Privy Council Appeal No. 110 *of* 1933.

G. A. P. Brickenden - - - - - - *Appellant*

v.

The London Loan and Savings Company of Canada and others - *Respondents*

FROM

THE SUPREME COURT OF CANADA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 10TH MAY, 1934.

Present at the Hearing:

LORD MERRIVALE.
LORD THANKERTON.
LORD RUSSELL OF KILLOWEN.
LORD WRIGHT.
LORD ALNESS.

[*Delivered by* LORD THANKERTON.]

This is an appeal from a judgment of the Supreme Court of Canada, dated the 29th March 1933, which reversed a judgment of the Court of Appeal for Ontario, dated the 1st March 1932, and restored the judgment of the Trial Judge (Raney, J.), dated the 11th October 1930.

The action as originally constituted was brought by Walter H. Biggs and his wife, Eva Viola Biggs, against the London Loan and Savings Company and the Consolidated Trusts Corporation, seeking redemption of certain properties in the City of London, Ontario, on payment of the principal monies actually advanced and repudiating any liability for interest, on the ground that the mortgage transactions came within the sanction provided by the Interest Act of Canada. The claim of the original plaintiffs was dismissed by the Trial Judge, and no appeal was taken therefrom.

The two defendant companies delivered counter-claims, by which, in the first place, they both claimed to recover from the original plaintiffs the amounts which might be found due and owing by them on their several mortgages, with the usual remedies for collection of the same. The Trial Judge decided this matter in favour of the companies, and no appeal has been taken in respect thereof.

In the second place, the London Loan and Savings Company (hereinafter referred to as " the Loan Company ") made the counter-claim with which the present appeal is concerned, and which arose out of three advances on mortgage made by the Loan Company to Mr. and Mrs. Biggs. For the purpose of this counter-claim, the present appellant, who had been solicitor to the Loan Company at the time of the advances, and George G. McCormick, who had then been its vice-president and a director, were added as defendants to the counter-claim, and the following plaintiffs by counter-claim were added, viz.: the Huron and Erie Mortgage Corporation (hereinafter called " the Mortgage Corporation "), the Canada Trust Company, and the London Loan Assets Limited (hereinafter called " the Assets Company "). These three companies, along with the Loan Company, are the respondents in the present appeal. The appellant and McCormick were charged with fraud and conspiracy in procuring the placing of the loans to Mr. and Mrs. Biggs, and the advances of the monies by the Loan Company, and with a breach of the fiduciary relationship existing between each of them and the Company, and damages were claimed for the loss thereby sustained by the Company. The case against McCormick failed before the Trial Judge and also on appeal to the Court of Appeal for Ontario, and has not been persisted in. The present appeal is confined to an alleged breach by the appellant of his duty as solicitor to the Loan Company in connection with the third advance on mortgage made to Mr. and Mrs. Biggs, being an advance of $13,500 made in November 1924.

The circumstances under which that advance came to be made were as follows:—In 1922 Biggs obtained an advance of $18,000 on mortgage from the Loan Company, Mrs. Biggs joining to bar dower. Later, Biggs gave as collateral security a further mortgage for $3,000 on property on which there were already two mortgages for $6,000 and $1,000 respectively. Early in 1923 Mrs. Biggs obtained a loan of $12,000 on security of her own property from the Loan Company. Biggs and his wife appear to have made proposals to the Loan Company in 1923 for further loans, which were not entertained by the Company, but they were able to obtain advances on mortgage from the appellant to the amount of $5,000 in July 1923, of $2,000 in August 1923, and of $1,200 in January 1924. The mortgages to the appellant covered the properties previously mortgaged by Biggs and his wife to the Loan Company.

In November 1924, Biggs and his wife were heavily in arrear under their two mortgages to the Loan Company, and they wished to obtain further advances on mortgage. The appellant was not then in a position to make the advance and he spoke to Mr. Kent, then the Manager of the Loan Company. The result was that a proposal for a loan on mortgage of $13,500 came before the Board of the Loan Company on the 11th November 1924. In form the terms of the proposal are contained in a typewritten memorandum, which is unsigned, but it may be accepted as setting forth correctly the proposal made by Biggs and his wife. In addition to the proposal for interest and repayment by instalments, it was stated " A bonus of $1,000 to be allowed Company for the accommodation. Money to be applied to pay the arrears of interest on Company's present mortgages of $18,000 and $12,000 respectively and sundry accounts amounting to $7,500, and a second mortgage of $5,000 held by G. A. P. Brickenden which will mature about March 1925, and as security Company will receive a new mortgage for $13,500 on the property already mortgaged to Company." That application was laid over at the Board meeting of the 11th November, 1924, and it came before the Board meeting of the 17th November, when it was agreed to. Meantime the appellant had furnished the Board with a certificate of title, dated the 12th November 1924, which disclosed the appellant's mortgage for $5,000, as a mortgage to be assumed by the Loan Company. The mortgage deed for $13,500 by W. H. Biggs in favour of the Loan Company, and a collateral mortgage for the same amount by Mrs. Biggs, were executed on the 8th November 1924, and registered on the 12th November 1924.

The appellant admittedly acted as solicitor for Biggs and his wife in this transaction; as regards the Loan Company, it was contended on his behalf that he did not act as their solicitor in this matter except in making the certificate of title, but their Lordships cannot accept this restricted view of the appellant's duty to the Company as their solicitor in view of the admissions made by the appellant in the extracts from his examination on discovery which were put in at the trial, at which the appellant did not appear as a witness. The appellant was thus acting as solicitor to both parties in the matter of the $13,500 loan, and he was personally interested as regards the mortgages for $5,000, $2,000 and $1,200. The first of these three loans was disclosed both in the application and in the certificate of title, but the appellant was assured of repayment of this loan by the terms of the application, and this was noted in the certificate of title.

The appellant's loans of $2,000 and $1,200 were not disclosed in either the application or the certificate of title. The appellant's only answer is that these two loans had been discharged before the date of the certificate of title, but an examination

of the relevant dates will show that their discharge was actually effected by application of the proceeds of the $13,500 loan in question, which came into Biggs' hands before the loan was agreed to by the Board of the Loan Company.

Of the $13,500 advanced, the Company retained $1,636.14 in respect of arrears on their two earlier mortgages, and $5,000 against the repayment of the appellant's $5,000 mortgage. The total thus retained was $6,636.14, leaving a balance of $6,863.86 due to Biggs. Of this balance the Company, on the instruction of Biggs, paid $1,508.06 to the Dyment Lumber Company on the 8th November 1924. Biggs had his bank account with the Company, and the Company credited his account with the remainder of the balance—$5,355.80—on the 13th November, the day after the certificate of title, and four days before the loan was approved of by the Board. On the 14th November Biggs gave the Company a cheque for their $1,000 bonus.

The important fact, however, is that on the 8th November Biggs gave the appellant a cheque for $1,993·33 drawn on his account with the Company, in which he had then only $4·77 to his credit. The appellant, who also banked with the Company, did not pay this cheque into his account until the 13th November, a day after the certificate of title. It is certain that this cheque included the repayment by Biggs to the appellant of the balance of $800 outstanding on the $2,000 mortgage and the balance of $600 outstanding on the $1,200 mortgage. It is obvious that the Company would not have honoured that cheque until Biggs' account held funds to meet it, and yet the discharge of these two mortgages is registered on the 12th November, the same day as the certificate of title was made by the appellant.

Their Lordships are clearly of opinion that the appellant's non-disclosure of these two mortgages was a breach of his duty as solicitor to the Loan Company, particularly in view of his personal interest in them, and that it would equally have been a breach of duty if, contrary to their Lordships' opinion, the appellant had only been employed for the certificate of title. It follows that the Loan Company were entitled at least to nominal damages against the appellant.

It remains to consider which of the respondents is entitled to damages, and whether any damage has been proved.

In their Lordships' opinion the claim of the Loan Company against the appellant was not assignable, and the relationship of the Loan Company to the other respondents need only be examined in so far as it may affect the Loan Company's claim for damages.

The learned Trial Judge held the breach of duty to have been established, and, without discriminating between the respondents, gave judgment for all of them against the appellant for whatever balance there might be found owing on the mortgage for $13,500, allowing credit for any payments made by the

mortgagor, the appellant, on payment of such balance, being entitled to an assignation of the mortgage, or, if the properties were sold, at the discretion of the respondents, judgment for the deficiency against the appellant. The Court of Appeal for Ontario set aside the judgment of the Trial Judge on various grounds. They held *inter alia* that there was no evidence of breach of duty, and that, even if there were, there was no evidence that the Loan Company had not received the full face value of the mortgage on the sale and transfer to the Mortgage Corporation and that accordingly the Loan Company had not established loss. The Supreme Court of Canada restored the judgment of the Trial Judge, subject to the Loan Company giving credit for the $1,000 bonus received by them and a variation in the rate of interest from 8 per cent. to 5 per cent. They did not discriminate between the respondents.

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.

Their Lordships find no reason to differ from the findings of the Trial Judge as to the value of the security offered for the $13,500 loan in November, 1924. The learned Judge states " I am satisfied on the evidence that at the date of these $13,500 mortgages there was no equity in the properties which they covered, above the prior mortgages, not including Brickenden's $5,000 mortgage, and that on a forced sale at that time not enough could have been realised to pay the prior encumbrances." There can be little doubt that the Loan Company received a worthless security for their advance, and their Lordships are of opinion that the damages have been correctly dealt with by the Supreme Court, provided that the Loan Company have not already received the nominal value of the mortgage from the Mortgage Corporation. In their Lordships' opinion this can be determined on the documents, and no question of burden of proof arises, as the Court of Appeal considered.

By an agreement dated the 3rd July, 1929, and made under the power conferred by R.S.O. 1927, Chapter 223, section 55, the Loan Company sold and transferred to the Mortgage Corporation its entire assets and undertaking, including *inter alia* the mortgage for $13,500 and " All rights of action arising out of or incidental or appurtenant to ownership of any assets hereby assigned or conveyed or affecting the value thereof in so far as these rights of action are capable of being transferred." It was

further provided that nothing in the agreement should derogate from or extinguish any right of action then vested in the Loan Company in connection with the business of the Loan Company prior to the ratification of the agreement which was not capable of assignment or transfer, and that any such right of action should remain vested in and enforceable by the Loan Company and the Loan Company might take any proceedings to enforce, exercise or realise upon such rights of action in its own name for the benefit of its own shareholders. The agreement was tripartite and by its second part, the Mortgage Corporation transferred to the Assets Company, which was newly formed for the purpose, the assets formerly belonging to the Loan Company, which were listed in the schedule to the agreement (and which included the $13,500 mortgage) and which were stated to represent the surplus assets over and above the liabilities of the Loan Company to the public.

On the 29th August, 1929, the Lieutenant-Governor in Council duly gave his assent to the agreement in terms of section 60 of the Act. Thereupon, in terms of section 63, the Loan Company was dissolved except so far as should be necessary to give full effect to the agreement.

It follows, in their Lordships' opinion, that the claim of the Loan Company against the appellant remained with the Loan Company, and that the Company remained in existence for the purpose of enforcing the claim.

It is said, however, that the consideration paid by the Mortgage Corporation covered the mortgage for $13,500, and that it must be assumed, in the absence of evidence to the contrary, that full value was given for it.

The scheme of the agreement is clear. The Mortgage Corporation took over the entire assets of the Loan Company and its business and goodwill, and undertook all the debts, liabilities, contracts and engagements of the Loan Company in relation to the business. The Mortgage Corporation retained sufficient of the assets to meet the Loan Company's liabilities to the public, and transferred the surplus assets to the new Assets Company for realisation. This left the shareholders of the Loan Company as the only parties interested in the consideration received from the Mortgage Corporation, subject to remuneration and honoraria to their officers and staff and costs of carrying out the agreement and of any future proceedings required for protection of the interests of the shareholders. The share capital of the Loan Company and the Assets Company was in each case 20,000 shares.

The consideration received from the Mortgage Corporation was $720,000 in cash and the whole 20,000 shares of the Assets Company, which was the same consideration as the Mortgage Corporation was to receive from the Assets Company for the surplus assets. Any surplus over the $720,000 obtained by the Assets Company on realisation would go to its shareholders. It

was provided that, as each asset was realised by the Assets Company, a certain proportion of the proceeds was to be applied towards payment of the $720,000 to the Mortgage Corporation. That proportion was specified by a figure set opposite the assets in the schedule listed to the agreement. In the case of the $13,500 mortgage, it is grouped with other mortgages under one figure. If the mortgage proved valueless it would not contribute to the $720,000, and, in any event, would not contribute more than it realised. It is true that the $720,000 was immediately payable by the Mortgage Corporation to the Loan Company, and $700,000 was immediately distributable among the Loan Company's shareholders, but their Lordships deem it a legitimate inference that, as regards the surplus assets of the Loan Company, the scheme was one for their realisation by means of the Assets Company for the benefit of the shareholders of the Loan Company, and that the $720,000 was a payment to account of the proceeds of that liquidation, the balance to be received by them through their holdings in the Assets Company. Accordingly the $720,000 was not a lump sum paid for the surplus assets, which should be held to include a price for the $13,500 mortgage. The Loan Company's claim against the appellant is therefore not affected by the agreement with the Mortgage Corporation. No further argument against the assessment of damages by the Supreme Court was submitted by the appellant.

Their Lordships will accordingly humbly advise His Majesty that the appeal should be dismissed with costs and that the judgment of the Supreme Court of Canada, dated the 29th March, 1933, should be affirmed.

In the Privy Council.

G. A. P. BRICKENDEN

v.

THE LONDON LOAN AND SAVINGS COMPANY OF CANADA AND OTHERS.

DELIVERED BY LORD THANKERTON.

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