Dismissing professional negligence claims at the pleadings stage:
A commentary on a recent Ontario Court of Appeal decision

By: Chris Afonso

The Ontario Court of Appeal recently upheld the dismissal of a professional negligence claim at the pleadings stage of an action. Our firm represented the successful defendant who had been sued for negligent misrepresentation in connection with a real estate appraisal report. The dismissal occurred largely because of the disclaimers in the appraisal report. This decision, *Barkley v. Tier 1 Capital Management Inc*., 2019 ONCA 54 (“*Barkley*”) represents an important new development in the defence of professional negligence claims.

*Barkley* is one of three recent decisions amending the law governing a professional’s duty of care when drafting reports that others may rely on in making investment decisions. The first key decision was the Supreme Court of Canada’s 2017 decision *Deloitte & Touche v. Livent Inc. (Receiver of)*, [2017] 2 SCR 855 (“*Livent*”). The second was the Ontario Court of Appeal’s decision in *Lavender v. Miller Bernstein* *LLP*, 2018 ONCA 729 (“*Lavender*”).

In *Livent*, the Supreme Court updated the law governing when a duty of care is owed by a professional in respect of written reports. This appeal followed a trial in which an auditor was found liable to its client. The Supreme Court overturned a portion of the judgment based on the updated law.

The *Lavender* decision also involved audit reports. The plaintiffs were investors who were not clients of the auditor. The plaintiffs had been granted judgement against the auditor following a summary judgment motion, which had been decided before *Livent*. The auditor appealed. The Ontario Court of Appeal applied the updated law from *Livent* and found that the plaintiffs were not entitled to rely on the audit report. The judgment was overturned and the claim was dismissed.

In *Barkley*, the court dismissed a claim against a real estate appraiser because the appraiser did not owe a duty of care to the plaintiffs in respect of an appraisal report. This decision was made at the pleadings stage prior to any examinations for discovery.

In *Barkley*, the plaintiffs were a group of investors in a syndicated mortgage. The appraiser prepared an appraisal report for the property that was the subject of the mortgage. The appraiser had been hired by an investment firm who found the investors and arranged the mortgage. The investors never received the appraisal report, but did receive a brochure prepared by the investment firm summarizing the report very briefly.

The appraisal report contained a disclaimer provision stating that no party save for the investment firm was permitted to rely on the report without prior permission. There was another disclaimer that stated that the investment firm was not permitted to circulate the report without prior permission. No permission had been granted for either.

The *Barkley* case was a proposed class action. The representative plaintiffs brought a motion to certify the class action on behalf of all investors. The appraiser resisted this motion on multiple grounds, but the only ground considered by the motions judge was whether the Statement of Claim disclosed a reasonable cause of action.

To obtain a dismissal at this stage, the court had to find that the claim against the appraiser had no reasonable prospect of success. The appraiser met this threshold. The motions judge found that the investors were not permitted to rely on the report because of the disclaimer language. Accordingly, the court found the appraiser owed no duty of care to the investors.

The motions judge also ruled that even if a duty of care was owed, the fact that the investors never saw the appraisal report meant that they could never prove reasonable reliance – a necessary element for a misrepresentation claim. The motions judge found that the investors’ claims had no reasonable prospect of success for this second reason. The motions judges’ decision is reported at *Barkley v. Tier 1 Capital Management Inc*., 2018 ONSC 1956.

The investors appealed but the Court of Appeal upheld the lower court decision in full.

The *Barkley* decision represents a powerful precedent in the defence of professionals in negligent misrepresentation cases. Although the decision itself was largely an application of the legal concepts in *Livent* and *Lavender*, *Barkley* is the first case to apply these cases to achieve a dismissal at the pleadings stage. The only materials before the court in *Barkley* were the Statement of Claim and the appraisal report, which was explicitly referred to in the Claim.

The investors in *Barkley* attempted to argue at both the original motion and the appeal that the claim should be permitted to proceed to discoveries. Both courts rejected this argument and determined that the case could be dismissed solely on the pleaded Claim and the disclaimer language in the report.

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