New and Bold Decision by the Ontario Superior Court of Justice… Who Madoff with the Money

July 31, 2017

A recent decision by the Ontario Superior Court of Justice may be a game-changer in the Court's use of summary judgment motions, and notably, even in matters which are very complex and involve extremely large sums of money.

The judiciary has occasionally been criticized by the litigation bar for not taking advantage of the summary judgment procedures set out in the Court Rules. Indeed, it seems that a summary judgment is granted only in exceptional circumstances and a judge may be more prone to "kick the can down the road" rather than making the more difficult decision based solely on affidavit materials. This often leads to extensive time delays, unnecessary legal costs and disappointment with the dispensation of justice.

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Case Background

The case of *Fairfield Sentry Limited, et al v. PricewaterhouseCoopers LLP and Stephen Wall*, 2017 ONSC 3447 arose out of the Ponzi scheme orchestrated by Bernie Madoff. The facts are not terribly straightforward but can be summarized as follows:

- a group of "Fairfield" companies (the "Fairfield Companies") invested funds (the "Fairfield Funds") in Bernie Madoff's "investment" company ("Madoff Investments"). The Fairfield Funds were never really invested by Madoff Investments as they were used to facilitate the Ponzi scheme.
- the Fairfield Companies invested 95% of its funds (some of which were investments from other parties) with Madoff Investments to the tune of $7.2 billion.
- PwC was engaged to audit the Fairfield Companies financial statements for the years ending December 31, 2006 and December 31, 2007. Audits were issued by PwC in respect of the tax years 2007 and 2008 on April 24, 2007 and April 8, 2008 respectively.
- Madoff's fraud was revealed on December 10, 2008 by Bernie's own confession.

- the Fairfield Companies had received certain funds from Madoff Investments and the trustee for Madoff Investments (the "Madoff Trustee") brought an action against the Fairfield Companies to recover the funds it received from Madoff Investments. In total, the amount claimed by the Madoff Trustee against the Fairfield Companies exceeded $5.5 billion.
- in April/July 2009, the Fairfield Companies (which were incorporated in BVI) were placed into liquidation and a Liquidator was appointed (the "BVI Liquidator").
- prior to the appointment of the BVI Liquidator, the Fairfield Companies had made claims against Madoff Investments in an amount exceeding $7.0 billion.
- the Madoff Trustee had rejected the bulk of the Fairfield Companies claims on the basis that there was some double counting involved in its claim and that the methodology used to calculate their claim was improper.
- in May, 2011 the BVI Liquidator and the Madoff Trustee entered into a settlement agreement (the "Settlement Agreement").
- after entering into the Settlement Agreement, the BVI Liquidator brought an action against PwC claiming $5.0 billion in damages for breach of contract, negligence and negligent misrepresentation arising from the alleged defective audits for 2006 and 2007.
- the BVI Liquidator put forth a rather complex formulation as to how the damages were to be calculated.
- only for the purposes of the summary motion, PwC did not contest the negligence allegations (which would no doubt be a long, arduous and expensive piece of litigation) but only asserted that the BVI Liquidator could not prove that the Fairfield Companies suffered ANY damages.
- PwC filed affidavits by a very impressive consultant (expert witness) whose firm specializes in applied mathematical and statistical analysis used to analyze the quantum of damages. He was extensively cross examined.
- the BVI Liquidator put forth its own affidavit describing the methodology it had used to calculate the damages. The BVI Liquidator had also put forth an affidavit of an expert witness who endorsed the BVI Liquidator's analysis of damages and also critiqued the PwC expert's methodology used to quantify damages.
- the experts' analyses were at odds with each other but the PwC expert, in response to the criticism of the BVI Liquidator expert, used the BVI Liquidator's methodology and still concluded that the Fairfield Companies suffered no damages as a result of the alleged negligence of PwC.
- PwC sought an order dismissing the claim of the BVI Liquidator on the basis that the Fairfield Companies had not suffered any damages.

The Court's Decision

Justice Newbould decided the motion on the basis that:

1. both parties have an obligation to put their best foot forward on the application. The onus of establishing that there is no genuine issue requiring a trial is on the moving party (in this case PwC), but a respondent (in this case the BVI Liquidator) must "lead trump or risk losing".
2. on the whole, the Judge preferred and agreed with the evidence of the PwC expert witness and disagreed with the position of the BVI Liquidator and its expert.

As a result, the Court found that the BVI Liquidator had not established any damages and the action by the BVI Liquidator against PwC was dismissed on a summary basis.

In 2014, the Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 SCC 7 ("*Hryniak*") seemed to signal that the use of summary judgment motions should be more extensively considered by the lower courts. The fact-finding powers are presumptively available and may be exercised unless it is in the interests of justice for them to be exercised only at trial. The summary judgment rules should not be restricted to weed out only unmeritorious claims but should be used as an alternative method of adjudication.

In *Hryniak*, Justice Karakatsanis discussed the factors that determine when a genuine issue may not require a trial:

"There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process: (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result."

Conclusion

As seen in this case, the fact that the claim involves very large sums of money, complex factual issues and duelling experts does not in itself lead to the conclusion that a summary judgment would not be an appropriate method of dealing with a commercial dispute.

This may be a watershed moment for the summary judgment process. Clearly some judges are taking the bull by the horns and making more difficult decisions in complex commercial cases.

By

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