

 **Beaver Lumber Co. v. 222044 Ontario Ltd.**

Ontario Judgments

Ontario Court of Justice (General Division)

Binks J.

Heard: February 19-23, 1996.

Judgment: March 29, 1996.

Court File No. 12120/89

[1996] O.J. No. 1132

Between Beaver Lumber Company Limited, plaintiff, and 222044 Ontario Limited, J.E. Thompson and Douglas B. MacDonald, defendants

(13 pp.)

Case Summary

Brokers — Duties of broker to principal — Real estate brokers — Misrepresentation — Breach — Remedies — Damages, punitive damages.

This was an action for damages of \$542,000 arising from a real estate transaction. The plaintiff vendor owned property on Bank Street. The defendant numbered company, formerly known as Radcliff, was a real estate broker. The defendant MacDonald was a licensed real estate broker and majority owner of Radcliff. The plaintiff agreed to convey the property on Bank Street to Thompson in trust at a purchase price of \$1,400,000. The sale was to be completed on May 31, 1984, but closing date was extended to June 14, 1984. Thompson was a secretary in Radcliff's office. She was obviously an innocent party who had been asked to lend her name to the transaction, and the action against her had been discontinued. After the agreement of purchase and sale was executed, the plaintiff learned that Thompson was a bare trustee for the defendant Radcliff, and further learned that Radcliff had agreed to convey the property to Grenville Goodwin Limited for \$1,942,000. When entering into the transaction with the plaintiff, neither MacDonald nor Radcliff gave notice, as required by section 31 of the Real Estate and Business Brokers Act, to the vendor that they were a real estate salesperson and broker, respectively. The plaintiff alleged that had it received the statutory statement before the agreement was signed, it would not have sold the property for the amount it received. MacDonald and Radcliff had lost their licenses as a result of this transaction.

HELD: There was judgment for \$542,000 for the plaintiff.

Taking into account the defendants' breach of the Real Estate and Business Brokers Act, and the involvement of Thompson, it was clear that the real buyer, Radcliff, intended to mislead and misrepresent the transaction to the vendor. It was this deliberate misrepresentation which created the cause of action in these circumstances. Radcliff and MacDonald made false representations of fact, that the purchase price was \$1,400,000 rather than \$1,900,000, with

knowledge of the falsity, with the intention that the representations should be acted on by the plaintiff, and the plaintiff did act on them and thereby suffered damages. An award of punitive damages was not appropriate as the defendants had lost their licences to operate as real estate brokers as a result of this transaction.

Statutes, Regulations and Rules Cited:

Real Estate and Business Brokers Act, R.S.O. 1980, c. 431.

Counsel

Guy J. Pratte and Jane Bachynski for the plaintiff. Harold Poultney for the defendant 222044 Ontario Limited. Douglas B. MacDonald acting on his own behalf.

BINKS J.

1 This action arises out of a real estate transaction which occurred over a period of several months commencing in the early part of 1984 and culminating in a transfer of property on June 14, 1984.

2 The plaintiff claims damages of \$542,000.00 representing a profit which it says was realized by the defendants 222044 Ontario Limited and Douglas B. MacDonald, as well as punitive damages from the defendants, and pre-judgment interest and post-judgment interest and costs.

3 The plaintiff is a limited company and, in early 1984, was the owner of commercial real property municipally known as 1500 Bank Street, Ottawa.

4 The defendant 222044 Ontario Limited is a company that was originally incorporated in Ontario on June 2, 1969 under the name of Radcliff Realities Company Limited and at all material times concerning this action carried on the business of real estate broker registered under the Real Estate and Business Brokers Act, R.S.O. 1980, c. 431. The Articles of Incorporation of Radcliff were amended effective March 6, 1986 changing the name of the company to 222044 Ontario Limited. I will refer to this defendant as "Radcliff" throughout, its name at the time of the transaction.

5 The defendant Douglas B. MacDonald resides in Ottawa and was at all material times a licenced real estate broker and a majority owner of Radcliff and, in 1984, its president. In this capacity he was carrying on the business of a real estate developer in the City of Ottawa.

6 L.A.T. MacDonald (or "Lou" MacDonald) is the father of Douglas MacDonald. He is not a party to this action. He testified that he had no official position with Radcliff in 1984.

7 Beaver Lumber agreed to convey all its interest in the real property at 1500 Bank Street,

Ottawa, by Agreement of Purchase and Sale dated March 20, 1984, to one J.E. Thompson in trust at a purchase price of \$1.4 million. It was to be completed on May 31, 1984.

8 After the execution of this agreement, it was learned that Thompson had entered into the agreement only as a bare trustee for the defendant Radcliff. It was further learned that Radcliff had entered into an Agreement of Purchase and Sale dated April 30, 1984 in which it agreed to convey its interest in 1500 Bank Street to Grenville Goodwin Limited, hereinafter called "Grenville", for \$1,942,000.00.

9 At the purchaser's request the parties agreed to extend the date of closing to June 14, 1984 subject to the condition, inter alia, that a further \$205,000.00 deposit be paid to the plaintiff's solicitors in trust in addition to the original \$25,000.00 deposit. On or shortly after May 29th, 1984 Beaver received an assignment from Radcliff in trust in favour of Grenville.

10 The plaintiff has alternatively pleaded that Thompson entered into the agreement as a bare trustee for the defendant Radcliff Realities Company Limited or alternatively for Douglas MacDonald who in turn sold his interest as purchaser to Grenville at a purchase price of \$1,942,000.00. Grenville agreed as part of that purchase price to give a mortgage back to Douglas B. MacDonald's nominee, Radcliff, for \$372,000.00 as part of the purchase price. Neither Radcliff or Douglas B. MacDonald gave notice, nor delivered a statement orally or in writing, required by Section 31 of The Real Estate and Business Brokers Act to Beaver that they were real estate broker and Salesman respectively, nor did they have Beaver acknowledge in writing that they had received such statement.

11 The plaintiff has alleged that had it received the statutory statement prior to the agreement being signed, it would not have sold the property for the amount it received.

12 It further alleges that because of the defendant's breach of this statutory duty, the defendants were unjustly enriched in the amount of \$522,295.00 and that this amount should therefore be paid over to the plaintiff.

13 It is necessary to recite the steps which the parties took from the beginning in the early months of 1984 to the closing of this transaction to determine whether the allegations of the plaintiff are true and, if so, what remedy, or remedies, if any, are available to the plaintiff in the circumstances.

14 In March 1984 Beaver Lumber accepted an offer from J.E. Thompson in trust. The closing was to take place on May 31, 1984. By May 24, 1984 no purchaser came forward until one John Hamilton, an Ottawa solicitor, contacted Beaver Lumber and advised that Grenville was purchasing 1500 Bank Street from Radcliff for \$1.9 million. There was no notice previous or actual, that Radcliff was involved. J.E. Thompson testified at trial that she held the property in trust for Radcliff. She said Radcliff and L.A.T. MacDonald were "all the same". L.A.T. MacDonald testified he could not disclose his interest personally or that of Radcliff because of his then financial situation. There was a Declaration of Trust in favour of Radcliff by J.E. Thompson dated March 20, 1984, the same date as her offer to Beaver Lumber. The evidence

was, and I find, that this document was signed by Janet Thompson on May 30th, 1984 even though it was back dated to March 20th, 1984. The closing was to take place May 31st, but there was an extension to June 15th and an additional deposit of \$205,000.00 was paid. The closing took place and 1500 Bank Street was conveyed from Beaver Lumber to Grenville Goodwin Limited for \$1.4 million.

15 In the period March and April, 1984, L.A.T. MacDonald was busy organizing the purchase from Beaver and the sale to Grenville, all unknown to Beaver. He entered into a joint venture agreement 50 - 50 with Grenville. He obtained an appraisal of the property from a qualified appraiser of \$2.4 million, and, on the strength of this appraisal, he obtained a mortgage commitment of \$4.8 million to develop a mall on the property, all of this well before May 31st, 1984.

16 John Brooks, a senior corporate executive of Beaver Lumber, was in charge of real estate, and gave instructions in the negotiation and closing of the sale of 1500 Bank Street. He instructed Laird Rasmussen, an Ottawa solicitor, to act for Beaver on the transaction. Neither Brooks nor Rasmussen knew who J.E. Thompson was, they did not know whether she was male or female. Nevertheless, Brooks gave authority to Rasmussen to extend the time for closing from May 31st to June 15th, and demanded and received a further \$205,000.00 deposit in consideration of the extension.

17 In due course Rasmussen was advised by Hamilton that Radcliff had assigned the agreement to Grenville Goodwin Limited, and Rasmussen prepared documents showing Goodwin as the purchaser for a price of \$1.4 million dollars. Rasmussen testified that had he not closed with Grenville he considered that Beaver would face a law suit. He honoured the Assignment in view of the Declaration of Trust executed by Radcliff. Douglas MacDonald signed the assignment as President of Radcliff.

18 J.E. Thompson was originally a party to this action but the action against her was discontinued. She was obviously an innocent party. She now is Janet Dixon, having since married. She testified that she was a secretary in Radcliff's office, having started working there in May of 1983. She received instructions from both Lou and Douglas MacDonald. She swore that Lou MacDonald told her that he was buying a piece of property in trust and wanted to buy it without anyone knowing that he was the purchaser, adding that he wouldn't be able to purchase the property under his own name or the name of Radcliff Realities, so he used her name, J.E. Thompson. She also signed a Declaration of Trust on May 30th, 1984 but it was dated March 20th, 1984, and, at that time, it was not witnessed. At the time of signing she was no longer working in the MacDonald office but was told she had to sign, Lou MacDonald telling her that if she did not, the bank would be looking for her next day for \$1.4 million dollars. She was a responsible, forthright witness, and I accept all of her testimony unreservedly.

19 When Douglas MacDonald testified, his evidence was evasive and contradictory. However, he did volunteer spontaneously, and not in answer to any question on examination-in-chief, that the property was flipped. At that point there was no suggestion of any flip. But the word "flip" was volunteered by him. In view of all the evidence, I certainly accept this part of his testimony,

as well as his statement that he and Radcliff Realities lost their licence as a result of this transaction.

20 In three related actions, apart from this lawsuit, one or other of the MacDonalds swore that Radcliff Realities was the real buyer.

21 Beaver Lumber was not aware of any of the above. It entered into an agreement to sell the property for \$1.4 million dollars and, after extending the agreement for two weeks, this is what it received.

22 Beaver was represented throughout by Alex Fitzsimmons, a respected real estate broker of many years in Ottawa, who discovered, quite by chance, while searching adjoining properties in the Registry Office in 1987, that after the deed from Beaver to Goodwin for \$1.4 million was registered, there was then registered subsequently a mortgage from Goodwin to Radcliff for \$372,000. He pursued the matter, advised Beaver, which resulted in this law suit.

23 Beaver takes the position that the property was purchased by Radcliff and flipped to Goodwin for \$1,942,000 and that it is entitled to the profit because Radcliff is unjustly enriched by \$542,000. The defendants' position is that even if the Court accepts none of the defence evidence and accepts only the plaintiff's evidence, that its case must fail. They say that Beaver got exactly what it agreed to accept and that the subsequent mortgage was an entirely separate transaction involving a joint venture.

24 John Brooks swore that had Beaver known that Radcliff was the buyer, it would not have sold for \$1.4 million. Radcliff and Douglas MacDonald, like any broker, were obliged to comply with Section 31(1) of the Real Estate and Business Brokers Act, which reads as follows:

31(1) No broker or salesman shall purchase, lease, exchange or otherwise acquire for himself or make any offer to purchase, lease, exchange or otherwise acquire for himself, either directly or indirectly, any interest in real estate for the purpose of resale unless he first delivers to the vendor a written statement that he is a broker or salesman, as the case may be, and the vendor has acknowledged in writing that he has received the statement.

25 Radcliff and Douglas MacDonald were registered real estate brokers, and they did not comply with this section. While failure to comply with section 31(1) of the Act does not create a cause of action, the failure here was symptomatic, and part of, a well thought out course of action to deceive Beaver.

26 Taking this breach into account, with the evidence of J.E. Thompson who was advised by Lou MacDonald that the true purchaser could not be disclosed, is clear evidence that the real buyer, Radcliff Realities, intended to mislead and misrepresent the transaction to the vendor. I do not accept that Radcliff was buying "in trust" for Lou MacDonald. There was no trust agreement. It is this deliberate misrepresentation, a deceit, which creates the cause of action in these circumstances. The plaintiff says there was either a deliberate or negligent misrepresentation.

27 Although Grenville was shown as purchaser in the deed, the real buyer was Radcliff and it flipped the property to Grenville for a profit of \$542,000.00. The shortfall between the \$1.4 and \$1,942,000.00 million being made up as follows:

Mortgage to Radcliff by Goodwin	\$372,000
Finders Fee	70,000
Payment in cash	100,000
	\$542,000

28 In *Harland v. Fancsali* ([1994](#), [121 D.L.R. \(4th\) 182](#) (Div. Ct.) Howden J. listed, at page 186, the factors said to be necessary to constitute the tort of deceit, as follows:

- (1) the defendant made a false representation of fact;
- (2) the representation was made with knowledge of its falsity;
- (3) the representation was made with the intention that it should be acted on by the plaintiff;
- (4) the plaintiff acted upon the representation;
- (5) the plaintiff suffered damage by so doing.

29 I find that the defendant Radcliff and its President Douglas MacDonald made false representations of fact (that the purchase price was \$1.4 million rather than \$1.9 million) with knowledge of its falsity with the intention that the representations should be acted on by the plaintiff and the plaintiff did so act thereby suffering damages.

30 Beaver also claims punitive damages. This was a calculated, devious and carefully thought-out scheme to purchase 1500 Bank Street, and flip it to Grenville, involving much detailed deception; deliberate false representation, not a little ingenuity, and made intentionally to cause Beaver to sell to Grenville for \$1.4 million. However, the defendants have lost their licence to operate as real estate brokers as a result of this transaction. Although their actions were fraudulent, I am not convinced that their conduct merits an award of punitive damages. In reaching this conclusion I have referred to the following authorities.

Vorvis v. Insurance Corp. of British Columbia, [\[1989\] 1 S.C.R. 1085](#).

Norberg v. Wynrib [\(1992\)](#), [2 S.C.R. 226](#).

Warner v. Arsenault [\(1982\)](#), [53 N.S.R. \(2d\) 146](#) (C.A.).

31 There will therefore be judgment for \$542,000.00 plus pre-judgment interest.

32 The parties may make submissions, in writing or orally, on the question of costs.

BINKS J.

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