

Clark Boyce

Appellant

v.

Dorothy Dean Mouat

Respondent

(and cross-appeal)

FROM

THE COURT OF APPEAL OF NEW ZEALAND

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE
4TH OCTOBER 1993

Present at the hearing:-

LORD GOFF OF CHIEVELEY
LORD JAUNCEY OF TULLICHETTLE
LORD LOWRY
LORD MUSTILL
LORD SLYNN OF HADLEY

[Delivered by Lord Jauncey of Tullichettle]

This appeal concerns the position of a solicitor who carries out a conveyancing transaction on behalf of two parties with conflicting interests. The dramatis personae are Mrs. Mouat, the respondent, a widow of 72 years at the material time, her son Mr. R.G. Mouat, a chartered accountant and management consultant then aged 45 years, and Mr. Martin Boyce, a solicitor and partner in the Christchurch firm of Clark Boyce, the appellants.

In August or September 1988 Mr. R.G. Mouat wished to raise \$100,000 to pay for certain alterations to his house and meet certain business expenses. Since his own house was fully mortgaged he asked his mother whether she would be prepared to mortgage her house for the required sum and upon her agreement he made preliminary arrangements for the execution by her of a mortgage as a first security over her house to secure a loan of \$110,250 from Allied Mortgage Guarantee Company Limited ("AMG"). In terms of the proposed arrangements Mrs. Mouat was the mortgagor, Mr. R.G. Mouat was the guarantor and the loan was for a period of three years with interest of \$4065 payable quarterly. It was part of the arrangement that Mr. R.G. Mouat would undertake primary liability for

payment of the interest. In pursuance of the proposed arrangements AMG sent certain documents to Mr. R.G. Mouat's solicitor, Mr. P.M. Davis of Messrs. Meares and Williams, who was also a family friend, but he advised Mr. R.G. Mouat that it was not a matter in which his firm should properly act. Thereafter Mr. R.G. Mouat asked Mr. Boyce whether he would be prepared to act for him and his mother to which Mr. Boyce replied that he would subject to certain conditions. On 9th November 1988 Mrs. Mouat was taken by her son to Mr. Boyce's office and during the course of a meeting, whose details will be referred to later, Mrs. Mouat signed the mortgage and some ancillary documents. Mr. R.G. Mouat also signed the mortgage. In 1989 Mr. R.G. Mouat's business deteriorated and by early 1990 he was in arrears with payment of interest on his mother's mortgage. Later he became bankrupt with the result that Mrs. Mouat was left with a liability to repay the principal sum of \$110,250 together with arrears of interest. She thereafter raised the present action against the appellants alleging in her statement of claim that they were in breach of contract in *inter alia* the following respects:-

- "(a) That the Defendant failed to ensure that the Plaintiff had her own independent advice in respect of the said transaction.
- (b) That the Defendant failed to refuse to act for the Plaintiff in respect of the said transaction when it was acting for the said Robert Gordon Mouat."

She alleged negligence on the part of the appellants in identical respects. She further alleged that the appellants had breached their fiduciary obligations in the following manner:-

- "(a) It failed to decline to act for the Plaintiff.
- (b) It failed to disclose the following relevant information to the Plaintiff:-
 - (i) That the former solicitors for the said Robert Gordon Mouat, Meares Williams, had declined to act for either the said Robert Gordon Mouat or the Plaintiff in respect of the proposed mortgage transaction.
 - (ii) That it had only been instructed on the 8th day of November 1988 to act for the said Robert Gordon Mouat in respect of the proposed mortgage transaction and knew nothing about his ability to service the mortgage.
 - (iii) That it was not in her interests to sign the mortgage.
- (c) It failed to adequately advise the Plaintiff of her need for independent advice."

After trial Holland J. gave judgment for the appellants but the Court of Appeal by a majority allowed Mrs. Mouat's appeal and remitted the case back to the High Court to deal with questions of contributory negligence and contribution. At this stage it is unnecessary to refer to the further proceedings which followed the remit.

It is appropriate now to return to the meeting in Mr. Boyce's office which lasted for some forty to fifty minutes. Holland J. accepted Mr. Boyce's account of this meeting and where there was a conflict preferred his evidence to that of Mrs. Mouat. Although he found that in 1988 Mrs. Mouat was fully able to comprehend the nature of the transactions involved and the risk to her property he considered that her health had deteriorated since that time and that her memory as to certain events which had then occurred was not entirely accurate. In reaching this conclusion he made clear that Mrs. Mouat gave her evidence in accordance with what she believed to be true.

At the beginning of the meeting Mr. Boyce pointed out to Mrs. Mouat that her position as mortgagor providing the security was substantially different to that of her son as guarantor and recipient of the loan and he advised her to obtain independent legal advice. He also indicated that he could arrange for her to see a lawyer at one of the neighbouring law firms if she so wished. Mrs. Mouat stated that she did not think it was necessary to see another lawyer. Mr. Boyce formed the impression that she had made her decision and that was the end of the matter. He then drafted a form of authority and declinature of independent advice which Mrs. Mouat agreed to sign and which was in the following terms:-

"Messrs. Clark Boyce
Solicitors
CHRISTCHURCH

Attention: Mr. Boyce

Dear Sirs

I hereby direct and authorise you to disburse to my son Robert Gordon Mouat the net proceeds derived from the mortgage over my property at 106 Roydvale Avenue, Christchurch and given to the Allied Mortgage Guarantee Company Limited on the 9th November, 1988 and in accordance with the documentation I have signed at your offices today.

I further direct that the receipt of my son shall be a sufficient and proper discharge to you as the disbursement of those funds.

I acknowledge you have fully advised me of the legal implications and effects arising out of the mortgage I have given to Allied Mortgage Guarantee Company

Limited. I am aware your instructions in this matter have been given to you by Allied Mortgage Guarantee Company Limited on behalf of my son. Notwithstanding your advice I should obtain independent legal advice in relation to the matter I record and hereby instruct you I do not wish so to do.

Yours faithfully

Mrs D D Mouat
(Dorothy Dean Mouat)"

Thereafter Mr. Boyce went through the terms of the mortgage with Mrs. Mouat and pointed out to her as bluntly as he could that if her son failed to meet the mortgage payments she would lose her house and property. Mrs. Mouat then stated that she considered that her son knew what he was doing and she trusted him. Mrs. Mouat also made clear that she was already aware of the consequences of non-payment by her son. She thereafter signed the form of authority and the mortgage. On three occasions during the meeting Mr. Boyce raised the question of independent advice but Mrs. Mouat appeared to be determined to proceed without it.

Against that background of fact Holland J. dealt with the allegation that Mr. Boyce should have ensured that Mrs. Mouat had independent advice in the following manner:-

"I am satisfied from the totality of the evidence that Mrs. Mouat knew at all times that the defendant was her son's solicitor, she knew the type of transaction that she was about to embark upon, and that having decided to support and trust her son she did not expect or require any legal advice as to the wisdom of her entering into the transaction. In the circumstances Mr. Boyce was not negligent in what he did in this regard."

He rejected the claim that Mr. Boyce should have declined to act for Mrs. Mouat on the ground that there was no general principle of law to this effect and went on to hold that Mr. Boyce's failure to discuss with Mrs. Mouat Messrs. Meares Williams' refusal to act did not amount to a non-disclosure of material information in breach of a fiduciary duty. Even if the matter had been discussed, the learned judge considered that Mrs. Mouat would either have said that she was aware of the matter or that it was not a matter which concerned her. Holland J. further rejected the claim that in the circumstances Mr. Boyce should have disclosed to Mrs. Mouat that he was unaware of Mr. R.G. Mouat's ability to service the mortgage. He dealt with the claim that Mr. Boyce should have advised Mrs. Mouat that it was not in her interests to sign the mortgage in this way:-

"It was made quite apparent to Mr. Boyce that Mrs. Mouat knew what a mortgage was and that if her son defaulted she stood the risk of losing her home. It was obvious to her, as it was to everyone else, that it was

not in her financial interests to sign the mortgage, but nevertheless she wished to do so. The circumstances were not such as gave rise to any obligation on Mr. Boyce to advise her against signing the transaction.

I note that in giving evidence the plaintiff indicated that if she had been advised by Mr. Boyce not to sign the mortgage she would not have done so. Sadly, I am unable to accept that answer as accurately recording the situation as it was on the day."

It was implicit in Mr. Boyce's evidence, which Holland J. accepted, that Mrs. Mouat did not require advice from him as to the wisdom of the transaction and that she had already decided what she wanted to do. Indeed during his evidence-in-chief Mr. Boyce said:-

"I recall it was at that point she said she trusted Robbie and that was really the end of it as far as she was concerned. I got the distinct impression she'd made up her mind that she was going to assist him in this way. And there was nothing I was going to be able to do to dissuade her from that."

The majority of the Court of Appeal, McGechan J. and Sir Gordon Bisson, Gault J. dissenting, allowed the appeal although accepting Holland J.'s findings as to credibility and fact. Sir Gordon Bisson who delivered the leading judgment in relation to breach of contract and tort considered that Mr. Boyce was not justified in accepting Mrs. Mouat's instructions relying, as he did, on his impression that she had made up her mind to assist her son. After referring to the conclusion (*supra*) of Holland J. that Mrs. Mouat did not require legal advice as to the wisdom of entering into the transaction he stated:-

"With respect, for the reasons I have given I draw a different conclusion from the evidence. In a word, the situation was so obviously one of grave conflict, one in which the son's usual solicitor was not prepared to act even for him, that Mr. Boyce, who was not a family solicitor with a full understanding of all the circumstances, should have ensured the appellant had independent legal advice or in the absence of advising her fully himself, he should have refused to act for her as well as for her son. In my view he was negligent under paras (a) and (b) as pleaded and already set out."

In relation to fiduciary duty Sir Gordon Bisson said:-

"Applying those principles to this case, I am satisfied that there was a breach of fiduciary duty under the first allegation, that Mr. Boyce should have declined to act for the appellant when already acting for Mr. Mouat for the same reasons I have held he was negligent. He did advise the appellant that she

should have independent legal advice but he did not make the fullest disclosure to her of the circumstances known to him, or adequately advise her of her need for independent advice. Although the appellant understood her home would be at risk if her son defaulted in making the payments due under the mortgage she did not know the degree of that risk. Nor did Mr. Boyce. He had the last chance to advise her on that risk. He should have disclosed that her son's usual solicitors had declined to act for him and that he, Mr. Boyce, unlike Mr. Davies knew nothing of her son's financial position and that he had made no enquiries into it. For these reasons I consider there was a breach of fiduciary duty as pleaded."

McGechan J. agreed with Sir Gordon Bisson's conclusions as to breach of fiduciary duty and considered that Mr. Boyce had failed to make a sufficient disclosure of material matters to establish a fully informed consent to the dual retainer proposed and that this failure related in particular to the following three facts:-

- (1) that her son's solicitors had refused to act,
- (2) that he had no knowledge of her son's ability to service the mortgage and
- (3) that it was not in her interests to sign the mortgage.

There is no general rule of law to the effect that a solicitor should never act for both parties in a transaction where their interests may conflict. Rather is the position that he may act provided that he has obtained the informed consent of both to his acting. Informed consent means consent given in the knowledge that there is a conflict between the parties and that as a result the solicitor may be disabled from disclosing to each party the full knowledge which he possesses as to the transaction or may be disabled from giving advice to one party which conflicts with the interests of the other. If the parties are content to proceed upon this basis the solicitor may properly act. In *Boulting v. Association of Cinematograph, Television and Allied Technicians* [1963] Q.B. 606 Upjohn L.J. said at page 636:-

"... the client is entitled to the services of his solicitor who may not charge more than he is legally entitled to, and must not put himself into a position where he may owe conflicting duties to different clients (see, for example, *In re Haslam and Hier-Evans* [1902] 1 Ch. 765). But the person entitled to the benefit of the rule may relax it, provided he is of full age and sui juris and fully understands not only what he is doing but also what his legal rights are, and that he is in part surrendering them."

Farrington v. Row McBride & Partners [1985] 1 NZLR 83 concerned a solicitor who advised a client to invest money in a company which was also a client of his without

disclosing that fact to the potential investor. Richardson J. said at page 90:-

"A solicitor's loyalty to his client must be undivided. He cannot properly discharge his duties to one whose interests are in opposition to those of another client. If there is a conflict in his responsibilities to one or both he must ensure that he fully discloses the material facts to both clients and obtains their informed consent to his so acting:

'No agent who has accepted an employment from one principal can in law accept an engagement inconsistent with his duty to the first principal from a second principal, unless he makes the fullest disclosure to each principal of his interest, and obtains the consent of each principal to the double employment' (*Fullwood v. Hurley* [1928] 1 K.B. 498, 502 per Scrutton L.J.).

And there will be some circumstances in which it is impossible, notwithstanding such disclosure, for any solicitor to act fairly and adequately for both."

In the last sentence of that dictum Richardson J. no doubt had in mind a situation where one client sought advice on a matter which would involve disclosure of facts detrimental to the interests of the other client.

In determining whether a solicitor has obtained informed consent to acting for parties with conflicting interests it is essential to determine precisely what services are required of him by the parties. In this case Holland J. was satisfied that Mrs. Mouat was not concerned about the wisdom of the transaction and was "merely seeking (sic) the service of the solicitor to ensure that the transaction was (sic) given proper and full effect by way of ascertaining questions of title and ensuring that by appropriate documentation the parties achieved (sic) what they had (sic) contracted for". Gault J. considered that this finding was amply supported by the evidence. As has already been observed Sir Gordon Bisson drew a different conclusion from the evidence as did McGechan J. In their Lordships' opinion Holland and Gault JJ. drew the correct conclusion. As Viscount Haldane L.C. observed in *Nocton v. Lord Ashburton* [1914] A.C. 932 at page 957 "it is only in exceptional circumstances that judges of appeal, who have not seen the witness in the box, ought to differ from the finding of fact of the judge who tried the case as to the state of mind of the witness". Holland J. had the advantage of seeing and hearing all the witnesses and of forming an impression therefrom as to their states of mind and what had occurred during the meeting in Mr. Boyce's office. There are no exceptional circumstances which would justify differing from his conclusions on these matters.

Their Lordships are accordingly satisfied that Mrs. Mouat required of Mr. Boyce no more than that he should carry out the necessary conveyancing on her behalf and explain to her the legal implications of the transaction. Since Mrs. Mouat was already aware of the consequences if her son defaulted Mr. Boyce did all that was reasonably required of him before accepting her instructions when he advised her to obtain and offered to arrange independent advice. As Mrs. Mouat was fully aware of what she was doing and had rejected independent advice, there was no duty on Mr. Boyce to refuse to act for her. Having accepted instructions he carried these out properly and was neither negligent nor in breach of contract in acting and continuing to act after Mrs. Mouat had rejected his suggestion that she obtain independent advice. Indeed not only did Mr. Boyce in carrying out these instructions repeat on two further occasions his advice that Mrs. Mouat should obtain independent advice but he told her in no uncertain terms that she would lose her house if Mr. R.G. Mouat defaulted. One might well ask what more he could reasonably have done.

When a client in full command of his faculties and apparently aware of what he is doing seeks the assistance of a solicitor in the carrying out of a particular transaction, that solicitor is under no duty whether before or after accepting instructions to go beyond those instructions by proffering unsought advice on the wisdom of the transaction. To hold otherwise could impose intolerable burdens on solicitors.

It remains to consider the conclusion of the Court of Appeal that Mr. Boyce was in breach of fiduciary duties. Sir Gordon Bisson's observations on this matter have already been set out. McGechan J. agreed with these observations albeit at somewhat greater length. That a solicitor owes a fiduciary duty to a client is not in doubt. The classic case where the duty arises is where a solicitor acts for a client in a matter in which he has a personal interest. In such a case there is an obligation on the solicitor to disclose his interest and, if he fails so to do, the transaction, however favourable it may be to the client, may be set aside at his instance. (*Lewis v. Hillman* [1852] 3 Clark's H.L.C. 607). Another case of breach is where a solicitor acts for both parties to a transaction without disclosing this to one of them or where having disclosed it he fails, unbeknown to one party, to disclose to that party material facts relative to the other party of which he is aware. A fiduciary duty concerns disclosure of material facts in a situation where the fiduciary has either a personal interest in the matter to which the facts are material or acts for another party who has such an interest. It cannot be prayed-in-aid to enlarge the scope of contractual duties. Thus, there being no contractual duty on Mr. Boyce to advise Mrs. Mouat on the wisdom of entering into the transaction, she cannot claim that he nevertheless owed her a fiduciary duty to give that advice. Furthermore any duty of disclosure can only extend to the solicitor's knowledge of facts and not to his lack of knowledge thereof.

Both Holland and Gault JJ. considered that Mr. Boyce's failure to disclose that Messrs. Meares Williams had declined to act for Mr. R.G. Mouat was not a failure to disclose information material to the transaction. Given the information which was then available to Mr. Boyce and the fact that he saw nothing sinister in Messrs. Meares Williams' refusal to act their Lordships are satisfied that that information was not material information which should have been disclosed. It therefore follows that Mr. Boyce was not in breach of any fiduciary obligation owed to Mrs. Mouat.

It only remains to say a further word about Mr. Boyce's alleged failure to disclose his lack of knowledge as to Mr. R.G. Mouat's ability to service the mortgage. It is implicit in this allegation that Mrs. Mouat should have been advised to investigate her son's financial affairs. Such an allegation might be the basis for breach of contract but could not for the reasons already stated found a claim for breach of fiduciary duty. However even if it had amounted to a breach of contract there was evidence neither that Mrs. Mouat would have accepted the advice nor that if she had she would have acted differently. It follows that she has failed to establish that she suffered a loss as a result of any such breach.

For the foregoing reasons their Lordships will humbly advise Her Majesty that the appeal should be allowed and the judgment of Holland J. of 4th March 1991 be restored. There will be no order as to costs before the Board and in the Court of Appeal. It is accordingly unnecessary to consider the cross-appeal by Mrs. Mouat against a finding of contributory negligence in the proceedings subsequent to the remit by the Court of Appeal after the first hearing in that court.