Real estate wins

bode well for lawyers

LawPRO successfully defended several real estate solicitors in 2005. These successes are wins which keep on giving. The courts' reasons for judgment will be helpful in defending other solicitors in the future.

Breach of fiduciary duty claims fail

Breach of fiduciary duty claims have long been a *bête noire* for real estate and commercial lawyers. Defending them is difficult, but not necessarily impossible, as the next two cases show.

In *Upper Valley Dodge Chryster Ltd. v. Huckabone and Cronier*[1], the Court of Appeal affirmed the judgment of Maranger, J.[2] Justice Maranger held that a firm of solicitors did NOT breach its fiduciary duty, although it acted on both sides of a loan transaction. While it would have been preferable had the wife, Mrs. Cronier, been sent out for independent legal advice, there was no obligation to insist on such advice in this case.

The wife granted a mortgage of the family home to the plaintiff Upper Valley Dodge Chrysler as security for a loan to the Cronier family business. Mrs. Cronier understood the transaction, and it was beneficial to her. Although Mrs. Cronier did not own the family business, it provided a livelihood for the family. The purpose of the $160,000 loan was to consolidate other outstanding loans owed by the business, $90,000 of which was owed to the plaintiff, and to provide money to seek a federal work contract. It was not a case of someone putting up their house for someone else's clearly foolhardy loan. This was a case where the individual in question had a vested interest in obtaining the loan to consolidate and potentially reduce an overwhelming debt load. Mrs. Cronier could not rely on *non est factum*, unconscionability, duress, undue influence, or lack of independent legal advice.

The Court of Appeal wrote at para. 24:

> "Although it obviously would have been better had Jacqueline Cronier obtained independent legal advice before signing the mortgage, on the basis of the trial judge's findings of fact and the record before us, we are persuaded that even if she did obtain independent legal advice she would have nonetheless signed the mortgage so her husband and his company could obtain the loan. Thus this argument must fail, as did Upper Valley's principal argument on the issue of causation."

The Court rejected Upper Valley Dodge's contention that its solicitor was in breach of his fiduciary duty to it, since the law firm acted on both sides of the transaction. The transaction was a simple one. There was no room for negotiation once the transaction arrived at the law firm. Upper Valley was adamant that Mrs. Cronier provide a mortgage on her home. The Cronier business needed the loan. The plaintiff lender was eager to proceed with the loan because the borrowers already owed it money, and under the terms of the loan the plaintiff would get security on the house. The solicitor suggested that Mrs. Cronier be sent out for independent legal advice, but Upper Valley refused, suggesting that "it would take its chances in Court."

The Court wrote at para 12:

> "Lawyers and law firms must, of course, be wary of acting on both sides of a transaction. The law reports contain many cases where acting on both sides gives rise to a disqualifying conflict of interest. However, we think that on the record before him, it was open to the trial judge to find that no conflict arose requiring separate representation. We therefore decline to interfere with it."

Hendry v. Strike[3] is another unsuccessful breach of fiduciary duty claim against a solicitor.

The plaintiffs were partners in a land development partnership. When the land development failed, they sued solicitor Strike for breach of fiduciary duty in his capacity as managing partner and solicitor for the partnership.

The action against Strike was dismissed. He acted in the best interest of the partnership at all times, and got instructions from it. He had no "unilateral discretion" with respect to the plaintiffs' interests, nor were they "at his mercy." The fact that he was managing partner, and had occasionally acted as the plaintiffs' solicitors on unrelated matters, did not enhance his obligation to the plaintiffs to provide investment advice with respect to unrelated transactions. There was no "general retainer." These unrelated transactions were mostly arranged without Strike's involvement in any event. The plaintiffs called no evidence concerning the standard of care of a solicitor acting as a managing partner of a real estate partnership. The appropriate standard of care was not within the knowledge of the court.

The plaintiffs were financially ruined by the failure of the partnership due to the real estate recession, the freeze on waterfront development, and the freeze on residential developments outside of municipal boundaries. The plaintiffs also purchased and over-mortgaged properties in order to support a lifestyle beyond their means. These factors were not Strike's fault.

Attempt to expand solicitor's responsibility fails

A developer's attempt to substantially expand its solicitor's responsibility failed in *Accurate Fasteners Ltd. v. Gray.*[4]

Justice Molloy held that a solicitor for a purchaser of raw land has no responsibility for seeing to the satisfaction of conditions in the agreement of purchase and sale relating to business, structural, electrical or construction issues. Verifying satisfaction of these conditions falls to the client. A lawyer ought not to take on responsibility for matters outside his area of legal expertise. The solicitor has responsibility for conditions relating to zoning and environmental soil reports. The plaintiff took "short cuts" in its due diligence concerning the costs of grading and construction. The solicitor cannot be responsible for the client's lack of due diligence.

The court rejected evidence from the plaintiff's expert that a solicitor must review the client's due diligence on these issues. The defence's expert evidence to the contrary was accepted.

Molloy, J. found that it would have been preferable had solicitor Gray confirmed in writing with his client precisely what tasks Gray had undertaken, and which were the responsibility of the client. However, a failure to confirm in writing does not constitute a breach of the duty of care.

The client was informed of and understood the extent of what his solicitor would be doing. There was no requirement that the solicitor reduce the understanding to writing.

The plaintiff also failed to prove any damages. The plaintiff incurred $216,000 in grading and landfill costs, which he had not expected to incur. The court declined to award these damages because:

1) this work was required because of the characteristics of the soil, not because of any error or omission on Gray's part;

2) there was no evidence that the vendor would have allowed any abatement had the grading issue been raised prior to the conditions having been waived. All evidence was to the contrary.

The plaintiff led no evidence as to the market value of the property at the time of its purchase. Diminution in value is the preferred approach to damages in cases such as this one. The evidence that did exist suggested that the property was worth the price that the plaintiff in fact paid.

The plaintiff's action was therefore dismissed.

Solicitor not liable for failing to detect purchaser's alleged mental incompetence

Plaintiffs are ingenious in their attempts to hold solicitors responsible for their real estate losses.

In *Smith v. George, Murray & Shipley*,[5] the defendant solicitor was sued for allegedly failing to recognize that the plaintiff was mentally incompetent to enter into three real estate transactions.

The action was dismissed. The evidence did not establish that the plaintiff was incapable of managing his financial affairs. Even if he were, the evidence did not establish that the defendant knew or ought to have known that the plaintiff was mentally incompetent.

Compelling evidence is required to override the presumption of capacity found in s. 2(2) of the *Substitute Decisions Act*.

The court also rejected the contentions that the defendant should have advised concerning the purchase price of the property, or the appropriate down payment.

Claims by non-clients dismissed

LawPRO generally has been successful in defending claims against solicitors by non-clients.

Rapoport and Wine v. Polsinelli, Draiman et al.[6] was no exception. G. Speigel, J., confirmed that solicitors acting for vendors and purchasers owe no duty to subsequent encumbrancers to register information on title that a work order has been issued by the Ministry of the Environment.

Nor can the solicitors' failure to do so constitute a "conspiracy," since their decision not to do so was legal, and there was no intent to cause harm to the plaintiffs, a subsequent second mortgagee. If the plaintiffs' solicitors had done the appropriate searches with the Ministry of the Environment, they would have learned of the work order.

A mortgagor's solicitor who gives a mortgagee an opinion with respect to the mortgagor's corporate status owes no duty to the mortgagee above and beyond the contents of that opinion. There is no duty to volunteer information or advice about other matters.

The *ex turpi causa* defence is alive and well

In *Stoneman v. Gladman and Monteleone et al.*[7], the plaintiffs' claim for return of

1 [2005] O.J. No. 5097 (C.A)

2 [2004] O.J. No. 2260 (S.C.J.)

3 Unreported judgment of Ferguson, J.E., released September 7, 2005, Whitby Court file no. 21352/03

4 [2005] O.J. No. 4175 (S.C.J.); (2005) 35 R.P.R. (4th) 9.

5 Unreported judgment of Abbey, J., released orally on March 23, 2005 and in writing June 20, 200, Sarnia Court file 756/99 (S.C.J).

6 [2005] O.J. No. 2089 (S.C.J.)

7 Unreported judgment of Perell, J., released July 22, 2005, Toronto Court file no. 01-CV-221646 CM (S.C.J.)

property which they transferred to two of the defendants prior to their bankruptcy was dismissed.

First, any cause of action for return of their property vested in their trustee in bankruptcy, not in the plaintiffs personally. The fact that the trustee did not pursue this claim did not confer status on the plaintiffs. Second, their action was barred by *ex turpi causa*. Their scheme to keep property out of the hands of their trustee was dishonourable and illegal. The court would not assist them to get this property back. The action against the defendant solicitor, who allegedly advised them concerning this scheme, was dismissed as well.

To read more about these judgments

Three of the judgments featured above are reported; three are not. If you wish to read the unreported judgments, go to LawPRO 's website: www.practicepro.ca/magazinearchives.

Select the current issue of LawPRO Magazine, and scroll down to supplementary materials listed under this Casebook.

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casebook #2

IP Lawyers Beware

Fallout from Dutch Industries Decision and new Section 78.6 of *Patent Act*

Patent lawyers may want to circle February 1, 2007, in red on their calendars: "Top-up" fee payments must be made prior to that date to ensure the validity of a patent or patent application for which payments had been incorrectly made at the small entity rate.

In the *Dutch Industries Ltd. v. Canada* (Commissioner of Patents) 2003 FCA 121 (CanLII) decision, the Federal Court of Appeal held that any fee paid to the Canadian Intellectual Property Office (CIPO) in connection with a patent (or patent application) on a small entity basis, where small entity status could not validly be claimed, would result in the patent or patent application being declared invalid (or abandoned) after exhaustion of the statutory 12-month grace period for late payment of fees (reinstatement).

The court also held to be improper the earlier established practice of CIPO to accept "top-up" payments for the difference between the small and large entity fees, at any time during the life of an application or patent, if a payment was found to have been incorrectly paid at small entity rate.

This decision created confusion in the intellectual property (IP) bar, and raised the spectre of potential LawPRO claims.

To rectify the fallout from this court decision, a new section of the *Patent Act*, Section 78.6, was enacted. It came into force on February 1, 2006.

Section 78.6 legitimizes any previously made corrective "top up" payments, and removes the possibility of an invalidity declaration of the basis of such payments.

Most importantly, Section 78.6 provides a once only twelve-month window of time, commencing February 1, 2006, during which any fee payments previously made incorrectly at the small entity rate, may be corrected by payment of the difference between the small and large entity rates for the relevant fee at the relevant time.

Any corrective payment being made during that twelve month period will need to be accompanied by information with respect to the day on which the underpaid fee was submitted, the service or proceeding in respect of which the fee was paid, and the patent or application in respect of which the fee was paid.

To help lawyers determine if corrective payments need to be made, relevant fee schedules and a fee payment history with respect to specific patent applications or patents are available online in the Canadian Patents Database.

After February 1, 2007, any application or patent in connection with which corrective payment has not been made will be susceptible to an invalidity attack.

LawPRO encourages all lawyers who may have matters where top-up fees are required to conduct a careful review of their files, and take appropriate steps to deal with the issue and ensure that all top-up fees are paid well before the February 1, 2007, deadline.