Indexed as:
Jacks v. Davis

Between
Terrence Ross Jacks, plaintiff (respondent), and
Andrew Reed Davis, defendant (appellant)

[1982] B.C.J. No. 2053

Vancouver Registry No. CA800677

(1982), 141 D.L.R. (3d) 355

British Columbia Court of Appeal
Vancouver, British Columbia

Carrothers, Hinkson and Hutcheon JJ.A.

Judgment: October 20, 1982.

(29 paras.)

Counsel:

Robert H. Guile, for the appellant.
John Laxton and S. Bannister, for the respondent.

The judgment of the Court was delivered by

1 **HINKSON J.A.**:-- This is an appeal by the defendant from a judgment of Mr. Justice Anderson in the Supreme Court of British Columbia reported in [1980] 6 W.W.R. 11, awarding the plaintiff damages in the sum of $142,474.51 together with prejudgment interest. The defendant Davis is a solicitor and the plaintiff was his client.

2 The sole issue on this appeal is the quantum of the plaintiff's damages.

3 The plaintiff is a successful musician, composer and singer. As a result of his success he earned a substantial income. His financial adviser in 1976 was one Abbott. The defendant had incorporated a company known as Blunden Developments Ltd. in July 1975. There were three equal shareholders

in the Blunden Company, Abbott, John Clarke and William Betts. Abbott was the president of Blunden.

4 In June 1975 Mr. W.B. Jurome had commenced construction of an apartment block at the City of Penticton, known as Kirkland Place. During the course of construction of the apartment building Jurome ran short of cash flow and it was necessary to sell the apartment block. He listed the property for sale at $880,000. In February 1976 Blunden offered $845,304 and Jurome accepted that offer. An interim agreement was entered into between Blunden and Jurome on February 27, 1976

5 In the spring of 1976 the plaintiff spoke to Abbott and indicated that he was about to receive a substantial royalty cheque and that he wished to make an investment. Abbott advised the plaintiff of the availability of apartment blocks in Penticton and in particular, of Kirkland Place. A pro forma budget was produced and the plaintiff met with his accountant and with Abbott. After the discussion with the plaintiff's accountant Abbott referred the plaintiff to the defendant.

6 The defendant had been involved in the transaction between Blunden and Jurome since February 25th or 26th, 1976. At that time he had discussions with some of the representatives of Blunden as a result of which the interim agreement between Jurome and Blunden was drawn up. Blunden was buying the property as a tax shelter for resale.

7 When the plaintiff agreed to purchase Kirkland Place he retained the defendant to attend to the conveyance. Initially it was anticipated that there would be a conveyance from Jurome to Blunden and then a conveyance from Blunden to the plaintiff. The defendant decided to make the conveyance from Jurome to the plaintiff. The purchase price to the plaintiff from Blunden was $910,600.

8 On April 26th or 27th, 1976 the plaintiff attended at the defendant's office to sign the closing documents. At that time the plaintiff was not aware that Blunden was making a profit on the transaction and that Abbott stood to gain as a result of that profit.

9 The defendant had anticipated that the plaintiff might ask him whether Abbott or Blunden were making a profit on the transaction and testified at trial that prior to meeting the plaintiff to have him sign the closing documents the defendant had spoken to Abbott and had received permission from him to disclose that a profit for Blunden was involved in the transaction. The defendant testified that he was aware that he had an obligation to disclose to the plaintiff the fact that Blunden was making a profit on the transaction and the magnitude of the profit. When the plaintiff attended at the defendant's office to sign the closing documents he asked him directly whether a profit was being made on the transaction by Blunden or Abbott. The defendant failed to disclose the secret profit and gave an evasive answer.

10 The purchase of Kirkland Place was completed and the plaintiff entered into possession of it. Later in May or June 1977, the plaintiff employed another solicitor to act for him in connection with repairs to the apartment building which were to have been completed by the vendor at the time of the sale. That solicitor, Mr. Cave, ascertained that an undisclosed profit had been made on the sale of the apartment block to the plaintiff and as a result an action was commenced inter alia against Abbott, Jurome and Blunden. That action was settled in the summer of 1978 by Abbott and Blunden repaying their undisclosed profit to the plaintiff and by the action against Jurome being settled for $725,000. As part of that settlement the apartment block was sold to Fred and Ted Construction for $700,000.

11 At trial the plaintiff was awarded his net loss on the resale $147,135.96 and part of his operating loss, less his income tax savings, bringing the judgment to $142,474.51.

12 On the appeal the defendant contended that he had been retained by the plaintiff as a conveyancer but that the effect of the judgment at trial was to hold him responsible as a financial adviser to the plaintiff. The plaintiff had entered into the agreement to purchase Kirkland Place before he retained the defendant. It was contended that the defendant should not be held responsible for damages flowing from the purchase by the plaintiff of Kirkland Place. Rather it was submitted that the defendant should only be liable for the loss flowing from his failure to disclose the secret profit. That loss had already been recouped by the plaintiff from Abbott and Blunden.

13 The essence of the defendant's submission was that the relationship between the plaintiff and the defendant arose as a result of the contract entered into when the plaintiff retained the defendant as a conveyancer. As the defendant had no financial interest in the transaction between Jurome, Blunden and the plaintiff it was contended that no fiduciary relationship existed between the plaintiff and the defendant. The defendant sought to limit the recovery of the plaintiff to a claim for damages for breach of contract. Reference was made to Groom v. Crocker [1939] 1 K.B. 194, Lake v. Bushby [1949] 2 All E.R. 964, Bailey v. Bullock [1950] 2 All E.R. 1167, Clark v. Kirby-Smith [1964], Ch. 506, Bagot v. Stevens Scanlan & Co. [1964] 3 All E.R. 577, Cook v. Swinfen [1967] 1 W.L.R. 457, Winrob et ux v. Street and Wollen [1959] 28 W.W.R. 118 and Schwebel v. Telekes [1967] 61 D.L.R. (2d) 470.

14 Relying on those decisions, the defendant invited this court to consider again the decision in Nocton v. Lord Ashburton [1914] A.C. 932 and a number of decisions which have purported to follow that case and to conclude that a claim by a client against a solicitor involves only a breach of contract. Nocton v. Lord Ashburton, supra, decided that a duty of making a full disclosure is imposed on a solicitor by the fiduciary position which arises from the solicitor and client relationship. In Nocton v. Lord Ashburton in discussing the form of relief available to the plaintiff Viscount Haldane, L.C. said at p. 946:

> There is a third form of procedure to which the statement of claim approximated very closely, and that is the old bill in Chancery to enforce compensation for breach of a fiduciary obligation.

15 The plaintiff in the present action based his claim upon breach of fiduciary obligation and sought equitable relief.

16 Viscount Haldane indicated that in order to determine whether a fiduciary relationship existed which would give rise to the solicitor being under a special duty to make full disclosure depended upon the circumstances and relations of the parties. But it is clear from that decision that such a relationship arises when the solicitor and client relationship exists. The reason it arises is that the client is reposing confidence in the solicitor and the solicitor is obliged to make full disclosure to the client in order that the client may properly make decisions in respect of the matter upon which he is retaining the solicitor. I conclude that the defendant was under a fiduciary obligation to make full disclosure to the plaintiff with respect to the secret profit and that a clear breach of that obligation occurred.

17 In these circumstances the issue to be determined is as to the measure of damages that flowed from the breach of the fiduciary obligation. In many of the cases in this field of the law the solicitor

had a personal interest in the transaction which he failed to disclose. In my opinion where no such personal interest is involved the measure of compen-sation for breach of the fiduciary obligation is the same as where such an interest exists. The following decisions appear to support that view.

18 In the London Loan & Savings Co. of Canada v. Brickenden [1933] S.C.R. 257, a solicitor acting for both parties in the matter of a loan to be secured by a mortgage did not disclose the existence of two prior mortgages in which he was personally interested. The solicitor benefited directly from the loan being granted in that his mortgages were paid down. In the Supreme Court of Canada the minority agreed with the majority view that the solicitor was in breach of his fiduciary duty but the minority felt that his liability should only extend to the amount of money that he directly gained as the result of the breach. Smith, J., delivering the judgment of Rinfret, Lamont and Smith JJ. said at p. 258:

> I am of opinion that the appellant Loan Company should be placed as nearly as possible in the position in which the appellants would have been had there been no breach of duty on the part of Brickenden; that is, that the appellant Loan Company is entitled to the full amount of damages sustained. Nocton v. Lord Ashburton [1914] A.C. 932.

The judgment of the Supreme Court was upheld on appeal to the Privy Council, [1934] 2 W.W.R. 545. Lord Thankerton stated at p. 550:

> When a party, holding a fiduciary relationship, commits a breach of his duty by non-disclosure of material facts, which his constituent is entitled to know in connection with the transaction, he cannot be heard to maintain that disclosure would not have altered the decision to proceed with the transaction, because the constituent's action would be solely determined by some other factor, such as the valuation by another party of the property proposed to be mortgaged. Once the Court has determined that the non-disclosed facts were material, speculation as to what course the constituent on disclosure, would have taken is not relevant.

19 That passage is of significance on the present appeal in view of the finding of the trial judge that the plaintiff would not have completed the transaction if the secret profit had been disclosed.

20 In Howard v. Cunliffe (1973) 36 D.L.R. (3d) 212 the court was concerned with circumstances in which a solicitor had failed to disclose a material fact to his client. Bull J.A. and McFarlane J.A. both concluded that the solicitor was in breach of his duty to this client. Bull J.A. held that the client was entitled to recover the loss of the money which had resulted from performing pursuant to the terms of an interim agreement. In that case the solicitor had no personal interest in the transaction and had not induced the client to enter into the agreement. McFarlane J.A. made reference to the duty of making full disclosure imposed on the solicitor by the fiduciary position which arose from the solicitor and client relationship, citing Nocton v. Lord Ashburton, supra,as authority for the proposition and then in terms similar to those used by Lord Thankerton in the Brickenden case, said at p. 221:

> ...I do not think the Court should speculate or presume in favour of the defaulting solicitor. His breach of duty being established, I think the onus lay upon him to

> show that his client's loss would have occurred in any event if he had performed his duty towards her.

21 It is significant that in this case the loss of the plaintiff as a result of performing the agreement would not have occurred, in any event, if the defendant had performed his duty and made full disclosure as the plaintiff says he would not have proceeded with the purchase and the trial judge so found. In those circumstances it is necessary to turn to a consideration of the loss to the plaintiff which occurred as a result of performing the agreement.

22 At trial the plaintiff called as an expert witness an appraiser, Mr. Locke, to give evidence with respect to the circumstances which existed in Penticton in 1976 at the time that the sale of Kirkland Place to the plaintiff was being negotiated. Locke testified that by virtue of the number of new apartment blocks then under construction there was going to be a surplus of rental space upon the market and that as a result Kirkland Place was going to experience vacancies, even though it was fully occupied at the time that the plaintiff took possession of it in May 1976. Locke's opinion was borne out by what occurred in the period subsequent to May 1976 until the apartment block was sold to Fred and Ted Construction in the summer of 1978. The defendant did not call any evidence with respect to this aspect of damages. Although the defendant sought to challenge the opinion of Locke in cross-examination the trial judge accepted Locke's evidence. In addition, the defendant sought to attribute some of the loss in value in the apartment block to contributory negligence on the part of the plaintiff. Further the defendant contended that the plaintiff had failed to act reasonably to mitigate the losses experienced in the operation of the apartment block and in the value of it.

23 The trial judge concluded with respect to the operating losses of the plaintiff that they were due to poor business judgment and poor management and that after July 1, 1977, by which date the plaintiff should have taken steps to mitigate his loss, the claim for operating losses could not be allowed.

24 However the trial judge concluded, upon the basis of the evidence of Locke,that in all probability the price paid by Blunden was greatly in excess of the true market value. He concluded that the price obtained in July 1978 reflected true market value at April 1976. Thus the price obtained on the 1978 sale by the plaintiff reflected the loss suffered as a result of performing the agreement. Approached in this way contributory negligence and failure to mitigate had nothing to do with the value of the apartment block in April 1976. The trial judge concluded the plaintiff was entitled to the whole of that loss rather than merely the $65,000 secret profit. Understood in that way, in my opinion, the learned trial judge correctly determined the quantum of damages flowing from the breach of the fiduciary obligation.

25 In the result I would dismiss the appeal.

26 On the hearing of the appeal counsel for the plaintiff abandoned the cross-appeal and as a result I would dismiss it.

27 The plaintiff is entitled to his costs of the appeal.

HINKSON J.A.

28 CARROTHERS J.A.:-- I agree.

29 HUTCHEON J.A.:-- I agree.

qp/s/qlrlm