C.A. No. 103814

NOVA SCOTIA COURT OF APPEAL

Cite as: Barrett v. Gaudet, 1994 NSCA 184
Hallett, Chipman and Roscoe, JJ.A.

BETWEEN:		
WAYNE BARRETT and MARLENE BARRETT		J. George Byrne for the Appellants
	Appellants	
- and -		
GILBERT L. GAUDET		Harry E. Wrathall, Q.C. for the Respondent
	Respondent	
		Appeal Heard: September 22, 1994
		Judgment Delivered: October 3, 1994

THE COURT: The appeal is allowed as per reasons for judgment of Roscoe, J.A.; Hallett and Chipman, JJ.A., concurring.

ROSCOE, J.A.:

This is an appeal from a decision granting a motion for nonsuit made on behalf of the respondent at the conclusion of the evidence presented on behalf of the appellants in a consolidated action claiming damages from the respondent in negligence and breach of contract.

The appellants were the owners of a residential property located at 7A Mersey Court, Hatchett Lake, Halifax County. The appellants retained the respondent lawyer to act as their counsel on the sale of the property to the Reynolds, who were also named as defendants in the consolidated action. Other defendants were the real estate agent and the bank involved in the financing for both the Reynolds and the appellants. The respondent, after having been retained by the appellants, was also retained by the Reynolds to act on the purchase of 7A Mersey Court. The agreement of purchase and sale between the appellants and the Reynolds was conditional upon the Reynolds obtaining suitable financing within fourteen banking days, which condition was deemed satisfied unless the Reynolds notified the appellants to the contrary within the fourteen day period. The purchase price of 7A Mersey Court was $250,000.00. The closing was originally scheduled for July 3, 1990, but by later agreement, was moved to June 29, 1990. The Reynolds owned another home, in Fairview, but their offer to purchase the Mersey Court property was not subject to the sale of that property. The Reynolds obtained financing from the Canadian Imperial Bank of Commerce (CIBC) which was conditional upon the sale of the Reynolds' other property. The Reynolds did not sell their other property and were unable to complete the transaction with the appellants.

A representative of the CIBC had forwarded instructions for the mortgage and a copy of the mortgage approval to the respondent on March 20, 1990. The approval indicated the Reynolds' mortgage financing was conditional upon the sale of their other property. The claim by the appellants against the respondent was based on

the fact that the appellants were never advised by the respondent that the Reynolds' financing was conditional. After learning from a CIBC employee that the Reynolds had arranged financing, the appellants made arrangements for a line of credit with CIBC for funding the construction of their new home, on the understanding that they would pay off that indebtedness with the proceeds of the sale to the Reynolds. The appellants signed a letter directed to the respondent advising him to forward all proceeds from the sale to the CIBC. The letter was dated March 29, 1990 and the respondent acknowledged receipt of it in writing. The appellants began construction of their new home in April, 1990.

Approximately two weeks before the scheduled closing date the respondent advised the appellants that he could no longer represent them on the real estate transaction. He advised them to collect their file from his office, which they did. In the file they found a copy of the Reynolds mortgage approval. Almost two years later the appellants sold their property for $55,000.00 less than the Reynolds had agreed to pay. The appellants claimed the expenses of the additional interest charges on their line of credit and the difference in the sale price as special damages from the respondent and the other defendants.

The respondent was not retained by the appellants in connection with any aspect of the financing for or construction on lot 7B.

In his brief oral decision granting the nonsuit motion, the trial judge, after citing Rule 30.08 and **Turner-Lienaux v. Attorney General of Nova Scotia**, said:

> ". . . I have to look at the evidence that I have before me, and the law and the facts, whether the Plaintiff has made a case against Mr. Gaudet. I don't think its relevant whether or not lawyers should do certain things. I have to look at the practice as it is and the cost of litigation to date, and that inasmuch as I've spoken in the past against real estate agents acting for all parties and one thing or another, it is done, as Mr. Wrathall indicates, that lawyers do act for both parties and in many cases, in the rural areas, there's only one lawyer to do it, and unless there is a conflict, it happens frequently. And in this case, Mr. Gaudet withdrew when he thought there was a problem arising or a problem had

> arisen. Mr. Gaudet was hired in the transaction of the sale of 7A. I do not find that he had any knowledge of the bridge financing or that he had any relevant or any information that he knew would be relevant to the Barretts, and therefore, I will grant Mr. Wrathall's motion and dismiss the proceeding against Mr. Gaudet."

The motion was made pursuant to **Civil Procedure Rule** 30.08 which provides:

> "At the close of the plaintiff's case, the defendant may, without being called upon to elect whether he will call evidence, move for dismissal of the proceeding on the ground that upon the facts and the law no case has been made out."

The test to apply on a nonsuit motion is as stated in **Turner-Lienaux v. Nova Scotia Attorney General** (1993), 122 N.S.R. (2d) 119 (N.S.C.A.) at p. 123:

> "In the reasons for judgment, the trial judge referred to this rule and pointed out that the test is whether or not a prima facie case has been made. It is not a question of whether the judge believes the plaintiff's evidence, but whether there is enough evidence, if left uncontradicted, to satisfy a reasonable person . See **J.W. Cowie Engineering Ltd. v. Allen, Smith, Keeping** (1982), 52 N.S.R. (2d) 321 (A.D.); 106 A.P.R. 321 (C.A.). In **Wentzell v. Spidle** (1987), 81 N.S.R. (2d) 200 (N.S.S.C.,A.D); 203 A.P.R. 200 (C.A.), Clarke, C.J.N.S., on behalf of the court in dealing with an appeal from the granting of a nonsuit, referred at p. 201 to the following passage from Sopinka and Lederman, **Evidence in Civil Cases** at p. 521:
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> > '. . . If such a motion is launched, it is the judge's function to determine whether any facts have been established by the plaintiff from which liability, if it is in issue, may be inferred. It is the jury's duty to say whether, from those facts when submitted to it, liability ought to be inferred. The judge, in performing his function, does not decide whether in fact he believes the evidence. He has to decide whether there is enough evidence, if left uncontradicted, to satisfy a reasonable man. He must conclude whether a reasonable jury could find in the plaintiff's favour if it believed the evidence given in trial up to that point. The judge does not decide whether the jury will accept the evidence, but whether the inference that the plaintiff seeks in his favour could be drawn from the evidence adduced, if the jury chose to accept it. This decision of the judge on the

> sufficiency of evidence is a question of law; he is not ruling upon the weight or the believability of the evidence which is a question of fact. Because it is a question of law, the judge's assessment of the probative sufficiency of the plaintiff's evidence, or the defendant's evidence on a counterclaim for that matter, is subject to review by the Court of Appeal.'
>
> We must therefore in addressing the issues keep in mind whether, having regard to the law and the facts which were adduced in evidence, the judge was correct in concluding that there was insufficient evidence, if believed, to satisfy a reasonable person that the case could be resolved in the appellant's favour. "

To succeed at the conclusion of this case against the respondent, the appellants would have to prove on a balance of probabilities:

1. that there was a duty owed to the appellants by the respondent to notify them of relevant information that came to his attention;

2. that the conditional nature of the Reynolds' mortgage approval was relevant information;

3. that the respondent breached the duty by not providing the appellants with the relevant information;

4. that damages resulted from that breach.

The nonsuit motion should not have been granted if the plaintiff presented evidence, from which, if left uncontradicted, an inference could be drawn to establish each of the four elements.

Whether there was a duty to notify the appellants is a question of law. If a duty exists it arises from the common law and the codes of conduct prescribed by professional associations. In **Ridge View Development & Holding Co. Ltd. and Fritzler v. Simper**, [1989] 5 W.W.R. 133, (A.Q.B.), Miller, A.C.J. was dealing with an action against a solicitor who had acted for both sides in a property transaction which fell through as a result of the purchaser not completing the sale of his other property. The

lawyer had failed to advise the vendor-builder when he learned that the purchaser was having trouble with the financing. Miller, A.C.J., after citing the general duties and standard of care of a solicitor, noted that there are special obligations when a lawyer agrees to act for both sides in a transaction, one of which is: (p. 153)

> ". . . to inform both sides that the usual solicitor-client privilege would not pertain to this transaction, and that he had an obligation to pass on any relevant information he learned about either side's position to the other side as soon as practicable."

In **Ridge View**, the solicitor was found to have been negligent in not providing details of the purchaser's financing arrangements to the vendor. See also **Spector v. Ageda,** [1971] 3 All E.R. 417 (Ch. D.)

The trial judge in this case erred by concluding that the appellant's had not established a prima facie case on the evidence. The issue before him on the motion for nonsuit was whether there was a duty of care owed by the respondent to the appellants and, if so, whether it was breached and caused the appellants to suffer damage. The standard of care is that expected of a reasonably competent solicitor. If the plaintiff presented evidence from which inferences could be drawn that there was a duty of care, that the standard of care had not been met and that damages resulted, the motion should have been denied. In our view, there was sufficient evidence to meet the test. The retainer of the respondent by the appellants gave rise to a duty of care. The specific duty to notify the appellants of relevant information arises from the case law. Knowledge by the respondent that the financing of the Reynolds was conditional might be inferred by the fact that the mortgage approval was sent to the respondent by CIBC. The relevance of that information to the appellants might be inferred from the letter of direction to the bank which was in the possession of the respondent and the evidence from the appellants that they advised the respondent that they were building

a new house. That damages resulted from the breach might be inferred from the evidence of the appellants that they would not have incurred new financing expenses had they known of the conditional nature of the Reynolds' mortgage approval.

The appeal is allowed, the order dismissing the action against the respondent is set aside and the matter is remitted to the trial judge. We order costs in the cause in the amount of $1,000.00, plus reasonable disbursements.

Roscoe, J.A.

Concurred in:

Hallett, J.A.

Chipman, J.A.