IN THE SUPREME COURT OF YUKON

Citation: *Bradshaw Estate v. Bank of Montreal*, 2008 YKSC 17

Date: 20080310
S.C. No. 07-A0026
Registry: Whitehorse

Between:

ZOE MORRISION, PERSONAL REPRESENTATIVE OF THE ESTATE OF GEOFFREY DAVID BRADSHAW BY LETTERS OF ADMINISTRATION

Plaintiff

And

BANK OF MONTREAL

Defendant

Before: Mr. Justice L.F. Gower

Appearances:

Anna Pugh — Counsel for the Plaintiff
André Roothman — Counsel for the Defendant

REASONS FOR JUDGMENT

INTRODUCTION

[1] In this summary trial, the plaintiff, Zoe Morrison, on behalf of the estate of Geoffrey Bradshaw, seeks judgment against the defendant, Bank of Montreal, for the full amount necessary to discharge a mortgage taken out by Mr. Bradshaw to purchase his home in Whitehorse. At the time of that purchase, Mr. Bradshaw declined an opportunity to take out life insurance on the mortgage, through the bank. However, due to an admitted error on the part of the bank, the mortgage particulars were entered into the bank's computer system indicating the Mr. Bradshaw *had* applied for mortgage

insurance. Accordingly, from the time of the purchase until Mr. Bradshaw's accidental death a couple of years later, the bank regularly deducted mortgage insurance premiums and forwarded statements to Mr. Bradshaw indicating that he had life insurance on his mortgage.

[2] The Plaintiff summits that these incorrect communications constitute a negligent misrepresentation which has caused Mr. Bradshaw's estate to suffer a loss in the amount of the uninsured balance of the mortgage still owing to the bank.

ISSUE

[3] There is really only one issue in this summary trial: Did Mr. Bradshaw reasonably rely upon the bank's inaccurate communications that he had mortgage insurance, when in fact he did not? For the reasons which follow, I conclude that there is no evidence of such reliance and that the plaintiff's claim must therefore fail.

[4] However, in the event that I am wrong in this conclusion, if Mr. Bradshaw did reasonably rely upon the bank's misrepresentation, the second potential issue is whether that reliance was detrimental to him in the sense that damages resulted. I conclude that it was not.

FACTS

[5] On July 16, 2004, Mr. Bradshaw obtained a Mortgage Commitment and Disclosure Statement from the Bank of Montreal confirming his eligibility for financing to purchase a home at 13 Takhini Avenue in Whitehorse. The loan was at a fixed interest rate of 4.9% per annum. The document indicated that Mr. Bradshaw's solicitor for the

mortgage would be Serge Lamarche, of the then Lackowicz and Shier law firm. The document included the following figures respecting the amount of the loan:

Basic Loan Amount	$116,000.00
Mortgage Default Insurance Premium	$1,160.00
Total Mortgage Loan	$117,160.00
Deducted from proceeds of Total Mortgage Loan for:	
Default Ins. Premium remitted plus Prov. Tax at 0.0% -	$1,160.00
Disbursed to you or as directed by you	116,000.00

Curiously, there was no evidence to indicate whether the above information was intended to confirm that mortgage insurance was being excluded from the total amount of the loan. One reasonable interpretation would be that since the default insurance premium was shown as "deducted" from the "Total Mortgage Loan", such premium was not intended to be paid.

[6] However, the Mortgage Commitment and Disclosure Statement also included the following information:

Total Payment amount		$353.63
Principal & Interest	$310.02	
Taxes	$36.58	
Life Insurance Premium	$7.03	

Once again, there was no evidence as to why the life insurance premium was listed as part of the "Total Payment Amount", if indeed the mortgage default insurance premium had been deducted from what was being loaned to Mr. Bradshaw.

[7] On August 4, 2004, Mr. Bradshaw signed the mortgage in the presence of his lawyer, who acted as a witness. The principal amount of the mortgage was

$117,160.00. That would seem to confirm that Mr. Bradshaw was indeed being charged the Mortgage Default Insurance Premium of $1,160.00, as per the Mortgage Commitment and the Disclosure Statement of July 16, 2004.

[8] I find as a fact that, at or about the time that Mr. Bradshaw signed the mortgage, he was provided with a seven page "Mortgage Protection Life Insurance" package by the bank. That document indicated to potential borrowers the benefits and potential costs of taking out mortgage life insurance, and encouraged them to do so. Pages 3 and 6 of that package gave the borrower the option of either accepting the insurance, for which they would pay a periodic stated premium, or waiving the opportunity to buy such life insurance (the "waiver"). Page 3 of the package was the bank's copy of the document, and page 6 was the customer's copy of the same document.

[9] The bank's copy of the waiver in this case was produced in evidence. It indicates that it is in relation to the mortgage signed by Mr. Bradshaw. At the bottom of that document is the following statement:

> **"Waiver of Insurance**
>
> By signing below, you acknowledge that you have been given the opportunity to buy life insurance for the mortgage listed above and have determined that you are not eligible or decided not to take advantage of this offer. You also understand that you can apply for coverage at any time, subject to the Terms and Conditions then in effect."

Below that statement was a box ticked off stating:

> "do not wish to take insurance at this time"

Below that is the signature of Mr. Bradshaw, unfortunately undated.

[10] The plaintiff submitted that while Mr. Bradshaw “may have signed a waiver of insurance at some point in time, when that occurred is not clear.” I have no difficulty finding that the waiver was signed by Mr. Bradshaw at or about the time that he signed the mortgage on August 4, 2004. One might reasonably expect that the Mortgage Protection Life Insurance package would have been among the various documents reviewed by Mr. Bradshaw at the time of taking out the mortgage. The waiver from that package has the mortgage number on it and the amount of the loan of $117,160.00. It also shows that (had Mr. Bradshaw accepted the insurance) the insurance premium would have been $7.03 per mortgage payment, which is consistent with the information in the Mortgage Commitment Disclosure Statement.

[11] The Whitehorse branch manager of the Bank of Montreal, Richard Oviatt, explained in his affidavit that normally all mortgage applications are set up with life insurance coverage included by default. Specifically, the documents are all prepared to indicate that insurance coverage *will* be selected, but if the mortgagor chooses not to have insurance then he or she signs the waiver. The waiver is then kept in the bank’s records and (generally) a copy of the waiver is not given to the client. Further, if the mortgagor waives the insurance coverage, the other parts of the uncompleted insurance application package are usually discarded. I find that is what happened in this case.

[12] Although the original of the waiver was not produced in evidence, I am satisfied that Mr. Oviatt and his staff made reasonable efforts to locate it, but were ultimately unsuccessful. The photocopy which was produced is therefore the best available evidence.

[13] Mr. Oviatt further explained that when the mortgage documents are processed, if the bank's officer punches in the letter "Y" into the computer system, that signifies an answer of "YES" to the query of whether the mortgagor has accepted life insurance coverage. As a result, all subsequent documents generated by the bank's computer system will indicate that the mortgage carries such insurance, unless the error is corrected. For the same reason, the insurance premiums would also be automatically deducted from the mortgagor's account, along with the mortgage payments.

[14] On August 6, 2004, the bank sent a memorandum to Mr. Bradshaw confirming that his mortgage loan had been advanced as of that day in the amount of $117,160.00. It further indicated, incorrectly, that the total regular bi-weekly payments were to include a life insurance premium of $7.03.

[15] Sometime shortly after the end of 2004, the bank sent a "Statement of Mortgage Account" for that year to Mr. Bradshaw advising him of the particulars of his mortgage balance. At the beginning of that statement, was the following sentence, "You have single life insurance coverage on your mortgage. You do not have accident & illness mortgage protection on your mortgage – apply today."

[16] The same information appeared on a Statement of Mortgage Account for the year 2005, presumably sent to Mr. Bradshaw in early 2006.

[17] Incidentally, Mr. Oviatt produced another waiver, which was similarly undated but which also referred to the mortgage by its number, whereby Mr. Bradshaw declined the purchase of accident and illness mortgage protection. I find that this was probably signed at the same time as the waiver of life insurance for the mortgage. Apparently, this waiver was correctly processed, as Mr. Bradshaw was never charged any

premiums for accident and illness protection, and the Statements of Mortgage Account for 2004 and 2005 both confirmed he had no such coverage.

[18] Zoe Morrison met Mr. Bradshaw in September 2004 and began a relationship with him. In December 2005 she moved into Mr. Bradshaw's house at 13 Takhini Avenue. On July 22, 2006, Mr. Bradshaw died, intestate, as a result of a helicopter accident. With the agreement and assistance of Mr. Bradshaw's family, who live outside of the Yukon, Ms. Morrison applied for and received letters of administration appointing her as administrator of Mr. Bradshaw's estate.

[19] On or around July 31, 2006, Ms. Morrison contacted the bank to advise them of Mr. Bradshaw's death and was informed, incorrectly, that he had life insurance on his mortgage.

[20] Sometime in August 2006, the bank discovered that Mr. Bradshaw had initially signed a waiver of the life insurance coverage on the mortgage and rebated his account the amount of $351.50 for the insurance premiums which had been automatically deducted from his account in error. The mistake was not brought to Mr. Oviatt's attention until shortly after October 11, 2006.

[21] On October 19, 2006, Mr. Oviatt spoke with Ms. Morrison and informed her that Mr. Bradshaw did not have life insurance on the mortgage.

[22] Mr. Oviatt has also confirmed that, between the time of taking out the mortgage and his death, Mr. Bradshaw never subsequently applied for life insurance on the mortgage and at no time did he make any inquiries of the bank regarding the existence of such insurance.

ANALYSIS

[23] The tort of negligent misrepresentation arises from the English case of *Hedley Byrne & Co. v. Heller & Partners Ltd.,* [1964] A.C. 465 (H.L.). That case was referred to by the Supreme Court of Canada in *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87, 1993 CanLII 156 (S.C.C.), at page 29 (CanLII):

> "The required elements for a successful *Hedley Byrne* claim have been stated in many authorities, sometimes in varying forms. The decisions of this Court cited above suggest five general requirements: (1) there must be a duty of care based on a "special relationship" between the representor and the representee; (2) the representation in question must be untrue, inaccurate, or misleading; (3) the representor must have acted negligently in making said misrepresentation; (4) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and (5) the reliance must have been detrimental to the representee in the sense that damages resulted. …"

Counsel for the bank concedes that the first three parts of the test for negligent misrepresentation have been satisfied in this case, but he disputes the fourth and fifth aspects of that test.

Reasonable Reliance?

[24] With respect to the question of whether Mr. Bradshaw reasonably relied upon the inaccurate information sent to him by the bank, I understood the plaintiff's counsel to argue as follows.

[25] Firstly, as I indicated above, the plaintiff's counsel seems to suggest that there was some uncertainty about when the waiver of insurance was signed by Mr. Bradshaw. I have already disposed of that issue by finding that the waiver was more than likely signed at or about the time the mortgage was signed on August 4, 2004.

[26] Secondly, the plaintiff's counsel suggested that, with respect to waiver, where a party is engaged in the business of advising people and offering services, and where certain protections for services may be waived, there is an onus on that party to ensure that the person waiving these protections clearly understands the nature of the document they are signing, and that all relevant information must be disclosed. In the case at bar, counsel argued that the bank had a duty, in offering life insurance, to ensure not only that Mr. Bradshaw understood what he was signing under the terms of the waiver, but that he also understood that, in the event he wished life insurance in the future, it would require a further application. Further, on this point, the plaintiff's counsel argued that "if this fact [the need to apply if he changed his mind] was not made clear" to Mr. Bradshaw, and he "was subsequently led into error" through reliance on his payment of premiums and the various statements from the bank indicating that he had life insurance, then the bank is "negligent for failing to fully explain the nature and effect of the waiver of insurance".

[27] In my view, there is an evidentiary burden on the plaintiff to establish a foundation for the suggestion that Mr. Bradshaw did not understand the nature of the waiver he signed. In the case relied upon by the plaintiff, *Deraps* v. *Coia*, 1999 CanLII 3790, (1999), 124 O.A.C. 73 (Ont.C.A.), there was an evidentiary foundation for the plaintiff's claim that she did not understand the meaning and import of the waiver at the time she signed it. There is no such evidence in the case at bar.

[28] In addition, the wording of the waiver (see para. 9 above) is in plain English and clear on its face. It specifically informed Mr. Bradshaw that he could apply for life insurance coverage at any time in the future. The plaintiff's counsel speculates that this

fact may not have been made clear to Mr. Bradshaw, but failed to point to any evidence to support that inference. And, if there was any confusion on Mr. Bradshaw's part, he presumably had access to his lawyer for advice.

[29] It is also important to note that Mr. Bradshaw signed a waiver of accident and illness mortgage protection at the same time as he waived the life insurance protection. That waiver similarly informed him that he could apply for coverage at any time in the future, should he change his mind. That information was reinforced in the Statements of Mortgage Account sent to Mr. Bradshaw for the years 2004 and 2005. As a result, it would seem to have been made abundantly clear to Mr. Bradshaw that, should he have changed his mind about declining either form of insurance in the future, then it would be necessary for him to contact the bank and make an application for coverage.

[30] Finally on this point, the plaintiff's counsel says that Mr. Bradshaw was somehow "led into error" by the bank's conduct and that therefore the bank is negligent for failing to fully explain to Mr. Bradshaw that he would have to apply for life insurance in the future, should he change his mind. Thus, the premise of this submission requires me to conclude that Mr. Bradshaw did, in fact, rely upon the incorrect statements and the deduction of premiums in error. However, for the reasons which follow, I conclude there is no evidence of any such reliance.

[31] Therefore, the plaintiff's second argument with respect to the waiver must fail.

[32] The third aspect of the plaintiff's argument, as I have just alluded to, stresses that Mr. Bradshaw could have been expected to reasonably rely on the bank's statements and the unauthorized premium deductions. Here, counsel stated that "the Court must rely on what a reasonable person in [Mr.] Bradshaw's situation *may* have relied upon",

with respect to the bank's conduct in that regard (my emphasis). The plaintiff's counsel further stated that it would be reasonable for Mr. Bradshaw to rely on the bank's statement as accurate, since they reflected the previous information provided by the bank in its memorandum of August 6, 2004, confirming the terms of the mortgage and including the fact that life insurance premiums would be charged. Counsel then concluded by stating that it "appears" that Mr. Bradshaw was aware of the insurance premium payments from the outset and that he "accepted [the] advice" from the bank that he had life insurance on the mortgage. Thus, the plaintiff's counsel concluded that Mr. Bradshaw relied on the bank's incorrect representations because "it is reasonable to infer that he would have objected to the premiums payments" if he had no such reliance.

[33] The flaw in this argument is that it once again relies on pure speculation as to Mr. Bradshaw's state of mind as a result of having received the inaccurate information from the bank. There is simply no evidence whatsoever in that regard. First, there is no evidence that Mr. Bradshaw had actual notice of the bank's misinformation and/or the unauthorized premium deductions. As I said at the hearing, it is equally plausible that he ignored the bank's statements and paid no attention to the relatively small premiums being added to his bi-weekly mortgage payments. Second, even speculating that he had such actual notice, there is no evidence that he relied upon the misinformation or the unauthorized deductions. Third, there is no basis for concluding that such reliance was reasonable. On the contrary, given that Mr. Bradshaw did not fill out an application for insurance and given that he signed two waivers expressly declining insurance, both of which explicitly informed him that he would be required to apply for insurance, if he

changed his mind in the future, then, even assuming that he was actually aware of the bank's misinformation and the unauthorized premium deductions, any expectation that he therefore had valid and enforceable life insurance would have been unreasonable.

[34] The bank's counsel submitted that the plaintiff has the onus in this summary trial to prove its case and it has simply failed to do so. Further, the bank says that the evidence supports an inference that Mr. Bradshaw clearly did *not* intend to take out life insurance on the mortgage. I agree and would add that such an inference would be consistent with his circumstances at that time. Given that Mr. Bradshaw was a single male of approximately age 30 when he purchased 13 Takhini Avenue and given that he had not yet met Ms. Morrison, he likely assumed that, in the absence of a spouse or any dependants and in the event of his death, the house would simply be sold and the proceeds used to pay off the mortgage. Thus, had Mr. Bradshaw in fact subsequently learned that he was being charged for life insurance, one might reasonably have expected him to question the bank in that regard. However, the absence of evidence that Mr. Bradshaw had concerns about the bank's unauthorized deductions, or queried them with anyone, supports the conclusion that he was unaware of the bank's error.

[35] In order for the plaintiff's claim to have any possibility of success, it would seem to me that she ought to have adduced evidence of conversations or communications made by Mr. Bradshaw during his life-time to indicate that: (a) he was aware of the unauthorized premium deductions; and (b) that he somehow changed his mind and decided to acquiesce with the bank's conduct, in the expectation that he would continue to receive the insurance protection. However, there is simply no such evidence. Accordingly, the plaintiff has failed to meet the fourth part of the *Hedley Byrne* test, i.e.

there is no evidence that Mr. Bradshaw reasonably relied upon the bank's inaccurate communications that he had mortgage insurance.

[36] In any event, even if there were evidence that Mr. Bradshaw became aware of the bank's error, his estate cannot now attempt to take advantage of that error by demanding payment of the full amount of the mortgage balance. In *McCunn Estate* v. *Canadian Imperial Bank of Commerce*, (2001) 53 O.R. (3d) 304, the Ontario Court of Appeal held, at para. 23, that where a party knows of another's mistake, or should reasonably know of it, he cannot expect the law will permit him to take advantage of it.

[37] The plaintiff relied on the case of *Silver-Newman* v. *Bank of Montreal*, [2005] Q.J. No. 1723. In that case, the plaintiff and her husband obtained a mortgage from the Bank of Montreal and concurrently signed an application for life insurance on the mortgage. The enrolment form for the insurance policy included some small print which indicated that the insurance would terminate when the borrower, the plaintiff's husband, turned 70 years of age. The husband turned 70 on October 26, 1996 and died on September 9th, 2000. Prior to the husband's death, the plaintiff, as co-borrower, had received various statements from the bank indicating the existence of mortgage life insurance, even after her husband had reached his 70th birthday. In addition, the bank continued to receive and accept the couple's monthly life insurance premiums. It was not until after the husband's death that the bank advised the plaintiff that it had been accepting the insurance premiums in error, relying upon the clause which terminated coverage upon the husband obtaining the age of 70. Under protest, the plaintiff paid out the balance of the mortgage. The court held that the admitted error of the bank, in providing documentation to the plaintiff which stipulated that the life insurance was in force after

the husband turned 70, was a form of disinformation which constituted negligence. Accordingly, the court ordered that the bank repay the plaintiff the full amount she paid to the discharge the mortgage.

[38] However, *Silver-Newman* is distinguishable on a number of points. First, the plaintiff and her husband, as co-borrowers, actually applied for life insurance on the mortgage, which Mr. Bradshaw did not do. Second, the court held that the bank could not ignore the fact that it led the couple into error by informing them in writing, after the husband had turned 70, that they had life insurance as well as by continuing to deduct the amount of monthly life insurance premium from their account. At para. 29, the court said:

> "This error by the Bank induced, in turn, the Newmans into the error of not taking any measures to protect a vulnerable position, for which the Bank must now be held to account."

In the case at bar, there is no evidence that Mr. Bradshaw was induced by the bank's error to not take measures to protect himself. Third, in *Silver-Newman*, there was evidence that, had the bank not erred, the plaintiff and/or her late husband might have simply increased their line of credit, which was insured and without any age condition. In other words, there was evidence that, but for the bank's error, the plaintiff could have mitigated her loss. In the case at bar, as I will next address, there is no such evidence.

Detriment and Damages?

[39] Assuming I am wrong in the above conclusion and that it might be successfully argued that Mr. Bradshaw did reasonably rely upon the bank's negligent misrepresentation, the fifth part of the *Hedley Byrne* test still requires the plaintiff to

prove that the reliance must have been detrimental to Mr. Bradshaw in the sense he suffered damages as a result. Here, the plaintiff's counsel argued that it would be reasonable to infer that Mr. Bradshaw, in reliance upon the bank's negligent misrepresentation, would not have sought any other form of life insurance protection. Therefore, since there is, in fact, no such protection, Mr. Bradshaw's estate has suffered a loss by way of its liability to pay the balance of the mortgage.

[40] Counsel for the bank countered by submitting that, once again, the plaintiff bears the onus of supplying proof that Mr. Bradshaw or his estate actually suffered a financial detriment consequent to Mr. Bradshaw's assumed reasonable reliance upon the bank's conduct. He says that there is no such proof and that it is pure speculation for the plaintiff to suggest that Mr. Bradshaw would not have sought other forms of life insurance protection, because he believed he had life insurance on the mortgage. Again, I agree with this argument.

[41] The converse of the plaintiff's argument seems to be that, but for the bank's error, Mr. Bradshaw would have purchased other form or forms of life insurance, which might have been used to pay out the balance of the mortgage and thus alleviate the loss. However, that reasoning is not only speculative, it is also weakened by the absence of evidence as to when Mr. Bradshaw, assuming he had actual notice of the bank's error, might have come to reasonably rely upon it. The affidavit of Ms. Morrison indicates that, although she and Mr. Bradshaw became a couple in the fall of 2004, she did not move into 13 Takhini Avenue until December 2005. That was almost 1 ½ years after Mr. Bradshaw took out the mortgage. Prior to that point in time, as I commented above, it would not have been surprising for Mr. Bradshaw, as a single young man with

no spouse or dependants, to have no particular need for life insurance of any kind. Therefore, it seems to me that the “but for” inference implicitly urged by the plaintiff cannot succeed.

[42] In summary, I agree with the bank’s counsel that any supposed reasonable reliance by Mr. Bradshaw must have resulted in actual, and not merely possible, financial detriment. The plaintiff’s argument that the bank’s error, in a but for sense, caused Mr. Bradshaw not to seek other forms of life insurance, at best, only gives rise to the possibility of financial detriment.

[43] Finally, it is clear that there is no proof of any loss suffered by Ms. Morrison, either personally or in her capacity as administrator of Mr. Bradshaw’s estate. She cannot claim to have suffered a loss as a potential statutory beneficiary of the estate under the *Estate Administration Act*, R.S.Y. 2002 c. 77. While she may view herself to have been Mr. Bradshaw’s common-law spouse, it would appear that she did not cohabit with him for at least 12 months immediately before his death. Therefore, Ms. Morrison does not fit the definition of “common-law spouse” under that *Act*. Nor has Ms. Morrison proven that she, in reliance upon the initial misstatement by the bank on or about July 31, 2006 (that Mr. Bradshaw had life insurance), acted to the financial detriment of the estate.

CONCLUSION

[44] The plaintiff’s claim is dismissed.

[45] While I did not hear from the parties on the issue of costs, in the circumstances, keeping in mind that it was the bank’s error which precipitated this litigation, I will depart

from the usual rule in which costs follow the event and order that each party bear their own costs.

GOWER J.