Court File No. CV-22-00684100-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

CANADIAN WESTERN BANK

Applicant

and

2722959 ONTARIO LTD. and 2156775 ONTARIO LIMITED

Respondents

BOOK OF AUTHORITIES OF THE RESPONDENT 2156775 ONTARIO LIMITED

(Motion returnable July 24, 2023)

DATED: July 12, 2023

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ADGA Systems International Ltd. v. Valcom Ltd. et al.*

[Indexed as: ADGA Systems International Ltd. v. Valcom Ltd.]

43 O.R. (3d) 101
[1999] O.J. No. 27
Docket No. C28907

Court of Appeal for Ontario
Carthy, Laskin and Goudge JJ.A.
January 12, 1999

*Application for leave to appeal to the Supreme Court of Canada was dismissed with costs April 6, 2000 (McLachlin C.J., Iacobucci and Major JJ.). S.C.C. File No. 27184. S.C.C. Bulletin, 2000, p. 608.

Corporations -- Directors -- Personal liability -- Plaintiff bringing action against director and senior employees of competitor in their personal capacity for inducing breach of fiduciary duty -- No principled basis existing for protecting director and employees from liability on basis that their conduct was in pursuance of interests of corporation -- Motion by director and employees for summary judgment dismissing action against them dismissed.

Employment -- Employees -- Liability of employees -- Plaintiff bringing action against director and senior employees of competitor in their personal capacity for inducing breach of fiduciary duty -- No principled basis existing for protecting director and employees from liability on basis that their conduct was in pursuance of interests of corporation -- Motion by director and employees for summary judgment dismissing action against them dismissed.

The plaintiff brought an action against a competitor, V Ltd., the sole director of V Ltd. and two senior employees of V Ltd. alleging that the defendants had raided its employees and caused it economic damage and seeking damages for inducing breach of contract and inducing breach of fiduciary duty. The director and employees, who were sued in their personal capacity, moved for summary judgment dismissing the claim against them. The motion was dismissed. The Divisional Court allowed the appeal from that order, holding that, since the employees of V Ltd. were not furthering their own interests and were pursuing their duties of employment to further the interests of their employer, no cause of action was revealed which justified a trial. The plaintiff appealed.

Held, the appeal should be allowed.

There was no principled basis for protecting the director and employees of V Ltd. from liability for their alleged conduct on the basis that such conduct was in pursuance of the interests of V Ltd. It may be that for policy reasons the law as to the allocation of responsibility for tortious conduct should be adjusted to provide some protection to employees, officers or directors, or all of them, in limited circumstances where, for instance, they are acting in the best interests of the corporation with parties who have voluntarily chosen to accept the ambit of risk of a limited liability company. However, the creation of such a policy should not evolve from the facts of this case where the alleged conduct was intentional and the only relationship between the corporate parties was as competitors.

Craik v. Aetna Life Insurance Co. of Canada, [1995] O.J. No. 3286 (Gen. Div.), affd [1996] O.J. No. 2377 (C.A.); Golden v. Anderson, 64 Cal.Rptr. 404 (1967); Kepic v. Tecumseh Road Builders (1987), 23 O.A.C. 72, 18 C.C.E.L. 218; London Drugs Ltd. v. Kuehne & Nagel International Ltd., [1992] 3 S.C.R. 299, 73 B.C.L.R. (2d) 1, 97 D.L.R. (4th) 261, 143 N.R. 1, [1993] 1 W.W.R. 1, 43 C.C.E.L. 1, 13 C.C.L.T. (2d) 1; Montreal Trust Co. of Canada v. ScotiaMcLeod Inc. (1995), 26 O.R. (3d) 481, 129 D.L.R. (4th) 711 (C.A.) (sub nom. ScotiaMcLeod Inc. v. Peoples

Jewellers Ltd.); Normart Management Ltd. v. West Hill Redevelopment Co. (1998), 37 O.R. (3d) 97, 155 D.L.R. (4th) 627, 41 C.C.L.T. (2d) 282, 17 C.P.C. (4th) 170 (C.A.); Said v. Butt, [1920] 3 K.B. 497, [1920] All E.R. Rep. 232, 90 L.J.K.B. 239, 124 L.T. 413, 36 T.L.R. 762; Truckers Garage Inc. v. Krell (1993), 68 O.A.C. 106, 3 C.C.E.L. (2d) 157 (Div. Ct.), consd

Other cases referred to

Alper Development Inc. v. Harrowston Corp. (1998), 38 O.R. (3d) 785, 36 C.C.E.L. (2d) 173 (C.A.); Berger v. Willowdale A.M.C. (1983), 41 O.R. (2d) 89, 145 D.L.R. (3d) 247, 23 B.L.R. 19 (C.A.); Lewis v. Boutilier (1919), 52 D.L.R. 383 (S.C.C.); Salomon v. Salomon & Co. Ltd., [1895-9] All E.R. 33 (H.L.); Sullivan v. Desrosiers (1986), 76 N.B.R. (2d) 271, 192 A.P.R. 271, 40 C.C.L.T. 66 (C.A.)

APPEAL from a judgment of the Divisional Court ((1997), 105 O.A.C. 209, 33 C.C.E.L. (2d) 135) allowing an appeal from a dismissal of a motion for summary judgment dismissing an action against the moving parties.

David B. Debenham, for appellant.
M. James O'Grady, Q.C., and Katherine J. Young, for respondents.

The judgment of the court was delivered by

CARTHY J.A.: -- This appeal presents for consideration once again the troublesome issue of the liability of officers and directors of a corporation for acts done in pursuance of a corporate purpose.

The plaintiff, ADGA Systems International Ltd., has claimed that a competitor, the defendant Valcom Ltd., raided its employees and caused the plaintiff economic damage. The plaintiff also claims against three of its own employees for breach of fiduciary duty in acceding to the importunes of

Valcom Ltd. The issue in controversy on this particular appeal is the claim by the plaintiff against the director and two employees of Valcom Ltd. for their personal involvement in this recruitment program. Those three defendants brought a motion for summary judgment seeking to dismiss the claim against them. The motion was dismissed by Mercier J. The Divisional Court then heard an appeal from that order, allowed the appeal, and dismissed the claim against those three defendants. The plaintiff now appeals to this court and seeks to justify proceeding to trial against MacPherson, the Director of Valcom Ltd. and Ewing and McKenzie, senior employees of Valcom Ltd. The question is whether the respondents can be sued for thei r actions as individuals, assuming those actions were genuinely directed to the best interests of their corporate employer. In my view a cause of action does exist against the respondents and a trial is required to determine the merits of that action.

Facts

For purposes of this appeal, a simple sketch of the background facts is sufficient. The plaintiff ADGA and the defendant Valcom were competitors, and for some years the plaintiff had a substantial contract with Correctional Services Canada for technical support and maintenance of security systems in the federal prisons. In 1991 the contract was coming up for renewal and the Department of Supply and Services called for tenders. One of the conditions of the tender was that the tendering party provide the names of 25 senior technicians together with their qualifications, thus assuring that the tendering company would be competent to perform the work required under the contract. Through its long association with this contract, the plaintiff had 45 such employees. Valcom is alleged to have had none. The pleadings and the evidence indicate that Valcom, through its sole director MacPherson and the two senior employees Ewing and McKenzie, set out to interview the senior representatives of the plaintiff's technica l staff to convince them of the following: to permit their names to be used on the tendering document; to come to work for Valcom if the tender was successful; and to use their efforts to convince the other employees on the technical staff of the plaintiff to do likewise. In the result, all but one of

the 45 members of the plaintiff's technical staff apparently "signed on" with Valcom. Both companies presented the same staff in their tender offerings, and Valcom was the successful bidder.

In the statement of claim as amended, and in addition to damages sought against its own employees and Valcom, the plaintiff seeks damages against the respondents to this appeal for inducing breach of contract, for interference with economic interests and relations and for inducing breaches of fiduciary duty. Judging from the argument of the appellant, it appears that the focus of the claim against the respondents is now limited to inducing breach of fiduciary duty.

Decisions Below

On the original motion, Mercier J. commented that the circumstances of this case are very different from those normally found in cases where the plaintiff seeks to pierce the corporate veil in order to claim liability against employees or directors of a company, and concluded that there was more than one triable issue that could not be determined by way of summary judgment.

A review of the reasons of the Divisional Court [(1997), 105 O.A.C. 209, 33 C.C.E.L. (2d) 135] indicates that in allowing the appeal, emphasis was placed on the decision of this court in Montreal Trust Co. of Canada v. ScotiaMcLeod Inc. (1995), 26 O.R. (3d) 481, 129 D.L.R. (4th) 711. [See Note 1 at end of document.] Since the employees of Valcom were not furthering their own interests in any respect and were pursuing their duties of employment to further the interests of their employer, the Divisional Court relied on ScotiaMcLeod as the basis for concluding that no cause of action was revealed which justifies a trial.

In its conclusion, the Divisional Court observed (at p. 216) that, "[i]n commercial cases such as this, our courts are carefully examining the trend of simply suing officers, directors and employees in their personal capacities, without really carefully examining the facts or without carefully

pleading the allegations which relate to them personally."

Analysis

At the outset, my analysis of the pleadings indicates no lack of particularity as is often found in similar instances. The pleadings specifically allege that the competitor's employees and sole director developed the "recruitment" plan, approached the appellant's employees individually, and were successful in accomplishing the intended purpose, thereby causing damage to the appellant. The distinction, if any, between inducing a breach of contract and inducing a breach of fiduciary duty is not a present concern on a summary judgment proceeding. If there is to be a trial, that issue can be resolved on the basis of all of the evidence. The issue that I must deal with is whether, on the assumption that the defendant Valcom committed a tort against the appellant, the sole director and employees of Valcom can be accountable for the same tort as a consequence of their personal involvement directed to the perceived best interests of the corporation.

My first observation is that I recognize the policy concern expressed by the Divisional Court, and other General Division judges, over the proliferation of claims against officers and directors of corporations in circumstances which give the appearance of the desire for discovery or leverage in the litigation process. This is a proper concern because business cannot function efficiently if corporate officers and directors are inhibited in carrying on a corporate business because of a fear of being inappropriately swept into lawsuits, or, worse, are driven away from involvement in any respect in corporate business by the potential exposure to ill-founded litigation. That being said, it is not appropriate to extend the reasoning of ScotiaMcLeod beyond its intended application by reading it as protecting all conduct by officers and employees in pursuit of corporate purposes. The common law should not develop on an ad hoc basis to put out fires. When a policy issue arises, here from modern b usiness realities, the courts must proceed on a principled basis to establish a framework for further development which recognizes the new realities but preserves the fundamental purpose served by that area of law. For this

reason I intend to analyze the development of law in this field from its beginnings.

That beginning is found in the House of Lords' decision in Salomon v. Salomon & Co. Ltd., [1895-9] All E.R. 33 (H.L.), which established that a company, once legally incorporated, must be treated like any other independent person, with rights and liabilities appropriate to itself. From time to time, litigants have sought to lift this "corporate veil", by seeking to make principals of the corporation liable for the obligations of the corporation. However, where, as here, the plaintiff relies upon establishing an independent cause of action against the principals of the company, the corporate veil is not threatened and the Salomon principle remains intact.

The distinction between an independent cause of action and looking through the corporation was confirmed by the subsequent case of Said v. Butt, [1920] 3 K.B. 497. This is a King's Bench decision but has been adopted in Canada and throughout the United States. (See, for instance, Kepic v. Tecumseh Road Builders (1987), 18 C.C.E.L. 218 at p. 222, 23 O.A.C. 72; and Golden v. Anderson, 64 Cal.Rptr. 404 (1967) at p. 408.)

In Said v. Butt, the plaintiff was engaged in a dispute with an opera company which refused to sell him tickets to a performance. The plaintiff purchased a ticket through an agent and when he appeared at the opera the defendant, an employee of the opera company recognized him and ejected him. The plaintiff sued the employee for wrongfully procuring the company to break a contract made by the company to sell the plaintiff a ticket.

The court held that there was no contract because the company would not knowingly have sold a ticket to the plaintiff. Nevertheless, on the assumption that there was a contract, the court considered the implications to the defendant employee. McCardie J. stated at p. 504:

It is well to point out that Sir Alfred Butt possessed the widest powers as the chairman and sole managing director of the Palace Theatre, Ld. He clearly acted within those powers

when he directed that the plaintiff should be refused admission on December 23. I am satisfied, also, that he meant to act and did act bona fide for the protection of the interests of his company. If, therefore, the plaintiff, assuming that a contract existed between the company and himself, can sue the defendant for wrongfully procuring a breach of that contract, the gravest and widest consequences must ensue.

After detailing the mischief that would flow from permitting such claims to be made McCardie J. concluded at p. 506:

> I hold that if a servant acting bona fide within the scope of his authority procures or causes the breach of a contract between his employer and a third person, he does not thereby become liable to an action of tort at the suit of the person whose contract has thereby been broken. . . . Nothing that I have said to-day is, I hope, inconsistent with the rule that a director or a servant who actually takes part in or actually authorizes such torts as assault, trespass to property, nuisance, or the like may be liable in damages as a joint participant in one of such recognized heads of tortious wrong.

For present purposes, I extract the following from McCardie J.'s reasons. First, this is not an application of Salomon. That case is not mentioned anywhere in the reasons. Second, it provides an exception to the general rule that persons are responsible for their own conduct. That exception has since gained acceptance because it assures that persons who deal with a limited company and accept the imposition of limited liability will not have available to them both a claim for breach of contract against a company and a claim for tortious conduct against the director with damages assessed on a different basis. The exception also assures that officers and directors, in the process of carrying on business, are capable of directing that a contract of employment be terminated or that a business contract not be performed on the assumed basis that the company's best interest is to pay the damages for failure to perform. By carving out the exception for these policy reasons, the court has emphasized and left intact the

general liability of any individual for personal conduct.

The third point of interest arises from this excerpt from the reasons at p. 505:

> The explanation of the breadth of the language used in the decisions probably lies in the fact that in every one of the sets of circumstances before the Court the person who procured the breach of contract was in fact a stranger, that is a third person, who stood wholly outside the area of the bargain made between the two contracting parties. If he is in the position of a stranger, he will be prima facie liable, even though he may act honestly, or without malice, or in the best interests of himself; or even if he acts as an altruist, seeking only the good of another . . .

The court was there referring to the stranger as the wrongdoer but the same principle might be applied in the converse situation where the stranger is the victim. This suggestion, was picked up later in the dissenting reasons of La Forest J. in London Drugs Ltd. v. Kuehne & Nagel International Ltd., infra, to the effect that a jurisprudential division line might be drawn between those who contract with the company, or voluntarily deal with it, and can be taken to have accepted limited liability, and strangers to the company whose only concern is not to be harmed by the conduct of others. On that theory, those harmed as strangers to the corporate body naturally look for liability to the persons who caused the harm and those who have in some manner accepted limited liability in their dealings with the company would be limited in recourse to the company. As evidenced by the decision in London Drugs v. Kuehne that theory of demarcation of liability has not been adopted in Canada.

The consistent line of authority in Canada holds simply that, in all events, officers, directors and employees of corporations are responsible for their tortious conduct even though that conduct was directed in a bona fide manner to the best interests of the company, always subject to the Said v. Butt exception.

In Lewis v. Boutilier (1919), 52 D.L.R. 383 at p. 389 (S.C.C.), the president of a company was held personally liable for negligently putting a boy to work in a dangerous area of a sawmill where he was killed. It was held to be no defence to the president that the corporation that owned the sawmill might also be liable.

In Berger v. Willowdale A.M.C. (1983), 41 O.R. (2d) 89 at p. 98, 145 D.L.R. (3d) 247 (C.A.), leave to appeal to the Supreme Court of Canada refused May 17, 1983, this court dealt with a claim by an employee against the president of her employer corporation for damages arising from slipping on an icy sidewalk. Under the Workmen's Compensation Act, employees could not be sued for such workplace accidents. However, executives were excluded from the definition of employees under the Workmen's Compensation Act. The court held that, given the existence of a duty of care owed by the president to this employee, and a failure to respond appropriately to that duty, damages against the president were recoverable even though the action against the company was barred by the provisions of the Workman's Compensation Act. The fact that the duty of care co-existed in the employer and president did not constitute a bar to a claim against the executive officer.

In Sullivan v. Desrosiers (1986), 76 N.B.R. (2d) 271, 40 C.C.L.T. 66 (C.A.), leave to appeal to the Supreme Court of Canada refused June 4, 1987, the plaintiffs were surrounding landowners of a hog farm who claimed that their lands had been polluted by a manure lagoon on the site of the farm. The issue before the Court of Appeal was whether the owner of the company could be held personally liable.

At p. 277 Hoyt J.A. stated:

> The question here is whether Mr. Sullivan, who was the manager and principal employee of the company that committed the nuisance, may be responsible along with the company. I see no reason why, because of his involvement in creating and maintaining the nuisance, Mr. Sullivan should not also be responsible.

And at p. 278:

> Nor am I attracted to the submission that Mr. Sullivan is protected by reason of the rule in Salomon v. Salomon & Co., [1897] A.C. 22. The question here, as I have pointed out, is not whether Mr. Sullivan was acting on behalf of or even if he "was" the company, but whether a legal barrier, here a company, can be erected between a person found to be a wrongdoer and an injured party thereby relieving the wrongdoer of his liability. In my opinion, once it is determined that a person breaches a duty owed to neighbouring landowners not to interfere with their reasonable enjoyment of their property, liability may be imposed on him and he may not escape by saying that as well as being a wrongdoer he is also a company manager or employee.

The Supreme Court of Canada again considered the issue of an employee's liability for acts done in the course of his duties on behalf of the employer in London Drugs Ltd. v. Kuehne & Nagel International Ltd., [1992] 3 S.C.R. 299, 97 D.L.R. (4th) 261. The plaintiff delivered a transformer to a warehouse company for storage. An employee of the warehouse company negligently permitted the transformer to topple over, causing extensive damage. Even though there was a contractual relationship between the company and the customer, the majority held in favour of the claim against the employee.

Iacobucci J. stated at pp. 407-08:

> There is no general rule in Canada to the effect that an employee acting in the course of his or her employment and performing the "very essence" of his or her employer's contractual obligations with a customer does not owe a duty of care, whether one labels it "independent" or otherwise, to the employer's customer. . . .
>
> . . . The mere fact that the employee is performing the "very essence" of a contract between the plaintiff and his or her employer does not, in itself, necessarily preclude a conclusion that a duty of care was present.

La Forest J. dissented on this issue and was prepared to relieve the employee from personal liability in tort where the tort occurred in the context of a breach of contract between the employer and the customer, and so long as the employee's tort was in the course of duties. His analysis of the distinction between the voluntary and involuntary creditor is, and will continue to be, of interest as policy questions impact upon the evolving jurisprudence in this area. At p. 349 he stated:

> The distinction between voluntary and involuntary creditors is also useful in this area. As commentators have pointed out (Halpern, Trebilcock and Turnbull, "An Economic Analysis of Limited Liability in Corporation Law" (1980), 30 U.T.L.J. 117), different types of claimants against the corporation have differing abilities to benefit from being put on notice with respect to the impact of the limited liability regime. At one end, creditors like bond holders and banks are generally well situated to evaluate the risks of default and to contract accordingly. These "voluntary" creditors can be considered to be capable of protecting themselves from the consequences of a limited liability regime and the practically systematic recourse by banks to personal guarantees by the principals of small companies attests to that fact.
>
> At the other end of the spectrum are classic involuntary tort creditors exemplified by a plaintiff who is injured when run down by an employee driving a motorcar. These involuntary creditors are those who never chose to enter into a course of dealing with the company and correspond to what I have termed as the classic vicarious liability claimant.

These Canadian authorities at the appellate level confirm clearly that employees, officers and directors will be held personally liable for tortious conduct causing physical injury, property damage, or a nuisance even when their actions are pursuant to their duties to the corporation.

An action for economic recovery on facts quite similar to those before this court was considered by the California Court

of Appeal, Second District, in Golden v. Anderson, supra. There, a brokerage firm claimed that employees of a competitor brokerage firm had conspired together to interfere in the plaintiff's relationship with a customer with the intent of depriving it of a commission. The court upheld recovery and distinguished the situation before it, which involved a claim against strangers to the plaintiff corporation, from that where the employees' conduct relates to a contract made with their employer.

At p. 408, the opinion of Jefferson J. reads:

> The court found that, since the evidence showed these three defendants were acting in their representative capacities as managing agents of the defendant corporations, they were immune from liability. The court erred in so concluding. Plaintiff's action is for an intentional tort. All persons who are shown to have participated are liable for the full amount of the damages suffered. . . . "When conspiring corporate officials act tortiously and individuals are injured as a proximate result, such tortfeasors are liable to the injured persons even though the corporation may also be liable . . .
>
> The case of Wise v. Southern Pacific Co., 223 Cal.App.2d 50, 35 Cal.Rptr. 652, relied on by defendants and by the court below, involved the situation, not here present, where the corporate defendant was charged with breach of contract and with conspiring with its officials and agents to breach that contract. The court applied the familiar rule that corporate officers are privileged to participate in their representative capacities in the breach of a contract by their corporate principal [this refers to the principle in Said v. Butt]. . . .

Although the jurisprudence on this subject has followed a very straight path since the decisions in Salomon v. Salomon and Said v. Butt, in recent years in this jurisdiction judges hearing motions to dismiss claims have tended to smudge these principles, inspired, in my view, and as expressed by them, by the legitimate concern as to the number of cases in which

employees, officers, and directors are joined for questionable purposes. The assumption has filtered into reasons for judgment that the employee is absolved if acting in the interests of the corporation, the employer, even in cases that do not raise the Said v. Butt defence.

An immediate example is found in the reasons of the Divisional Court in this case where at p. 214 of the reasons it is stated:

> There was no evidence to show that what these appellants did was to further their own interests in any respect. All evidence points to the fact that their actions were done as part of their duties of employment and to further the interests of Valcom.

The judgment then proceeds to analyze the jurisprudence in support of the above conclusion. Dealing with the appellate authorities referred to by the Divisional Court, the first is Craik v. Aetna Life Insurance Co. of Canada, [1995] O.J. No. 3286 (Gen. Div.), Court File No. 95-CQ-64403, affirmed by the Court of Appeal [1996] O.J. No. 2377. The facts are somewhat similar to those before this court, but the decision of Cumming J. and the oral endorsement of this court appear to pivot on the fact that the pleadings asserted that the corporation acted tortiously but did not assert that the employees acted in any personal capacity. The claim against the employees was struck out.

Reliance was also placed by the Divisional Court on Truckers Garage Inc. v. Krell (1993), 68 O.A.C. 106, 3 C.C.E.L. (2d) 157. That was a case in which a principal of the defendant corporation allegedly induced a breach of contract of employment of the plaintiff. That was a classic Said v. Butt example and, in this court Osborne J.A. said as follows:

> Marvin Teperman was Truckers' directing mind when Krell was both hired and fired. However, that alone is not enough to find him liable for inducing the breach of the Truckers-Krell employment contract. At the very least the evidence must establish, to a degree of probability, that some separate

interest from Teperman's standpoint was involved. See Ontario Store Fixtures Inc. v. Mmmuffins Inc. (1989), 70 O.R. (2d) 42. If that were not the case the directing mind of any corporate employer would he liable for the tort of inducing a breach of contract in the event an employee was wrongfully terminated. This court's judgment in Kepic v. Tecumseh Road Builders, Division of Countryside Farms Ltd. (1987), 18 C.C.E.L. 218 (C.A.) provides an example of what is required. In that case, the individual defendants acted fraudulently in furtherance of their personal interests. In another case, McFadden v. 481782 Ont. Ltd. (1984), 47 O.R. (2d) 134 (H.C.), the individual defendants wrongfully re moved money from the company for their personal benefit. Thus, personal liability was found in both cases.

In this case, there is no evidence and no finding by the trial judge of an intentional wrongful or unlawful act by Marvin Teperman. There is no evidence that Marvin Teperman acted as he did for his personal gain.

Kepic v. Tecumseh Road Builders, supra, referred to by Osborne J.A. is helpful in putting the expression "acting bona fide in the interests of the company" in proper context.

In Kepic, Brooke J.A. stated at p. 222:

It is well established that the directors of a corporation will not be liable for inducing that corporation to breach its contract when they are performing bona fide their functions as corporate officers. See Said v. Butt, [1920] 3 K.B. 497; Thomson & Co. v. Deakins, [1952] 2 All E.R. 361, [1952] 1 Ch. 6461 (C.A.). This is not the case where a director acts in a fraudulent manner: Fraudulent efforts by a director of a corporation to increase the revenue of that body cannot be said to be bona fide in its best interest. See generally Einhorn v. Westmount Investments Ltd. (1969), 69 W.W.R. 31, 6 D.L.R. (3d) 71 (Sask. Q.B.), affirmed (1970), 73 W.W.R. D.L.R. (3d) 509 (Sask. C.A.) [sic]; McFadden v. 481782 Ontario Ltd. (1984), 47 O.R. (2d) 134, 5 C.C.E.L. 83, 27 B.L.R. 173 (Ont. H.C.).

Thus, an officer is disentitled to the Said v. Butt defence if he is not acting bona fide in the interests of the company. This is not to say that if Said v. Butt has no application the conduct is excused if the interests of the company are being served.

The Divisional Court placed its prime reliance on the judgment in ScotiaMcLeod Inc. and in doing so created a much broader canvass for the reasoning of this court than it was, by its language, intended to fill. That case concerned whether a reasonable cause of action was pleaded against certain individual directors of the defendant company. The plaintiff's complaint was that, as a result of certain filing statements, it had been misled into making investments in the defendant corporation's debentures.

The dismissal of the claim against what I will call a group of non-active directors was upheld because the pleading did not allege any negligence against them. The plaintiff sought to hold those directors vicariously liable for the negligence of the corporation, and no attempt was made in the pleading to single out their activities as individuals. This is similar to the situation in Craik v. Aetna, supra. On the other hand, two of the directors who had attended and made representations at a due diligence meeting were alleged to have been directly and personally involved in the marketing of the debentures and to have made representations which were relied upon by the plaintiffs. The action against those active directors was permitted to go to trial.

An excerpt from the reasoning of Finlayson J.A. in ScotiaMcLeod Inc., at pp. 490-91 O.R., pp. 720-21 D.L.R., has been quoted from time to time by General Division judges and, here, by the Divisional Court, as suggesting some limitation on the liability of directors and officers who are acting in the course of their duties:

> The decided cases in which employees and officers of companies have been found personally liable for actions ostensibly carried out under a corporate name are fact-specific. In the absence of findings of fraud, deceit,

dishonesty or want of authority on the part of employees or officers, they are also rare. Those cases in which the corporate veil has been pierced usually involve transactions where the use of the corporate structure was a sham from the outset or was an afterthought to a deal which had gone sour. There is also a considerable body of case-law wherein injured parties to actions for breach of contract have attempted to extend liability to the principals of the company by pleading that the principals were privy to the tort of inducing breach of contract between the company and the plaintiff: see Ontario Store Fixtures Inc. v. Mmmuffins Inc. (1989), 70 O.R. (2d) 42 (H.J.C.), and the cases referred to therein. Additionally there have been attempts by injured parties to attach liability to the principals of failed businesses through insolvency litigation. In every case, however, the facts giving rise to personal liability were specifically pleaded. Absent allegations which fit within the categories described above, officers or employees of limited companies are protected from personal liability unless it can be shown that their actions are themselves tortious or exhibit a separate identity or interest from that of the company so as to make the act or conduct complained of their own.

The operative portion of this paragraph is the final sentence which confirms that, where properly pleaded, officers or employees can be liable for tortious conduct even when acting in the course of duty. That this is clearly the intent of what was being stated is evidenced by the conclusion that the action should proceed against two defendants; against whom negligent conduct had been properly pleaded. The reasoning of ScotiaMcLeod has been recently applied by this court in decisions which confirm my interpretation.

In Normart Management Ltd. v. West Hill Redevelopment Co. (1998), 37 O.R. (3d) 97, 155 D.L.R. (4th) 627 (C.A.), Finlayson J.A. again wrote reasons for this court dealing with an allegation that individual directors had conspired with their corporation to cause injury to a company that had a contractual relationship with the defendant corporation. At p. 102 Finlayson J.A. stated:

It is well established that the directing minds of corporations cannot be held civilly liable for the actions of the corporations they control and direct unless there is some conduct on the part of those directing minds that is either tortious in itself or exhibits a separate identity or interest from that of the corporations such as to make the acts or conduct complained of those of the directing minds: see ScotiaMcLeod Inc. v. Peoples Jewellers Ltd. (1995), 26 O.R. (3d) 481 at p. 491, 129 D.L.R. (4th) 711 (C.A.). In the statement of claim in appeal, there is no factual underpinning to support an allegation that the personal defendants were at any time acting outside their capacity as directors and officers of the corporations of which they were the directing minds.

Although not stated in the reasons, the individual defendants were ostensibly entitled to rely upon Said v. Butt because their alleged conduct was associated with the breach by the defendant corporation of a contract with the plaintiff corporation. In any event, there is nothing in the reasons to detract from my rationale that, where properly pleaded, a claim may be asserted for the tortious conduct of individuals where the defence in Said v. Butt is not available.

In Alper Development Inc. v. Harrowston Corp. (1998), 38 O.R. (3d) 785, 36 C.C.E.L. (2d) 173 (C.A.), this court dealt with a pleading that the corporate defendant had breached its contract with the plaintiff by failing to obtain appropriate insurance coverage and that the vice-president of the defendant was negligent in discharging his duties to the plaintiff. Goudge J.A. referred to the often quoted excerpt from ScotiaMcLeod and, significantly, italicized the words three lines from the end of that quote "unless it can be shown that their actions are themselves tortious". Having done so, Goudge J.A. concluded that on the basis of the Supreme Court of Canada judgment in London Drugs, the pleading did support an allegation of breach of duty of care against the respondent personally and that this pleading justified the case going forward to trial.

Conclusion

It is my conclusion that there is no principled basis for protecting the director and employees of Valcom from liability for their alleged conduct on the basis that such conduct was in pursuance of the interests of the corporation. It may be that for policy reasons the law as to the allocation of responsibility for tortious conduct should be adjusted to provide some protection to employees, officers or directors, or all of them, in limited circumstances where, for instance, they are acting in the best interests of the corporation with parties who have voluntarily chosen to accept the ambit of risk of a limited liability company. However, the creation of such a policy should not evolve from the facts of this case where the alleged conduct was intentional and the only relationship between the corporate parties was as competitors. Any such evolution should await facts which are apposite to the policy concerns and should probably be articulated as a definitive extension of the defence in Said v. Butt. Such a development would be in the direction indicated by La Forest J. in his dissenting reasons in London Drugs and thus may have to await further consideration by the Supreme Court. In the meantime the courts can only be scrupulous in weeding out claims that are improperly pleaded or where the evidence does not justify an allegation of a personal tort. A principled development of jurisprudence is the tradition and the strength of the common law and must take precedence over incidental attempts to abuse the law as it develops.

For these reasons I would allow the appeal, set aside the order of the Divisional Court, and dismiss the original motion for summary judgment. The costs of the motion, of the application for leave to appeal to the Divisional Court and in the Divisional Court, of the application for leave to this court and in this court, shall be to the appellant on a party-and-party basis as against the three respondents.

Appeal allowed.

Notes

Note 1: This decision is sometimes also referred to as

ScotiaMcLeod Inc. v. Peoples Jewellers Ltd. For the purposes of these reasons, I will refer to it as ScotiaMcLeod.

Tab 2

TORT LAW

SEVENTH EDITION

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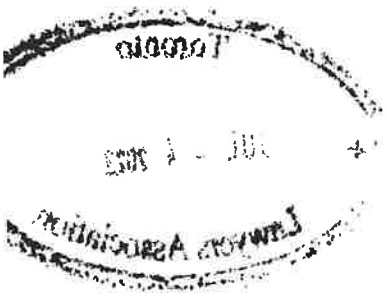

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care to another litigant regarding the manner in which the litigation is conducted.[198] A civil action cannot be brought against someone based on the latter's false evidence.[199] Nor can an action be brought against the Attorney General for the manner in which it has exercised its prosecutorial discretion.[200]

4. MISFEASANCE IN A PUBLIC OFFICE

Although most actions brought against public authorities arise from allegations of negligence in the performance of their duties, there have been a rising number of claims alleging misconduct of a much more serious nature. The tort of misfeasance in a public office, or abuse of public office,[201] can be brought for intentional acts of wrongdoing by public officials that have harmed the economic or other interests of private persons.[202]

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was struck out. In *Howatt*, an action brought against a defendant relating to a psychiatric assessment report which he prepared was struck out. In *Elliott*, fire investigators for an insurer who were witnesses at the insurance trial were protected from suit, although other investigators who were not witnesses were not.

198 *Bus. Computers Int. Ltd. v. Reg. of Companies*, [1987] 3 All E.R. 465 (Ch. D.).

199 See *Marrinan v. Vibart*, [1962] 3 All E.R. 380 (C.A.); *Cabassi v. Vila* (1940), 64 C.L.R. 130 (Aust. H.C.). Also see *Horn Abbot Ltd. v. Reeves* (2000), 189 D.L.R. (4th) 644 (N.S. C.A.) and *Smith (Next Friend of) v. Kneier* (2001), 288 A.R. 144 (Q.B.).

200 See, for example, *Aubichon v. Saskatchewan*, 2010 SKQB 49, 2010 CarswellSask 59. The plaintiff, a passenger who was injured in a car accident, claimed that the wrongdoer/driver should have been criminally charged with impaired driving causing bodily harm. A guilty verdict would have allowed the plaintiff to recover its economic losses pursuant to *The Automobile Accident Insurance Act*, R.S.S. 1978, c. A-35. The court held that "barring flagrant impropriety" a court will not review the Attorney General's exercise of its prosecutorial discretion. The court also dismissed the plaintiff's claim that legislation should have been enacted so that prosecutors were aware of car accident victim's concerns when laying charges against at fault drivers.

201 In *Uni-Jet Industrial Pipe Ltd. v. Canada (Attorney General)* (2001), 9 C.C.L.T. (3d) 1 (Man. C.A.), Kroft J.A. notes that the following terminology seems to be used to describe the tort: abuse of public authority, abuse of statutory authority, abuse of public office, and misfeasance in public office. As stated by Kroft J.A., "nothing really turns on this point" and he accepts that the descriptions can be used interchangeably.

202 The leading Canadian judgment on the elements of the tort is *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263, 233 D.L.R. (4th) 193, 19 C.C.C.L.T. (3d) 163. For a very comprehensive discussion of this tort see Erika Chamberlain, *Misfeasance in a Public Office* (2016). Also see John Irvine, "Misfeasance in Public Office: Reflections on Some Recent Developments" (2002), 9 C.C.L.T. (3d) 26; Phegan, "Damages for Improper Exercise of Statutory Powers" (1980-82), 9 Sydney L. Rev. 93; Shibley, "The Personal Liability of Members of Municipal, Provincial and Federal Governments" (1985), 1 Admin. L.J. 56; Robert Sadler, "Liability for Misfeasance in a Public Office" (1992), 14 Sydney L. Rev.137; Bodner, "The *Odhavji* Decision: Old Ghosts and New Confusion in Canadian Courts" (2005), 42 Alta. L. Rev. 1061; Erika Chamberlain, "What is the Role of Misfeasance in a Public Office in Modern Canadian Tort Law" (2010), 88 Canadian Bar Rev. 579; Harry Wruck, "The Continuing Evolution of the Tort of Misfeasance in

As discussed by Professor Irvine, while the tort of misfeasance in a public office requires "willful, conscious misconduct" and not "mere carelessness, indolence or ineptitude", the degree of misconduct required and more specifically the nature of the defendant's state of mind has been an issue of debate in the recent jurisprudence.

The requirements of the tort are as follows:

(a) the actor must be a public official;
(b) the public official must have engaged in wrongful conduct in his or her capacity as a public officer; and
(c) the wrongdoing must be intentional.

(a) Public Official

The tort is committed by those who hold public office or act under statutory authority. In *Uni-Jet Industrial Pipe Ltd. v. Canada (Attorney General)*,[203] for example, the tort applied to a peace officer who was a member of the RCMP. He was subject to the Royal Canadian Mounted Police Act[204] and his act, which in this case was to divulge information to the media prematurely, was held to be a violation of his statutory authority.[205] The definition of public office is wide and generally has not posed a problem.[206]

An interesting case is *Freeman-Maloy v. York University*.[207] The defendant was the President of a public university. She was sued by a student who had been

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Public Office" (2008), 41 U.B.C.L.Rev. 69; and Horsman and Morley, eds., *Government Liability: Law and Practice* (2007), Chapter 7.

[203] Above, note 186.

[204] R.S.C. 1985, c. R-10.

[205] The Court considered the Criminal Code provisions relating to search warrants in determining that the release of details concerning searches prior to the execution of the warrant and before the Return to the Judge had been filed was in violation of the Code. The court held, however, that violation of operational or policy manuals that do not have statutory authority cannot form the basis of this tort.

[206] Actions have been brought against a mayor, other municipal officials, the Premier and Attorney General of a province, a member of the R.C.M.P., police officers, a Cabinet Ministry, superintendents of hospitals, among others. For an extensive discussion of this matter, see Chamberlain, above, note 187, at 86-98. As discussed by Chamberlain at 99-101 not only must it be shown that the defendant was a public officer but also that the impugned conduct was part of its public as opposed to private functions. In *Wu v. Vancouver (City)*, above, note 40, the Court of Appeal held that the action could be brought against more than one public official who participated in the decision, but that the defendants must be named. In *British Columbia v. Greengen Holdings Ltd.*, 2023 BCCA 24, 2023 CarswellBC 118 it was held that where the suit is brought against the public authority responsible for making the decision and not particular public officials, the public officials need not be named as defendants. However, the individual public officials whose conduct is being questioned must be named by the plaintiff, to the extent that is possible, in the statement of facts, the Notice of Claim or in the particulars as required.

suspended for his participation in campus demonstrations. Although the motions judge had struck out the claim on the basis that the defendant, although a statutory officer, was not a public officer subject to governmental control and hence the Charter, the Court of Appeal held that it was not plain and obvious that the claim could not succeed. Although not subject to governmental control, the plaintiff was subject "to the regime of public law", and her activity in this case, i.e., suspending a student, was subject to "judicial review".[208] Thus, it has been suggested that the test for public office is "an administrative law-based test. If the impugned action involves the exercise of statutory power, and is reviewable on the application of judicial review, it is also (at least arguably) subject to liability under the tort of misfeasance in public office".[209]

Whether an action for misfeasance in a public office could be brought by police officers against Crown prosecutors was considered by the Supreme Court of Canada in *Ontario (Attorney General) v. Clark*.[210] Three police officers sued the Attorney General for the misconduct of Crown prosecutors in the way they dealt with allegations made against the officers by two persons whom they had arrested and subsequently charged. The accused alleged that the police had beaten them during their arrest. Although these allegations were ultimately proved to have been false, they were initially conceded to and not challenged by the prosecutors. The majority of the Supreme Court of Canada held that allowing a misfeasance claim against prosecutors to proceed would "raise profound risks to the rights of the accused and to prosecutorial independence and objectivity".[211] There was a lengthy dissent by Cote J. who argued that the liability threshold of the tort of misfeasance in a public office was high enough to allow this claim to proceed.

(b) Wrongful Conduct in the Defendant's Capacity as a Public Officer

The nature of the wrongful conduct which is required in order to constitute the tort of misfeasance in a public office has been in issue in recent cases and was the primary issue in the *Odhavji* case.[212]

The traditional misfeasance case involved a public official who maliciously exercised a power or authority which the official actually had. The example given

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207 (2006), 267 D.L.R. (4th) 37 (Ont. C.A.), leave to appeal refused (2006), 2006 CarswellOnt 5558 (S.C.C.), reversing in part (2005), 253 D.L.R. (4th) 37 (Ont. C.A.).

208 Whether this will be the minimum requirement remains to be seen. As noted by Chamberlain, above, note 187, there seems to be a trend towards a "looser definition of public office", and the law on this point remains unsettled.

209 See Horsman and Morley, above, note 187, at 7.20.10(1).

210 2021 CSC 18, 2021 SCC 18, 2021 CarswellOnt 6043, [2021] S.C.J. No. 18, 456 D.L.R. (4th) 361, 2021 CarswellOnt 6042.

211 At para. 40.

212 See Chamberlain, above, note 187 at 113-130. The author notes that "the misfeasance tort encompasses not only deliberate abuse of power, but also breach of statutory duty, violations of administrative fairness, and acting *ultra vires* for improper purposes".

of this by Iacobucci J. in *Odhavji* was *Ashby v. White*.[213] An elections officer who had the power to deprive certain persons from voting, exercised this power maliciously and fraudulently to deprive the plaintiff of his voting right.

Similar to this is where a public official commits a wrongful act in the purported exercise of a power which he or she knowingly does not have. Thus, for example, a Premier and Attorney General who ordered that a person's liquor license be cancelled can be used to illustrate this type of wrongdoing.[214] The Premier did not actually have the power to cancel the plaintiff's license, but used his authority to prevail upon the person who had the power to do so. Thus, either abusing a power which one actually has or knowingly exceeding one's powers are activities that can constitute the tort of abuse of power.[215]

More difficult to rationalize as a tort of misfeasance in a public office are those cases where public officials breach their statutory duties, but are not, at least in the traditional sense, abusing their powers. It is here where the recent cases have made their most significant extension to the tort.

The leading Canadian case is *Odhavji Estate v. Woodhouse*.[216] The plaintiffs sued the defendant police officers alleging that they intentionally breached their statutory duties under the *Police Services Act*.[217] The statute imposed a duty on the defendants to co-operate with a Special Investigations Unit established to investigate the fatal police shooting of the plaintiffs' relative. The police officers' failure to co-operate allegedly caused the family of the deceased mental distress.

At the Court of Appeal,[218] Borins J.A., for the majority of the court, distinguished between breaching a statutory duty, for which a negligence action, for example, might lie, and the improper exercise or the abuse of an administrative or legislative power. According to Borins J.A., it is only the latter wrongdoing which can form the basis of the tort of misfeasance in a public office. In this respect, the Court of Appeal held that the police officers' failure to co-operate in the investigation, while perhaps a breach of a statutory duty imposed on them, did not constitute an improper exercise of their power or authority.

The dissenting judge, Feldman J.A., held that the tort could be made out by proving that the defendants deliberately breached their statutory duties to cooperate, if they knew or were recklessly indifferent to the fact, that the plaintiff

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213 (1703), 2 Ld. Raym. 938, 92 E.E. 126 (Eng. K.B.).

214 *Roncarelli v. Duplessis*, [1959] S.C.R. 121.

215 In essence, in both cases the public official is exercising a power that he or she does not have, since one can assume that in democratic societies public officials are not granted powers for the sole purpose of harming others.

216 [2003] 3 S.C.R. 263.

217 R.S.O. 1990, c. P.15.

218 (2000), 194 D.L.R. (4th) 577, 3 C.C.L.T. (3d) 171 (Ont. C.A.), additional reasons at (2001), 2001 CarswellOnt 476 (C.A.), leave to appeal allowed (2001), 2001 CarswellOnt 3081 (S.C.C.), reversed (2003), 2003 CarswellOnt 4851 (S.C.C.).

would likely be injured. In other words, the tort should not be confined to the abuse of an administrative or legislative power.

The Supreme Court of Canada adopted the broader approach of Feldman J.A. According to Iacobucci J., the essence of the tort is deliberate *unlawful or wrongful conduct* by a public official, where the plaintiff's injury is either intended or likely to occur. The wrongful conduct can consist of the unlawful exercise of a statutory or prerogative power, *or* the intentional breach of a statutory duty. In coming to this conclusion, Iacobucci J. referred to other Commonwealth cases that have moved the tort forward in this direction.[219] In addition, this broader view of the nature of the wrongful conduct necessary for the commission of the tort had been accepted in earlier Canadian cases cited by Iacobucci J.[220]

There is the danger that an over-extension of the tort of misfeasance in a public office can clash with Canadian law's refusal to recognize a tort of breach of statutory duty and its restrictive attitude to negligence claims against public authorities. As discussed above, many negligence actions against public authorities for beaching statutory duties have failed for want of proximity. Statutory provisions have invariably been construed as creating duties of care owed only to the public. The tort of misfeasance in a public office seems now to provide an alternative and perhaps more easily proved remedy to plaintiffs.[221]

(c) Intentional Wrongdoing

It is this element of the tort that has received the most attention from the recent jurisprudence. What constitutes intentional wrongdoing sufficient to establish the tort of misfeasance in a public office?[222]

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219 Cases referred to include *Northern Territory of Australia v. Mengel* (1995), 129 A.L.R. 1 (Australia H.C.); *Garrett v. New Zealand (Attorney General)*, [1997] 2 N.Z.L.R. 332 (New Zealand C.A.); and *Three Rivers District Council v. Bank of England (No. 3)*, [2000] 2 W.L.R. 1220 (U.K. H.L.).

220 Cited were *Alberta (Minister of Public Works, Supply & Services) v. Nilsson* (1999), 46 C.C.L.T. (2d) 158, [199] 9 W.W.R. 203 (Alta. Q.B.), leave to appeal allowed (1999), 1999 CarswellAlta 1119 (C.A.), affirmed (2002), 2002 CarswellAlta 1491 (C.A.), additional reasons at (2003), 2003 CarswellAlta 565 (C.A.), leave to appeal refused (2003), 2003 CarswellAlta 1050 (S.C.C.); *Uni-Jet Industrial Pipe Ltd. v. Canada (Attorney General)* (2001), 9 C.C.L.T. (3d) 1 (Man. C.A.); and *Powder Mountain Resorts Ltd. v. British Columbia* (2001), 94 B.C.L.R. (3d) 14 (C.A.).

221 Others have also commented negatively on the broadening of the tort. Erika Chamberlain, "Misfeasance in a Public Office: In Defence of the Power/Duty Distinction", above, note 187, writes:

> . . .[T]he tort has undergone rapid expansion in the last few decades, and threatens to shed its "exceptional" character if current trends persist. There has been a relaxation of the elements necessary to prove the claim: a looser definition of public office; a watering down of the requisite malicious state of mind; and an erosion of the necessary proximity between the public officer and the plaintiff. . . The effect of this trend is that a public officer can now be sued for misfeasance in a public office for breach of duty that is not directed at anyone in particular, and without any vindictive purpose. In the author's view, this trend offends the exceptional nature of the tort, and provides the potential for misfeasance in a public office to overtake negligence in the sphere of authority liability.

It is recognized that there are two forms of the tort. First, where a public official acts, even within its statutory authority or power, for an improper purpose, namely to specifically injure the plaintiff,[223] the tort is made out. Second, and alternatively, where a public official acts, knowing that it lacked the authority to do so, and knowing that this act would probably injure the plaintiff, the tort is also made out.[224]

The leading Canadian authority on the first form of this tort, i.e., "targeted malice", is *Roncarelli v. Duplessis*.[225] In this case, the Supreme Court of Canada found the defendant, who was Premier and Attorney General of the Province of Quebec, personally liable for ordering the Commission that regulated liquor licensing in Quebec to cancel the plaintiff's liquor license. The majority of the Court held that the defendant acted with the deliberate intention to injure the plaintiff and to punish him for his support of a religious sect that the defendant found objectionable. The Court also held that the defendant acted knowing that he did not have the authority to do so. In this type of case where there are acts that are outside of the official's authority, where the official is aware of this, and where the act is done in order to injure the plaintiff, the tort is clearly made out.

In *Three Rivers District Council v. Bank of England (No. 3)*,[226] the English House of Lords reviewed the history of the tort and laid down its ingredients.[227] It confirmed that exercising public power or authority for an improper purpose or ulterior motive, i.e., in order to injure a person, is tortious. This is the classical view of the tort and has been widely referred to as a case of "targeted malice".[228]

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222 Chamberlain, above note 187, at 131-144 refers to this element as a matter of malicious state of mind.

223 Whether other types of improper purposes will satisfy this tort remains unclear. See discussion below.

224 See Irvine, above, note 187. Irvine explains these two forms or varieties of the tort. Category A: using actual statutory authority or power for an improper purpose; i.e., to injure the plaintiff. Category B: acting knowing that one has no authority and that this act would "probably" injure the plaintiff. This analysis is the one articulated by the House of Lords in *Three Rivers District Council v. Bank of England (No. 3)*, [2000] 3 All E.R. 1 (H.L.), discussed below. Cases supporting the two category approach prior to *Three Rivers*, which are frequently referred to in recent cases, include *Bourgoin SA v. Ministry of Agriculture, Fisheries & Food* (1984), [1985] 3 All E.R. 585, [1986] Q.B. 716, [1985] 3 W.L.R. 1027 (Q.B.), *Chabra v. R.* (1989), 89 D.T.C. 5310 (Fed. T.D.) and *Francoeur v. R.* (1994), 78 F.T.R. 109 (T.D.), affirmed (1996), 110 F.T.R. 321 (note) (C.A.).

225 [1959] S.C.R. 121. The case emanated from Quebec and was based on the Civil Code. The principle it established, however, would apply to common law jurisdictions as well and has been used as the basis of the common law cases.

226 Above, note 205.

227 Separate judgments on the tort of misfeasance in public office were written by Lord Steyn, Lord Hutton, Lord Millett and Lord Hobhouse. There were some differences in the way the tort was explained, although all agreed with the basic principles.

228 It can be explained on the basis that since it is obvious that the statute was not enacted with the purpose of injuring a specific person, a public official who is using the statute to

In addition, and in the absence of targeted malice, acting with actual knowledge that one's act is unlawful and that damage to the plaintiff is probable is also tortious.[229] The Lords went further, however, and held that either reckless indifference as to the legality of one's act or to its probable consequences satisfies the above requirements of intentional misconduct.[230] The Lords rejected the argument that mere foreseeability of the damaging consequences is sufficient to establish liability, even where the defendant acted with knowledge that its acts were unlawful.

The Supreme Court of Canada adopted this approach in *Odhavji*. According to Iacobucci J., the nature of the tort requires intentional and unlawful conduct, coupled with the knowledge that the conduct is unlawful and likely to harm the plaintiff. Where the intention to injure is present, i.e., targeted malice, both elements are automatically proven. This is because a public official does not have the authority to deliberately set out to injure a specific person, and one who does so clearly knows this and realizes that the plaintiff will be injured by the abuse. Where there is no intention to injure, the two elements must be proven separately. Not only must it be shown that the official knew or was recklessly indifferent to the fact that he or she was acting unlawfully, but in addition it must be shown that the official knew or was recklessly indifferent to the fact that harm to the plaintiff was likely. The allegations in *Odhavji* were directed to the second form of the tort; that is, the police officers knew that they were not acting lawfully in refusing to co-operate and that this would likely injure the plaintiffs.

Several Canadian cases have considered the tort both before and after the House of Lords decision in *Three Rivers*. In a detailed review of the action, Marceau J. in *Alberta (Minister of Public Works, Supply & Services) v. Nilsson*[231] found the Crown liable for the second form of the tort. The Crown abused its statutory authority to create a Restricted Development Area by creating an RDA for an improper purpose.[232] The Court held that although the evidence did not allow for the conclusion that the Crown actually knew that its act was illegal, it was "recklessly indifferent as to whether or not it was acting illegally". This

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specifically target someone is clearly acting without the honest belief that he is acting lawfully. See Lord Hobhouse's judgment in *Three Rivers*.

229 This can be termed "untargeted malice". Note, however, that malice in the narrow sense of intending to injure the plaintiff, or acting out of spite or ulterior motive is not required in this form of the tort.

230 Lord Hobhouse in *Three Rivers* called this "reckless untargeted malice". As Newbury J.A. noted in *Powder Mountain Resorts Ltd. v. British Columbia* (2001), 8 C.C.L.T. (3d) 170 (B.C. C.A), this is "subjective" recklessness. The defendant must have been reckless in its disregard of the legality of its acts or its probable consequences.

231 [1999] 9 W.W.R. 203, 46 C.C.L.T. (2d) 158 (Alta. Q.B.), leave to appeal allowed (1999), [2000] 2 W.W.R. 688 (Alta. C.A.), affirmed (2002), [2003] 2 W.W.R. 215 (Alta. C.A.).

232 The issue arose in a land-use planning context under *The Department of the Environment Act*, S.A. 1971, c. 24. Restricted Development Areas could be created pursuant to statute for environmental purposes, e.g., creating a green belt. The Crown used it in this case for the goal of eventual highway development. The Court held that this purpose was invalid.

was done with knowledge that damage would occur to the claimant, whose land was affected by the order, and thus the action was made out.[233]

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[233] The decision went into further details on this matter. Essentially, the plaintiff's use of his land was restricted, a specific development proposal was turned down, and the government failed to purchase it from him at fair market value within a reasonable time. The Court of Appeal agreed with the trial judge's approach. Although the tort cannot be used for the "merely negligent exercise of power" it can be invoked in a case of "willful blindness to the lack of statutory authority to act." Moreover, foresight of the risk of the type of harm suffices, even if the defendant did not foresee the specific harm actually suffered. In *Longley v. Minister of National Revenue* (1999), 176 D.L.R. (4th) 445 (B.C. S.C.), affirmed (2000), 184 D.L.R. (4th) 590 (B.C. C.A.), leave to appeal refused (2000), 152 B.C.A.C. 320 (note) (S.C.C.), the Minister of National Revenue was liable for the tort when officials in its department knowingly misled the plaintiff by refusing to acknowledge the legality of a tax avoidance scheme that the plaintiff had concocted. The court held that the defendant had therefore knowingly acted outside of its statutory authority where damage to the plaintiff was probable satisfying the second form of the tort. In *E. (D.) (Guardian ad litem of) v. British Columbia* (2004), 28 C.C.L.T. (3d) 283 (B.C. C.A), reconsideration refused (2005), 2005 CarswellBC 1220 (C.A.), the court allowed actions to proceed against Superintendents of medical hospitals who recommended sterilization procedures on patients in cases where the Superintendents ought to have known that the procedures were not justified by the provisions of the statute. In *O'Dwyer v. Ontario Racing Commission*, 2008 ONCA 446 (Ont. C.A.), the Ontario Racing Commission was held liable for refusing to acknowledge that it had made an adverse decision with respect to the plaintiff, thereby depriving him of his statutory right to challenge that decision. In *McMaster v. R.*, 2009 CarswellNat 2934, [2009] F.C.J. No. 1071 (F.C.), Correctional Services of Canada was held liable for failing to ensure that prison inmates were adequately clothed while exercising. The dispute concerned the officer's refusal to provide its inmate with adequate running shoes. In *Rosenhek v. Windsor Regional Hospital*, 2010 CarswellOnt 153, [2010] O.J. No. 129 (C.A.), additional reasons 2010 CarswellOnt 1321 (C.A.), leave to appeal refused 2010 CarswellOnt 8019, 2010 CarswellOnt 8020 (S.C.C.), a hospital was held liable for its bad faith in revoking a doctor's hospital privileges. In *Apotex v. Canada* (2014), 15 C.C.L.T. (4th) 220 (F.C.), Health Canada was held liable for delaying approval of the plaintiff's drug by breaching an agreement that it had entered into with the plaintiff. The defendant was also liable for negligence. A case where the action was dismissed based on a lack of intentional wrongdoing is *CADNET Productions Inc. v. R.* (2004), 25 C.C.L.T. (3d) 297 (Fed. C.A.), leave to appeal refused (2004), 2004 CarswellNat 2946 (S.C.C.). Also see *Mitchell Estate v. Ontario* (2004), 242 D.L.R. (4th) 560 (Ont. Div. Ct.); and *Windset Greenhouses (Ladner) Ltd. v. Delta (Corp.)*, [2007] 8 W.W.R. 503 (B.C. C.A.), affirming (2006), [2006] B.C.J. No. 459, 2006 CarswellBC 494 (B.C. C.A.). In *Meekis v. Ontario* (2021), 461 D.L.R. (4th) 307, 2021 CarswellOnt 10777, 2021 ONCA 534 the Ontario Court of Appeal allowed a claim against the Province for the manner in which the coroner investigated the death of a child who lived on a First Nation reserve to proceed. The allegation was that the coroner's failure to properly investigate the death was based on a discriminatory policy and thus was an exercise of discretion for an improper purpose. This was said to constitute unlawful conduct with knowledge that it would likely harm First Nations people. In *Pedigree Poultry Ltd. v. Saskatchewan Broiler Hatching Egg Producers' Marketing Board*, 2022 SKCA 113, 2022 CarswellSask 462, [2022] S.J. No. 359 (C.A.), reversing in part *Slater v. Pedigree Poultry Ltd.*, 2020 SKQB 100, 2020 CarswellSask 189 the Saskatchewan Court of Appeal allowed a claim against a Marketing Board and two directors of the Board for their treatment of two producers whose businesses fell under the oversight of the Board. In a useful review of the

Another case that dealt with the "targeted malice" form of the tort is *First National Properties Ltd. v. Highlands (District)*.[234] The case involved an action brought by a property developer against a mayor and other municipal officials who frustrated the developer's efforts in terms of the property's development. Newbury J.A. reaffirmed the two forms of the tort; i.e., abusing one's office by using one's authority in order to cause harm to an individual, or abusing one's office by knowingly acting without authority where such act would cause probable injury to an individual. Since the actor's motive can turn a lawful act into an unlawful one in this action,[235] Newbury J.A. advised "judicial caution" in imputing bad faith to elected officials. Newbury J.A. concluded that the defendants' motive in this case was not to injure the plaintiffs but to further its political agenda of preserving natural lands in an undeveloped state and on this ground, as well as others, found that the tort had not been committed.[236]

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development of the tort of misfeasance in a public office and its current requirements, L.M. Schwann J.A. held that the defendants were liable under the second form of the tort. In their dealings with the plaintiffs, they had acted either knowingly or with reckless indifference as to the lawfulness of their acts and with knowledge that this would likely cause harm to the plaintiffs.

234 (2001), 198 D.L.R. (4th) 443, 9 C.C.L.T. (3d) 34 (B.C. C.A.), leave to appeal refused (2001), 169 B.C.A.C. 320 (note) (S.C.C.), reversing (1999), 48 C.C.L.T. (2d) 94, 178 D.L.R. (4th) 505 (B.C. S.C.). The Court of Appeal judgment was decided after the House of Lords decided *Three Rivers* and provides a good review of the jurisprudence.

235 Therefore being "an exception to the general rule that, if conduct is presumptively unlawful, a good motive will not exonerate the defendant, and that, if conduct is lawful apart from motive, a bad motive will not make him liable" — Newbury J.A. at (2001), 9 C.C.L.T. (3d) 34 (B.C. C.A.) at 52, quoting from Lord Steyn in *Three Rivers*. Newbury J.A. reiterated that caution must be exercised in imputing bad motives to public officials in *Powder Mountain Resorts Ltd. v. British Columbia* (2001), 8 C.C.L.T. (3d) 170 (B.C. C.A.).

236 Newbury J.A. implies that the wish to injure another is one type of targeted malice, but that the improper motive can also be the desire to advance one's interests, or even to advance a private purpose that is "foreign" to the purposes for which the powers are granted; at 62-63 C.C.L.T. This expands "targeted malice" and raises the question as to what a specific claimant who is harmed by this improper motive must show in order to succeed in a claim. Newbury J.A. also disagreed with the trial judge's conclusion on the matter of a causal link between the defendants' actions and the failure of the development as well as with regard to the assessment of damages. Also see Newbury J.A.'s judgment in *Powder Mountain Resorts Ltd. v. British Columbia* (2001), 8 C.C.L.T. (3d) 170 (B.C. C.A.). An action for abuse of public office against the Premier and other officials was brought based on a developer's failure to win a government contract for developing a ski resort. In dismissing the action, Newbury J.A. held that the plaintiff had failed to show that the province had acted in order to injure it as opposed to acting in the province's best interests. In addition, there were no abuses of statutory authorities or powers. As she had done in earlier cases, Newbury J.A. cautioned against an unwarranted extension of this tort. The British Columbia Court of Appeal reaffirmed these principles in *Rain Coast Water Corp. v. British Columbia*, [2019] B.C.J. No. 1011, 2019 CarswellBC 1565, 2019 BCCA 201, leave to appeal refused *Rain Coast Water Corp. v. Her Majesty the Queen in Right of the Province of British Columbia, et al.*, 2020 CarswellBC 86, 2020 CarswellBC 87

In addition to the above elements, the plaintiff must establish a causal connection between the wrongdoing and the injuries suffered. The type of injuries suffered must be compensable. In *Odhavji*, the plaintiffs were claiming that they suffered mental distress as a result of the defendants' misconduct. The Supreme Court affirmed that while under Canadian law damages for grief or emotional distress are not recoverable, psychiatric damages resulting from a "visible or provable illness" or "recognizable physical or psychopathological harm" are.[237]

5. CONCLUSION

Delineating the principles of public tort liability continues to challenge the courts, not only in Canada but also across the Commonwealth. The Supreme Court of Canada, the House of Lords, and authoritative courts elsewhere have devoted a considerable amount of their time in recent years in attempting to clarify this area.

There are two conflicting and legitimate points of view that create the disharmony. On the one hand it is believed that public authorities, like individuals in the private sector, ought to be required to conduct themselves reasonably and lawfully in furtherance of their statutory mandates, with due regard to the interests of others who are foreseeable victims of their misbehaviour. If they fail to do so, they ought to be subject to liability. On the other hand, public authorities are not like private persons. They are meant to act not in their own interests, but in the public interest. They do not operate for profit or for the furtherance of their own goals. They must weigh and balance conflicting interests in determining what is in the public good. They are, in many cases, answerable to the electorate.

Despite the confusing terminology, and the tortured attempts to rationalize individual decisions, the common law has been taking these factors into consideration in determining the tort liability of public authorities. A duty to take reasonable care can be imposed on the public authority defendant in the

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(S.C.C.) in dismissing the action against public officials who had cancelled the plaintiff's water licenses. In *Trillium Power Wind Corp. v. Ontario (Minister of Natural Resources)* (2013), 117 O.R. (3d) 721 (C.A.), the Court held that a government's decision to exercise one of its powers for political or electoral expediency, even though it knows this decision will harm the economic interests of the plaintiff, cannot form the basis of the tort. It is only when the decision is made with the specific intention of causing harm to the plaintiff can the tort claim succeed. The Court of Appeal allowed the plaintiff's claim to proceed on this narrow basis. See more recently *Canadian Union of Public Employees v. Ontario (Premier)*, [2018] O.J. No. 1804, 52 C.C.L.T. (4th) 340, 2018 CarswellOnt 22632, 2018 ONCA 309 where this principle is applied.

237 19 C.C.L.T. (3d) at 189 (S.C.C.). This is also the position taken with reference to this tort by the House of Lords. See *Watkins v. Home Office*, [2006] UKHL 17. Chamberlain, above, note 187, at 144-153, notes that although most claims involve economic loss, there can also be successful claims for psychological injuries, physical harm, and loss of liberty.

Tab 3

Francisco (Re)

Ontario Judgments

Ontario Court of Justice (General Division)

In Bankruptcy - Toronto, Ontario

Adams J.

March 31, 1995

Estate No. 31-292784

[1995] O.J. No. 917 | 32 C.B.R. (3d) 29 | 19 C.L.R. (2d) 146 | 54 A.C.W.S. (3d) 428

IN THE MATTER OF the bankruptcy of Casimiro Almeida Francisco, of the City of Etobicoke, in the Municipality of Metropolitan Toronto, in the Province of Ontario, Roofer

(10 pp.)

Counsel

Pauline Bosman, for the appellant BPCO, a division of EMCO Limited. Craig Colraine, for the respondent bankrupt Casimiro Almeida Francisco.

ADAMS J.

1 This is an appeal from an order of Registrar Ferron dismissing an application for leave to continue with an action against a bankrupt. In considering an application for leave, the function of a bankruptcy court is not to inquire into the merits of the action sought to be commenced or continued. Instead, the role is one of ensuring that sound reasons, consistent with the scheme of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, exist for relieving against the otherwise automatic stay of proceedings. See Re Cravit (1984), 54 C.B.R. 214 (Ont. S.C. (Master)); and Re Advocate Mines Limited (1984), 52 C.B.R. 277 (Ont. S.C. (Master)). On appeal, the reviewing court cannot substitute its opinion for that of the court of first instance given the discretionary nature of the decision appealed from. But such discretion must be exercised in accordance with legal principle.

2 The appellant BPCO sold and delivered roofing materials to Caldense Roofing and Insulation Limited ("Caldense") between August 23, 1988 and October 31, 1989 for installation at construction projects on which Caldense was working. The amount due to BPCO was $120,159.06. Casimiro Francisco, Carlos Santos and Antonio Santos were shareholders, officers and directors of Caldense at various times. On February 16, 1990, BPCO commenced

an action against Caldense and Francisco for these unpaid invoices and for breach of trust pursuant to the Construction Lien Act, R.S.O. 1990, c. C.30, as amended. Ultimately, Carlos Santos was added as a defendant, and Carlos Santos and Antonio Santos were added as Third Parties. Section 8 and subsections 13(1) and 13(2) of that statute provide:

> 8.- (1) All amounts,
>
> (a) owing to a contractor or subcontractor, whether or not due or payable; or
>
> (b) received by a contractor or subcontractor, on account of the contract or subcontract price of an improvement constitute a trust fund for the benefit of the subcontractors and other persons who have supplied services or materials to the improvement who are owed amounts by the contractor or subcontractor.
>
> (c) The contractor or subcontractor is the trustee of the trust fund created by subsection (1) and the contractor or subcontractor shall not appropriate or convert any part of the fund to the contractor's or subcontractor's own use or to any use inconsistent with the trust until all subcontractors and other persons who supply services or materials to the improvement are paid all amounts related to the improvement owed to them by the contractor or subcontractor. R.S.O. 1990, c. C. 30, s. 8.
>
> [...]
>
> 13.- (1) In addition to the persons who are otherwise liable in an action for breach of trust under this Part,
>
> (a) every director or officer of a corporation; and
>
> (b) any person, including an employee or agent of the corporation, who has effective control of a corporation or its relevant activities,
>
> who assents to, or acquiesces in, conduct that he or she knows or reasonably ought to know amounts to breach of trust by the corporation is liable for the breach of trust.
>
> (2) The question of whether a person has effective control of a corporation or its relevant activities is one of fact and in determining this the court may disregard the form of any transaction and the separate corporate existence of any participant.

3 It would appear the funds received by Caldense from construction projects were all deposited into one bank account without differentiating the various jobs and payments were made out of these funds on a running account basis.

4 In his Third Party claim, Francisco alleges he was out of the country from July 1, 1989 to August 17, 1989 and further alleges that, in his absence and without his consent, the Third Parties caused Caldense to pay $100,000 to Antonio Santos from its general account comprised of monies paid to Caldense on account of the projects subject to BPCO's claim. The Third

Parties deny that payment was made without Francisco's knowledge and assure that the monies paid were not from the projects subject to BPCO's action.

5 Caldense consented to summary judgment against it by order of Hoilett J. dated May 9, 1990 in the amount of $117,000. Paragraph 2 of that order provides:

> 2. This Court ORDERS that this judgment against the Defendant, Caldense Roofing and Insulation Limited is without prejudice to the Plaintiff continuing its claim against the Defendant, Casimiro Francisco.

Paragraphs 4, 9 and 10 of BPCO's claim alleges:

> 4. The Defendant, Casimiro Francisco resides in the Province of Ontario and was at all material times an officer, director and person having effective control of Caldense.
>
> 5. The Plaintiff further alleges that Caldense, in breach of the Construction Lien Act, 1983 appropriated or converted to its own use or a use not authorized by the trust the funds received on the projects referred to in paragraph 8 hereof and thereby caused the Plaintiff damages thereby to the extent of its claim herein.
>
> 10. The Plaintiff further alleges that the Defendant, Casimiro Francisco was and is an officer, director and person with the effective control of the affairs of the Corporation and assented to and/or acquiesced in conduct which he knew or ought to reasonably have known amounts to a breach of trust by the Corporation and is personally liable to the Plaintiff herein for such breach pursuant to Section 13 of the said Act.

6 BPCO was unable to collect its judgment against Caldense, and the trial of the action against Francisco commenced on September 26, 1994 before Davidson J. After three days of hearing, however, the trial was adjourned to a date to be fixed in order to permit BPCO further discovery of Francisco on documents produced by him at trial and not previously produced. Costs were also awarded against Francisco.

7 On October 28, 1994, Francisco made an assignment in bankruptcy, and on November 14, 1994 BPCO filed a proof of claim in the bankruptcy proceeding. BPCO, however, also took the position that Francisco's liability to BPCO survives his bankruptcy because it is a "liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity" within the meaning of subsection 178(1)(d) of the Bankruptcy and Insolvency Act. The argument is that the failure to pay BPCO out of project funds received by Caldense made Francisco liable for misappropriation or defalcation while he was acting in a fiduciary capacity given that the funds were impressed with a statutory trust, the breach of which Francisco was made liable by subsection 13(1) of the Construction Lien Act.

8 Subsection 178 (1)(d) of the Bankruptcy and Insolvency Act provides:

> 178. (1) An order of discharge does not release the bankrupt from
>
> [...]
>
> (d) any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity; [...]

9 Master Ferron refused leave to continue the action. His endorsement took the following summary form:

> January 5, 1995
>
> - None of the items described in subparagraphs (d) or (e) of Section 178 have been pleaded against the Bankrupt.
>
> - Further, the reasons for lifting the stay which I listed in Re: Advocate Mines are not present.
>
> - The action against the company of which the Bankrupt was an officer has been concluded and Judgment rendered.
>
> In that action and in the Judgment there was no finding of fraud, misrepresentation etc. against the company.
>
> The Bankrupt liability, if any, must be established through the company, that is, his liability is vicarious.
>
> It must follow that if the company has been adjudicated not to be liable on any grounds except breaching a simple contract, no liability under the Construction Lien Act can be attributed to the Bankrupt. It is not sufficient to suggest that the breaching the trust provisions of the Act can be established against the company in an action against the principal.
>
> This is not an appropriate case for lifting the Section 69 stay.

10 With the greatest of respect, I have come to the conclusion that Registrar Ferron erred in principle in rejecting the application. Therefore, this appeal must be allowed. Consent to the action continuing is granted.

11 Without intending to usurp the role of the trial judge to decide otherwise on the facts established before him, I am satisfied BPCO has pleaded sufficient allegations to bring its claim, at least arguably, within subsection 178(1)(d). Francisco is alleged to have been a director or officer of a corporation who assented to or acquiesced in conduct he knew or should have known amounted to breach of trust by the corporation. Subsection 13(1) of the Construction Lien Act makes such a person "liable for the breach of trust". Thus, it is reasonably arguable that a director acts in a fiduciary capacity with respect to the beneficiaries of this trust relationship. For very similar fact situations see, for example, J.B. Allen & Co. v. D.E. Witmer Plumbing & Heating Ltd. (1992), 12 C.B.R. (3d) 272 (Ont. Gen. Div.), and Smith v. Henderson (1992), 10 C.B.R. (3d) 153 (B.C.C.A.).

12 It should be understood that Re Advocate Mines Limited, supra, is not an exhaustive codification of the policy underlying the Bankruptcy and Insolvency Act. It is but one thoughtful decision attempting to articulate the type of grounds which may provoke the exercise of a judicial discretion. To view Advocate Mines as a limiting or exhaustive instrument is an error in principle. Moreover, I am satisfied the action in question is one in respect of which a discharge may not be a defence and, further, that the action had progressed to a point where logic dictated the action be permitted to continue to judgment.

13 While the action against Caldense had culminated in a consent summary judgment, the fact that there had been "no finding of fraud, misrepresentation etc. against the company" was not material to issue before the learned registrar. The words "misappropriate" and "defalcation" are not used in a pejorative or accusatory sense and are applicable simply where there has been a failure to properly account for funds. See Abstainer's Insurance Company v. Pellegrino (1989), 77 C.B.R. 108 (Ont. Dist. Crt.), and Turner v. Midland Doherty Ltd. (1992), 13 C.B.R. (3d) 16 (B.C.S.C.).

14 Further, it was not for the registrar to determine that the liability of a director under subsection 13(1) of the Construction Lien Act is merely "vicarious". I personally have difficulty with this conclusion given the wording of that subsection. But this is for the trial judge to determine. The consent judgment against Caldense was made expressly subject to the right of the plaintiff to proceed against Francisco. I do not appreciate the existence of any a priori legal principle precluding BPCO from establishing facts which demonstrate Caldense's conduct as a background to establishing Francisco's independent liability for breach of trust. In any event, this too is a matter for the trial judge.

15 Accordingly, the appeal is allowed and the section 69 stay is lifted. BPCO may continue its action against the bankrupt and in respect of which the applicability of s. 178(1)(d) can be definitively determined. See Turner v. Midland Doherty Ltd., supra.

16 I may be spoken to concerning costs on appointment.

ADAMS J.

End of Document

Tab 4

Francisco (Re)

Ontario Judgments

Ontario Court of Appeal

Toronto, Ontario

McMurtry C.J.O., Catzman and Weiler JJ.A.

June 6, 1996.

Court of Appeal File No. C21510 and Estate No. 31-292784

[1996] O.J. No. 2024 | 40 C.B.R. (3d) 77 | 63 A.C.W.S. (3d) 1012 | 1995 CanLII 7371

IN THE MATTER OF the Bankruptcy of Casimiro Almeida Francisco, of the City of Etobicoke, in the Municipality of Metropolitan Toronto, in the Province of Ontario, Roofer

(2 pp.)

Counsel

C. Colraine for the appellant. Chris Reed for the respondent.

The judgment of the Court was delivered by

McMURTRY C.J.O. (endorsement)

1 We agree with the conclusion of Adams and his reasons for reaching that conclusion. The appeal is therefore dismissed. The costs of the appeal (including the motion to grant the appeal) are reserved for dispositions by the judge pending at the trial of the action.

McMURTRY C.J.O.

Tab 5

2001 CarswellOnt 1019
Ontario Court of Appeal

Ma, Re

2001 CarswellOnt 1019, [2001] O.J. No. 1189, 104 A.C.W.S. (3d) 261, 143 O.A.C. 52, 24 C.B.R. (4th) 68

In the Matter of the Bankruptcy of James Hoi-Pang Ma, of the City of Mississauga, in the Regional Municipality of Peel, in the Province of Ontario

James Hoi-Pang Ma (Bankrupt (Appellant)) and Toronto Dominion Bank (Applicant (Respondent))

Abella, Charron, Sharpe JJ.A.

Judgment: March 23, 2001
Judgment: April 4, 2001 (Written Reasons)
Docket: CA C34958

Proceedings: affirming (2000), 20 C.B.R. (4th) 267 (Ont. Bktcy.); affirming (2000), 19 C.B.R. (4th) 117 (Ont. Bktcy.)

Counsel: *Chi-Kun Shi*, for Appellant
Bruce S. Batist, for Respondent
William J. Meyer, Q.C., for Trustee in Bankruptcy

Endorsement. *Per curiam*:

1 The appellant argues that when considering an application to lift a stay under s. 69.4 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3, the applicant is required to establish a *prima facie* case for the proposed action. *Bowles v. Barber* (1985), 60 C.B.R. (N.S.) 311 (Man. C.A.) is cited in support of this proposition. It is argued that to the extent Ontario cases such as *Arrojo Investments v. Cardamone* (1995), 33 C.B.R. (3d) 46 (Ont. Gen. Div.) apply a more lenient standard, they are inconsistent with decisions from other provinces.

2 In our view there is no requirement to establish a *prima facie* case and no inconsistency in the case law. We do not agree that *Bowles v. Barber* imposes a *prima facie* case requirement. More importantly, that requirement is not imposed by the statute. Under s. 69.4 the court may make a declaration lifting the automatic stay if it is satisfied (a) that the creditor is "likely to be materially prejudiced by [its] continued operation" or (b) "that it is equitable on other grounds to make such a declaration." The approach to be taken on s. 69.4 application was considered by Adams J. in *Re Francisco* (1995), 32 C.B.R. (3d) 29 (Ont. Bktcy.), at 29-30, a decision affirmed by this court (1996), 40 C.B.R. (3d) 77 (Ont. C.A.):

> In considering an application for leave, the function of a bankruptcy court is not to inquire into the merits of the action sought to be commenced or continued. Instead, the role is one of ensuring that sound reasons, consistent with the scheme of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3, exist for relieving against the otherwise automatic stay of proceedings.

3 As this passage makes clear, lifting the automatic stay is far from a routine matter. There is an onus on the applicant to establish a basis for the order within the meaning of s. 69.4. As stated in *Re Francisco*, the role of the court is to ensure that there are "sound reasons, consistent with the scheme of the *Bankruptcy and Insolvency Act*" to relieve against the automatic stay. While the test is not whether there is a *prima facie* case, that does not, in our view, preclude any consideration of the merits of the proposed action where relevant to the issue of whether there are "sound reasons" for lifting the stay. For

example, if it were apparent that the proposed action had little prospect of success, it would be difficult to find that there were sound reasons for lifting the stay.

4 In the case before us, Justice Lane found that the Deputy Registrar was correct in finding that the applicant would suffer sufficient prejudice to justify an order lifting the stay. This finding accords with s. 69.4 and is supported by the record. We see no basis for interfering with his conclusion. The appeal is therefore dismissed with costs.

Appeal dismissed.

Tab 6

2012 ONSC 7319
Ontario Superior Court of Justice [Commercial List]

Peoples Trust Co. v. Rose of Sharon (Ontario) Retirement Community

2012 CarswellOnt 16827, 2012 ONSC 7319, 19 C.L.R. (4th) 1, 224 A.C.W.S. (3d) 323, 97 C.B.R. (5th) 303

Peoples Trust Company (Applicant) and Rose of Sharon (Ontario) Retirement Community (Respondent)

D.M. Brown J.

Heard: December 21, 2012
Judgment: December 27, 2012
Docket: CV-11-9399-00CL

Counsel: C. Prophet, C. Stanek for Receiver, Deloitte & Touche Inc.
R. Jaipargas for Trisura Guarantee Insurance Company

***D.M. Brown J.*:**

I. Motion to lift stay in a receivership in order to set down for trial a construction lien action

1 On September 27, 2011, C. Campbell J. appointed Deloitte & Touche Inc. receiver and manager of all the assets, undertakings and properties of Rose of Sharon (Ontario) Retirement Community. Paragraph 8 of the Appointment Order contained the standard clause staying proceedings against the debtor.

2 Rose of Sharon owned a long-term care condominium located on Maplewood Avenue, Toronto. Prior to the appointment of the Receiver construction lien litigation had broken out over the condominium project and the general contractor, Mikal-Calladan Construction Inc., had initiated lien proceedings. On January 30, 2012, Trisura Guarantee Insurance Company obtained an assignment of Mikal-Calladan's lien. On November 26, 2012, Trisura obtained an order to continue the construction lien action. As required by the terms of section 37 of the *Construction Lien Act*, R.S.O. 1990, c. C.30, Trisura must set the construction lien action down for trial by December 31, 2012, failing which its lien will expire.

3 Trisura therefore moved for an order lifting the stay of proceedings to allow it to pursue the construction lien action so that it can set the action down for trial.

4 The Receiver did not oppose the lifting of the stay, but it sought certain terms for the order. Trisura has agreed to all the terms, but one — whether as a condition of lifting the stay this Court should set aside a default judgment granted against Rose of Sharon some two days after the Appointment Order was made and the earlier noting in default of Rose of Sharon.

II. Governing legal principles governing the lifting of stays

5 On a motion to lift a stay of proceedings in a receivership the moving party bears the onus of convincing the court that the relief should be granted, and in considering such a request the court should look at the totality of the circumstances and the relative prejudice to both sides.[1] The parties agreed that the court may find guidance in the jurisprudence which has developed around requests to lift stays imposed by the *Bankruptcy and Insolvency Act*. Section 69.4(1) of the *BIA* provides that a court may declare that the statutory stays no longer operate, "subject to any qualifications that the court considers

proper", where the court is satisfied that the creditor is likely to be materially prejudiced by the continued operation of the stays or that it is equitable on other grounds to make such a declaration. In *Ma, Re*[2] the Court of Appeal set out the basic considerations on a request to lift a stay under *BIA* s. 69.4:

> Under s. 69.4 the court may make a declaration lifting the automatic stay if it is satisfied
>
> (a) that the creditor is "likely to be materially prejudiced by [its] continued operation" or
>
> (b) "that it is equitable on other grounds to make such a declaration." The approach to be taken on s. 69.4 application was considered by Adams J. in *Re Francisco* (1995), 32 C.B.R. (3d) 29 at 29-30 (Ont. Gen. Div.), a decision affirmed by this court (1996), 40 C.B.R. (3d) 77 (Ont. C.A.):
>
> > In considering an application for leave, the function of a bankruptcy court is not to inquire into the merits of the action sought to be commenced or continued. Instead, the role is one of ensuring that sound reasons, consistent with the scheme of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, exist for relieving against the otherwise automatic stay of proceedings.

As this passage makes clear, lifting the automatic stay is far from a routine matter. There is an onus on the applicant to establish a basis for the order within the meaning of s. 69.4. As stated in *Re Francisco*, the role of the court is to ensure that there are "sound reasons, consistent with the scheme of the *Bankruptcy and Insolvency Act*" to relieve against the automatic stay. While the test is not whether there is a prima facie case, that does not, in our view, preclude any consideration of the merits of the proposed action where relevant to the issue of whether there are "sound reasons" for lifting the stay. For example, if it were apparent that the proposed action had little prospect of success, it would be difficult to find that there were sound reasons for lifting the stay.

III. The basic chronology

6 Mikal-Calladan preserved a Claim for Lien on November 19, 2010 against title to the Project. It perfected its lien by commencing the construction lien action — CV-10-417426 — on December 31, 2010. On July 21, 2011, Peoples Trust served a statement of defence in the Lien Action. Rose of Sharon was noted in default in the Lien Action; exactly when, the materials did not disclose.

7 On August 31, 2011, with the consent of Peoples Trust, the parties agreed to refer the Lien Action to a construction lien master in Toronto for a trial. MacDonald J. made a standard Reference Order on that day which provided that "the Master determine all questions arising in this action on the reference".

8 Then, less than a month later, at the suit of Peoples Trust, the Appointment Order was made.

9 On September 12, 2011, before the Appointment Order was made, Mikal-Calladan had requisitioned default judgment against Rose of Sharon. On September 29, two days after the Appointment Order was made, the Registrar signed default judgment against Rose of Sharon for $4,195,768.64, plus costs of $1,350.00 (the "Default Judgment").

10 As mentioned, earlier this year Trisura took an assignment of Mikal-Calladan's Lien Claim and obtained an order to continue the Lien Action about a month ago.

11 With the December 31 deadline looming to set down the Lien Action or face the expiry of its lien, on November 7, 2012 Trisura's counsel wrote to the Receiver's requesting that the Receiver consent to a lifting of the stay so it could set the Lien Action down for trial. Trisura's counsel indicated that "the main issue in the lien action relates to the priority of the lien over the People's Trust mortgage".

12 Receiver's counsel responded on November 22, 2012 advising that the Receiver was prepared to consent to lifting the stay on the following terms:

Condition 1: Trisura obtained an order to continue in the Lien Action;

Condition 2: Trisura agreed to set aside the noting in default of Rose of Sharon and the Default Judgment so that the Receiver could defend the Lien Action;

Condition 3: Issues of liability, timeliness and quantum in the Lien Action would be determined in a Reference before a Master; and,

Condition 4: The issue of the priorities of the construction lien vis-à-vis any other encumbrance would be determined by a judge of the Commercial List.

13 Mr. Edouard Chassé, a claims adjuster retained by Trisura, in his affidavit stated that Trisura had obtained an order to continue and it agreed to Conditions 3 and 4. Trisura opposed Condition 2 "as the Receiver has had notice of the default for 14 months and has taken no steps" to set aside the noting in default and default judgment.

IV. Analysis

14 There is no doubt that if the stay is not lifted, Trisura would be prejudiced materially by losing its ability to advance its lien claim. Section 37(1) of the *Construction Lien Act* provides that a perfected lien, such as that assigned to Trisura, expires immediately after the second anniversary of the commencement of the lien action unless either (i) an order is made for the trial of an action in which the lien may be enforced or (ii) an action in which the lien may be enforced is set down for trial. December 31, 2012 is the second anniversary of the commencement of the Lien Action, so unless the stay is lifted, Trisura's lien claim will expire. As mentioned, the Receiver has consented to the lifting of the stay, so the remaining dispute centres only around Condition 2 — the Receiver's requirement that the noting of default and Default Judgment against Rose be set aside.

15 Trisura advanced two arguments why no setting aside should occur. First, Trisura argued that because the August 31, 2011 Reference Order of MacDonald J. stipulated that "the Master determine all questions arising in this action on the reference and all questions arising under the *Construction Lien Act*", it was not open to the court supervising the receivership proceedings to set aside a noting of default which had occurred in the Lien Action.

16 I disagree, for two reasons. First, the Default Judgment was made two days after the Appointment Order. No doubt that occurred because the papers requisitioning the Default Judgment were moving through the court's administrative office and the Registrar was unaware of the Appointment Order. Nonetheless, given the stay of proceedings ordered in the Appointment Order, the Default Judgment contravened the Appointment Order and therefore was of no force or effect.

17 Second, Trisura's submission ignored what occurred less than one month after MacDonald J. made his Reference Order — this receivership came about. As a result of the Appointment Order, the court supervising the receivership considers all issues relating to or touching upon the receivership and therefore is the proper court to determine whether, as a condition of lifting a stay of proceedings, certain relief should be granted to the receiver as part of the process of balancing the respective interests at stake on the lift-stay motion.

18 Which brings me to the second argument made by Trisura: it contended that the appropriate test for considering whether to set aside a noting in default in a construction lien action is that set out in the *Construction Lien Act* and the related jurisprudence and, in the circumstances of this case, the Receiver could not meet that test. Section 54(3) of the *CLA* provides that where a defendant has been noted in default, it shall not be permitted to contest the claim "except with leave of the court, to be given only where the court is satisfied that there is evidence to support a defence". Section 67(3) of the *CLA* states that "except where inconsistent with this Act...the *Courts of Justice Act* and the rules of court apply to pleadings and proceedings under this Act."

19 In *M.J. Dixon Construction Ltd. v. Hakim Optical Laboratory Ltd.*, Master Polika held that Rule 19.03(1) of the *Rules of Civil Procedure* dealing with the setting aside of notings in default was inconsistent with *CLA* s. 54(3) because it was less stringent than the test under the *CLA* by reason of granting the court a discretion to set aside a noting of default on such terms

as were just. Master Polika stated that the sole test a party moving to set aside the noting of default in a construction lien action needed to meet was that set out in *CLA* s. 54(3) — i.e. to satisfy the court that there existed evidence to support a defence.[3] In *A1 Equipment Rental Ltd. v. Borkowski* Lederer J. stated that a party moving to set aside a noting in default under the *CLA* must not only demonstrate that evidence existed to support a defence, it also had to move promptly to set aside the noting in default.[4]

20 Whether, when a lien claimant seeks leave of the court supervising a receivership to lift the stay of proceedings and the receiver seeks a condition that a noting of default be set aside, the court must apply the test under *CLA* s. 54(3) or may proceed on a less stringent basis as part of its discretion in lifting the stay, is a question I need not determine for the simple reason that on the facts of this case the Receiver meets the test under the *CLA*.

21 Trisura submitted that the Receiver cannot now attempt to impose a condition setting aside the noting of default when over a year has passed since that event. The evidence does not support that contention. First, just over a week after the making of the Appointment Order, counsel for Mikal-Calladan wrote to Receiver's counsel advising of the Default Judgment and stating:

> Under the circumstances, we will not take any steps to enforce our client's judgment in the absence of obtaining the necessary leave from the Court.

In light of that position taken by the lien claimant, it is not surprising that the Receiver took no immediate steps to set aside the Default Judgment or the noting in default.

22 In its First Report dated December 12, 2011 the Receiver reported:

> While there may be setoffs against Mikail's claim that may be asserted by the Receiver, pending disposition of the Property, the Receiver does not intend to take any action in connection with any of the above-noted lien claims at this time.

Again, this constitutes evidence of a reasonable explanation by the Receiver about why it did not take steps at the time in the Lien Action.

23 On February 29, 2012, Trisura advised the Receiver of the assignment of the Lien Claim, but then took no further steps to move the Lien Action along until October 24, 2012 when it informed the Receiver that it wished to obtain a trial date. Further emails between counsel ultimately resulted in the Receiver's November 22, 2012 letter setting out the terms for lifting the stay of proceedings. In those circumstances, I see no argument that the Receiver failed to take steps promptly to set aside the noting in default once it became aware of Trisura's intention to proceed with the Lien Action. I also would note, by way of chronology, that on September 14, 2012, a month before Trisura approached the Receiver about further steps in the Lien Action, the Receiver had commenced a claim against Trisura under the performance bond for the Project.

24 As to whether the Receiver has filed evidence to support a defence, it has. Although the Receiver has not filed a draft Statement of Defence, the Receiver provided Trisura with ample details of its defence through its July 10, 2012 letter to Trisura's counsel, in particular the sections entitled "Set-Offs" and "Deficiencies", as well as in portions of its Statement of Claim in the performance bond action, specifically paragraphs 42 and 62 of the claim.

25 In balancing the interests of Trisura and the Receiver on this motion to lift the stay of proceedings, I conclude that it is fair and appropriate to require, as a term of lifting the stay, that both the noting of default of Rose of Sharon and the Default Judgment be set aside, and that the Receiver be permitted to file a Statement of Defence in the Lien Action within 20 days.

V. Summary and costs

26 By way of summary, I grant the motion of Trisura to lift the stay of proceedings contained in the Appointment Order to allow it to pursue the Lien Action, including allowing Trisura to set the Lien Action down for trial. Out of an abundance of caution, given the proximity of the December 31 deadline, I also order the trial of the Lien Action. As conditions for lifting the stay I order as follows:

(i) the noting in default of Rose of Sharon and the Default Judgment against it are set aside so that the Receiver can defend the Lien Action;

(ii) the Receiver may file a Statement of Defence in the Lien Action within 20 days;

(iii) the issues of liability, timeliness and quantum in the Lien Action shall be determined in a Reference before a Master; and,

(iv) the issue of the priorities of the construction lien vis-à-vis any other encumbrance shall be determined by a judge of the Commercial List in these receivership proceedings.

As to costs, the conditions sought by the Receiver in its November 22, 2012 letter were reasonable. There really was no need for a contested motion. Accordingly, I grant the Receiver its costs of this motion fixed at $4,000.00 payable by Trisura within 20 days of the date of this Order. I am available at a 9:30 appointment tomorrow, Friday, December 28, 2012, to issue this order, if required.

Motion granted.

Footnotes

1 *Ford Credit Canada Ltd. v. Welcome Ford Sales Ltd.*, 2010 ABQB 199 (Alta. Q.B.), paras. 13 and 14.

2 (2001), 24 C.B.R. (4th) 68 (Ont. C.A.), paras. 2 and 3.

3 (2009), 79 C.L.R. (3d) 144 (Ont. Master), para. 24.

4 (2008), 70 C.L.R. (3d) 274 (Ont. S.C.J.), para. 51.

Citing References (13)

Treatment	Title	Date	Type	Depth	Abridgment Classifications
Considered in	C 1. **Syndic de 9270-4378 Quebec inc.** 2020 QCCS 400 (Que. Bktcy.) **Judicially considered 1 time**	Feb. 12, 2020	Cases and Decisions		—
Considered in	H 2. **D'Amico v. Minassian** 2019 ONSC 6856 (Ont. S.C.J.)	Dec. 17, 2019	Cases and Decisions		CIV.XVI.5.b
Considered in	H 3. **D'Amico v. Minassian** 2019 ONSC 5217 (Ont. S.C.J.)	Sep. 18, 2019	Cases and Decisions		CIV.XVII.7
Considered in	4. **Business Development Bank of Canada v. 8000140 Canada Ltd. carrying on business as Servpro Winnipeg et al** 2018 MBQB 94 (Man. Q.B.) **Judicially considered 3 times**	June 06, 2018	Cases and Decisions		CIV.XVII.3.i
Considered in	H 5. **Romspen Investment Corp. v. Courtice Auto Wreckers Ltd.** 2017 ONCA 301 (Ont. C.A.) **Judicially considered 10 times**	Apr. 13, 2017	Cases and Decisions		BKY.V.4 BKY.XVI.1.a.ii BKY.XVII.7.b.ii.C LAB.I.3.c.iii LAB.I.5.c.iii.A.6
Referred to in	C 6. **Peoples Trust Co. v. Rose of Sharon (Ontario) Retirement Community** 2014 ONCA 534 (Ont. C.A.) **Judicially considered 1 time**	July 07, 2014	Cases and Decisions		PPS.IV.7
—	7. **Bankruptcy and Insolvency Law of Canada, 4th Edition s 5:332, § 5:332. Lifting the Stay**	2023	Secondary Sources	—	—
—	8. **Construction, Builders' and Mechanics' Liens in Canada, 8th Edition APP PS s PS:53, § PS:53. Pleadings**	2023	Secondary Sources	—	—
—	9. **Construction, Builders' and Mechanics' Liens in Canada, 8th Edition APP PS s PS:55, § PS:55. Expiry of Perfected Lien and Order Dismissing Action**	2023	Secondary Sources	—	—
—	10. **Faillite et insolvabilite - (LFI) Commentaires 69.4§2, — Demande d'autorisation au tribunal**	1999	Secondary Sources	—	—
—	11. **Manual of Construction Law s 5:42, § 5:42. Failure to Fix Date for or Set Down for Trial within Two Years—Section 46**	2023	Secondary Sources	—	—
—	12. **Houlden and Morawetz Insolvency Newsletter; 2017-17 Houlden & Morawetz Insolvency Newsletter**	2017	Secondary Sources	—	—
—	13. **Houlden and Morawetz Insolvency Newsletter; 2013-08 Houlden & Morawetz On-Line Newsletter**	2013	Secondary Sources	—	—

CANADIAN WESTERN BANK - and - 2722959 ONTARIO LTD. et al

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