IN THE COURT OF APPEAL OF NEW ZEALAND CA37/99

BETWEEN GORDON JAMES BLACK
Intended Appellant

AND STANLEY OLIVER SHAKESPEARE
Intended Respondent

Hearing: 22 March 1999

Coram: Richardson P
Henry J
Blanchard J

Appearances: W V Gazley for Intended Appellant
A R Davie for Intended Respondent

Judgment: 22 March 1999

JUDGMENT OF THE COURT DELIVERED BY BLANCHARD J

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[1] This is an application for leave to appeal from a decision of the High Court dismissing the intended appellant's appeal from a decision of the District Court at Wellington. The High Court has refused leave for a second appeal.

[2] The intended appellant is a solicitor and the proceeding is one for professional negligence brought by a former client.

[3] In 1977 the intended respondent sold a property to his son on a long term agreement for sale and purchase. He retained title. By 1989 the amount outstanding had been reduced to $17,600. The son was of course the equitable owner of this property at Kinapori Terrace, Newlands. He entered into an agreement to sell it for the purpose of buying a property at Arapaepae Road, Levin. This purchase was in the name of the son and his wife.

[4] The son needed his father's co-operation in not requiring repayment of the $17,600. It was agreed that the father would take, instead, a third mortgage over the

Arapaepae Road property for that amount. Mr Shakespeare alleged that he believed that the first mortgage, to a bank, secured no more than $105,000 in principal sum which meant that, when the second mortgage of $10,000 to the vendor of the Arapaepae Road property was taken into account, the father's third mortgage ranked behind mortgages totalling $115,000.

[5] In fact, the first mortgage contained an express provision for a priority limit for the bank of $131,250.

[6] Mr Black acted for both father and son and also accepted instructions to act for the bank.

[7] Mr Shakespeare alleged that Mr Black was negligent in not telling him that his third mortgage would rank behind $141,250; and that he would not have made his advance, in the sense of accepting the third mortgage in the place of his legal ownership of the Kinapori Terrace property, if properly informed by Mr Black of the position.

[8] The third mortgage was not registered. The son and daughter-in-law later refinanced with another bank, Westpac. The new mortgage was in ordinary banking form with no fixed priority sum but the amount refinanced was $140,000. When Westpac eventually conducted a mortgagee sale the property sold for only $146,000. There was nothing for Mr Shakespeare.

[9] In the District Court Judge Willy found the intended respondent's evidence credible when he said he would not have left the $17,600 outstanding and to be secured on the property if he had been told how much was secured ahead of it. He found Mr Black in breach of his contractual obligation to use all due care and skill expected of a solicitor in the particular circumstances. As a direct consequence the intended respondent had lost his money. The Judge also found Mr Black to have been in breach of fiduciary duty in acting for more than one party to the transactions and failing to see that Mr Shakespeare's money was properly secured.

[10] A Full Bench of the High Court (Heron and Gendall JJ) heard Mr Black's appeal. That Court was sensibly not prepared to differ from Judge Willy's factual finding that the intended respondent would not have exchanged his interest as vendor for the third mortgage if advised of the priority limit. The Court concluded that the balance of the original debt was not statute barred and confirmed the lower court's view that the intended appellant was in breach of duty to the intended respondent. It pointed out that because the latter retained title to the original property he was in a position to control the situation and to refuse to go ahead if not satisfied with the substitute security. The appeal was dismissed.

[11] The Full Court subsequently dismissed an application for rehearing and refused leave to appeal to this Court. It said no new point had emerged and that there was no question of any general importance. All the lower court did was to determine whether in a particular conveyancing transaction Mr Black had breached his duty to Mr Shakespeare.

[12] The argument which the intended appellant seeks to advance in this Court is essentially one of fact and we agree with the High Court that it does not raise a question of general importance.

[13] Mr Gazley submits that the lower Court failed to appreciate that no duty to inform Mr Shakespeare about the priority limit arose in this case because no new advance was being made. The mortgage simply secured the old indebtedness. The solicitor was merely implementing an agreement already reached between father and son.

[14] We do not think that the Courts below failed to appreciate the reality of the position. They were aware that there was no cash advance. But in our view that cannot possibly mean that there was no duty to warn Mr Shakespeare that the priority limit on the first mortgage to which his security was subject was significantly higher than the nominal amount of the principal sum. It was open to the District Court to hold that Mr Black was in breach of duty in this respect.

[15] The cases to which Mr Gazley referred the Court did not assist his argument. They involved whether a solicitor had an obligation to advise a client about the wisdom of a transaction. That was not in issue in this case. The complaint was that Mr Black failed to inform the intended respondent of a crucial fact, namely the priority limit in the first mortgage. It can be accepted that in the particular circumstances his retainer did not oblige him to do more than inform. The wisdom of the informed client was a matter for the client.

[16] There is nothing in this case to justify a second appeal. The practice of this Court was recently restated in *Waller v Hider* [1998] 1 NZLR 412. The intended appellant would have done well to reflect on that case and the earlier decisions referred to in it before coming to this Court with the present application.

[17] The matter being inappropriate for a second appeal, the application for leave is dismissed with costs of $1,250.

Solicitors
M G Gazley, Wellington, for intended appellant
Andrew R Davie, Wellington, for intended respondent