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September 8, 2023

No damages caused by listing agent's failure to recommend legal advice (*Stanley v. Grech*)

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In some cases, real estate agents should recommend that their clients obtain legal advice about a proposed transaction. Situations may arise when the agent knows that a client has future development plans for a property or other issue that involve legal restrictions. Whether the failure to recommend legal advice results in liability will generally turn on evidence that the plaintiff could have pursued an alternative course of action that would have avoided the damages claimed.

In *Stanley v. Grech*, [2023 BCCA 348 \(CanLII\)](#), the Court of Appeal for British Columbia upheld the dismissal of an action for professional negligence against the plaintiff's real estate agent.

The property in issue was one of two lots on a residential "strata" property in the Southlands area of Vancouver, in a neighbourhood containing large properties which had luxury homes as well as equestrian facilities.

The original property was about 3.15 acres. In the mid-2000's, it was converted into two strata lots under the [Strata Property Act](#). The two lots shared "limited common property" that was designated for the exclusive use of the strata lot owners as tenants in common. Limited common property cannot be developed or altered without amending the strata plan, which requires the unanimous consent of all strata lot owners.

In February 2017, the plaintiff purchased one of the lots from his late friend's estate, pursuant to an option to purchase granted to him under her will. Under the strata plan, the lot comprised only the footprint of a 2000 square foot house along with the limited common property. The purchase price was \$4.5 million, which represented 50% of the appraised value.

The plaintiff intended to purchase the lot and re-sell it for development purposes,

envisaging the potential construction of a 7,000 square foot dwelling. He met the defendant real estate agent at an open house, who then assisted him in arranging private financing to complete the purchase. The agent was not otherwise retained to act for the plaintiff during the purchase.

In December 2016, before the plaintiff completed the purchase of the lot, the agent sent him a draft listing agreement for the sale of the lot with a listing price of \$13.888 million. The plaintiff subsequently purchased the lot in February 2017 and listed the property for sale with the defendant as the listing agent.

It turned out, however, that both the plaintiff and the agent operated under misapprehensions as to the nature of the strata lot. The plaintiff believed that he had exclusive use of both the portion of the lot with the dwelling and the related limited common property, and that the entire property could be redeveloped without the consent of the owner of the second strata lot. However, it could not be redeveloped without the consent of the owner of the other strata lot.

The agent had worked primarily in North and West Vancouver and had not previously sold a property in the Southlands. In January 2017, before the purchase was completed, he spoke to the listing agent for a property located across the street, which was a similar strata property. He was advised that the property had been on the market for some time because the owner needed the approval of the neighbouring strata owner to make any changes.

Over the course of 2017 and 2018, the property was listed for sale at \$13.88 million. Ultimately, however, the lot was sold for \$7.5 million in April 2018. The company that obtained title to the property was controlled by the owner of

the other strata lot. By that time, the defendant agent was no longer involved.

The plaintiff sued the agent for negligence, alleging that he breached his duties by:

- a) failing to recognize the nature of strata lot and the restrictions associated with it;
- b) recommending a listing price for the lot that was too high, based on his failure to understand the true nature of the restrictions on the strata lot; and
- c) failing to recommend or obtain legal advice.

The trial judge concluded that when the agent learned that there were restrictions on the redevelopment of the lot, he raised the issue but the plaintiff maintained that the situation with his lot was different and that he did not need the permission of the other owner to build. The plaintiff maintained that this information was wrong. The agent did not recommend that the plaintiff obtain legal advice. However, the plaintiff ignored the agent's information and did not seek legal advice because it did not accord with his own independently formed opinion of his rights.

In the trial judge's view, the plaintiff failed to prove that the agent's failure to understand and advise on the nature of the strata lot breached the standard of care. Similarly, the plaintiff did not establish that the agent breached the standard of care with respect to setting the listing price.

Conversely, the trial judge found that it was a breach of the standard of care for the agent

to have failed to either recommend that the plaintiff seek legal advice, despite his personal opinion, or to seek that legal advice himself given the potential issues with developing the lot. It ought to have been apparent to the agent that legal advice was required concerning the legal impediments to the development of the strata lot before any representations could be made to potential purchasers.

Nevertheless, the trial judge concluded that the plaintiff failed to prove that the agent's breach of the standard of care caused any damage since there was no evidence that he could have been in a better position had he received legal advice during the listing process. The claim was therefore dismissed: *Grech v. Stanley*, [2021 BCSC 2169](#).

On appeal, the plaintiff argued that the trial judge had failed to apply the correct approach to causation and had failed to consider whether there was a real and substantial possibility that he had suffered a loss as a result of the agent's negligence.

The appeal turned on the legal concept of causation, which involves two distinct inquiries. First, a plaintiff must prove that the defendant's breach was the factual cause of the loss. This is generally based upon a "but for" test which requires a plaintiff to establish on a balance of probabilities that the harm would not have occurred but for the defendant's negligent act: *Nelson (City) v. Marchi*, [2021 SCC 41](#) at para. [96](#); *Clements v. Clements*, [2012 SCC 32](#) at para. [8](#).


Second, a plaintiff must also establish that the defendant's breach was the legal cause of the loss, which requires proving that the harm was not too remote and was the "reasonably foreseeable result" of the negligent conduct: *Nelson* at para. [97](#).

The Court of Appeal agreed with the trial judge that the plaintiff failed to establish that the agent breached the standard of care by failing to recognize the issues with the strata lot. The plaintiff had not filed any expert evidence about the applicable standard of care. Expert evidence is generally required to establish the standard of care in professional negligence claims unless the error is egregious and involves a non-technical issue such that an ordinary person may be expected to have sufficient knowledge: *Krawchuk v. Scherbak*, [2011 ONCA 352](#).

Similarly, setting the listing price is not a non-technical matter or something within the knowledge of ordinary people, particularly given the unique issues involved with a strata lot. The plaintiff failed to establish that the agent breached the standard of care in that regard.

While the failure to recommend legal advice was a breach of the standard of care, the plaintiff failed to show that any damages were caused as a result. The Court of Appeal noted that the plaintiff relied primarily on the alleged improper listing price of the lot as the source of his damages. However, the plaintiff failed to prove that he would have been in a better economic position had he sought legal advice earlier (if such a course of action had been recommended by the agent), and the restrictions with the strata lot identified. There was no evidence that a sale would have been completed earlier for a higher price. The plaintiff's arguments about what else might have occurred were speculative.

The case shows the importance of establishing causation in professional negligence claims. Significantly, the plaintiff was already the beneficial owner of the lot by the time he listed the property for sale with the defendant. There was no suggestion advanced at trial that the agent should have advised the plaintiff on the



purchase of the lot, or that the plaintiff would not have purchased the lot but for any advice received (or not received) from him.

Contact us

If you have a litigation matter and are in need of legal advice, please do not hesitate to contact James Cook, at 416.865.6628 or jcook@grllp.com.

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