kehler left, indicating he was Bud's lawyer and wanted the Public Health Nurse to contact Bud's family physician Dr. Halka, to get Bud "… the needed help he requires." On September 11, 2008, the Public Health Nurse made notes of an actual conversation with Mr. Kehler, in which Mr. Kehler confirmed he had spoken to Gary and that Mr. Kehler was aware Dr. Halka had referred Bud to a psychiatrist. The Public Health Nurse also made notes about the fact that he told Mr. Kehler about Dr. Lint's "past and current involvement" with Bud and that Bud signed a power of attorney while at the CGP.

[217] By October 10, 2008, when Bud attended at Mr. Kehler's office again for a short meeting, Mr. Kehler had a revocation of the power of attorney ready for Bud's signature. Mr. Kehler reviewed Bud's option to prepare a new power of attorney but Bud was emphatic that he did not need one.

[218] Notwithstanding the facts Mr. Kehler learned about Bud's health status from Gary and the Public Health Nurse, he never got the sense that anything about Bud was amiss, since everything Bud said and did seemed completely normal. It was also Mr. Kehler's evidence that he never considered the need for a medical or psychiatric assessment before accepting Bud's instructions to draft a revocation of the power of attorney without drafting a new one to replace it. This is believable to me because there was no evidence that Mr. Kehler ever had Bud sign a medical release authorizing Bud's physicians to communicate with Mr. Kehler about their patient's medical condition. Mr. Kehler knew,

as any lawyer would, that medical practitioners are bound by rules of confidentiality and cannot disclose patient information without informed consent.

[219] From all of the evidence, I am satisfied that the unshakeable confidence that Mr. Kehler had in forging ahead with a revocation of the power of attorney and continuing in a lawyer-client relationship with Bud about the sale of the Land, was based entirely on what Mr. Kehler perceived during his interactions with Bud. The best summary of what Mr. Kehler surmised about Bud's mental capacity is offered by the following exchange during his direct examination:

> Q Okay. Mr. Kehler, did you try and talk to a physician about Bud or seek a medical opinion about him, or try and refer him to -- for a medical assessment before having him sign this revocation on October 10th, 2008?
>
> A No, I did not.
>
> Q And why not?
>
> A I -- it was -- at that time, it was not -- there was nothing that Bud presented to me that caused me concern or that was out of character. The -- I would have had the information at hand from Gary and -- and [the Public Health Nurse], but those appear to be just instances that related to his short-term involvement with [CGP], and he was receiving whatever treatment he needed for that. It didn't seem that it was -- would have changed my mind as to what Bud was presenting to me on the previous occasions that I've already met with him and discussed him -- or discussed with him and interacted with him.
>
> Q As of October 10, 2008 when Bud signed the revocation, did you know whether he was living independently or not?
>
> A Yeah, absolutely, he was, as I had even attended to the property, he was a hundred percent independent. He was driving, attending appointments on his own and managing his affairs, even, you know, to the extent of, you know, his landholdings, cattle operation. Like I said, I -- I don't know exactly when I was aware of his RTM business venture of putting together a home on that small parcel, but he was definitely an active individual in day-to-day life.
>
> Q Okay. And based on your understanding as a lawyer, on October 10, 2008, did you have a view about whether the mere existence of a power of attorney prevented the donor from acting on his own or transacting on his own if he was competent?
>
> A Yeah, absolutely not. There was nothing to prevent Bud from continuing on, unless there was, you know, in my opinion, a formal declaration of mental incapacitation. And basically, if he was competent to sign a power of attorney

> back in the spring and he didn't present any red flags or any oddities in his mannerisms and activities, you -- he was still competent to sign a revocation.

[220] After the revocation was signed, the process of selling the Land began in earnest. On February 24, 2009 Mr. Kehler attended at Bud's home to discuss the potential sale of the RTM Property. At that time, Bud indicated he wanted to be sure that all of the outstanding invoices of the tradespeople were paid from the sale proceeds. The two men drove the short distance from Bud's home to the RTM Property for an inspection. Mr. Kehler noted that construction was not complete.

[221] There was nothing about Bud's management of the construction project that caused Mr. Kehler to be concerned. The owner of the company that sold the RTM Property to Bud and that was completing the interior, expressed no concerns about how Bud was interacting with him. In all of his dealings with Bud, Mr. Kehler noted that Bud showed up on time for his appointments and he often drove his own vehicle to get there. Bud had no restrictions or limitations on his driver's licence.

[222] On March 18, 2009, Mr. Kehler recorded another meeting with Bud in his office. By then the real estate transaction involving the RTM Property had closed and the sale process of the City Lands was underway. Mr. Kehler indicated that Bud, quite logically, was interested in knowing when the sale proceeds would be released to him and he reassured Bud that everything was "on track." It was Mr. Kehler's impression that everything about the way Bud communicated and interacted with him was not only "very normal" but also that Bud was "attentive to the matter at hand." In other words, Bud paid attention to details and was alert to anything that might delay the release of the sale proceeds.

[223] Throughout the closing of all the real estate deals, Mr. Cole posted "For Sale" signs on the properties up for sale and along highway 110. Mr. Kehler noted that Gary and Bud's other children never made inquiries or voiced concerns to Mr. Kehler about any of the sales. The only communication that Mr. Kehler had with Bud's children were the phone calls with Gary on September 10 and 11, 2008.

[224] The original offer on the City Lands, issued by Brandon failed, as Mr. Kehler advised counsel for Brandon that Bud did not own the streets and lanes. Mr. Kehler recalled explaining to Bud in mid-January of 2009 that the real estate deal could not close because he could not sell land that he did not hold title to and Bud had no difficulty understanding that.

[225] Later Brandon submitted a new offer that was for a lower amount than the original offer due to the fact that Brandon was prepared to take title to the City Lands "as is" with the existing subdivision registered on the title. Bud signed the closing documents at Mr. Kehler's office on March 30, 2009. Again, Mr. Kehler noted Bud consistently followed up with Mr. Kehler, as negotiations for the sale of the City Lands were ongoing "*…and he was tracking the transaction and the situation as it unfolded*."

[226] On July 28, 2009, Mr. Rudani submitted an offer to Bud, drawn up by Mr. Cole as lawyer for both sides, for $654,410 for all 122.58 acres on the northwest quarter. Mr. Kehler was not involved in the negotiations as to marketing or prices and noted that the offer was made without conditions for a November 2009 closing. A previous offer for the NW Quarter failed as the proposed purchaser imposed extensive conditions on the sale that were unacceptable to Bud. Mr. Kehler testified he disclosed the conflict of

interest to Bud, as he would also be acting for the purchaser, Mr. Rudani, and Bud understood this. Mr. Kehler testified that the Law Society of Manitoba permitted lawyers to "double end" a real estate transaction provided clients provide informed consent and that joint retainers on real estate transactions were common in Brandon at that time and still are today.

[227] Mr. Kehler also testified as to his involvement with Bud in 2010 on a failed real estate transaction involving Bud's Homestead. By that time, the three transactions for the sale of Land had closed and Mr. Kehler had released the net sale proceeds to Bud.

[228] On April 30, 2010, Mr. Kehler attended at Bud's home for a walking tour of the property line, to establish how Bud's land could be subdivided in a way to place his house on a separate title from the vacant farmland that surrounded the house. Mr. Kehler was alert to the fact that the septic field and well had to be part of the new title for Bud's home, so he asked Bud about this while the two of them were walking along the property line.

[229] According to Mr. Kehler "*… Bud identified that [the septic field] was in the pasture further out away…*" *and* "*… he identified that the septic field was approximately 60 by 30, so quite a large area, and the well was – was basically north of that*." Apart from this evidence, other parts of Mr. Kehler's testimony of that day also show a remarkable degree of clarity in Bud's thinking and memory. Bud was able to identify that the property line ran "*a good fifty feet into the pasture area, and – and so Bud was – was clear on that. He also provided us the measurements of the garage, because that's quite close to the property line, and he – he identified the garage was 24 by 30, and that put it to the*

proposed property lines." None of the evidence offered by Mr. Kehler about this meeting with Bud and Bud's observations and memory about the Land were effectively challenged in cross-examination.

[230] The subdivision of Bud's house from the remaining farmland did not proceed as Bud's health took a turn for the worse and his family successfully applied for a committeeship order in July of 2010. Mr. Kehler's files were subsequently transferred to the plaintiffs' counsel.

[231] Despite the obvious concerns about Bud's memory that were brought home to Mr. Kehler in September of 2008, he remained oblivious to the fact that his legal advice to Bud might come under scrutiny at some future point. In that respect his lack of caution in protecting both his own position and those of his client are puzzling. It is beyond question that the keeping of detailed notes by Mr. Kehler and having all instructions confirmed by Bud in writing would likely have changed the nature of this litigation or perhaps precluded it.

[232] The question before me though is not whether the failure of Mr. Kehler to keep detailed notes and accepting legal instructions without third-party evaluations results in liability. The question at hand is what the evidence shows about Bud's mental capacity and if this evidence is sufficient to overcome the presumption of mental capacity. As I have already noted, the behaviour Bud exhibited to Mr. Kehler and his conduct throughout their professional relationship of about 18 months did not indicate that Bud failed to understand the essential elements as to the sale of land. Bud certainly knew what land he was selling, why he wanted it to be sold, the value of the land in general terms and

what the consequences of the sale would be. I am satisfied that Bud's keen understanding about the Land and his Homestead where he operated his cattle business over many years was not compromised by his short-term memory problems. The evidence of Mr. Kehler about Bud's understanding of the property lines of his Homestead in 2010 show Bud's memory of his Land was sound and remarkably detailed.

[233] Although Mr. Kehler risked exposing himself to the kinds of allegations that the plaintiffs has made against him, he was satisfied that there was no need to make careful notes about Bud's mental capacity or to involve neutral third parties, such as medical experts, extended family or care givers, in evaluating Bud's mental capacity. The reason Mr. Kehler came to this conclusion was that Bud consistently presented himself as someone who had the necessary legal capacity to engage in the type of legal transactions he was involved in.

[234] Mr. Kehler never wavered from his absolute certainty that Bud had the requisite degree of mental capacity to:

a) Communicate his legal objectives;

b) Understand the legal advice that flowed from those stated objectives; and

c) Issue rational or reasonable instructions in response to that legal advice.

[235] Due to these facts, Mr. Kehler assumed that the presumption in favour of Bud's mental capacity could not be challenged and that detailed note taking or third-party evaluations were unnecessary. To repeat, this was risky behaviour on Mr. Kehler's part, but does not constitute a breach of contract or fiduciary duty. The evidence of the

Defendant Realtors also supports Mr. Kehler's opinion that Bud was mentally competent to understand the transactions pertaining to the sale of the Land.

16.0 Evidence of Other Eye Witnesses

[236] Mr. Cole and Mr. Kehler were the eyewitnesses with the closest interactions with Bud over the time that the real estate transactions for the Land came to fruition. In the section below, I below I will review the evidence offered by other eyewitnesses during that time frame.

[237] The three McLeod brothers (Bud's sons Gary, Greg and James) who testified at trial did not have close relationships with their father. Their opportunities to speak or otherwise interact with Bud were sporadic and typically occurred when some kind of problem or concern about Bud manifested itself. It is also evident that Bud did not reach out to his children or grandchildren to stay in touch through phone calls or letters. There is no evidence that Bud ever used social media or email to stay in touch with family or friends.

[238] I do not want to suggest that Bud was a recluse or a hermit, but all of the evidence at trial suggested Bud was an intensely private person who prided himself on living independently. Bud was also not the kind of man who sought out the company of his family to mark special events such as birthdays or holidays. If Bud did reach out to his family, it was typically due to some kind of concern he had or because he wanted to accomplish some goal or task.

16.1 Greg McLeod

[239] Bud's son Greg testified he was "not very close" to his father and saw him only "a few times over the years." Greg also testified he saw Bud at most once a year for an hour and so was almost completely estranged from him. As a result, Greg had no meaningful opportunity to observe Bud's physical health or the deterioration in his short-term memory.

[240] Greg testified about incidents, which demonstrated that Bud's memory was impaired in some way. In 2007 Greg recalled that Bud did not recognize him or respond to a joke he was told. Greg also testified that during one conversation Bud only talked about the past and the conversation did not venture into what Greg considered to the pressing matters of the moment such as taking his medication. Nevertheless, the sample size of Greg's interactions with Bud are extremely limited. Greg saw Bud once a year at most and for more than 30 minutes at a time. Other than these few visits, Greg had no phone or mail contact with Bud at all despite the fact that they both lived in Brandon.

[241] Notwithstanding these concerns, Greg testified that Bud was "functioning well" in how he managed his day-to-day needs, such as cleaning and shopping well and "he seemed to be healthy." Greg had no concerns about Bud managing to live safely in his own home and operating motor vehicles. The family consensus, according to Greg, was to preserve Bud's independence and maintain his status of living independently. No consideration was given to placing Bud in a nursing home, as in Greg's view Bud was better off in his own home.

[242] Although Greg expressed concern at trial about Bud managing the "complicated task" of selling his land, he did nothing to question or thwart those plans. This evidence is of course self-serving and relates to the very issue I have to determine, but in the main the limited observations Greg had with Bud do not allow me to draw any meaningful conclusions. Greg did not visit Bud when he was admitted to the CGP in 2007 or 2008 and he never acted in even a modest way on any of the concerns he expressed about Bud.

[243] The evidence offered by Greg that Bud seemed healthy and that he was effectively managing the essential tasks of daily living in his own home, undermine the theory of the plaintiffs' case that Bud was a doddering or senile man who was incapable of remembering what land he owned, what it might be worth and what the consequences of a sale would be.

16.2 Gary McLeod

[244] Gary had the closest relationship to Bud, but after the summer of 2008, his interactions with Bud were very limited. Gary was living in Saskatchewan at that time and he testified he would try to reach Bud on the phone every two weeks or so but their conversations were "very superficial" because Bud "… was very guarded and didn't want to really have a conversation. I – I basically felt like I was shut out." The estrangement described by Gary did not really change prior to Bud's death.

[245] Gary took Bud to the CGP in November of 2007. The event that triggered this was an unattended pot that Bud left burning on the stove, which Gary concluded was a sign of dementia. At that time, Gary testified Bud was, talking about his ex-wife as if she was

still alive. Gary also indicated that Bud did not fully comprehend the subdivision process that Gary was helping him with. Prior to Bud's admission the CGP in 2007 Gary and Bud submitted an application to have part of Bud's Homestead and the Northern Portion of the NW Quarter subdivided into two acre "country residential" lots, but the subdivision plan they submitted ultimately did not receive approval.

[246] After Bud was discharged from the CGP in 2007, Gary arranged for his son Colin (a licensed pharmacist) to fill and deliver Bud's prescriptions to his home and involve the Public Health Nurse in checking in on Bud. Gary testified that Bud's mental function was better and sharper after he was discharged from the CGP and returned home. Gary was not involved in the events leading to Bud's second admission to the CGP in March of 2008, but he came to Brandon at that time and visited Bud daily while he was a patient at the CGP and noted improvements in Bud's condition by the time he was discharged, which he attributed to the medication Bud was prescribed. The plaintiffs did not call Bud's grandson Colin, who both filled Bud's prescriptions and delivered them to Bud.

[247] Gary knew that Bud signed a Power of Attorney before his discharge from the CGP and prescribed Exelon again. After the discharge, Gary returned to his home in Saskatchewan with Bud and they remained there for a week, during which time Gary noted that Bud's condition really improved. When Bud returned to his own home, Gary arranged for Barb to visit Bud daily to ensure he was taking his medication and for the Public Health Nurse to make regular contact with Bud, but after August of 2008 Gary had "pretty minimal" contact with Bud and he left it to his family members in Brandon to monitor Bud and act on any concerns.

[248] Gary testified about receiving a voice-mail from Mr. Kehler in September of 2008 and faxing him the signed power of attorney and the CGP discharge form that Gary signed on April 3, 2008, which contained a record of Bud's prescribed medications and the contact information for the Public Health Nurse. Gary's testimony was that during their telephone conversation the next day, he told Mr. Kehler that Bud had been a patient at the CGP where he was "diagnosed" with dementia, Alzheimer and paranoia. I am satisfied that this is what Gary said to Mr. Kehler but it was not accurate, as no Alzheimer diagnosis was made. The actual diagnosis was dementia and the paranoia was a short-term symptom Bud displayed.

[249] The tenor of the conversation with Mr. Kehler, according to Gary was cordial and business like. Mr. Kehler was clear in his indication to Gary that the power of attorney would be revoked and rather than expressing even the mildest concerns about the revocation or the risk this might expose his father to, Gary just shrugged his shoulders and went along with Mr. Kehler's stated plan. I am satisfied that Gary's recollection of this conversation is accurate. The following extracts from Gary's direct examination are important in my view:

> Q Okay. So then, you did speak to Mr. Kehler the next day?
>
> A That's right.
>
> Q Okay. And what did you tell him?
>
> A I told him basically what -- what was on this discharge sheet but I said I -- that I had taken my dad to -- to CGP or whatever and he was -- he was diagnosed with -- with dementia and Alzheimer's and paranoia and he was on these medications. And then I -- then I -- and he said, well why? And I said -- I said -- or this was in -- in regard to the power of attorney he said what's the power of attorney for? And I said, well, I said my dad is having trouble paying his bills. He remembered to pay some of his bills and -- and that's what the power of attorney was put in place for.

Q Okay.

A And the conversation continued and I said he's having -- I was kind of joking around a little bit with him, I said he's having his -- having problems paying his bills and I says, I hope he doesn't forget to pay your bill. And he came back at me -- he came back at me and says, well, you don't have to worry about me I'm a big a boy. He was quite assertive about it and he says, this is just the general power of attorney, we'll get rid of it.

Q Yeah. Okay. So was that the end of the conversation?

A Yes, that was the end of the conversation.

Q How long was the conversation, do you think?

A Well, it went on for a while because I kind of explained to him, you know, the medication a bit and I said, you know, some of the bills I think I said that he didn't -- wasn't paying. I don't know, it could have been ten minutes, I don't know.

Q What did you understand by the words, we'll get rid of it?

A Well, to me it sounded like that he was going to make himself my dad's power of attorney.

Q Okay.

A That's what I was sure happened.

Q At this point did you have concerns about the conversation you had with Mr. Kehler, about what was going to happen next?

A Well, at first I was just -- I had to sit back and think about it and a little confused at first but then I kind of -- I got thinking, well, you know what, Mr. Kehler is an attorney. He'd probably do just as good of job as me or better so my dad, he always -- it was like my dad to do that because he always trusted professionals and he had accountants and stuff like that. So if he had a lawyer to do it, well, he's definitely more capable than I.

Q Did you have any more -- prior to your dad's -- prior to your dad's death, did you have any further conversations with Mr. -- Mr. Kehler?

A None whatsoever.

[250] It is telling in my view that Gary never took steps to act on the power of attorney or take even the most modest steps to raise alarm about the revocation of the power of attorney before or after it occurred. It would have been easy for Gary to contact the lawyer who he prepared and witnessed the power of attorney to follow up on the fact that Mr. Kehler was taking steps to have the power of attorney revoked and possibly

taking over that duty for himself. The failure of Gary to intervene at this point speaks clearly to the fact that he believed Bud was mentally capable of engaging in that legal act and that Gary was not unhappy about avoiding responsibility in the future for Bud's legal or personal matters. This also seriously undermines the theory of the plaintiffs' case that Bud was hopelessly incapable of managing his own affairs in general or to sell the Land in particular.

[251] There is more evidence from Gary that undermines the theory of the plaintiffs' case. Gary knew that Bud was selling the RTM Property in the summer of 2008 and he could not be bothered to speak to Bud about the impending sale. Gary also expressed no concern about the sale of the City Lands or the NW Quarter either. The evidence he offered at trial about his concerns about Bud's incapacity to sell the Land in 2009 is not only self-serving, it is totally contradicted by his conduct at the relevant time.

[252] Gary admitted that no one in his family tried to get Bud involuntarily committed to undergo a mental capacity assessment and that they all agreed that Bud should continue to live independently until his health deteriorated markedly in June of 2010.

16.3 James McLeod

[253] Bud's son James is a retired banker who was transferred by his former employer to a branch in Saskatchewan in July of 2008 until his return to Brandon in fall of 2009. Over a 20-year span, ending in 2008, the relationship between these two men consisted of mostly of obligatory phone calls a few times every year. James testified that changed shortly before he was transferred to Saskatchewan by his then employer in the summer of 2008.

[254] The following exchange from the direct examination of James reveals a lot about Bud and the relationship between the two men:

> Q And what changed in 2008?
>
> A 2008, I remember my dad needed -- he had -- sorry, I am just going to back up, before I say that. He had, kind of, a -- well, he was pretty gruff, and he was rough, and ornery, and stuff like that, and so he would criticize things that we did, and stuff like that. So sometimes we didn't want to really, you know, talk to him that much, or be around that much, and -- but this period of time he seemed a lot more vulnerable, and -- and mellow, and he needed us to help him with his record player at home, my wife and I.
>
> Q Okay.
>
> A So we went over there and she fixed it for him, and he was -- just seemed like, kind of, a different guy. He was a little calmer, more relaxed, and more accommodating, I guess you'd say, or -- happier.

[255] James had limited contact with Bud after he was transferred to Saskatchewan but the frequency of their interactions increased when James was reassigned to a bank branch in Brandon in the fall of 2009. The evidence James gave at trial was that he met with Bud "at least every other week" and they would speak on the phone "maybe, six to eight times during the month, and probably more during some months, depending on if he needed me for something, or a crisis might have come up, or something like that."

[256] James noted remarkably few concerning observations about Bud during the time the sale transactions with Mr. Cole and Mr. Kehler were underway. Virtually all of the concerns expressed by James arose after the last transaction in September 2009.

[257] After his return to Brandon in the fall of 2009, James noted that Bud forgot the PIN number for his client card that gave him access to the automatic teller at his bank. This would have occurred after the closing of transactions for the sale of the City Lands and the RTM Property. Around that time, Bud would have been making the final

arrangements for the sale of the NW Quarter. Bud signed those closing documents on September 28, 2009.

[258] James also testified that he saw Bud in the bank branch that James was managing in October of 2009. At that time, Bud was speaking to a bank employee about the interest rates he was being offered on a $500,000 GIC. James was unable to get Bud to understand what exactly his options were for investing this GIC. The conversation was "scrambled and rambling" according to James.

[259] James also recalled an incident during the winter of 2009 to 2010, when Bud called him from his car to say he got lost while driving around Brandon. James got in his car to locate Bud and direct him home. There was also an incident in 2010 when Bud delivered some vegetables from his garden to James, but placed them in a neighbour's garage instead of James' garage. Another incident in 2010 that James recalled was a request by Bud for help towing his car to a mechanic in Brandon with his farm tractor.

[260] These incidents from 2010 do not assist me in determining what Bud's mental capacity was like during the time the Land was sold. It is telling however, that none of these events caused James to call a family meeting to discuss Bud's mental health or his ongoing status as a single person living independently in his own home. James, like his brothers, did not reach out to mental health professionals or to lawyers to discuss the need to intervene on Bud's behalf. The absence of any meaningful steps to take such measures or to raise alarms about Bud's health or ongoing living arrangements totally undermine the theory of the plaintiffs' case. The self-serving opinion offered by James about Bud's lack of capacity to sell the Land in 2009 cannot be given any weight. The

actions of James and his brothers at the relevant time, or better said "lack of action," does not support the theory of the plaintiffs' case.

16.4 Scott Minary (The Public Health Nurse)

[261] The evidence of the Public Health Nurse is that he first spoke with Bud by phone on December 4, 2007. At that time, Bud displayed insight and his short-term memory seemed more impaired than his long-term memory. No confusion or disorientation was evident. The Public Health Nurse sent a letter to Bud's family doctor about his initial home visit with Bud on December 6, 2007 and recorded that Bud scored 20/30 on his MMSE.

[262] The notes of the Public Health Nurse indicated that Bud showed no signs of psychosis, hallucination, delusions, anxiety, agitation, suspicions or paranoia. He also noted that there were no signs of intoxication or alcohol use and that Bud had no difficulty walking. No concerns were noted about Bud's home other than that it was cluttered and needed cleaning.

[263] The Public Health Nurse had no further phone contact with Bud until January 31, 2008, when Bud presented himself in a pleasant and friendly fashion, but appeared to have no recollection of who the Public Health Nurse was. Bud also did not recall who Dr. Lint was. The Public Health Nurse recorded another visit with Bud on March 17, 2008, at which time he appeared disheveled and the house was not clean. Bud was also in an "ornery" mood and was not shy about using profanities. The Public Health Nurse was satisfied Bud was not taking his medication. Bud's second admission to the CGP followed less than two weeks later.

[264] After many unsuccessful attempts to contract Bud, the Public Health Nurse spoke to Bud in late May of 2008. The Public Health Nurse tried to visit Bud but was unsuccessful in seeing him at his house until August 13, 2008. Although the Public Health Nurse had no recollection of this meeting, his notes indicated that Bud was "ornery" again and using "colourful" language and his notes also indicated Bud was taking his medication.

[265] At a visit on August 22, 2008, Bud was reluctant to allow the Public Health Nurse into his home and they spoke outside on his deck. Bud correctly told the Public Health Nurse that he had seen Dr. Halka, who told him to stop taking his medication. Other evidence confirmed that this was in fact the case.

[266] The evidence of the Public Health Nurse was that after he received the voice-mail from Mr. Kehler on September 9, 2008 he called Gary who expressed no concerns and said that Bud could do as he pleased. The Public Health Nurse did not think it was his role to call Mr. Kehler back to inform him of Bud's medical status. The two men did speak on the telephone at a later date and the notes of the Public Health Nurse indicated that Mr. Kehler was aware that Dr. Halka had referred Bud to a psychiatrist and that the Public Health Nurse told Mr. Kehler about Bud's past contact with Dr. Lint.

[267] On his December 19, 2008 visit, the Public Health Nurse noted that Bud was friendly throughout their 90-minute meeting. Bud's house was also cleaner than on the previous visit and he was dressed appropriately for the weather. Bud also correctly informed the Public Health Nurse that he had revoked the power of attorney. The notes of the Public Health Nurse also indicate that Bud mentioned he had not taken medication

for about six weeks. This is consistent with Dr. Halka's cancellation of Bud's prescriptions and Dr. Vipulananthan's failure to prescribe new medication after his consultation with Bud on November 4, 2008. Bud's memory was accurate on all of these points. The Public Health Nurse closed his file for Bud on April 17, 2009, due to his inability to maintain contact with Bud, despite his best efforts.

[268] The Public Health Nurse did not see Bud from November 30, 2007 to December 19, 2008, and they did not see each other in 2009. They had only five in-person visits in total and their telephone calls were short. The main concern I have about the evidence offered by the Public Health Nurse is that it does not offer me meaningful insight into Bud's condition in 2009, which is the relevant time span in question. From his evidence, it is also clear that Bud's condition varied and improvements in his mood and memory were noted from time-to-time, which is consistent with the expert evidence of Dr. Silberfeld that patients with vascular-type dementia can have periods of lucidity.

16.5 Barbara Ksiazek

[269] Barb attended at Bud's home daily beginning in April 2008, to ensure he was taking his medication. These visits ended in August of 2008. According to Barb, Bud was a good at carrying on a conversation in April but by July or August, she said he was repeating himself. Notwithstanding that, Barb recalled that Bud spoke appropriately about current events, his "lady friend," and other parts of his day-to-day life. This evidence undermines the evidence of Gary, Greg and James who all said Bud tended to live in the past and that he was disconnected from the reality of current events.

[270] Barb also testified that Bud took his medication in her presence and she was satisfied that Bud took his medication in the beginning. Barb was not clear in her evidence about whether or not Bud was taking his medication later on and she did not offer a clear explanation as to why she reached that conclusion.

[271] Barb saw Bud daily for four and one-half months from April 2008 to mid-August 2008 or about 135 times. On two of those 135 occasions, when she found Bud asleep on the sofa with empty beer bottles on the table, it was evident to her that Bud had lost control of his bladder. Barb primarily engaged in small talk with Bud and they did not discuss "complex" matters such as his business affairs or land transactions.

[272] Despite the large number of times she visited with Bud and the sheer amount of time she spent with him (approximately 135 visits), Barb had remarkably little to say that was concerning about Bud and what little she did say was not specific. Essentially she and Bud conversed about historical and current events and he took his medication in her presence at times. Apart from the bladder control issues, Barb offered no other observations of concern despite spending all of that time with Bud. Barb did not see Bud after mid-August 2008.

[273] For all of these reasons, I can give little weight to Barb's conclusions that Bud would have had difficulties making complex decisions since she did not discuss complex matters with him. Overall, her evidence is not helpful on the issue of Bud's mental capacity to understand land sales in 2009.

16.6 Stuart Cowie

[274] Mr. Cowie was the broker who owned Cowie Real Estate, where Mr. Cole worked. Mr. Cowie met Bud for the first time at the RTM house in August, 2008. Thereafter he saw Bud two to five times per month. Bud dropped in at the offices of Cowie Real Estate frequently and Mr. Cowie recalled speaking with Bud on some of those occasions about the Land Bud owned and his plans to sell them. Bud clearly stated his intention to sell the Land in order from least valuable to most valuable. During all of these conversations Mr. Cowie was always left with the impression that Bud clearly understood what land he owned and that he was managing the sale of the Land in a logical manner. No concerns about mental capacity arose in Mr. Cowie's mind as a result of his interactions with Bud.

[275] At the August 2008 meeting at the RTM Property, Bud walked around the property with Mr. Cole and Mr. Cowie and told them about the history of the construction project, including the pouring of the basement. Bud also confirmed the RTM house was placed on the basement and pointed out where the well and septic field were. By the time of this meeting, Mr. Cowie indicated Bud was eager to sell the RTM house "as is" and let the new owner complete the finishing work. Mr. Cowie testified that he explained to Bud that although the ultimate sale price was lower than Bud was hoping, potential buyers would not offer top dollar for an unfinished house that needed work and that Bud clearly understood that was the case.

[276] Mr. Cowie testified that Bud typically was very aggressive in pricing the Land and was blunt in suggesting he could find other realtors if he and Mr. Cole did not want to list his Land at prices high enough to meet his expectations. Bud was the kind of client who

set the listing price, even if it was higher than what his realtors were recommending. Bud also displayed a keen understanding of the Land and was aware which of his properties were lower or higher in value. Moreover, Mr. Cowie testified that Bud readily followed their conversations and never lost focus or went off on tangents while they were speaking. Mr. Cowie also testified that Bud intently followed their conversations and through his responses or questions it was clear that Bud understood what they were saying and the advice they were giving to him.

[277] The factual observations made by Mr. Cowie about how Bud acted and interacted with him during the crucial time that the Land was listed for sale and ultimately sold were not effectively challenged in cross-examination. I accept Mr. Cowie's observations as accurate.

17.0 Did the Defendant Lawyers Meet Their Professional Standard of Care?

[278] The plaintiffs have not proven on a balance of probabilities that Mr. Kehler failed to meet the professional standard of care he owed to his client. The professional standard of care defines the contractual obligations Mr. Kehler owed to Bud as a client. There was no breach of contract. My reasons for this conclusion follow.

17.1 The Law – Professional Standard of Care

[279] Under the heading on p. 164, "Professional Negligence", the text by The Honourable Allen M. Linden and Bruce Feldthusen, *Canadian Tort Law*, 9th ed. (Markham, Ontario: Lexis Nexis Canada, 2011), at pp. 164-171, confirms the following legal principles apply to professional advisors:

- The actions of professional advisors, who hold out to the public that they have special skills, are to be judged on an objective standard;
- This objective standard is not based on the highest possible degree of skill in any given profession, but rather a fair, reasonable and competent degree of skill other professionals would provide in similar circumstances;
- For lawyers, this objective standard means that they are liable if it is shown that their error or ignorance was such that an ordinary competent lawyer would not have made that kind of error in similar circumstances. This standard of care is described as that of the reasonably competent lawyer or the ordinarily prudent lawyer and not the perfect lawyer;
- Lawyers have no obligation to provide perfect outcomes. The objective standard involves providing careful advice on legal matters that is not negligent. Lawyers must decline retainers that call for legal steps beyond their level of knowledge or expertise, unless they educate themselves in the area of the law in which their knowledge is deficient or they seek advice from experienced lawyers; and
- There is no liability for unfavourable outcomes to a client from honestly formed opinions that any other average lawyer would offer in the customary practice of lawyers in the same circumstances.

[280] The above noted standards are largely reflected in Chapter 2 of the *Code of Professional Conduct* of the Law Society of Manitoba, at p. 3, in effect in 2009 ("the *Code*"), which is entitled "Competence and Quality of Service." This chapter of the *Code* provides that a lawyer owes his or her client a duty to be competent to perform any legal

services undertaken and that services should be provided in a conscientious, diligent and efficient manner so as to provide a quality of service equal to that which lawyers would generally would expect of a competent lawyer in a like situation.

[281] Chapter 5 of the *Code* at p. 15 entitled "Impartiality and Conflict of Interest Between Clients," also permitted lawyers to accept joint retainers, which involve a lawyer representing opposing parties to an agreement or a transaction. In these circumstances, the *Code* demands that lawyer receive the informed consent of their clients under a joint retainer and to act scrupulously to avoid giving one client preference over another.

[282] As at January 1, 2011 the *Code* included section 3.2-9 entitled "Clients with Diminished Capacity," expressly addressing the obligation of lawyers who represent clients with diminished mental capacity. In those situations "… *the lawyer must, as far as reasonably possible, maintain a normal lawyer and client relationship*" (p. 26). The lawyer should be sensitive to the fact that a client with diminished mental capacity "… *may be capable of making some kinds of decisions, but not others*" (p. 26). The key is whether the client has the ability to understand the information relative to the decision at hand and to appreciate the reasonably foreseeable consequences of the decision. The lawyer is obligated to assess whether the impairment is of a nature that precludes the lawyer from accepting instructions from the client or precludes the client from engaging in binding legal acts.

[283] The *Code's* provisions as at January 1, 2011, sets out that a lawyer must decline to act for a potential client if the lawyer is satisfied that the person is incapable of giving instructions about a legal matter. In such circumstances a lawyer may act for a client

under a "limited scope retainer," if a failure to act could result in imminent irreparable harm to that person. When acting under a limited scope retainer the lawyer can only undertake legal actions necessary to protect the person and decline to take further steps. In any event, the lawyer has an ethical obligation to ensure that the client is not abandoned (pp. 26-27).

[284] Peter Cole, the legal standard of care expert retained by the Defendant Lawyers, testified that although the limited scope retainer provisions under the *Code* did not come into effect until 2011, they were still generally considered to be applicable ethical standards for lawyers in Manitoba in 2009. There was no dispute at trial that this statement was accurate.

17.2 Expert Evidence

[285] Richard Adams, ("Mr. Adams") who has practiced law in Winnipeg since 1973, was retained as an expert on the legal standard of care by the plaintiffs. Peter Cole was called to the Bar in the same year as Mr. Adams and testified as an expert on the legal standard of care for the defendants. The primary and significant difference between the two experts is that Peter Cole practiced law in a rural community and was well acquainted with the sale of farmland and he had many clients who were farmers, while Mr. Adams practiced law in a large Winnipeg firm that did not have a significant number of clients who were farmers.

[286] I am not accepting the expert evidence of Mr. Adams that the Defendant Lawyers breached the professional standard of care. My reasons for this are as follows:

a) The primary focus of Mr. Adams' report pertains to the revocation of the power of attorney by Bud and Mr. Kehler's shortcomings in that regard and not with respect to the sale of Land;

b) Mr. Adams never comments on what the legal standard of capacity is with respect to the sale of land and how that standard was not met on these facts;

c) Mr. Adams makes limited comments about Bud's health or the state of his memory in 2009 when the Land was sold. The report of Mr. Adams only mentions that medication was prescribed after a medical diagnoses of dementia in 2007, Bud's admissions to the CGP in 2007 and 2008 and that the medical reports made available to him showed Bud's "capabilities were declining." This conclusion is overly broad and ignores the detailed evidence from medical witnesses and eyewitnesses that Bud's condition fluctuated and at times his memory and cognitive function was good;

d) Mr. Adams also incorrectly states in his report that Bud's "*continued contact with medical professionals though to the time of his death describe a continuing deterioration of his mental condition*." Again, this is an overly broad statement and ignores the significant fluctuations in Bud's condition and significant improvements in his memory and mood from time to time. If Bud's mental capacity was plotted on a graph, it would not show a line continuously declining from 2007 to the time of his death in 2010. Mr. Adams' report gives short shrift to the possibility of fluctuations in Bud's condition, as the facts clearly demonstrate, and completely ignores the fact that Bud was living

independently throughout 2009 and attending to the daily tasks of living with little, if any, assistance;

e) Mr. Adams' evidence also fails to deal effectively with the fact that the certification of Dr. Lint that Bud had the mental capacity to sign a power of attorney in April of 2008 represented an obvious improvement in his condition and it was not that far in time from the revocation of the power of attorney later that same year. Mr. Adams explains this away by making critical comments about Dr. Lint who gave an opinion that Bud was competent to execute a power of attorney in 2008. In his report Mr. Adams comments *"It is difficult for me to reconcile how in April, 2008 the doctor could make the diagnosis of McLeod that he did, yet certify that McLeod was capable of executing a Power of Attorney. It may be that McLeod's condition was such that at certain points in time, he was competent to make decisions. That being said it seems quite remarkable that each time Kehler met with McLeod, McLeod was (in Mr. Kehler's judgment) competent, he understood the subject matter of their discussion, and was able to give full and complete instructions to revoke and replace the Power of Attorney in 2008, and to carry out the transactions that were conducted in 2009 and 2010*";

f) The final page of Mr. Adams' report again focuses primarily on the revocation of the power of attorney in 2008 and that there was "some doubt" as to Bud's capacity, which should have caused Mr. Kehler to consult with "third party professionals" before accepting instructions to revoke same. Mr. Adams makes no effort to tie this revocation in 2008 to the test for legal capacity to sell land

in 2009 and fails to make the obvious observation that a person who signs or revokes a power of attorney is not surrendering his or her right to sell his or her own real property at some future date;

g) Oddly, Mr. Adams also concludes that the failure to recommend an independent appraiser for an FMV evaluation prior to closing represented a failure on Mr. Kehler's part to act in a manner consistent with the requisite legal standard of care. The evidence of Mr. Adams on this point was that since two of the three sale transactions reflected "very significant prices" an independent appraisal was necessary. Mr. Adams was unable to state why such an exercise might benefit Bud, given that the offers were binding by the time Mr. Kehler received the accepted offers to purchase and a refusal to close the transactions would have exposed Bud to a breach of contract claim;

h) Mr. Adams' report and his evidence at trial was also unclear as to what assumptions of fact he made as to Mr. Kehler's knowledge of Bud's medical condition or behavior in 2009. Mr. Adams seems to have assumed that Bud exhibited "unusual behaviour" in front of Mr. Kehler, which I am satisfied was not the case. Mr. Adams also comments on the fact that the transactions involved "very significant prices" are also off the mark as a supporting rationale for his criticisms of Mr. Kehler and betray his lack of knowledge as to the prices of farmland. I prefer the evidence of Peter Cole on this point who indicated that from his extensive experience, multi-million dollar sales of farmland were not unusual in Manitoba; and

i) Mr. Adams also justified his criticism of Mr. Kehler for not taking notes based on the erroneous assumption that Bud appeared to Mr. Kehler to be "*not…entirely capable of making decisions or determinations*." This factual assumption was not proven at trial and no effort was made to tie this to the legal test necessary for the sale of land in 2009.

[287] In his report, Peter Cole concluded Mr. Kehler did not breach the standard of care expected of a reasonably careful lawyer in similar circumstances with respect to the issues of capacity and fair market value. Peter Cole found that Mr. Kehler met the required standard of care with respect to both issues.

[288] In forming this opinion Peter Cole relied on the comments of Mr. Kehler that Bud was mentally competent and clearly understood exactly what he was doing throughout the time that he was interacting with Mr. Kehler in 2009 when the Land was sold. Although Peter Cole was surprised that Mr. Kehler was not alive to the potential legal issues that could arise from the facts disclosed to him by Gary about dementia or episodes of short-term memory problems, he opined it was not a breach of professional standards.

[289] Mr. Kehler was entitled to rely on his own observations and interactions with Bud in concluding that Bud's mental capacity to sell land was not at issue in Peter Cole's opinion. In the same vein, Peter Cole concluded although it was risky for Mr. Kehler not to start carefully documenting his file about his observations about Bud's behaviour and memory, there was nothing in the circumstances that suggested a breach of professional standards had occurred. Those circumstances included the fact that Bud continued to

live alone, managed his day-to-day tasks without assistance and he continued to drive his own vehicle and operate farm equipment.

[290] According to Peter Cole the normal "red flags" lawyers encounter when dealing with clients of advanced years were not present in this case, namely evidence that Bud was being manipulated by someone else to act against his interests, imagining things or mistaken about the essential facts of the sale transactions regarding the Land. Another absent red flag in this case, according to Peter Cole, was the fact that the price for each parcel of land was negotiated at arm's length by a professional realtor on Bud's behalf and was not "clearly" outside the realm of FMV.

[291] The other factors, according to Peter Cole, that supported a conclusion as to the absence of red flags for Mr. Kehler were as follows:

a) The commissions charged by the Defendant Realtors were based on a percentage of the sale price, so it was in their best interests to find a purchaser willing to pay the highest price possible;

b) In two of the transactions, Bud instructed the Defendant Realtors to reject the initial offers and submitted counter-offers at higher prices;

c) The offers to purchase that were delivered to Mr. Kehler's office had been accepted by Bud and were not subject to his approval as Bud's lawyer. The offers were only subject to the usual conditions respecting financing and in the case of the first offer on the NW Quarter there was a condition as to subdivision;

d) Mr. Kehler's representation of both sides in some of the transactions only arose following the execution of the agreements of sale and he was never involved in the negotiations; and

e) Bud retained the services of a professional accountant to assist him with his tax returns and other business dealings.

[292] Given all of these facts, Peter Cole opined that there was nothing about the three real estate transactions in question, which should have given Mr. Kehler a sufficient degree of concern to decline the retainer or abandon Bud as a client. Further, it was not incumbent on Mr. Kehler to challenge the terms of the purchase price stated in each agreement, unless there was clear evidence of misfeasance in the negotiations or a lack of understanding on Bud's part as to the essential terms of the agreements. A lawyer is not expected to serve as an appraiser or act in any other capacity the lawyer is not qualified to perform. Some lawyers may have general ideas as to what land may be selling for in a certain area at a particular time, but that does not make them land valuation experts.

[293] Peter Cole disagreed with the three concluding points in Mr. Adams' report. The conclusions offered by Peter Cole to those three points were as follows:

a) Mr. Kehler was under no obligation to refuse Bud's instructions to revoke the power of attorney without seeking a medical opinion, as there were no facts to suggest to Mr. Kehler that Bud did not know what he was doing;

b) Mr. Kehler was under no obligation to insist that Bud retain appraisers to provide opinions of FMV, as the prices were already negotiated and not subject

to further negotiation by the time they came to Mr. Kehler's attention. Peter Cole adamantly disagreed with this opinion offered by Mr. Adams;

c) Mr. Kehler was under no obligation to make detailed notes about his discussions with Bud and the advice he provided throughout his retainers because lawyers handling real estate transactions rarely keep detailed file notes in the absence of red flags. A lawyer would only be obliged to do that if there were genuine concerns as to mental capacity.

[294] The disagreement between the two experts on a legal standard of care reflects the fact that they came to different conclusions as how Mr. Kehler acted in response to what he knew about Bud. I am satisfied that Mr. Adams applied the standard of perfection in coming to his conclusion about Mr. Kehler, which is not the applicable standard. I am also satisfied Mr. Adam's opinion is flawed based on incorrect assumptions of fact and the other reasons I have already set out. I accept the expert opinion of Peter Cole that the legal standard of care was not breached in all of the circumstances.

[295] I find that Mr. Kehler met the professional standard of care of an ordinary competent lawyer in the same circumstances and as a result, the claim against the Defendant Lawyers must be dismissed.

17.3 Inferences about Witnesses who did not Testify

[296] The evidence at trial indicated that Bud interacted with numerous individuals between 2007 and 2010. The list of individuals who interacted with Bud during this time frame includes:

a) his friend/companion Doris;

b) Jim Fehr who according to Gary assisted Bud with the development of the RTM Property;

c) Bud's accountant, Darcy Gerow, who assisted Bud with paying bills from time-to-time, including bills related to the development of the RTM Property and his tax returns;

d) David Quirk and his field crew, who attended to surveying some of the Land on Bud's instructions; and

e) Ms. Marshall at the City of Brandon, whose letter to Bud about the City Lands has already been mentioned in these reasons.

[297] The letter from Ms. Marshall on November 5, 2008 is telling as it clearly shows Bud not only visited her office, without the involvement of Mr. Kehler or Mr. Cole, but that Bud also discussed the sale of the City Lands with her in an intelligible way that led to an expression of interest from Brandon to purchase the City Lands. The letter indicates that at a minimum, Bud was capable of making arrangements to meet with Ms. Marshall, attending at her office alone and having a coherent discussion with her about the potential sale of the City Lands. There is nothing in this letter that suggests Bud was as confused and irrational a person as the plaintiffs have suggested he was. In fact, it suggests to me that Bud had a high level of cognitive function when it came to discussing the possible sale of the City Lands and constitutes important independent evidence that supports a finding that Bud had the necessary mental capacity to understand the essential elements of the sale of Land at that time.

[298] The plaintiffs knew that Ms. Marshall and the other individuals interacted with Bud before and during the time the Land sales transactions were underway and yet the plaintiffs chose not to call any of them as witnesses. The failure of the plaintiff to call Ms. Marshall and the other witnesses mentioned above suggests to me that these witnesses would not have assisted the plaintiffs' case.

18.0 Conclusion on Mental Capacity

[299] The plaintiffs have failed to discharge their burden of proving that Bud lacked the necessary mental capacity to understand the essential elements of the sale of Land in 2009. This is not a situation where the onus shifts to the defendants. There are no suspicious circumstances and the equitable remedies arising from undue influence or unconscionable bargain have no application on the facts before me.

[300] I arrive at this conclusion based on my analysis of all of the evidence offered by eyewitnesses and experts. Due to the fact that the mental capacity to sell land is time and task or circumstance specific, the best evidence in this case comes from Mr. Cole, Mr. Cowie and Mr. Kehler who interacted regularly with Bud at the time the transactions regarding the sale of the Land were underway. Although the other eyewitnesses testified about episodes or periods where Bud demonstrated poor short-term memory, the incidents they testified about did not typically occur at the time of the land sales.

[301] The absence of confusion or forgetfulness is not the standard for overcoming the presumption of mental capacity to engage in the sale of land. The evidence offered by the other eyewitnesses that is consistent with Bud suffering from some degree of dementia does not automatically lead to a conclusion that he lacked the ability to

understand the essential elements of the sale of land, with proper explanations from expert advisors.

[302] The evidence is overwhelming that Bud's knowledge about the three parcels of Land was sound and in no way impaired at the times they were sold. The knowledge Bud had about the Land was deeply engrained in his long-term memory and unaffected by the short-term memory impairment that was evident. The facts consistent with Bud fully understanding the essential elements of a sale of land are as follows:

a) Bud made a plan on his own initiative to sell the Land after he retired from farming and quite logically had no need to keep holding on to it;

b) The plan Bud devised to sell the Land in order from least valuable to most valuable was logical and he never wavered from it;

c) Bud remained active in executing this plan by reviewing offers before rejecting some of them or accepting others. Bud successfully made counter-offers on two occasions;

d) Bud was able to appreciate that the RTM Property was a small, triangle-shaped parcel of land that would be hard to sell as undeveloped land and could increase its value by having an RTM house moved onto a basement foundation. Bud’s ability to organize and supervise the construction of the RTM house showed an impressive degree of organizational skill and cognitive thinking;

e) Bud also correctly understood that the City Lands were his “crap land” because they were in a low-lying area prone to flooding and they would yield the lowest sale price of his three properties;

f) Bud correctly understood that that the NW Quarter might be worth as much as $10,000 per acre and this made it his most valuable land; and

g) After the three parcels of Land were sold, Bud correctly appreciated in 2010 that his Homestead was likely his most valuable piece of Land. In the spring of 2010 when he met with Mr. Kehler, Bud was able to pace around the boundaries of the Homestead and correctly identify where the septic field and tank were in relation to the property's boundaries. Bud also gave reasonably accurate dimensions for the size of his garage and the septic field.

[303] Selling land is not the kind of complex mental challenge the plaintiffs have made it out to be. In this case, Bud had retired from farming and no one in the family wanted to take over the farm. Bud's plan to sell the Land was entirely logical and made sense. Arguably, selling vacant farmland is less complex than selling a residential dwelling because it does not involve moving into a new home.

[304] Once the decision to sell the Land was made, Bud appropriately sought out the advice of realtors as to the listing price and to complete the paperwork for the sales. Thereafter he retained a lawyer to help him close the transactions.

[305] Mr. Cole and Mr. Cowie gave Bud advice about the value of the three parcels of Land. They also gave him advice about the listing prices, before Bud gave clear instructions as to what list price was to be set. Mr. Cole, with Mr. Cowie's assistance, then gave Bud advice about what to do with the offers that were presented: reject them, accept them or counter-offer. Bud was free to agree or disagree with the professional advice he was getting. The evidence consistently shows Bud did not ignore the

professional advice he was offered or took wildly excessive positions with respect to what the Land was worth. Bud had a certain price in mind for each property, but he listened to Mr. Cole and Mr. Cowie and took their advice by moderating his positions when the properties did not attract offers. After each offer to sell was accepted, Bud sought out the advice of Mr. Kehler to complete the legal work to close the sale transactions.

[306] Understanding the nature of real estate listings and offers or the legal documents for the closing of a real estate transaction are daunting for any lay person, regardless of their mental state. Like anyone selling real estate, Bud was entitled to rely on professional advice. The assistance offered by professional advisors greatly reduces the complexity of real estate transactions any lay person would perceive. The responsibility of any realtor or lawyer is to work through the legal documents and explain them to the client in simple terms. In the case of a lawyer who like Mr. Kehler, was not retained to negotiate the terms of a land sale, there is no possibility of negotiating a way out of a binding agreement for sale. Bud was obligated to sell the Land under the agreements he had signed and that were prepared by the Defendant Realtors.

19.0 Did the Defendant Lawyers Cause or Contribute to Any Damages as Alleged by the Plaintiffs?

[307] The plaintiffs concede that all tort claims against the Defendant Lawyers are statute-barred due to the provisions of ***The Limitations of Actions Act***, C.C.S.M. c. L150. The only basis for a claim against the Defendant Lawyers is in breach of contract. The remedy for a breach of contract under the common law calls for a plaintiff to be put in as good a position as the plaintiff would have been had the contract been properly performed or received the performance promised. In the alternative, the plaintiff is

entitled to be put back in the same position the plaintiff was in before the contract was made. (See Stephen M. Waddams, *The Law of Contracts*, 7th ed. (Toronto: Thomson Reuters, 2017), at paras. 703 and 739.)

[308] The return of Land by third-party purchasers in good faith is not possible in this case, so in practical terms the plaintiffs must prove that the Defendant Lawyers breached their contract with Bud and this breach caused them a loss of some kind. In this case the plaintiffs say the loss can be measured by the FMV of the City Lands and the RTM Property at the time of the sales in 2009. The same argument applies to the sale of the NW Quarter to the Corporate Defendant if rescission is not the appropriate remedy.

[309] My finding that Bud had the necessary mental capacity to accept the three offers regarding the sale of the Land and close the transactions, means that these transactions are all valid and irreversible. In his capacity as a lawyer, Mr. Kehler did not act as a land valuator and he never suggested or implied he was qualified to recommend land values. By the time the offers to purchase arrived at his office, they were unconditional and Bud was obligated to close the deals as written. If those offers did not represent FMV, the plaintiffs' recourse, if any, is against the Defendant Realtors from whom Bud sought advice and opinions regarding the FMV of the Land, including the setting of the listing prices of the Land and how the offers were presented to Bud.

[310] Given Mr. Kehler's opinion that Bud was mentally competent to meet the test for the sale of real property, he was entitled to accept Bud's instructions to close the real estate sale transactions Bud had agreed to in writing. Unless an accepted offer to purchase real estate is explicitly made subject to the approval of a lawyer, there is no

way for a lawyer to "rewrite" the offer after it is accepted. In this case, the offers that arrived in Mr. Kehler's office were final and the sale prices could not become the subject of negotiation. The responsibility of Mr. Kehler at that point was to close the transactions under the terms of the binding agreements Bud had accepted.

[311] It is undisputed that Mr. Kehler was not involved in giving advice on land valuation and he rightly testified it was outside his area of expertise or the scope of his retainer. Provided the purchaser tendered the closing funds as provided for in the written agreement, there was no way for Bud to instruct Mr. Kehler not to close the transactions without exposing Bud to a claim for breach of contract.

[312] There is no causal link between Mr. Kehler's conduct and the damages allegedly suffered by the plaintiffs. There is no link between the conduct of Mr. Kehler and the losses as alleged by the plaintiffs due to sale prices of the Land being below FMV. The failure of the plaintiffs to prove Mr. Kehler caused them losses is fatal to their claims against Mr. Kehler and the Defendant Lawyers. Had I found that the Land was in fact sold for significantly less than FMV, the plaintiffs' only recourse would have been against the Defendant Realtors stemming from the advice they gave Bud about FMV of the Land.

Part IV – Did the Defendant Realtors Meet their Professional Standard of Care

[313] The Defendant Realtors, just like the Defendant Lawyers, acknowledged that as professionals, they had a contractual relationship with Bud and that their contractual obligation to Bud was defined by their professional standard of care as realtors. Although the plaintiffs cannot succeed in a tort action of negligence against the Defendant Realtors, due to the expiry of the limitation period, the Defendant Realtors concede that any failure

to abide by professional standards amounts to a breach of contract that is actionable and that the same can be said for any breach of fiduciary duty, if proven.

[314] Some of the case law as to professional liability cites claims arising from negligence when addressing a breach of professional standards and frames the question in a way that asks if the "duty of care" arising from the professional standard of care was breached. Although damages in tort are not at issue in this case, it is still helpful to examine them and extract principles relevant to breach of contract as defined by the professional standard of care.

20.0 Fiduciary Duty

[315] A breach of fiduciary duty does not necessarily arise every time the breach of a contractual obligation, owed by a professional to a client, is proven. Some claims arising out of a relationship with a fiduciary may simply be a breach of contract or a negligent breach of the duty of care. This principle is stated in ***Lac Minerals Ltd. v. International Corona Resources Ltd.***, 1989 CanLII 34 (SCC), [1989] 2 SCR 574, at p. 647 as follows: "*Further, not every legal claim arising out of a relationship with fiduciary incidents will give rise to a claim for breach of fiduciary duty*."

[316] ***Lac Minerals***, at pp. 646-647, provides examples of certain relationships which will give rise to specific fiduciary obligations, which typically entitle the client to have absolute trust that the professional will not steal the client's money, enter into a contract with the client without full disclosure or bill for disbursements that were never incurred. A fiduciary duty entitles the client to have absolute trust in the fact that the professional will not act against the client's best interest. The disclosure of a potential conflict of

interest is clearly a fiduciary duty of a professional realtor or lawyer and without informed consent of both clients to a joint retainer, a breach of fiduciary duty would clearly arise.

[317] The evidence shows that Mr. Cole and Mr. Cowie consistently acted in Bud's best interests by ensuring that Bud was selling the Land for the highest possible price and that there was no conflict of interest or an effort to deceive Bud as to what they sincerely believed the FMV to be.

[318] The evidence is undisputed that Bud set the listing prices for all three parcels of Land and that Bud insisted on testing the market by demanding that the Defendant Realtors list the Land at prices they thought were unreasonably high. The Defendant Realtors followed Bud's instructions to list the Land at higher prices than they thought the market would support. When offers were received, the Defendant Realtors reviewed them with Bud, gave him opinions as to value, and accepted his instructions to counter-offer on two parcels of Land in an effort to achieve the best price possible for Bud.

[319] Nothing about the joint retainer involving the sale of the NW Quarter amounted to a breach of either fiduciary duty or professional standards. The real estate code of professional conduct at that time explicitly permitted the joint retainers with informed consent. At best, the case against the Defendant Realtors boils down to the allegation that Bud was persuaded to sell the Land significantly below FMV. This would amount to a breach of contract as it is connected to the allegation that the conduct of the Defendant Realtors failed to meet the standards of their profession.

[320] As I have already noted, the onus for proving a failure to meet the professional standard of care rests on the plaintiffs. This means that the plaintiffs must lead evidence

from like-professionals as to both the required standard of care and that the conduct subject of the court action is in breach of that standard.

[321] The determination of whether a real estate agent met the applicable standard of care is to be decided on an objective basis. The question before me is whether the Defendant Realtors acted with a reasonable degree of care and skill that a realtor of ordinary prudence and ability might be expected to show in similar circumstances. The standard of care is not perfection – it is reasonableness assessed on an objective basis. (See Campion and Dimmer, *Professional Liability in Canada*, loose-leaf Release 11 (Toronto: Thomson Reuters Canada, 2018) at pp. 5-48-5-51.)

[322] There can be two or more sets of reasonable practices, which, if fulfilled, meet the standard of care. A defendant who meets either of these standards cannot be found to have failed the standard of care. In ***Campbell et al v. Jones et al***, 2016 MBQB 10 (CanLII), Joyal C.J. states, at para. 77:

> [77] … an expected standard of care in the field of medicine may nonetheless permit differences of opinion as amongst reasonably competent professionals. In other words, there may exist in some circumstances more than one acceptable standard. Indeed, the fact that one body of physicians may advocate a particular standard of care does not mean that a physician is by definition negligent for not adhering to that standard. Courts have long recognized that it is not possible in most instances to say that there is any one answer exclusive of all others to various problems of professional judgment. As was argued by the defendants, a court may prefer one body of opinion to the other, but that is not necessarily a basis for a conclusion of negligence.

20.1 Analysis – Realtors Professional Standard of Care

[323] The plaintiffs called Jim McLachlan ("Mr. McLachlan") to provide an opinion as to the standard of care of a real estate agent. Mr. McLachlan started his career as a realtor

in 1999 as a sales associate for a real estate firm in Brandon and worked as a farm sales manager and marketing representative from 2001-2016 with a different firm.

[324] Ray Brownlee ("Mr. Brownlee") provided an expert opinion as to the standard of care on behalf of the Defendant Realtors. Mr. Brownlee was a professional realtor in the Brandon area for over 40 years. From 1974 to 1996, he was a real estate agent and from 1996 through to 2020, he was a real estate broker.

[325] In support of his opinion, Mr. McLachlan prepared a three-page report, which included nine points that he claimed to be the standard of care for a real estate agent practicing in Manitoba. Certain problems with these nine points became evident during Mr. McLachlan's cross-examination, most notably that:

a) The list probably did not cover all of the duties incumbent on a realtor;
b) The list sets out his private or personal practice, but he could not say if this is what other realtors typically did; and
c) There was no duty to involve family members when dealing with "elderly clients" and this was not the kind of action every realtor would take.

[326] It was clear throughout his testimony that Mr. McLachlan was describing what <u>he thought</u> the standard of perfection for a realtor should be. By definition, this is not the correct principle applicable to the professional standard of care. It describes some notional standard of perfection.

[327] Mr. McLachlan glued and pasted some excerpts from course material offered by the Manitoba Real Estate Association into a different section of his report entitled "Fiduciary Duties." These excerpts offered broad sweeping statements that ostensibly

defined certain fiduciary duties. Mr. McLachlan admitted in cross-examination that he did not include the sub-headings from the course materials in his report. These sub-headings offer the full context of the prescribed duties.

[328] Bullet point three, for example, was an excerpt from a section entitled "Abstain from Making a Secret Profit" and that bullet point five was found in the section defining the disclosure obligations of a realtor who has a financial interest in a transaction, apart from earning a commission.

[329] These particular sections describing fiduciary duties are not generic statements. Rather, they are intended to provide specific examples of when a realtor would be breaching a fiduciary duty owed to a client. None of these specific circumstances arose from the facts before me. The failure of Mr. McLachlan to provide the relevant context or to qualify the application of these broad statements to specific circumstances are misleading and significantly undermine his credibility as an expert.

[330] The onus rests on the plaintiffs to provide an expert opinion from a similarly situated professional detailing both the standard of care and how the conduct subject of the court action is in breach of that standard. The law requires that the plaintiffs must prove both elements by way of expert evidence. Mr. McLachlan's report does not meet this standard, as it does not provide a substantive opinion as to the standard of care. The report offered by Mr. McLachlan is simply a checklist of the "To Do" items that he follows when opening a file for a new client. This does not assist me in understanding the professional standard of care for real estate agents in Manitoba.

[331] Furthermore, the opinion offered by Mr. McLachlan does not substantively apply any of the facts of this case to these alleged professional standards and identify exactly how the Defendant Realtors breached these standards. Mr. McLachlan confirmed that that points one through five his report failed to refer to the facts that arose from the professional relationship between Bud and Mr. Cole. Mr. McLachlan's evidence does not help me understand the recognized standards of professional realtors in Manitoba or how the conduct of the Defendant Realtors fell short of those standards.

[332] The opinion offered by Mr. Brownlee specifically sets out the relevant facts in the professional relationship between a realtor and their client and applies that to the standard of care expected of realtors practicing in Manitoba in 2008-2009. It was Mr. Brownlee's opinion that the actions of the Defendant Realtors did not constitute a breach of the standard of care. Mr. Brownlee was not meaningfully challenged on his statement as to the standard of care of the Defendant Realtors. Given the deficiencies in Mr. McLachlan's report and the fact that his credibility was undermined, I accept the opinion of Mr. Brownlee as stated in his report and his evidence at trial that Defendant Realtors did not breach the professional standard of care they owed to Bud.

[333] The plaintiffs were critical of Mr. Brownlee's opinion and argued he did not address the "red flags" representing Bud's health problems that were known to Mr. Cole at the time the Land was listed and sold. The problem with this line of attack is that the evidence shows Mr. Cole was not aware of most of the "red flags" mentioned by the plaintiffs, other than the power of attorney and its revocation. Mr. Cole did not know about Bud's short-term memory problems or medical opinions related to them and he always believed

Bud was "sharp as a tack." Further, Mr. Cole did not know anything about the seizure of Bud's firearms, unproven allegations that Bud drank too much or that the Public Health Nurse was monitoring Bud. Mr. Cole was consistently of the view that Bud was "sharp as a tack" during all of his interactions with him. I am satisfied Mr. Cole was a credible witness on all of these points.

[334] Mr. Brownlee commented about the facts pertaining to the power of attorney and that Mr. Cole took Bud to a doctor's appointment. There is nothing to the plaintiffs' suggestion that Mr. Brownlee did not base his opinion on the full facts before the court. I am satisfied that Mr. Cole did not know about the "red flags" raised by the plaintiffs.

[335] I am satisfied on all of the evidence that Mr. Kehler did not tell Mr. Cole that a psychiatric examination of Bud was necessary. The following points are clear in the evidence:

a) Bud mentioned a strange story to Mr. Cole about his sons getting him drunk before he signed the power of attorney, which as it turns out was clearly untrue;
b) The strange story about the power of attorney led Mr. Cole to erroneously conclude that the existence of a power of attorney somehow precluded or impaired Bud's ability to sell the Land without Gary's approval as his attorney;
c) This erroneous conclusion lead Mr. Cole to avoid any further discussions about the sale of Land with Bud until Mr. Kehler sorted out what Mr. Cole believed to be a legal problem;

d) Mr. Kehler was correct in his evidence that he never mentioned the need for a medical opinion to Bud or Mr. Cole. Bud somehow came to understand a medical opinion was necessary and he communicated this to Mr. Cole; and

e) Contrary to his evidence, I am satisfied that Mr. Kehler did call Mr. Cole after Bud revoked the power of attorney and told Mr. Cole that Bud was "good to go" with respect to selling the Land. Mr. Cole's memory as to this call is probably accurate, in my view, because Mr. Cole was anxious to start with Bud's proposed sales of the Land and he concluded that this could not happen until Mr. Kehler gave him the approval to proceed. It is reasonable to conclude in this circumstance that Mr. Cole was not mistaken about what Mr. Kehler said or meant with the words that Bud was "good to go" and he reasonably concluded Bud had the mental capacity to sell the Land.

[336] My conclusions as to these points come from the following part of Mr. Cole's direct evidence:

> Q Okay. Okay. So do you know what happened after you told Bud to -- to call a lawyer or speak to a lawyer?
>
> A A couple of days later, I called Jarett [Kehler] to see -- I guess Bud, maybe, had went to see Jarett [Kehler]. I'm not sure, but I guess he had to because Jarett [Kehler] said, He might have to see a doctor, but ...
>
> Q Okay. Okay.
>
> A So Jarett [Kehler] was looking into it, I guess, trying to figure it out.
>
> Q Okay. And so then what did you next hear about the Power of Attorney?
>
> A That Bud had to been -- had to see a doctor.
>
> Q Okay. And who told you that?
>
> A I think Bud did.
>
> Q Okay.

A I think Jarett [Kehler] told Bud.

Q Okay. But you heard from Bud that he had to see a doctor?

A Yeah.

Q Okay.

A And maybe possibly Jarett [Kehler] too.

Q Okay.

A I'm not sure.

Q Okay. And how did you -- did -- did you have any role to play in -- in Bud seeing a doctor?

A Bud asked me to take him.

Q Okay. Did he tell you where he was going?

A He did, but I -- I don't remember where -- actually where -- what doctor we went to at that time.

Q Okay. Okay. Okay. Do you remember where the clinic was?

A It might have been that clinic in the Corral Centre.

Q Okay. And the Corral Centre is a mall in Brandon?

A Yeah. It might have been.

Q Okay. Do you remember the name of the physician?

A No, no.

Q Okay. Did you attend in the appointment with Bud?

A No, I just took him there.

Q Okay. Did -- did -- did you speak to the physician Bud saw?

A No, no.

Q Okay. Do you know what happened after that appointment?

A Not really, until Jarett [Kehler] phoned maybe a week later, and said, Bud's good to go. You can get -- the Power of Attorney's been revoked, Terry. You guys can go back doing business with Bud.

[337] I cannot be certain as to why Bud wanted a lift from Mr. Cole to a doctor's office or why Bud concluded a medical opinion was necessary before Mr. Kehler could revoke the power of attorney. It may have been due to Bud's short-term memory problems. In any event I am satisfied that Bud wanted to see a doctor for some reason but that this visit to the doctor was not was connected to Mr. Kehler's advice.

[338] Mr. Kehler would have needed signed medical disclosure authorizations from Bud to communicate with Bud's doctors and he had none on his files. If Mr. Kehler really wanted a medical opinion, he would have asked Bud about who his doctor was and laid the groundwork for getting a medical opinion. Nothing supports the suggestion that Mr. Kehler thought a medical opinion was necessary or that he communicated that to Bud. Mr. Cole came to this conclusion based on what Bud said and not what Mr. Kehler said.

[339] In any event, Mr. Cole was unquestionably convinced that Bud's visit to the doctor and his driving Bud to the appointment had nothing to do with any specific behaviour or concerns that he or Mr. Kehler had about Bud's memory or cognitive abilities during the course of their interactions with him. It was all about the power of attorney that Mr. Cole erroneously concluded made Bud unable to engage in the legal act of selling land.

[340] Mr. Brownlee fairly conceded in cross-examination, that if what the plaintiffs described as "red flag" behaviour was evident it would raise concerns about mental capacity, unless Mr. Cole was satisfied from his analysis of all of his interactions with Bud that sufficient mental capacity was still present. It was a judgment call Mr. Cole was entitled to make according to Mr. Brownlee and in making his decisions as to mental capacity, Mr. Cole was entitled to rely on the fact that a lawyer (Mr. Kehler) had provided him with the assurance that Bud was "good to go" as to mental capacity to sell the Land. I accept the expert opinion of Mr. Brownlee that a reasonable realtor was entitle to come to the conclusion that Bud had sufficient mental capacity based on the fact that his lawyer confirmed Bud was under no legal constraints regarding the sale of the Land.

[341] There was no effective challenge to Mr. Brownlee's evidence that the Defendant Realtors met the professional standard of care as to:

a) Listing the Land for sale;

b) The process leading up to the setting listing prices for the Land;

c) Marketing the Land; and

d) That the sale prices were fair.

[342] I accept that the expert evidence offered by Mr. Brownlee that the Defendant Realtors did not breach the professional standards of care. Briefly put I come to this conclusion because the evidence supports a finding that the Defendant Realtors followed the standard methodology in establishing land values and marketing land that the average realtor in the Brandon market followed at that time. In making this statement, it is important to note that a realtor's opinion of value of land is entirely different from an appraisal. Realtors are not appraisers and are not subject to the same professional standards as appraisers.

[343] A realtor's opinion of value is not subject to the same academic rigour or review processes as a typical appraisal and holding a realtors opinion of value to the same professional standard as that of an appraiser is an error. (See ***Nixon v. Eden***, 1998 CanLII 6627 (BC SC), [1998] B.C.J. No. 1986 (QL), at para 26.) Mr. McLachlan took no issue with this principle during his testimony and he stated that realtors establish a range of values, but do not calculate a precise price as part of their valuation process. It was also not unusual, according to Mr. McLachlan that realtors could come up with differing ranges of value for the same property. This is primarily because every property is unique

in one way or another and realtors often use different comparable sales when establishing ranges of value. The process of establishing opinions of value based on the sale of comparable properties in the same area is an art form and not a science. Reasonable realtors could disagree on opinions of value for that reason.

[344] In practical terms, this means it would be an error to ask if the opinions of value offered by the Defendant Realtors are contradicted by the expert opinions of the appraisers who testified at trial and whose evidence I will touch upon later in these reasons. The question for me to answer is if the Defendant Realtors met the standard of care for reasonable realtors in the Brandon market at that time on an objective basis. I am satisfied they met this standard.

[345] The law as to requisite knowledge of the value of assets necessary for a testator giving instructions for a will speaks to "general knowledge" of value and not a precise or "encyclopedic" one (***Quaggiotto v. Quaggiotto***, 2019 ONCA 107 (CanLII), at para. 7). I am satisfied that the same standard of requisite knowledge of value applies to transferors of land.

[346] The evidence consistently shows that the Defendant Realtors provided Bud with a general value of the Land based on the comparable sales they analyzed in establishing a range of values for each parcel of the Land that Bud ultimately sold. Peter Cole testified that farmers take a keen interest in the value of their land and land values are a frequent topic of conversation amongst farmers. Almost every farmer Peter Cole interacted with had a particular interest in this subject and an opinion as to what his or her land was worth.

[347] The fact that Bud was no different than any other farmer in this respect is evident to me by the fact that he typically disregarded the valuations offered by the Defendant Realtors and insisted that they list the Land at values higher than the range they recommended. The standard methodology for listing the Land through the MLS available to all realtors in Manitoba was also followed by the Defendant Realtors for each parcel of the Land that was sold. Prior to sale, each parcel of the Land was listed through the MLS for almost six months and available for viewing by any potential buyer. This exposure to the open market through the MLS for such an extended period of time satisfies me that the Defendant Realtors met the professional standard of care as to marketing the Land and achieving the best price possible for their client.

[348] Mr. Cowie's professional credentials permitted him to appraise residential properties, rural residential properties, farmland up to 160 acres in size and small commercial/residential complexes. The RTM Property was a rural residential property, and both the City Lands and NW Quarter were zoned AG80 and had been used agricultural purposes.

[349] The plaintiffs' argument at trial was that the NW Quarter was "land in transition" (meaning "capable of development") and beyond the scope of Mr. Cowie's designation. This argument fails to appreciate that Mr. Cowie did not offer an appraisal of the land. Rather, Mr. Cowie used his appraisal knowledge to undertake an assessment of rural residential properties to provide an opinion of value for the NW Quarter and to provide an opinion of value based on the assumption that it could be developed.

[350] To establish a range for each parcel of the Land, Mr. Cowie reviewed the MLS, conducted other research (i.e. the tax assessment office), gathered data, and did all of the due diligence that he would normally do for an appraisal. This information was communicated to Bud. Mr. Cole testified that he provided Mr. Cowie's opinion of value to Bud and discussed that with him when assessing list prices. The steps taken by Mr. Cowie do not fall short of the professional standard for realtors.

[351] Mr. Brownlee opined that the discussions that Mr. Cole had with Mr. Cowie about valuations for the Land benefited Bud, because Mr. Cowie was an experienced appraiser and he had access to extensive data beyond the scale of what most realtors have. The effort by Mr. Cole to consult with Mr. Cowie about land valuation was entirely appropriate, according to Mr. Brownlee in establishing ranges of value to present to Bud. In fact, Mr. Brownlee testified his brokerage operated in the same fashion with realtors consulting with brokers in making recommendations as to value to clients.

[352] The Defendant Realtors also met the standard of care insofar as they gave Bud proper advice when an offer was received and the ultimate decision as to the acceptance; rejection or countering on any offer they received was always left with Bud. Bud made all decisions as to counter-offers on terms he insisted upon and the Defendant Realtors always followed his instructions as to counter-offers.

[353] The professional standard did not require the Defendant Realtors to provide hard copies of comparable sales to Bud as intimated by the plaintiffs. There was no expert testimony offered in support of this position. The Defendant Realtors both testified that they considered comparable sales and verbally conveyed their findings to Bud. According

to the Defendant Realtors Bud did not want hard copies or print-outs of comparable sales. According to the expert opinion of Mr. Brownlee, information about comparable sales and a comparative market analysis could be either presented in print or verbally based on the preferences of the client.

[354] For all of these reasons I am satisfied that the Defendant Realtors met the professional standard of care by providing Bud with appropriate opinions of value for each parcel of Land and discussions as to pricing and sale strategies throughout the time each parcel of Land was exposed for sale in the market. The fact that each parcel of Land was exposed to the market over several months at prices that did not attract offers strongly supports this finding.

[355] I am also satisfied that Mr. Brownlee correctly concluded that the methodology followed by the Defendant Realtors in listing each parcel of Land was consistent with the professional standard. Each parcel of Land was listed through the MLS in the usual way and the MLS exposure was consistent with the reasonable practice of realtors in Manitoba at the relevant time. The MLS listings ensured that the each parcel of Land received maximum exposure to potential buyers on the local, national and international level.

[356] Further, the Defendant Realtors placed "For Sale" signs on or adjacent to each parcel of Land for the duration of the MLS listings. This resulted in the widest possible market exposure for each parcel of Land.

[357] I accept Mr. Brownlee's expert opinion that the Defendant Realtors represented Bud in a manner consistent with the professional standard applicable to realtors and the standards imposed on them under their governing legislation. I am satisfied that the

evidence supports this finding. Given my findings that the Defendant Realtors had no basis to be concerned about Bud's mental capacity to understand the essential elements of the sale of land and that they met the professional standard of care, I am satisfied there is no basis to find that that the Defendant Realtors breached a contractual obligation owed to Bud.

Part V – Damages

21.0 Measure of Damages

[358] The general rule as to calculating damages for breach of contract arising from the sale of land provides that damages are to be measured by the difference between the contract price and the FMV of the land at the time of the breach. (See ***Peters v. Rocher***, 1982 CanLII 4046 (MB QB), 15 Man. R. (2d) 168, at para. 19.)

21.1 Analysis

[359] Ordinarily, the finding I have made that the Defendant Realtors met the professional standard of care required of them with respect to providing opinions of value to Bud and marketing the Land would put an end to an inquiry as to FMV, as no breach of contract has been proven. As I have already concluded, the fact that the properties were on the market for extended periods of time and attracted few offers strongly supports a finding that FMV was achieved. The fact that the Defendant Realtors were paid a commission based on a percentage of the sale price also supports this conclusion.

[360] The evidence also showed that the pool of land developers in the Brandon area is not very deep and word travels fast in Brandon when land close to city limits with development potential comes to market. This means that the key players in the land

development business knew about the fact that the Land owned by Bud was for sale and yet they showed no interest in making offers higher than the ones that were ultimately accepted. This also strongly supports a conclusion that the Land was sold at FMV.

[361] The evidence supports a conclusion that the Land was sold in a price range representing FMV. On all of the facts, the defendants have failed to prove that the Land was sold far below FMV or that the Defendant Realtors did not meet the professional standard of care. This means that there was no breach of contract that the plaintiffs can recover damages for.

[362] If I am wrong in coming to these conclusions then damages for breach of contract are still a live issue, as it could be argued that the Defendant Realtors persuaded Bud to sell the Land for below FMV and this alone creates suspicious circumstances or a breach of fiduciary duty, as Mr. Rudani was given preferential treatment at Bud's expense. I am satisfied that in these circumstances I should state my conclusions as to why the prices achieved for the Land represented FMV. In so doing it will be clear why there is no basis to conclude that suspicious circumstances existed or that there was a breach of contract or fiduciary duty.

[363] The argument advanced by the plaintiffs that the sales of Land were significantly below FMV, holds at its core the notion that Bud was a vulnerable person who could be easily manipulated to act against his own best interests. If Bud's vulnerability was exploited by the Defendant Realtors for their own advantage or Mr. Rudani's advantage it would mean not only that the sale transaction took place in suspicious circumstances, but also that there was a breach of fiduciary duty. As I have already noted, proof of a

breach of fiduciary duty shifts the onus to the Defendant Realtors to prove that Bud (the innocent victim) would have gone ahead with the sale transactions anyway. In practical terms, this means that the Defendant Realtors would have to prove that Bud would have accepted the offers for the Land in the same way and at the same prices, notwithstanding their breach of fiduciary duty (***Hodgkinson***, at pp. 441-442).

[364] My conclusions about the adequacy of the marketing plan and the prices obtained at the time of sale defeat the arguments advanced by the plaintiffs that the Defendant Realtors breached their fiduciary duty by knowingly selling the Land for below FMV or allowing the sales to proceed when suspicious circumstances were present. Another consequence flowing from my conclusion that the Land sales were at FMV is that the equitable remedies flowing from undue influence or unconscionable bargains are not available to the plaintiffs.

[365] ***Hodgkinson*** clearly outlines the principles applicable to damages for a breach of fiduciary duty starting at p. 404. In summary, fiduciary duties arise in a relationship where a person relies on the guidance or expertise of another person. The person offering such guidance or advice cannot act in a way that results in an undisclosed benefit or breaches the confidence of the other person ~~client~~ in an exploitative way. The Supreme Court of Canada states at p. 405:

> From a conceptual standpoint, the fiduciary duty may be properly understood as but one of a species of a more generalized duty by which the law seeks to protect vulnerable people in transactions with others. I wish to emphasize from the outset, then, that the concept of vulnerability's not the hallmark of fiduciary relationship though it is an important *indicium* of its existence. Vulnerability is common to many relationships in which the law will intervene to protect one of the parties. It is, in fact, the "golden thread" that unites such related causes of action as breach of fiduciary duty, undue influence, unconscionability and negligent misrepresentation.

[366] I have already reviewed the facts that support a finding that Bud had the necessary mental capacity to sell the land. Bud was not a mentally vulnerable person when it came to the sale of the Land, as his long-term memory was not impacted to the point where he could not understand the essential elements of a sale of land when given proper advice. This is not a case where the Defendant Realtors withheld relevant information from Bud or exploited some knowledge that Bud revealed to them in order to obtain a secret or undisclosed benefit.

[367] This finding precludes any claim for breach of fiduciary duty, undue influence and unconscionability from succeeding in my view. This also means that is not a case where the onus of proof ever shifts to the Defendant Realtors. Since a claim in negligence is statute barred, the only claim open to the plaintiffs is a claim for breach of contract arising from a failure to meet the professional standard of care.

[368] For the reasons that follow, I am also satisfied that the plaintiffs have failed to prove that the Land was sold for significantly below FMV and this finding precludes the plaintiffs from claiming damages or other relief arising from either breach of contract or breach of fiduciary duty.

21.2 Evidence as to FMV – City Lands

[369] The plaintiffs relied on the opinion of Mr. McLachlan that the City Lands had a much higher FMV because the Defendant Realtors did not consider selling the individual plots of land within the shadow subdivision in accordance with what he believed was the highest and best use of the Land in 2009. Apart from the fact that I have already found Mr. McLachlan not to be a credible witness as to the standard of care of realtors, it is

important to note that he had no qualifications as a real estate appraiser or a municipal planner.

[370] The City Lands were listed for sale on August 19, 2008 at the price of $109,000 as directed by Bud. The property remained on the market for almost six months when it sold in February 2009. During this time, very little interest was generated on the market, and the only party to ever make an offer on the City Lands was Brandon. No real estate agents or developers made any inquiries about the City Lands.

[371] In his realtor's opinion, Mr. McLachlan suggested that the City Lands should have been marketed as 124 individual lots for residential development rather than as a single contiguous parcel of land. Mr. McLachlan reduced that number to 96 lots during his testimony at trial and opined each lot could have been sold for $10,000, yielding a FMV of $960,000 for the City Lands.

[372] What little credibility Mr. McLachlan had as a neutral witness was completely eroded by the fact that he did not disclose that he was actively working in a professional capacity for the plaintiffs at the time of trial. Mr. Cowie testified at trial that he had recently driven by Bud's Homestead and saw a "For Sale" sign with Mr. McLachlan's name on it. This evidence was not challenged.

[373] The failure by Mr. McLachlan to disclose this important information constitutes a fundamental breach of his primary duty to the court to serve as a non-partisan and objective witness. In ***White Burgess Langille Inman v. Abbott and Haliburton Co.***, 2015 SCC 23 (CanLII), the Supreme Court sets out at para. 2 that:

> [2] Expert witnesses have a special duty to the court to provide fair, objective and non-partisan assistance. A proposed expert witness who is unable or unwilling to comply with this duty is not qualified to give expert opinion evidence and should not

> be permitted to do so. Less fundamental concerns about an expert's independence and impartiality should be taken into account in the broader, overall weighing of the costs and benefits of receiving the evidence.

[374] Later in ***White Burgess***, the court comments that the duty to assist the court in a fair, objective and non-partisan manner is actually the primary duty of an expert witness. This primary duty overrides any obligation an expert may owe to the party who may be calling the expert. "*If a witness is unable or unwilling to fulfill that duty, they do not qualify to perform the role of an expert and should be excluded*" (at para. 46).

[375] There is another compelling reason to reject the opinion of Mr. McLachlan because Rocky Neufeld ("Mr. Neufeld"), the expert real estate appraiser called by the plaintiffs to opine on the FMV of the NW Quarter, admitted in cross-examination that the City Lands were undevelopable "for all intents and purposes" and "would be of very little interest to anybody." This evidence from Mr. Neufeld was unsolicited, but entirely contradicted Mr. McLachlan's opinion.

21.3 Evidence as to FMV – The RTM Property

[376] Mr. Cole, Mr. Cowie and Mr. Kehler were the only witnesses who observed the RTM Property prior to its sale. Their evidence was that the RTM house remained largely unfinished at the time it was listed for sale. Those unfinished items included interior work, such as installation of cabinets, flooring, appliances, stairs to the basement and landscaping. There is no evidence to contradict this, as the plaintiffs did not visit the RTM Property while construction was underway or at the time of sale.

[377] Bud decided to sell the RTM Property in an unfinished state as he was having difficulty retaining tradespeople to complete the work required. The RTM Property was

listed on the MLS in August of 2008 and remained on market for six months before it eventually sold on February 21, 2009 for $240,000 in "as is" condition. After the sale, the new owners completed a number of improvements, which included interior finishing and construction of both a double, detached garage and a 24 by 32 foot workshop.

[378] Mr. Cowie's evidence was that he reviewed comparable sales in the area and ultimately narrowed down his list to six "good" sales with similarities to the RTM Property. After making adjustments to the comparable sales based on differences in the homes (age, condition, location) he set a price range for the RTM house in finished condition of $270,000 to $275,000, which he then discounted ten to fifteen percent due to its incomplete state resulting in an FMV range of between $229,500 and $247,500.

[379] Notwithstanding the best efforts of the Defendant Realtors to set a realistic price, Bud insisted that the RTM Property be marketed at a price of $319,900. Mr. Cole and Mr. Cowie were of the view that this was too high, but they both indicated that it was Bud's prerogative as their client to stipulate the sale price.

[380] The plaintiffs' argument that the RTM Property was completed or near to completion at the time of sale has no merit. This is sheer speculation. The MLS listing shows the RTM house was "under construction", that the basement was "unfinished" and that the site was "not landscaped". Pictures accompanying the MLS listing show no appliances in the kitchen, and flooring and cabinetry were yet to be installed. The first offer to purchase, dated January 3, 2009, contained a condition that additional work had to be completed to the point where an occupancy permit would issue.

[381] This evidence supports the testimony of Mr. Cole and Mr. Cowie that Bud did not want to complete any additional work and that Bud rejected the offer, as the cost of bringing the house to completion was unknown. This evidence from Mr. Cole and Mr. Cowie was not effectively challenged.

[382] Mr. McLachlan provided an opinion of value that stressed the importance of comparable sales when a property was listed and mentioned the use of MLS listings and the tax assessment office for research purposes as to FMV. Yet, Mr. McLachlan refers to only two comparable sales in arriving at an opinion of FMV of $316,700.

[383] Both of the comparable sales referred to by Mr. McLachlan refer to 2011 transactions valued at $280,000 and he made no adjustments for superior features. Further Mr. McLachlan made no adjustments to account for the fact that the RTM Property was listed for sale in 2008 but only sold in 2009. On cross-examination, Mr. McLachlan admitted that he did not perform a time adjustment to arrive at a 2009 FMV. Applying this adjustment would have yielded a reduced FMV range of $232,400 to $246,400 to Mr. McLachlan's opinion.

[384] Although Mr. McLachlan agreed that the state of completion of the RTM house could be a relevant factor in assessing the FMV of a property, he did not weigh this as a factor when opining about the FMV of the RTM Property. Further, Mr. McLachlan admitted that he had not even been in the RTM house prior to the sale and relied on information from the plaintiffs as to the state of completion. As already noted, the plaintiffs had not been in the RTM house either. This means that Mr. McLachlan had no reliable information upon which to base his assumptions.

[385] The RTM Property remained on the market for six months and attracted only one offer that was rejected before the final sale. Mr. Cowie testified that he stressed to Bud that keeping the listing at $319,900 was a mistake and that potential buyers in a range of $280,000 to $290,000 were ignoring the listing. Despite this advice, Bud held firm on the listing price. Mr. Cowie testified that six months of exposure to the market without a sale clearly pointed to an excessive list price and that most residential properties in the area at that time sold in less than 90 days. Brett Ferguson ("Mr. Ferguson"), a qualified appraiser retained by the Defendant Realtors, also gave evidence that the real estate market in Brandon was fairly active at the time and that a typical marketing period would be between 30 to 60 days.

[386] There was no way for Mr. McLachlan to effectively deny that the listing of the RTM Property for 200 days at $319,900 without a matching offer showed that the listing price was too high. With this admission in mind, it is impossible to conclude that Mr. McLachlan's opinion of value at $316,700 for the RTM Property was anything other than a fantasy. I accept the evidence of Mr. Ferguson that the FMV of the RTM Property was $264,800.

21.4 Evidence as to FMV – The NW Quarter

[387] Bud used the NW Quarter to pasture cattle prior to retiring from farming in 2007. At the time of sale in 2009 the NW Quarter was undeveloped and zoned AG80 under the existing zoning by-law of the RM. "AG80" describes land zoned for agricultural use with lot sizes of at least 80 acres. The NW Quarter was not developed at the time the trial concluded in 2020 and the zoning designation had not changed.

[388] Bud sold the NW Quarter to the Defendant Corporation on September 29, 2009 for the purchase price of $654,410. The expert appraiser retained by the plaintiffs, Rocky Neufeld, ("Mr. Neufeld"), issued a report retrospectively to 2009 with a FMV for the NW Quarter of $1,500,000. Mr. Ferguson, who was retained by the Defendant Realtors to prepare a retrospective appraisal for the NW Quarter, concluded the FMV would have been only $582,460.

[389] I am attaching no weight to the expert report of Mr. Neufeld. The testimony offered by Mr. Neufeld at trial was not reliable or credible. This conclusion rests primarily on my finding that Mr. Neufeld, just like Mr. McLachlan, crossed the line that separates neutral experts from partisan witnesses who wish to advance the interests of a litigant. Mr. Neufeld's report not only contains errors, incorrect headings and incomplete information, but also inflammatory assumptions about the opposing parties that are not relevant to his opinion. These inflammatory assumptions clearly constitute advocacy rather than the opinion of a neutral expert intended to assist the court.

[390] In his report, Mr. Neufeld makes a point of stating assumptions that are wholly irrelevant to the valuation of land. The assumption stated in Mr. Neufeld's report that Bud's judgment was "impaired" and this was "obvious to anyone who was in contact with him" do not assist me in determining what the FMV of the NW Quarter was in 2009. It is a cheap shot intended to paint the conduct of all of the defendants in the worst possible light.

[391] Even worse, Mr. Neufeld jumps from improper assumptions to emphatic conclusions in his report when he writes, "*regardless of the value of the land, it is our*

opinion that the transaction was not appropriate and exposes some rather serious ethics questions." Those alleged "ethics questions" pertain to the fact that Bud did not have the benefit of independent lawyers or realtors to advise him during the course of the sales. Apart from being blatantly partisan and wholly irrelevant to Mr. Neufeld's area of expertise, this conclusion falls squarely within a crucial finding I have to make in this litigation.

[392] It was also evident to me throughout his cross-examination that Mr. Neufeld had no interest in giving his evidence fairly or in a neutral manner. Mr. Neufeld consistently refused to deviate from his opinion that his conclusions as to FMV were correct, even when different fact scenarios were fairly put to him in cross-examination. Rather than addressing these "what if" questions in straightforward manner, Mr. Neufeld would invariably start his responses with long-winded preambles intended to demonstrate that the premise of the question was flawed or fatuous and could in no way alter his opinion. The effect of the long-winded preambles offered by Mr. Neufeld not only unnecessarily prolonged his cross-examination; it added significant confusion to his evidence.

[393] The resistance of Mr. Neufeld to acknowledge simple alternative propositions demonstrates clearly that he had no interest in assisting me in understanding complicated evidence and that he saw his role as an advocate for the plaintiffs and not as a neutral witness. In so doing, Mr. Neufeld failed in his fundamental duty as an expert witness to provide opinion evidence that was fair, objective and non-partisan. This kind of unbridled advocacy for a litigant erodes virtually all of Mr. Neufeld's credibility as an expert witness.

[394] Given my conclusions about Mr. Neufeld as an expert, I have no need to delve into the nuts and bolts of his methodology in arriving at his opinions or what comparable sales he used in arriving at his conclusions as to FMV. However, there is one further area I am compelled to review that arises from the fact that Mr. Neufeld felt it was necessary to attack the expert report offered by Mr. Ferguson due to an alleged lack of adherence to the appropriate professional standards. The irony of this unprovoked attack on an opposing expert report merits comment because Mr. Neufeld repeatedly testified that the report he authored and that counsel for the plaintiffs marked as an exhibit at trial, was only a "draft" report, rather than a "final" report.

[395] The existence of this draft report on the record forced Mr. Neufeld to discount various parts of his report and to sheepishly explain that they should have been deleted. By his own admission Mr. Neufeld's report was "a work in progress" and contained evidence that he invited me to ignore. One example of the problematic nature stemming from the draft report was Mr. Neufeld's evidence as to which version of the Canadian Uniform Standards of Professional Appraisal Practice applied to his retrospective expert report. Mr. Neufeld admitted that he was not entirely certain on this point and in explaining his uncertainty, he offered a series of "dog ate my homework" excuses. The following excerpts from Mr. Neufeld's two days of cross-examination are telling:

> Q You don't know what standards apply to your report?
>
> A This was a long-term project. It begun in 2012. Presentation in -- eight years later. So I likely went through four different sets of standards in preparation of this. And I know that there's nothing in this report that -- that does not comply with any of the standards in those years, so -- but I'm not entirely sure which one this report was. And -- and there were also some issues with the -- the production of the report. I didn't file this with -- with the

court. And there was a bit of a mix up. There was a -- a better edited copy that had -- there -- you'll note that there are typos in here. That --

Q Right. We've --

A -- they were corrected and -- and I didn't have a chance to submit it. So I believe that question would have been clarified in -- in my actual final report but --

. . . . .

Q All right. So sitting here today, you can't identify which CUSPAP standards apply to Exhibit 182; is that what I'm hearing from you?

A No. I think what I said earlier was that when we -- the first -- it was first brought up that the -- the sections of the standards that had changed in that time period would not have affected this report in any way.

Q But, Mr. Neufeld, you also said that had you had the opportunity to produce a final version of this report you would've said which standards apply?

A Well, then I would've gone back and researched the -- the particular rule as to which one would've applied and then made sure that the reference came from the appropriate standard. That's part of the -- the final editing process, yes.

Q Okay. So Exhibit 182 then does not contain the final reference for standards that you would normally include in your final version report; is that correct?

A Yes.

[396] Another example of the incomplete and inaccurate nature of the Mr. Neufeld's report arose during cross-examination when he testified about the comparable land sales he used to establish FMV in his report. Mr. Neufeld testified that the inclusion of certain comparable sales was initially for information only and that certain comparable sales did not survive the final edit. Again, Mr. Neufeld was careful to add that the final report was not available.

[397] The "unknown" whereabouts of the final report raise more than suspicions in my view. The survival of the draft report as the only version of Mr. Neufeld's report available for submission into evidence at trial leads to an adverse inference.

[398] The evidence of Mr. Neufeld was that he had initially started working on his report in 2013 and at that time he had instructions to look at all three parcels of Land that are the subject of this litigation. The draft report however only refers to the FMV of the NW Quarter and is silent as to the FMV of the City Lands and the RTM Property. The fact that Mr. Neufeld admitted that the "draft" report contained extraneous information and references to irrelevant comparable sales that survived "poor editing" leads me to the conclusion that at some point in time another draft of his report contained opinions as to the FMV of the City Lands and the RTM Property.

[399] It is passing strange that the plaintiffs failed to include any commentary or appraisal value from Mr. Neufeld with respect to the City Lands and the RTM Property in the draft report that was submitted into evidence and opted instead to rely on an opinion as to FMV from Mr. McLachlan who was a realtor. From all of these circumstances I am drawing the adverse inference that Mr. Neufeld's opinions as to the FMV of the City Lands and the RTM Property did not support the theory of the plaintiffs' case.

[400] Quite apart from the fact that Mr. Neufeld testified in a partisan manner and not in an expert capacity as an expert witness, the filing of a report in draft form shatters any confidence I could have that the facts shown in Mr. Neufeld's report are complete and accurate. The evidence of Mr. Neufeld cannot support a finding that his opinion as to the FMV of the NW Quarter is reasonable.

[401] For all of these reasons I reject Mr. Neufeld's opinion as to the FMV of the NW Quarter. As already noted, the expert evidence of Mr. Ferguson was that the NW Quarter was sold for more than FMV. Although I accept the expert opinion of

Mr. Ferguson as to FMV as stated in his report, there is no need for me to engage in any analysis of his opinion as there is no credible or reliable evidence before me that the three parcels of Land that are the subject matter of this litigation were sold for less than FMV. The absence of evidence on this point means that the plaintiffs have failed to discharge the evidentiary burden resting on them that the Land was sold significantly below FMV.

[402] Such a finding was the only way for the plaintiffs to sustain their key arguments that the Defendant Realtors misled Bud as to FMV or deceived him into selling the Land at far less than FMV. Given my finding, that the Defendant Realtors did not breach a contractual duty to Bud (adherence to the professional standard) or a breach of fiduciary duty, there is no basis to find that suspicious circumstances existed or that a foundation for equitable remedies arising from unconscionability or undue influence exists. On these facts, there is no basis for the plaintiffs to argue that a shifting of the onus to the Defendant Realtors could apply.

PART VI – Summary and Conclusion

[403] The claims advanced by the plaintiffs as to liability, damages and equitable relief are unsustainable when all of the facts are scrutinized.

[404] The plaintiffs have failed to rebut the presumption that Bud had the necessary mental capacity to understand the essential elements of the sale of Land upon receiving professional advice. There is insufficient task specific evidence over the relevant period to rebut this presumption. Mr. Cole, Mr. Cowie and Mr. Kehler offered the key evidence as to mental capacity, that is both time and task specific and their testimony was consistent that Bud stuck to a coherent and logical plan to sell the Land. The evidence

of these witnesses offers reliable observations about Bud's behaviour and conduct over the relevant period of time and supports a finding that Bud not only understood how the plan to sell the Land was unfolding, but also that he participated meaningfully and appropriately in the sale process for each parcel of Land.

[405] I am also satisfied that the evidence shows that Bud responded appropriately to inquiries made by the Defendant Lawyers and the Defendant Realtors about each listing and the sale of each parcel of Land. Bud's instructions to those defendants demonstrated he had a sound understanding of the sale process. All of the evidence supports a finding that Bud has the necessary mental capacity to understand the essential elements of the sale of land in all three transactions.

[406] Mr. Kehler's evidence was equally supportive of Bud's capacity to complete the three sale transactions at issue in this litigation. Over the course of about 15 hours in total, Mr. Kehler interacted with Bud over the relevant period and nothing in his discussions with Bud about his plan to sell the Land and the individual sale transactions could lead to a finding that Bud lacked the necessary mental capacity to understand the essential elements of the sale of Land. The conduct of Bud in 2010 when he met Mr. Kehler at his Homestead to discuss a subdivision of that property is strong evidence that even in the final year of his life Bud had a sound memory about the Land.

[407] The plaintiffs have failed to discharge their onus to prove that the Defendant Lawyers breached a contractual obligation to Bud, as I am satisfied; they adhered to the professional standard of care. There is also no basis to conclude the Defendant Lawyers breached any fiduciary duty they owed to Bud.

[408] The Defendant Realtors did not breach a contractual obligation to Bud, as they also adhered to the professional standard of care. There is also no evidence of a breach of fiduciary duty.

[409] As to opinions of FMV, the evidence supports a finding that the Defendant Realtors gathered information about the Land and comparable sales in an appropriate manner to arrive at an opinion of value. Establishing opinions of value is an art and not a science. Differences of opinion amongst realtors is to be expected.

[410] I accept the evidence of Mr. Ferguson, a certified appraiser, that the three opinions of FMV offered by the Defendant Realtors were reasonable. The fact that I accept the expert opinion of Mr. Ferguson, an independent certified appraiser, that the Land was sold for FMV is persuasive evidence that the Defendant Realtors met the professional standard of care. The plaintiffs have produced no evidence to support the allegation that the Land was sold below FMV.

[411] Given the finding that there was no breach of the professional standard of care by the Defendant Realtors, there is no proof of a financial loss to form the basis of an award for damages.

[412] There is no evidence to support a finding that Bud was a vulnerable person who was exploited in some way. There was no breach of fiduciary duty by either the Defendant Lawyers or the Defendant Realtors. This can also be said about Mr. Rudani and the Corporate Defendant. The Defendant Realtors did not exploit Bud for their own personal gain or advantage or to offer Mr. Rudani and the Corporate Defendant some undisclosed benefit or advantage. There is no evidence that any defendant withheld

relevant information from Bud or turned confidential information Bud provided to them to their personal advantage to gain a secret or undisclosed benefit. There was no exploitation of a vulnerable person in a reliance-based relationship on the facts before me.

[413] The absence of a breach of fiduciary or a finding that Bud was exploited in some way means that there is no basis for me to intervene on these facts by way of an order for a remedy in equity to protect Bud's position. Evidence of exploitation of a vulnerable person, due to mental incapacity or the nature of the fiduciary relationship itself, which typically runs through cases involving undue influence and unconscionable bargain, is not present here.

[414] The absence of a breach of fiduciary duty or exploitation also means that there was no shifting of the onus from the plaintiffs to the defendants. The plaintiffs have failed to discharge their evidentiary burden.

22.0 Conclusion

[415] The claims against all of the defendants are dismissed. The parties can speak to costs if they cannot agree, provided they file written briefs in advance of the hearing.

REMPEL J.