

DATE OF RELEASE: May 7, 1991

NO. C904424

VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

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)
 BETWEEN:)
)
 WILFRED RAYMOND HEATH,)
 EDITH MAUDE WELLS,)
 ROWLAND HENRY HEATH and)
 LORRAINE PLACE, Executrix)
 of the Estate of)
 DORIS ISABEL OSTOICH)
 PLAINTIFFS)

REASONS FOR JUDGMENT

OF THE HONOURABLE

AND:)
)
 IVENS, McGUIRE, SOUCH and OTTHO,)
 a Law Firm and DONALD A. SOUCH,)
 ULF K. OTTHO and JOHN DOE,)
 Executor of the Estate of)
 HERBERT A. IVENS)
 DEFENDANTS)

MR. JUSTICE MACZKO

Counsel for the Plaintiffs:

F.G. Potts

Counsel for the Defendants:

J.D. Truscott

Dates and Place of Hearing:

February 14 & 15, 1991

Vancouver, British Columbia

This is an application pursuant to Rule 18A to find the solicitor, Mr. Ottho, negligent first in failing to advise the plaintiffs, Wilfred Raymond Heath, Edith Maude Wells and Rowland Henry Heath of a breach of trust and secondly in failing to advise the plaintiffs that there was a ten-year limitation within which they were required to take action to protect their interests in the estate of Muriel Heath.

To fully understand the facts and background to this decision one must read the judgment of Mr. Justice Spencer in Wilfred Raymond Heath et al v. Bernice Darcus and Jack Darcus, Action No. C890203, Vancouver Registry, May 2, 1990 and my own reasons for judgment in Wilfred Raymond Heath et al v. Ivens, McGuire, Souch and Ottho et al, Action No. C904424, Vancouver Registry, January 15, 1991.

In Heath v. Ottho I found that Mr. Ottho was negligent, and liable to the estate of Doris Isabel Ostoich, by failing to protect the interests of the estate. This action is by the other beneficiaries of the estate of Muriel Heath for a finding that they also suffered a loss as a result of the negligence of the defendant.

The key issue is whether Mr. Ottho, the solicitor for the estate, owed a duty of care to the plaintiffs for whom he did not act, or to put it another way were the plaintiffs within a sufficient degree of legal proximity to impose a duty on the solicitor to protect their interests in the estate of Muriel Heath.

Mr. Ottho was retained by Kenneth Ostoich to probate the estate of his mother, Doris Isabel Ostoich. Mrs. Ostoich was one of the six children to whom Muriel Heath left her estate when she died. The estate consists primarily of a home in Vancouver. When Muriel Heath died, Bernice Darcus, one of the siblings, was living in the house and the other siblings agreed that she should be permitted to live in the house so long as she had need of it. It was agreed that the house would be conveyed to her and when she no longer had need of it, it would be reconveyed to the siblings.

In an action by the siblings Mr. Justice Spencer found that Bernice Darcus breached the trust, but denied the claim because the action against Bernice Darcus was not commenced within the ten-year limitation period. Mr. Justice Spencer made findings of fact and law and I ruled that I was bound to accept his findings. In a subsequent application I found Mr. Ottho negligent while acting for the estate of Doris Ostoich, by missing the limitation period.

The present plaintiffs admitted that they had not retained Mr. Ottho to act for them and Mr. Justice Spencer found that he did not.

This claim is based on the proposition that Mr. Ottho had undertaken to protect the interests of the plaintiffs in the estate of Muriel Heath and he failed to do so. In addition it is argued that Mr. Ottho owed a duty to the plaintiffs because Kenneth Ostoich had retained Mr. Ottho to protect the interests of all the siblings and he was negligent in failing to do so.

The facts on which the plaintiffs rely are as follows:

Kenneth Ostoich retained Mr. Ottho to probate the estate of Doris Ostoich, one of the children of Muriel Heath. One of the assets of her estate was her interest in the home Muriel Heath left to her children in which Bernice Darcus was living. On February 16th, 1987 Mr. Ottho wrote to Wilfred Heath in the following terms:

"Thank you for informing me that the rest of your brothers and sisters are in favour of pursuing this matter. The next step to be taken is that a meeting should be arranged whereby the exact nature of Mrs. Darcus's oral representations can be determined. This should be done as soon as possible. Would you please get in touch with all the relatives, find out when and where they would be willing to meet and let me know. I will make myself available at everyone's convenience be it during the day or in the evening or on the weekend.

Please let me know as soon as you have determined when and where everyone can meet with the exception of Bernice Darcus. "

Subsequently a meeting was held and Mr. Ottho's notes show that present at the meeting were Maude Wells, Edwin Heath, Wilfred Heath, Roland Heath and Kenneth Ostoich. At the end of this meeting he concluded that there was not sufficient evidence to prove that a trust had been created and Mr. Ottho decided to write to Bernice Darcus with a view to inducing her to acknowledge the trust. On June 15th, 1978 he wrote to Bernice Darcus stating that he acted for all of the siblings and the estate of Doris Ostoich. He outlined the facts as he understood them and said that if she failed to reply he had no alternative but to take proceedings. Although he did have instructions to act for the estate he acknowledged that the other siblings had not formally retained him and had not instructed him to commence proceedings.

Prior to the letter being sent and presumably in preparation for her acknowledgment Mr. Ottho prepared a deed of land which would have conveyed from Bernice Darcus to Edwin Charles Heath, Wilfred Raymond Heath, Edith Maude Wells, Roland Henry Heath, Bernice Darcus, Kenneth Steven Ostoich, Diane Louise Ostoich and Lorraine Muriel Place, individually a 1/8 undivided interest in the property. Bernice Darcus was to have a life interest. This deed was never executed.

On June 27, 1979 Mr. Specht, a solicitor, writing on behalf of Bernice Darcus, responded to Mr. Ottho in essence saying that his client owned the property and she did not wish to be bothered. Mr. Justice Spencer found that this letter was a denial of trust. Sometime after receiving this letter Mr. Ottho advised Kenneth Ostoich to leave matters be and do nothing while Bernice Darcus was living on the property. Mr. Ottho had concluded that nothing could be done while she was living there and that the limitation period did not begin to run until she did something more. Nothing was done until the limitation period expired.

The present plaintiffs are in a different position than the estate because they had not retained Mr. Ottho and he was not acting for them directly. To determine what responsibility he had to these beneficiaries, I must look at the nature of the relationship and determine whether he had put himself into a position where he owed them a duty of care to protect their interests.

The negligence alleged is that having put himself in proximity to the plaintiffs, he failed to inform the plaintiffs that Bernice Darcus had breached the trust and that he failed to inform the plaintiffs that if they wished to protect their interests they would have to commence action within ten years. The plaintiffs have deposed that if they had been informed about the limitation period they would have taken action to protect their interests.

While testifying before Mr. Justice Spencer Mr. Ottho admitted that he had a consensus from the brothers and sisters to approach Bernice Darcus with a view to perfecting title, but he thought he had a discretion as to how that approach should be made and how title was to be perfected. He admitted that although he acted for the estate of Doris Ostoich, he took instructions from Kenneth Ostoich who instructed him that all the siblings were to have their share. He stated that on behalf of the estate of Doris Ostoich he undertook to put title in the names of the brothers and sisters. He admitted that he thought he had a duty towards the brothers and sisters to protect their interests.

DEFENCE ARGUMENTS

Counsel for the defendant argued that there was no legal relationship or proximity between the three plaintiffs and the defendant giving rise to a duty of care. He carefully took me through the evidence as it relates to each of the three plaintiffs and I feel compelled to summarize the evidence on which he relies.

ROWLAND HENRY HEATH

Mr. Justice Spencer found on a balance of probabilities and based on the circumstantial evidence that Rowland Henry Heath received a blind copy of the letter by Mr. Ottho to Bernice Darcus and that he also received a copy of Mr. Specht's reply. Although he was a party this Mr. Heath did not give evidence at that trial because he was too ill. On this application, however, he filed an affidavit in which he says he never received those letters and the defence argues that this is new evidence and the only evidence before me is that he did not receive the letters. The defendant argues that since he did not receive the letters there was no relationship formed between Mr. Ottho and Rowland Heath and therefore Mr. Ottho owed him no duty. Mr. Heath knew nothing about the denial of trust until 1984 and so far as he is concerned the defence argues that the limitation period is still running. That of course is foreclosed because Mr. Justice Spencer has found that the limitation period has expired. The defence also argues that Mr. Heath placed no reliance on Mr. Ottho and therefore Mr. Ottho had no duty to him.

EDITH WELLS

Mr. Justice Spencer found as a fact that Edith Wells received the letter from Mr. Ottho and a copy of the letter from Mr. Specht. He made this finding based on evidence she gave in an affidavit and on her discovery, although she denied receiving those letters at the time of trial. He found that she was very upset when she received the Specht letter which denied the trust. Counsel submitted that there was no evidence that she was given any advice by Mr. Ottho and she simply did nothing when she received the letters. She did nothing when Bernice Darcus moved out of the house and she placed no reliance on Mr. Ottho.

The defence argues that Edith Wells placed no reliance on Mr. Ottho and that it was not reasonably foreseeable that she would do nothing in response to the Specht letter. She knew about the denial of trust and it was up to her to do something about it.

WILFRED RAYMOND HEATH

There is no evidence that he received a copy of Mr. Ottho's letter to Bernice Darcus and there is no evidence he received a copy of the Specht letter. Indeed there is no evidence of any communication between Wilfred Raymond Heath and Mr. Ottho other than the meeting which was described earlier. Mr. Justice Spencer found that Mr. Ostoich was acting as agent for Wilfred Heath and he imputed knowledge of the breach of trust to Wilfred Heath which started the limitation period running. The defence argues that if there was any failure, the failure was that of Mr. Ostoich and not that of Mr. Ottho.

THE LAW

Where a lawyer contracts with a person to provide a benefit to a third party he has a duty of care to that third party, even though that third party did not rely on the solicitor and indeed knew nothing about the contract.

In Whittingham v. Crease and Company [1978] 5 W.W.R. 45 a solicitor had drawn up a will under which the plaintiff was the residuary beneficiary. The will failed because the wife of a beneficiary acted as witness and the beneficiary lost his interest in the estate. The British Columbia Court of Appeal held that the solicitor was liable to the beneficiary even though there was no contractual relationship between them.

A similar situation occurred in Ross v. Caunters (a firm) [1979] 3 All E.R. 580, where the court dealt with a solicitor's negligence in the preparation of a will. The solicitor failed to notice that the will had been attested to by a beneficiary's spouse, thereby invalidating the gift to that beneficiary. One of the issues in that case was "whether a solicitor owes a duty of care to a beneficiary under a will that he makes for a client, and, if

so, on what basis that duty rests." (p. 587)

Sir Robert Megarry V.C. states at p. 587 of the above judgment:

"In considering this, three features of the case before me seem to stand out. First, there is the close degree of proximity of the plaintiff to the defendants. There is no question of whether the defendants could fairly have been expected to contemplate the plaintiff as a person likely to be affected by any lack of care on their part, or whether they ought to have done so: there is no 'ought' about the case. This is not a case where the only nexus between the plaintiff and the defendants is that the plaintiff was the ultimate recipient of a dangerous chattel or negligent mis-statement which the defendants had put into circulation. The plaintiff was named and identified in the will that the defendants drafted for the testator. Their contemplation of the plaintiff was actual, nominate and direct. It was contemplation by contract, though of course the contract was with a third party, the testator.

Second, this proximity of the plaintiff to the defendants was a product of the duty of care owed by the defendants to the testator: it was in no way casual or accidental or unforeseen. The defendants accepted a duty towards the testator to take reasonable care that the will would, inter alia, carry a share of residue from the testator's estate to the plaintiff. In all that they did (or failed to do) in relation to the will, the solicitors were bound by the duty of care towards the testator that they had accepted; and that duty included a duty to confer a benefit on the plaintiff. When a solicitor undertakes to a client to carry through a transaction which will confer a benefit on a third party, it seems to me that the duty to act with due care which binds the solicitor to his client is one which may readily be extended to the third party who is intended to benefit.

Third, to hold that the defendants were under a duty of care towards the plaintiff would raise no spectre of imposing on the defendants an uncertain and unlimited liability. The liability would be to one person alone, the plaintiff. The amount would be limited to the value of the share of residue intended for the plaintiff. There would be no question of widespread or repeated liability, as might arise from some published mis-statement on which large numbers might rely, to their detriment. There would be no possibility of the defendants being exposed, in the well-known expression of Cardozo CJ, 'to a liability in an indeterminate amount for an indeterminate time to an indeterminate class': see Ultramares Corpn v. Touche. Instead, there would be a finite obligation to a finite number of persons, in this case one. "

The Caunters case, supra, makes reference to the Whittingham v. Crease case, supra. Sir Robert Megarry V.C. concludes on p. 599:

"(3) A solicitor who is instructed by his client to carry out a transaction that will confer a benefit on an identified third party owes a duty of care towards that third party in carrying out that transaction, in that the third party is a person within his direct contemplation as someone who is likely to be so closely and directly affected by his acts or omissions that he can reasonably foresee that the third party is likely to be injured by those acts or omissions. "

In Peake and Llanwrst Properties Ltd. v. Vernon and Thomson (1990) 49 B.C.L.R. (2d) 245 Selbie J. considered the principles in Caunters and applied them to a real estate transaction.

Even if there is no contract between a solicitor and a third party he may still put himself into a position of proximity giving rise to a duty of care by undertaking either directly or by implication to carry out a task.

In Tracy and Morin v. Atkins (1979) 16 B.C.L.R. 223 the British Columbia Court of Appeal found sufficient proximity between a solicitor and an opposing party in a real estate transaction to create liability.

The vendors listed their home for sale with a real estate firm and subsequently entered an interim agreement with a purchaser. The purchaser retained the defendant solicitor who acted for the purchaser throughout. The purchaser then engaged in a fraudulent scheme which deprived the vendors of \$40,000. The Court found the solicitor liable to the vendor because he had placed himself in a sufficient relationship of proximity by undertaking to register a mortgage on behalf of the vendors. Chief Justice Nemetz at p. 227 analysed the relationship as follows:

"Not in every case will a solicitor be in a relationship of such proximity with an opposing party as was the case here. In the circumstances of this case, the solicitor undertook to carry out all the conveyancing including work that would ordinarily be done by the vendor's solicitor, such as registration of the mortgage back. By undertaking to do so, he placed himself in the position of dealing with the plaintiffs' interests at a time when he knew or ought to have known that the plaintiffs were or might be relying on him to protect those interests. In the circumstances of this case, he placed himself in "a sufficient relationship of proximity" that he incurred a duty of care towards the plaintiffs. "

He goes on to state at p. 229:

"(2) A solicitor, like other persons possessing special skills, may in certain circumstances owe a special duty of care in the absence of a contractual solicitor-and-client relationship. This duty was set out by Lord Morris of Borth-Y-Gest in *Hedley Byrne & Co. v. Heller and Partners*, supra [p. 594]:

"...if someone possessed of special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies on such skill, a duty of care will arise. "

I agree with the learned trial judge, who also found the duty of care to be imposed upon a solicitor who knows that he is acting for both parties, or is the only solicitor involved, in circumstances such as here. "

..."In *Whittingham v. Crease & Co.*, [1978] 5 W.W.R. 45 (B.C.S.C.), Aikins J. (as he then was) found a solicitor liable for damages for negligence in not exercising the reasonable degree of skill and knowledge that should be expected from a solicitor undertaking to supervise the execution of a will. Aikins J. further held, and I am in respectful agreement with him, that despite the fact that there was no contractual relationship between the solicitor and the plaintiff beneficiary, the solicitor was liable for damages suffered by the plaintiff as he, the solicitor, had undertaken the responsibility of the proper execution of the will. Likewise in this case, I have no difficulty in finding the solicitor here liable since he had undertaken the responsibility of effecting the conveyance of the property and he should have known that the plaintiffs were relying on him to carry it out and to protect their interests. "

..."I should add that, in my view, the special relationship said to arise when one person relies on the skill of another who undertakes to apply that skill for his assistance is no more than a particular way of establishing a degree of proximity on which a duty of care may be founded. "

In my view the authorities are quite clear that a solicitor can put himself in a position of proximity which creates a duty of care even though he has not been retained or instructed by that person. If a solicitor undertakes to perform a task he must do so without negligence, and if he undertakes to a client to perform a task for a third party he may have a duty of care to that third party whether or not the third party relied on that undertaking.

FINDINGS

Accepting all the facts as outlined by the defence and interpreting them even in the most favourable light I find that there was a legal proximity between Mr. Ottho and the three plaintiffs which gives rise to a duty of care. He met all the parties and at the end of the meeting received a consensus from the parties to approach Bernice Darcus. The purpose of the approach was to perfect the title to the property and that was known to Mr. Ottho and to the parties.

Having undertaken this much for the parties he had, in my view, a duty to inform them that a limitation period existed, and that if they wished to protect their interest they were required to commence some form of action before the expiration of the limitation period.

Even if this meeting had not taken place and Mr. Ottho had not received a consensus to approach Bernice Darcus, I find that he would have been liable as a result of contract with the estate. He admitted that he had instructions from Mr. Ostoich and undertook to perfect title and put the property into the names of the brothers and sisters. He contracted with the estate to confer a benefit on the members of the family. In pursuit of those instructions he even prepared a deed which would have conveyed the property to all the beneficiaries of Muriel Heath's estate and some of their heirs. In my view he must have had instructions either from the estate or from the parties themselves to protect their interests. He knew the siblings were concerned to obtain title to the property; he undertook on behalf of the estate of Doris Ostoich to obtain title for all of the siblings and he failed to commence action within the required limitation period.

Mr. Ottho admitted that he believed he had a duty to protect the interests of the family and although his belief about his legal liability is not conclusive it is certainly some evidence that in fact there was a legal proximity between the plaintiffs and the defendant.

I find for the plaintiffs as against Mr. Ottho. The plaintiffs also ask for judgment against Mr. Donald A. Souch who was Mr. Ottho's partner at the time. Defendants' counsel took no position with regard to Mr. Souch and I therefore find that he is liable as a partner of Mr. Ottho.

"F. Maczko, J."

Vancouver, British Columbia

May 6, 1991