Fraudulent Misrepresentation To Receivers And Beyond: Meridian Credit Union Limited V Baig

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The Ontario Court of Appeal in *Meridian Credit Union Limited v Baig*[1] made it clear that misinforming a receiver during the purchase of a property, even by omission, will not be tolerated. Purchasers in the context of a receivership have an obligation to ensure that the receiver is aware of all of the facts. The court also took the opportunity to remind corporate directors that they will be held personally responsible for their tortious conduct, even if that conduct was directed in a *bona fide* manner to the best interests of the company. As such, directors of a corporation involved in the receivership process have been put on notice.

Facts and Judicial History

After a lengthy marketing process, the court-appointed receiver (the "Receiver") agreed to sell the property to Ahmed Baig ("Baig"), the appellant director, in trust for a corporation to be incorporated, for $6.2 million (the "Agreement").[2] The Receiver was not aware that, prior to the closing, Baig agreed to re-sell the property to Yellowstone Property Consultants Corp. ("Yellowstone") for $9 million for the purpose of avoiding land transfer tax.[3] Both Baig and his counsel wanted to prevent the Receiver from discovering the sale to Yellowstone as the $2.8 million difference in price would jeopardize the receipt of court approval.[4]

While the Agreement did not prevent Baig from re-selling the property, it prohibited him from assigning his interest under the Agreement without the Receiver's consent. The Receiver was permitted to refuse such consent unless the assignee was the "corporation to be incorporated for the purposes of [the] Agreement."[5] Further, the Receiver was required to obtain court approval prior to selling the property. The Receiver claims that if it had been aware of the agreement with Yellowstone, it would not have recommended that the court approve the Agreement.[6] The Receiver could have instead negotiated with Baig or Yellowstone to obtain a higher purchase price or solicited new offers.[7]

Several years later, Meridian Credit Union Limited ("Meridian") discovered the purchase of the property by Yellowstone and contacted the Receiver. As Meridian was unable to recover the full amount owing to it in the receivership proceeding, the Receiver assigned its cause of action against the appellant to Meridian.[8] Meridian claimed that

Baig misrepresented that Yellowstone was the company incorporated by him for the purpose of the Agreement with the Receiver.[9]Meridian sought an accounting for the profit made on the re-sale to Yellowstone or, alternatively, damages of approximately $2.1 million for breach of contract, fraudulent misrepresentation, and conspiracy.[10]

On a motion for summary judgment, the motion judge found Baig liable for two reasons. First, Baig was held liable for misrepresentations made by his counsel as the documents delivered as part of the closing contained untrue statements.[11] Second, the motion judge found Baig liable for his own personal conduct — the failure to correct the misimpression that Yellowstone was a corporation created by the appellant amounted to a fraudulent misrepresentation.[12]

Analysis

The Court of Appeal held that there was sufficient evidence to prove all four elements of a claim for civil fraud and found Baig personally liable for the fraudulent misrepresentation to the Receiver.[13]

A. Elements of a Claim for Civil Fraud

1. The Record Disclosed that Baig Engaged in Actions that Amounted to Misrepresentations

Both Baig and his counsel actively hid the second agreement with Yellowstone from the Receiver and fraudulently misrepresented that Yellowstone was the corporation incorporated to close the sale with the Receiver. Baig personally signed a title direction that falsely identified Yellowstone, and not himself or his company as the purchaser, knowing full well this information was false.[14] The court emphasized that silence and half-truths can amount to a misrepresentation.[15] It was held that while Baig had no duty to disclose the "flip", once his counsel made misleading disclosures misrepresenting Yellowstone to be the purchaser under Baig's agreement with the Receiver, the failure to correct the misimpression amounted to fraudulent misrepresentation.

2. Baig had Some Level of Knowledge of the Misrepresentations

He knew that the two sales were being represented as one for the purpose of saving land transfer tax and personally signed the title direction knowing that it was false. Baig also knew that the Receiver would be told to transfer title to Yellowstone and did not clarify that Yellowstone was an arms-length company rather than a company incorporated by him for the purposes of the purchase.[16]

3. The Representations Caused the Receiver to Seek Court Approval and Transfer Title Directly to Yellowstone

The court held that if the false representations had not been made, the Receiver likely would have acted differently and to the detriment of the appellant.[17] In other words, but for the misrepresentation, the Receiver likely would not have recommended that the court approve the Agreement.

4. As a Result of the Misrepresentations, the Receiver Lost an Opportunity to Negotiate a Higher Price with Baig or Another Party

The opportunity lost by the Receiver to negotiate a higher price was held to be a sufficient loss to ground a claim for fraud.[18]

B. Inapplicability of the Corporate Veil

The Court of Appeal also held that it was inappropriate for Baig to argue for the first time on appeal that there was no basis for him to be held liable because he was protected by the corporate veil.[19] The motion judge was said to have implicitly held that the corporate veil did not apply because Baig made the fraudulent misrepresentations in his personal capacity. The implied conclusion that the corporate veil did not apply in this case was supported by the following factors:

- The corporation incorporated by Baig never took title to the property, never had any dealings with the Receiver nor did it take part in the transaction;
- Baig signed the title direction, which falsely indicated Yellowstone as purchaser, as "Ahmed Baig", without any reference to his corporation or to any title or position he held at the corporation; and
- Baig's counsel's statement that the law firm represented Ahmed Baig.[20]

The Court of Appeal concluded that the motion judge's reasons read as a whole, together with the record, addressed the corporate veil issue. Subject to an exception set out in *Said v Butt*,[21] this case confirms 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", [22] quoting the decision in *AGDA Systems International Ltd v Valcom Ltd*.[23]

Conclusion

The court has made it explicitly clear that omissions, whether through silence or half-truths, will not be tolerated in dealings with receivers. In the insolvency context, the receiver and the court play an integral role in the marketing process to ensure that the highest value is obtained for the assets. The receiver acts as gatekeeper and, as such, purchasers must ensure that the receiver is aware of all of the facts. While the court addressed the issue of what is considered appropriate conduct in the course of insolvency proceedings, this decision has broader implications in the corporate context. This case confirms more generally that directors will be held personally responsible for their tortious conduct, even if that conduct was directed in a *bona fide* manner to the best interests of the company. Directors will not be permitted to benefit from their dishonesty and cannot hide behind the corporate veil.

[1] 2016 ONCA 150.

[2] *Ibid* at para 5.

[3] *Ibid* at para 6.

[4] *Ibid* at para 10.

[5] *Ibid* at para 7.

[6] *Ibid* at para 8.

[7] *Ibid* at para 15.

[8] *Ibid* at para 14.

[9] *Ibid* at para 15.

[10] *Ibid* at para 16.

[11] *Ibid* at para 18.

[12] *Ibid* at para 19.

[13] *Ibid* at para 27.

[14] *Ibid* at para 28.

[15] *Ibid* at para 30.

[16] *Ibid* at paras 31-32.

[17] *Ibid* at para 33.

[18] *Ibid* at para 34.

[19] *Ibid* at para 37.

[20] *Ibid* at para 38.

[21] [1920] 3 KB 497.

[22] *Supra* note 1 at para 39.

[23] (1999), 1999 CanLII 1527 (ONCA).

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