Date: 19981026 Docket: C.A. 144017

NOVA SCOTIA COURT OF APPEAL
Cite as: Poole v. MacKenzie, 1998 NSCA 156

Glube, C.J.N.S.; Hart and Cromwell, JJ.A.

BETWEEN:

FRANK L. POOLE	)	Walter O. Newton, Q.C. and
	)	William Watts
Appellant	)	for the Appellant
	)	
- and -	)	
	)	Leroy M. Lenethen, Q.C.
	)	for the Respondent
MICHAEL MacKENZIE	)	
	)	
Respondent	)	Appeal Heard:
	)	October 7, 1998
	)	
	)	
	)	Judgment Delivered:
	)	October 26, 1998
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	)	

THE COURT: Appeal dismissed.

BY THE COURT:

At the conclusion of the hearing of this appeal on Wednesday, October 7, 1998, the Court unanimously dismissed the appeal with costs and stated that reasons would follow. Those reasons are:

The appellant on May 25, 1990, at the request of his son attended at the office of the respondent lawyer and executed a guarantee of a $40,000 loan the son and his wife were getting from Hants County Business Development Centre Limited. His son and his wife were purchasing a restaurant and this loan was one part of the financing. The respondent was acting as lawyer for the son and his wife, as well as the financing agents, the Royal Bank and the Hants Centre.

The appellant had earlier taken out a loan of $50,000 on his home and turned it over to the son who used it as part of the financing of the purchase price. The legal work for this loan had been done by the respondent but he was not advised that the proceeds were to be used by the son and his wife in the purchase of the restaurant.

The restaurant business was unsuccessful and the Royal Bank appointed a receiver to dispose of its assets. Subsequently, the son filed for personal bankruptcy. On July 17, 1995, the Hants Centre sued the appellant as

guarantor for $41,600.84 being the balance of the unpaid loan to the son.

The appellant joined the respondent as a third party to the proceeding by Hants Centre against the appellant claiming the respondent was at all times his lawyer and that he failed to properly instruct the appellant on the obligations he was undertaking when signing the guarantee of the loan. He further claimed that Mr. MacKenzie failed to reveal that he was acting as solicitor for the lender at the time and should have advised Mr. Poole to seek independent advice.

The debt between Hants Centre and the appellant was settled at $18,960 on October 7, 1997, and this amount was then claimed against the respondent as a third party.

The proceeding was tried by Justice Kelly who after hearing the evidence of the son, the appellant and the respondent made the following findings:

> Here, the defendant was aware that Mr. MacKenzie was acting for his son and his son's wife, indeed, he had directed them to Mr. MacKenzie. He may have had the perception that Mr. MacKenzie was the "family lawyer" at the time of the signing of the documents but, as stated above, his perception alone does not create the retainer and a solicitor-client relationship. As a result I find that there was no solicitor-client relationship between the parties on May 25, 1990 and it follows that Mr. MacKenzie could not be in breach of any duty arising from such a relationship.

The trial judge found that there was no solicitor and client relationship

between the appellant and the respondent with respect to the signing of the guarantee. This finding is amply supported by the evidence and indeed was not strenuously attacked at the hearing of the appeal. We see no basis to interfere with the trial judge's conclusion on this point. It follows, as the trial judge also found, that there could be no breach of any duty flowing from a solicitor and client relationship.

When considering whether there was any other duty on the respondent, Kelly, J. summarized the facts as follows:

> 1. Mr. MacKenzie had no knowledge of the defendant's participation in his son's business transaction;
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> 2. That there were no indicators of undue influence affecting the defendant;
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> 3. Mr. MacKenzie knew the defendant to be a person with some knowledge of business transactions and was in a position, from past experience, to make some assessment of the defendant's experience, intelligence and business sophistication. He had no reason, based on this knowledge, to assume that the defendant was unaware of the effect of the guarantee;
>
> 4. The defendant did not request specific information from Mr. MacKenzie concerning the documents, nor say anything that would give rise to the suggestion that he was unaware of the nature of the transaction or was uncomfortable with it;
>
> 5. At several places in the documents, including the places signed by the defendant, it was indicated that the defendant was "guarantor."; and
>
> 6. The defendant gave evidence that he previously had experience with some commercial documents, including mortgages and promissory notes, and understood their general effect. Further, he indicated that he understood the

word “guarantor” and the general nature of the guarantee.

The trial judge then concluded:

> In assessing the preponderance of probabilities in this case, based particularly on the facts above and on the general body of facts, I conclude that it is more likely than not that Mr. MacKenzie had no cause to conclude that the defendant required independent legal advice in this situation and that he gave his usual brief explanation referred to above to the defendant. On all of the evidence, I conclude that the defendant has not discharged his burden of showing, on a balance of probabilities, that the third party was in breach of contract, negligent or had failed in any fiduciary obligation to the defendant. In the result, I dismiss the action and the third party shall have his costs in this matter.

Upon appeal to this Court the appellant states the issues to be:

1. Did the respondent owe a duty of care to advise the appellant?
2. If the respondent owed a duty of care to advise the appellant, did he adequately advise the appellant?

As well as concluding that there was no solicitor and client relationship between the parties, the trial judge also found that there was no breach of any fiduciary duty. Once again this finding is well supported by the evidence and the law and is not seriously attacked on appeal and we would not interfere with this conclusion.

The main point argued on appeal was that the respondent failed to discharge his duty to the appellant which included, in the appellant’s submission,

a duty to tell the appellant whom he was representing, to indicate that he could not advise the appellant with respect to the guarantee and to urge him to seek independent legal advice. The trial judge found no breach of duty in light of the facts as he found them which have been set out above. These factual findings are not, and could not be, challenged on appeal as they are well-supported by the evidence.

In essence, the appellant submits that there is always a duty on a solicitor to communicate the three points mentioned in the previous paragraph to an unrepresented party. While it may be advisable and wise to adopt that course, civil liability requires something more than simple failure to do so. Generally, it must be shown that the lawyer ought reasonably to have foreseen reliance by the plaintiff, that there was, in fact, such reliance and that it caused detriment. In mentioning this, we are not attempting a precise and exhaustive definition of when a duty may arise or of what it may consist but simply wish to illustrate the point that in circumstances such as we have here, something more than a simple failure to advise who the lawyer is representing, that the lawyer cannot act and that the party should seek independent legal advice is required to sustain an action in negligence.

On the facts found by the trial judge, there was no reliance by the appellant on the respondent and no reasonable perception on the part of the respondent of such reliance. The appellant did not ask a single question of the

respondent about the guarantee, the effect of which was briefly and correctly explained to him. The appellant does not allege that he was misled in any way by the respondent. Although the appellant attempted to maintain at trial that he did not understand the guarantee, he admitted under cross-examination that he knew it was some kind of guarantee, that he understood its general nature and understood the word guarantor. There was nothing in the evidence to put the respondent on his guard that there was any undue influence or lack of understanding or that any sort of unfair advantage was being taken of the appellant. In light of all this, we agree with the trial judge that the appellant did not establish a breach of any duty of care owed to him by the respondent.

The answers to the two questions set forth as issues on this appeal are essentially findings that have been clearly and properly made by the trial judge. In our opinion there was adequate evidence to support these findings and no error in law on the part of Justice Kelly has been shown. For these reasons we dismiss this appeal and we hereby fix the costs at $1,000.00 inclusive of disbursements.

Constance R. Glube, C.J.N.S.

Gordon L.S. Hart, J.A.

Thomas A. Cromwell, J.A.

C.A. No. 144017

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

FRANK L. POOLE	)	
Appellant	)	
- and -	)	REASONS FOR JUDGMENT BY:
MICHAEL MacKENZIE	)	
	)	THE COURT.
Respondent	)	