

COURT OF APPEAL FOR ONTARIO

CITATION: Demessey Limited v. Cassels Brock & Blackwell LLP, 2012 ONCA
423

DATE: 20120620

DOCKET: C54735

Doherty, Juriansz and Ducharme JJ.A.

BETWEEN

Demessey Limited

Plaintiff (Appellant)

and

Cassels Brock & Blackwell LLP, Gregory Jack Peebles, Lorne Hersh Saltman
and Robert Hryniak

Defendants (Respondents)

David Alderson, for the plaintiff (appellant)

Luisa Ritacca and Paul Saguil, for the defendants (respondents), Cassels Brock
& Blackwell LLP and Saltman

Heard and released orally: June 13, 2012

On appeal from the order of Justice Whitaker of the Superior Court of Justice,
dated November 10, 2011.

ENDORSEMENT

[1] We accept the motion judge's finding that the parties agreed on the form of the release. The motion judge correctly ordered the appellant to deliver a signed release in the form attached as Appendix A to the order, a copy of which is found at p. 135 of the appeal book.

[2] In our view, however, that determination by the motion judge did not resolve the substantive issue raised on the motion. The real question was whether the appellant was precluded by the terms of the release from alleging that Saltman had engaged in conduct for which his law firm Cassels Brock, another defendant, was vicariously liable. The appellant took the position that the release did not have that effect, but released only Saltman. The respondents take the position that the terms of the release also foreclosed any allegations against Cassels Brock based on Saltman's conduct.

[3] The motion judge found that the provision in the release, releasing Saltman's "agents", released Cassels Brock from any claim based on Saltman's conduct. The motion judge held that Cassels Brock was in fact an "agent" of Saltman and was, therefore, under the terms of the release released from any claims based on allegations that it was vicariously liable for the acts of Saltman. We cannot accept this interpretation of the word "agent". Certainly, Saltman was an agent of the law firm of which he was a partner. In the normal course, partners are agents of each other and of their law firm: see s. 6 of the *Partnership Act*. That section does not, in our view, mean that the law firm is

also an agent for its individual partners. That is not to say that for some purposes and in some circumstances a law firm would not properly be considered an agent of the individual partner. However, nothing in the language of the release agreed upon in this case supports that interpretation of the word “agent” as used in the release.

[4] We note that in the course of the negotiations over the terms of the release between counsel for the appellant and counsel for Saltman, who is also counsel for Cassels Brock, all parties seemed to contemplate that the appellant was not precluded from proceeding against Cassels Brock on the basis that Cassels Brock could be vicariously liable for Saltman’s conduct. This view is evident in the first version of the draft of the release provided to counsel for the appellant by counsel for Cassels Brock and Saltman.

[5] With respect to the conspiracy allegation, counsel for the respondents argue persuasively that the issue is not properly before us and is a matter to be addressed on a pending motion challenging the latest version of the statement of claim. However, in the hope of providing some assistance to the motion court should the issue of merger as it relates to the conspiracy and fraud allegations arise on the pleadings motion, we make the following observation. In para. 12 of his endorsement, the motion judge appeared to accept that the allegation of conspiracy merged with the allegation of fraudulent misrepresentation and that because the allegation of conspiracy added nothing, it should be struck by the

application of the doctrine of merger. The motion judge's approach seems to be in direct conflict with the reasoning of the Supreme Court of Canada in *Hunt v. Carey*, [1990] 2 S.C.R. 959 at para. 57. If the issue arises, it will be of course for motion judge to determine whether that conflict exists. If it does, the higher authority must prevail.

[6] In the result, the appeal is allowed to the extent that the order below will be varied so as to not preclude the appellant from pleading, obviously in accordance with the other pleadings rules, allegations to support a claim that Saltman engaged in activity for which his law firm, Cassels Brock, is vicariously liable.

[7] In all the circumstances, this is not a case for costs. No costs on the appeal.

"Doherty J.A."
"R.G. Juriansz J.A."
"Ducharme J.A."