

CANADA / JUDGMENT

Bryce v. Rala Investments Ltd.

2020 BCSC 90

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 90 Bryce v. Rala Investments Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bryce v. Rala Investments Ltd.,

2020 BCSC 90

Date: 20200124

Docket: S184679

Registry: New Westminster

Between:

John Peter Bryce

Plaintiff

And:

Rala Investments Ltd and Allan Sadler

Defendants

Before: The Honourable Mr. Justice G.C. Weatherill

Reasons for Judgment

Counsel for the Plaintiff:

T.J. Hewitt

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Counsel for the Defendants:

A. Dhinsa

J. McGreevy

Place and Dates of Trial:

New Westminster, B.C.

January 13-15, 2020

Place and Date of Judgment:

New Westminster, B.C.

January 24, 2020

Introduction

- [1] The plaintiff claims damages against the defendant mortgage brokers, Allan Sadler ("Sadler") and Rala Investments Ltd. ("Rala") (collectively, the "defendants"), for professional negligence in connection with a property appraisal the defendants provided to him, and upon which he relied, for the purpose of facilitating mortgage financing to a third party. The actual value of the property was substantially less than had been stated in the appraisal. The property was subsequently foreclosed and the plaintiff says he lost approximately \$202,000.
- [2] The defendants say that, at all material times, the plaintiff was an experienced lender who relied on his own experience and expertise to provide the financing. They further submit that the defendants advised the plaintiff to commission his own property appraisals and, therefore, did not violate the standard of care required of them.

Background

- [3] The plaintiff is 57 years old. In the 1970s, he had been a longshoreman. From approximately 1979 to 2008, he owned and operated a motorcycle repair shop in Burnaby, BC. In 2008, he retired. Throughout the years, he had purchased various properties for investment purposes.
- [4] On one of these occasions, the plaintiff arranged private mortgage financing using the services of a mortgage broker. Although he had been provided with an appraisal of the property from the previous owners, he was asked by the mortgage broker to obtain an updated appraisal, which he did. The plaintiff agreed on cross-examination that he wanted to ensure an accurate valuation of the property before he purchased it. He perceived, on that occasion, that the private mortgage lender involved in his property investment had fared well financially in the transaction.
- [5] After his retirement, the plaintiff decided to explore investing some of his financial resources in private mortgage financing but did not feel he was equipped with sufficient skill or expertise to do so without assistance.

- [6] At all material times, Sadler was a mortgage broker employed by Rala and was its principal. He has been a mortgage broker for the past 42 years and has owned Rala for the past 23 of those years. According to Sadler, a mortgage broker finds borrowers in need of mortgage loans and presents mortgage opportunities to lenders. Sometimes Sadler acted for the borrower, sometimes for the lender. Most of his deals involved higher risk second and third mortgage transactions.
- [7] Sadler testified that, typically, he receives an enquiry regarding a potential lending transaction either directly from a client or potential client, or by referral from another mortgage broker. His standard practice is to analyze the information provided to him, contact the lender he thinks should be approached with the opportunity and discuss it with him or her. If the lender is interested, Sadler sends along the information. Sometimes the information package includes an appraisal, sometimes it does not. Sadler testified that it was his standard practice to advise and recommend to all lenders that he acts for to obtain their own appraisal of the property that is to be used as security for the loan. Sadler testified that he is aware of the practice within the mortgage brokerage industry of obtaining a "Letter of Transmittal" (sometimes called a "Reliance Letter") ("LOT") from the author of an appraisal, authorizing its use by a party other than the party for whom the appraisal had been prepared. Sadler had often obtained such LOTs himself.
- [8] In approximately 2009, the plaintiff became aware of Sadler and Rala through an ad in the Yellow Pages telephone directory. The plaintiff telephoned Sadler, they met, and discussed the types of investments the plaintiff was interested in. The plaintiff testified that he advised Sadler he was a novice and was only interested in investments with a loan-to-value ratio of a maximum of between 60 to 65%. In other words, there would have to be equity in the property of at least between 35 to 40%. Sadler told the plaintiff that he would contact him if he became aware of a transaction he thought met the plaintiff's criteria.
- [9] Within a few months, Sadler facilitated the plaintiff's first investment as a mortgage lender. Four or five other transactions ensued between then and 2010. All were initiated by Sadler. All involved the plaintiff providing mortgage-secured loans for a term of one year. All involved Sadler providing to the plaintiff particulars of the investment opportunity, including an appraisal of the property for the plaintiff to consider. Sadler testified that, as was his standard practice, he recommended to the plaintiff "when we started doing business" that he should always obtain his own appraisal of properties. He conceded on cross-examination that he never put this recommendation in writing to the plaintiff.
- [10] Although the plaintiff initially denied that Sadler had ever advised him to obtain his own appraisal, he relented somewhat from that position during his cross-examination, conceding that he is unsure whether or not Sadler had done so. However, later during his cross-examination, the plaintiff stated that, if Sadler had given him any such advice, he believes he would have recalled it.

- [11] The plaintiff did not obtain his own appraisals for any of the properties involved in transactions facilitated by the defendants. He testified that he did not think to do so because, in each case, Sadler had provided him with an appraisal on which he relied when deciding to proceed with each investment. In those cases, the loan-to-value ratio was within the plaintiff's acceptable range. In direct examination, the plaintiff testified that he did not consider any of the investments to involve significant risk. However, during cross-examination, he acknowledged that there was always some risk.
- [12] All of the investments made by the plaintiff were successful, with the full investment repaid to him together with interest. The maximum investment made by the plaintiff during this period was \$350,000.
- [13] In May 2010, Sadler advised the plaintiff of a new mortgage investment opportunity. The deal involved a loan of \$500,000 secured by a second mortgage behind a first mortgage of \$600,000. At the time, the owners of the property in question were considering listing it for sale. It was a 25-acre tree farm near Chilliwack, BC. It included a large newly constructed house, a 5-car garage and two other houses, one of which had a pool (the "Property"). The Property was owned by Cornelia Autenrieth ("Cornelia") and at least one of the other houses was leased to tenants. An appraisal of the Property dated December 18, 2008 addressed to a Joe Autenrieth ("2008 Appraisal") was provided to Sadler by a Mr. Peter Davies, the Autenrieth's mortgage broker. Sadler, in turn, provided it to the plaintiff.
- [14] The 2008 Appraisal indicated that the Property had a value as of December 11, 2008 of \$2.1 million. The appraisal noted that, as of the time the appraisal was conducted in 2008, construction of the main house on the Property was only 65% completed. The 2008 Appraisal contained the following "fine print" language (the "Disclaimer Clauses"):

ORDINARY ASSUMPTIONS & LIMITING CONDITIONS

The certification that appears in this appraisal report is subject to the following conditions:

1. This report is prepared at the request of the client and for the specific use referred to herein. It is not reasonable for any other party to rely on this appraisal without first obtaining written authorization from the client, the author and any supervisory appraiser, subject to the qualification in paragraph 11 below. Liability is expressly denied to any person other than the client and those who obtain written consent and, accordingly, no responsibility is accepted for any damage suffered by any such person as a result of decisions made or actions based on this report. Diligence by all intended users is assumed.
11. The contents of this report are confidential and will not be disclosed by the author to any party except as provided for by the provisions of the Canadian Uniform Standards of Professional Appraisal Practice ("The Standards") and/or when properly entered into evidence of a duly qualified judicial or quasi-judicial body .

13. Written consent from the author and supervisory appraiser, if applicable, must be obtained before any part of the appraisal report can be used for any purpose by anyone except the client and other intended users identified in the report. Written consent and approval must also be obtained before the appraisal (or any part of it) can be altered or conveyed to other parties, including mortgagees (other than the client)
- [15] Sadler was aware that all appraisals typically contain such Disclaimer Clauses.
- [16] The plaintiff testified that he did not read the 2008 Appraisal in detail. Rather, he merely scanned it, focussing only on the appraised value. He did not read the Disclaimer Clauses.
- [17] The plaintiff visited the Property and liked what he saw. He and his sister, Joanne Bryce, made the loan of \$500,000 to Cornelia secured by a second mortgage with an interest rate of 14% per annum, compounded monthly ("Second Mortgage Investment"). The term of the mortgage expired one year later on July 4, 2011. The total interest payable under the loan was paid to the plaintiff and his sister in advance in one lump sum upon the mortgage being funded. Sadler was paid a mortgage broker fee of \$8,500.
- [18] In May 2011, Sadler learned from Mr. Davies that the Autenrieths were in need of additional financing. An appraisal dated May 10, 2011 was provided to Sadler by Mr. Davies. It valued the Property at \$2,550,000 ("2011 Appraisal"). Although the Autenrieths were initially looking for third mortgage financing, ultimately, a new first mortgage in the amount of \$1 million was registered. The plaintiff and his sister agreed to renew the Second Mortgage for another one-year term in consideration for the interest rate increasing from 14% to 16% with the interest, \$64,968.49, once again being payable in advance.
- [19] In April 2012, Sadler was advised by Mr. Davies that the Autenrieths were in need of further financing of \$250,000 to be secured by a third mortgage against the Property. Sadler relayed this information to the plaintiff because of his previous involvement in financing them. The proposed terms of financing included an interest rate of 18% per annum compounded monthly, prepayment of the interest, a 14-month term such that the mortgage term would expire at the same time as the Second Mortgage, which was to be renewed for a further 12-month term with a prepayment of the interest payable thereunder as well ("Third Mortgage Investment").
- [20] Sadler testified that, before he sent any documentation regarding the Third Mortgage Investment to the plaintiff, he expressed his view to the plaintiff that "these people are coming back to the well too often", that it appeared they had no ability to make the payments due under the mortgages on their own, and that the investment was "getting risky". Sadler testified that the only way out for the Autenrieths was to sell the Property, which, at that time, had been listed for sale. Sadler told the plaintiff that, essentially, he had two options: (a) foreclosing on the existing Second Mortgage or (b) extending the Second Mortgage, proceeding with the Third Mortgage Investment and again having the interest paid in advance. The plaintiff denied that Sadler told him the borrowers were in financial trouble and that the investment was getting risky.

- [21] Sadler testified that the plaintiff expressed interest in the Third Mortgage Investment despite being told that the Autenrieths were borrowing money to make the mortgage payments and before any of the documentation had been sent to him.
- [22] On April 5, 2012, Sadler provided the plaintiff with a more recent appraisal of the Property ("2012 Appraisal") dated February 2, 2012 prepared by Canadian Home Appraisals ("Appraisers") for an individual named J. McLean at an entity called "Verico Select Mortgages". As was the case with the 2011 Appraisal, the 2012 Appraisal indicated that the market value of the Property (in this case as at February 2, 2012) was also \$2,550,000. The 2012 Appraisal also contained the Disclaimer Clauses. Sadler had obtained the 2012 Appraisal two days earlier on April 3, 2012 from Mr. Davies.
- [23] Neither Sadler nor Rala obtained authorization from the Appraisers for the use of or reliance upon the 2012 Appraisal, as was stipulated by clause 13 of the Disclaimer Clauses. Neither Sadler nor Rala recommended to the plaintiff that he obtain a LOT from the Appraisers authorizing his use of and reliance upon the 2012 Appraisal.
- [24] However, Sadler testified that he advised the plaintiff to read the 2012 Appraisal carefully and that, if he was not satisfied with it, he could obtain his own appraisal. The plaintiff denied that Sadler recommended he obtain his own appraisal. He also denied that Sadler made him aware he was not authorized to use the 2012 Appraisal in the absence of the written consent of its author.
- [25] The plaintiff testified that he "breezed through" the 2012 Appraisal, essentially looking only at and relying upon the appraised value. He did not review the Disclaimer Clauses. Sadler testified that the plaintiff advised him that he thought the 2012 Appraisal was "okay".
- [26] On or about April 12, 2012, Sadler prepared and signed a "Form 9 - Lender Disclosure Statement" ("Form 9"). The British Columbia Financial Institutions Commission ("FICOM") mandates that such Form 9s be provided to all individual lenders but not institutional lenders. Sadler provided this document along with the borrowers' Mortgage Application to the plaintiff who acknowledged receipt of it on April 15, 2012. The plaintiff testified that he also simply "breezed through" these documents and had not given them much attention.
- [27] The Form 9 contained Sadler's calculation of a loan-to-value ratio (after the Third Mortgage Investment) of 68%, based upon the value of the Property contained in the 2012 Appraisal. The Form 9 cautioned the plaintiff to "very carefully assess the risk of the transaction" and to obtain independent legal advice regarding his decision to invest. The plaintiff did neither. It also cautioned the plaintiff to ensure that he had "sufficient documentation to support the property valuation quoted in this Investor/Lender Disclosure Statement".

- [28] On or about May 11, 2012, the plaintiff received notice from the borrower's insurer that their home insurance policy was being terminated for non-payment of premiums. The plaintiff testified that he was not concerned by this because the interest payments he would be entitled to would be prepaid. The plaintiff was satisfied that the \$800,000 in equity identified in the 2012 Appraisal was more than adequate to ensure he would be able to recover his investment.
- [29] The plaintiff testified that, on May 18, 2012, in reliance on the Appraisal as well as his own judgment based upon the success of the Second Mortgage Investment so far, the plaintiff funded the Third Mortgage Investment. He and his sister agreed to extend the term of the Second Mortgage as well. Although he advanced \$250,000, from those monies, he and his sister were paid \$73,477.40 for the extended Second Mortgage interest prepayment. In addition, the plaintiff was paid \$47,929.84 for the Third Mortgage interest prepayment. After further deductions for mortgage brokerage and legal fees, the borrower received \$110,612.76 in consideration of the grant of a \$250,000 third mortgage together with the one-year extension of the Second Mortgage.
- [30] The plaintiff testified that he would not have advanced the funds in respect of the Third Mortgage Investment but for his reliance on the appraised value set out in the 2012 Appraisal. He also testified that, had Sadler or Rala informed him that he was not authorized to use the 2012 Appraisal, he would have obtained his own appraisal of the Property which he says would have disclosed that its true value was well below the 2012 Appraisal and he would not have funded the Third Mortgage Investment.
- [31] Neither the Second Mortgage nor the Third Mortgage was repaid when due in July 2013. Separate foreclosure proceedings were commenced by both the first mortgagee and the plaintiff, together with his sister, in respect of the Second Mortgage. An Order Nisi was granted in each of the proceedings.
- [32] On March 7, 2014, the plaintiff and his sister were granted joint conduct of sale of the Property with the Autenrieths. The plaintiff and his sister obtained judgment against the Autenrieths for \$528,445.
- [33] On October 20, 2014, an Order for Sale was pronounced for the sum of \$1,420,550. Both the Second Mortgage and the Third Mortgage were expunged from title to the Property.
- [34] The plaintiff did not commence foreclosure proceedings in respect of the Third Mortgage because it was apparent to him that such proceedings would be futile.
- [35] The plaintiff and his sister pursued the Autenrieths on their judgment mostly to no avail. Joe Autenrieth filed an assignment in bankruptcy on February 14, 2018. The ultimate shortfall on the Second Mortgage was approximately \$80,000.
- [36] The plaintiff has not recovered any monies on the Third Mortgage debt.

Expert Reports Tendered by the Plaintiff

- [37] The plaintiff filed the expert report of Michael Reilly, an appraiser with Macintosh Appraisals Ltd., without objection. Mr. Reilly opined that the market value of the Property as at February 2, 2012 was only \$1,500,000.
- [38] The plaintiff filed, again without objection, the expert report of Jass Saran, an appraiser with Saran Appraisals & Consulting Ltd. Mr. Saran opined that the 2012 Appraisal contained multiple and significant errors, was not compliant with appraisal standards, and demonstrated that its author had exercised poor judgment in the appraisal valuation process. Mr. Saran also opined that the author of the 2012 Appraisal was not qualified to prepare it.
- [39] The defendants did not take issue with either the Reilly Report or the Saran Report or the opinions expressed in them.
- [40] In addition, the plaintiff attempted to introduce and rely upon an expert report prepared by a mortgage broker named John Ribalkin. Mr. Ribalkin has been a mortgage broker since 1977 and had been involved in more than 10,000 brokered mortgages during his career. The defendants objected to the admissibility of his report on the basis that it was an improper attempt by Mr. Ribalkin to usurp the function of the court. In a separate Ruling indexed at 2020 BCSC 51, I found that Mr. Ribalkin's report was flawed in several respects and held most of it to be inadmissible. However, I ruled a portion of it admissible to the extent that it provided an opinion as to the standard of care expected of a mortgage broker by the industry in the circumstances of this case.
- [41] In particular, I allowed the following reformulated opinion from Mr. Ribalkin:
- In my opinion, before making use of an appraisal prepared for a third party, it was standard practice in the mortgage brokerage industry for a mortgage broker to first:
- (a) obtain an "LOT";
 - (b) advise the lender to obtain an "LOT"; or
 - (c) advise the lender to obtain his own appraisal.
- [42] On cross-examination, Mr. Ribalkin conceded that there is no mandate by FICOM (which regulates mortgage brokers) requiring that a LOT be obtained before a third party makes use of an appraisal prepared for someone else. He also conceded that it was always open to a mortgage broker to simply advise a lender to obtain their own appraisal.

Credibility and Reliability

- [43] The law with respect to credibility and reliability was usefully summarized by this court in *Bradshaw v. Stenner* 2010 BCSC, at para. 186:

- [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis* (1926), 31 O.W.N. 202 (Ont. H.C.); *Faryna v. Chorny* (1951), [1952] 2 D.L.R. 354 (B.C. C.A.) [Faryna]; *R. v. S.* (R.D.), [1997] 3 S.C.R. 484 (S.C.C.) at para.128). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Faryna* at para. 356).
- [44] The plaintiff gave his evidence in a sincere and forthright manner, however, throughout his testimony his demeanour was that of a somewhat naïve person with respect to business savvy. I found that his recollection of the events of 2011 and 2012 were mostly reconstructed rather than actual and, hence, not always reliable. He did not exude confidence regarding his recall of what he had been told by Sadler regarding the use of appraisals generally and the risk associated with the Third Mortgage Investment in particular.
- [45] Sadler gave his evidence in a straightforward and honest fashion. His recollection of the events of 2011 and 2012 was much more assertive and confident than the plaintiff's. I find Sadler's evidence to be more reliable than that of the plaintiff and, to the extent their evidence is in conflict, I accept that of Sadler.
- [46] As was clear in my 2020 BCSC 51 Ruling regarding the admissibility of Mr. Ribalkin's expert report, I was very critical of it. I will not repeat those concerns here. In contrast to his report, Mr. Ribalkin presented as a knowledgeable, objective and helpful witness. I accept his opinion evidence to the extent I allowed its admissibility, namely as it relates to the standard of care expected of a mortgage broker.

Analysis

- [47] In order to find the defendants' liable for professional negligence, the plaintiff must establish that they owed a duty of care to him, that the duty of care was breached, and that the breach caused the plaintiff to suffer a loss.
- [48] The defendants have conceded they owed a duty of care to the plaintiff in this case. I, therefore, must consider whether they breached their duty.

- [49] The evidence discloses that, over the years, the plaintiff purchased several properties, including three commercial properties in the Lower Mainland, BC. In all cases, including those where he invested in mortgages, he focused only on the market value set out in the appraisal he had been provided. He never focused on and, indeed, admitted that he ignored the "fine print" set out in those appraisals.
- [50] There is no question that, from the outset of his dealings with Sadler, the plaintiff relied on Sadler's experience and expertise as a mortgage broker together with the information Sadler provided to him. He did not conduct his own due diligence with respect to the transactions he entered into, with the exception of having visited the Property prior to investing in the Second Mortgage with his sister.
- [51] While the plaintiff may have been a novice at the outset of his dealings with Sadler in terms of private mortgage lending, by 2012, that was no longer the case. He was clearly no neophyte regarding property investments and dealing with property appraisals. I do not accept that, in April 2012, the plaintiff did not understand that the 2012 Appraisal had been commissioned by the borrowers and prepared for their purposes as borrowers.
- [52] It is telling that the plaintiff was content to proceed with the Second Mortgage Investment in 2010 in reliance on the 2008 Appraisal, which was more than one year out-of-date. He took no steps to obtain an updated appraisal.
- [53] I find that the plaintiff decided to proceed with the Third Mortgage Investment because, as he stated, all of the other transactions Sadler brokered for him had been successful, as had been the Second Mortgage Investment with his sister. I find that, in deciding to proceed with the Third Mortgage Investment, the plaintiff was blinded by the success of those previous investments as well as by the prospect of an 18% return in 14 months, paid in advance.
- [54] It was abundantly clear and must have been obvious to the plaintiff that, in April 2012, the Autenrieths were in serious financial trouble and unable to pay their debts on their own. They were "borrowing from Peter to pay Paul". The plaintiff was buoyed by the prospect of the interest owing under the Third Mortgage Investment being paid to him in advance. He considered that the only risk to his interests, was the possibility that the Autenrieths' equity in the Property would turn out to be negative.
- [55] I accept Sadler's evidence that he pointed out to the plaintiff at the outset of their relationship, or close to it, that the plaintiff was free to obtain his own appraisal of the properties he was obtaining mortgage security over. I find that the plaintiff likely ignored that advice because of the cost, and because the transactions he engaged in with Sadler had all gone smoothly.
- [56] I also accept Sadler's evidence that, in April 2012, when he discussed the Third Mortgage Investment opportunity with the plaintiff, he expressed his view to the plaintiff that the Autenrieths appeared to be unable to meet their financial obligations and that dealing with them was getting risky. I find that the plaintiff ignored these cautions and decided to

proceed with the Third Mortgage Investment for two reasons: (1) the 2012 Appraisal indicated there was substantial equity in the Property; and (2) he was satisfied that the Property would sell at a price exceeding the debt owed on the Property.

- [57] Although it is clear that Sadler sent the 2012 Appraisal to the plaintiff without the covering email containing any language to qualify it, or cautioning against reliance on it, I accept that the plaintiff well understood the importance of a careful review of, not only the appraisal, but all other documents provided to him. Moreover, he was cautioned in writing, both by way of the Disclaimer Clauses in the 2012 Appraisal and by way of the cautions set out on the first page of the Form 9. He merely scanned those documents and paid no attention to those cautions. While Sadler may not have advised the plaintiff to obtain his own appraisal specifically in respect of the Third Mortgage Investment, I find that he had previously made the plaintiff aware of the importance of doing so for all mortgage investments.
- [58] In my view, the required standard of care was met by defendants in this case.
- [59] Regardless, causation is an essential element of every claim in negligence. The traditional test for causation is the "but for" test, which requires a plaintiff to prove on the balance of probabilities that "but for" the defendant's negligence, the damages suffered by the plaintiff would not have occurred: *Clements v. Clements*, 2012 SCC 32 at para. 8.
- [60] I find, on the balance of probabilities, that the plaintiff would have proceeded with the Third Mortgage Investment regardless of whether or not he was advised by Sadler to obtain a LOT or his own appraisal. Sadler's conduct was not the cause the plaintiff's loss.

Conclusion

- [61] The plaintiff's claim is dismissed.

costs

- [62] Subject to any submissions the parties wish to make, the defendants are entitled to their costs, at Scale B.

"G.C. Weatherill J."

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