COURT OF APPEAL FOR ONTARIO

CITATION: Trentfab Inc. v. Kinmond, 2012 ONCA 914
DATE: 20121228
DOCKET: C53367

LaForme and Watt JJ.A. and Lederman J. (*ad hoc*)

BETWEEN

Trentfab Inc. and 2202158 Ontario Inc.

Appellants

and

Brian Kinmond, 2198430 Ontario Inc.,
1745179 Ontario Inc. and Crawford Acquisitions Corp.

Respondents

Scott C. Hutchison, for the appellants

R. Steven Baldwin, for the respondents

Heard: December 12, 2012

On appeal from the order of Justice Herman Wilton-Siegel of the Superior Court of Justice, dated January 31, 2011 reported at 2011 ONSC 773.

ENDORSEMENT

Introduction

[1] Wilton-Siegel J. ordered that "there will be a trial of the issue concerning whether the activities of Brian Kinmond and 219 as alleged by the plaintiffs amounts to a fraudulent structure or scheme". The issue to be tried was later clarified in a consent order as "[encompassing] causes of action for both fraud and breach of fiduciary duty in relation to the structure or scheme as per

schedule “A” attached …”. Schedule “A” is an amended statement of claim, which focuses the issue to be tried.

[2] In a nutshell, the focus of the trial was whether the actions of Brian Kinmond (“Kinmond”) and 2198430 Ontario Inc. (“219”) constituted fraud or breach of fiduciary duty, *by way of misappropriation of funds* in relation to Trentfab Inc. (“Trentfab”).

[3] After seven and one-half days of trial, Wilton-Siegel J. released lengthy reasons for his decision which he commenced by noting that “I have used the term “fraudulent activity” to include activity constituting a breach of fiduciary duty, as well as activity constituting civil fraud, in each case involving a misappropriation of Trentfab assets”.

Issues at trial

[4] The principal claim of the plaintiffs at trial was that characteristics common to civil fraud were present and that an inference should be drawn that Kinmond and 219 engaged in fraudulent conduct. Relying on their expert Cameron McCaw, they alleged that Kinmond’s conduct resulted in a monetary benefit to 219 at the plaintiff, Trentfab’s expense.

[5] Alternatively the plaintiffs claimed that Kinmond was in breach of his fiduciary obligations to Trentfab. They argued that an arrangement by Kinmond

in connection with a decommissioning project was preferential treatment resulting in a misappropriation of monies owing to Trentfab.

[6] The defendants denied that there was any fraud or a breach of fiduciary duty. Their position was that the relationship between the parties was intended to be economically neutral to Trentfab. That is, it was conducted on the basis that the financial result to Trentfab was to be the same as if 219 had not been involved. As between 219 and Trentfab, it was never the intention that Trentfab would be paid on a job-specific basis.

[7] In his reasons the trial judge conducted an extensive review of the evidence and found that Kinmond's actions were not fraudulent and that he had not benefitted at Trentfab's expense. He held that the plaintiffs had failed to establish conduct on the defendants' part that constitutes fraud or breach of fiduciary duties, by way of any misappropriation of monies. The plaintiffs appeal the trial judge's decision.

Issues on Appeal

[8] On appeal the appellants submit that the trial judge erred in two respects: first, in finding Kinmond's conduct not fraudulent; and second, in finding that the involvement of 219 was financially neutral to Trentfab. They essentially argue that although the trial judge set-out and applied the correct law; even on the

findings as made by him, had he approached the evidence properly, both fraud and breach of fiduciary duty were proven.

[9] At the core of the appellants' arguments is the contention that the trial judge did not assess the evidence collectively and as a whole. Rather, they say he relied on parts of the evidence in assessing a specific issue and other evidence in connection with another. In approaching his task in this fashion, the appellants submit the trial judge committed an error of law.

Analysis

[10] The issue to be tried was specifically narrowed and defined by the parties with the case management guidance of Wilton-Siegel J. Some of the reasons for this are that there are several other issues in Trentfab and 220's action which remain unresolved, including claims for breach of statutory duty of care under the OBCA, and interference with contractual relations. In addition, Kinmond has commenced a separate wrongful dismissal claim against Trentfab in another jurisdiction.

[11] It is with this background that the parties defined the issue to be tried and how it was narrowly presented and argued at trial. Moreover, the parties submitted written closing submissions to the trial judge for his reference. Thus, the trial judge was well aware of the issue to be decided, namely whether Kinmond committed fraud or breached his fiduciary duty by misappropriating

funds or assets of Trentfab through a scheme involving 219. He was also entirely aware, through the written submissions of counsel, what evidence was being relied on in connection with each issue to be considered.

[12] Because the issue to be tried was intentionally defined narrowly, and given that the trial proceeded the way it did through the evidence called and relied upon the parties, we do not accept that the trial judge wrongly approached his analysis. Instead, we think his analysis was faithful to what was agreed upon and the issue he was asked to decide.

[13] In the end, the appellants' arguments essentially amount to disagreements with the trial judge's findings of fact. Absent establishing palpable and overriding errors that impact the trial judge's findings, a reviewing court will not interfere. They have failed to do so.

[14] In reaching his decision the trial judge provided extensive reasons that examined the law, the issues raised and he undertook a thorough assessment of all the evidence. The trial judge expressly stated that he approached Kinmond's evidence with caution. That would include his explanation for the interposition of 219 between Trentfab and the equipment purchasers. Nevertheless, the trial judge specifically found that:

> a) there was no evidence that Kinmond diverted funds owing to Trentfab from Trentfab's customers to 219 or himself. No money has gone missing;

b) the allegations of Trentfab were based on the assumption of a job-by-job accounting. However, the trial judge found that the accounting for the project was always intended and was in fact on a global basis with a reconciliation at the end;

c) there was no evidence that 219 retained any money payable to Trentfab for longer than was necessary;

d) neither 219 nor Kinmond obtained any financial gain at Trentfab's expense. He found that 219's involvement was financially neutral to Trentfab;

e) although the principals of Trentfab may not have known of the involvement of 219, Trentfab's operational employees did and the "October spreadsheet" which was created before Kinmond's termination clearly disclosed 219's involvement.

[15] The result of his review was his finding that there was no evidence of fraud or misappropriation of funds. He found that that Kinmond's actions were not dishonest and there was no benefit to Kinmond and no deprivation to the appellants. These findings are amply supported by the evidence, and should not be interfered with on appellate review.

Conclusion

[16] Here, the trial judge convincingly established through his analysis and reasons that there was no evidence of fraud or misappropriation of funds. Each of his findings of fact was amply supported by the evidence which, as we said, the trial judge thoroughly analysed. His conclusions, based on the evidence were all reasonable and there is no basis upon which this court should interfere. His findings are entitled to deference and the appeal is dismissed.

Cross-Appeal

[17] In their cross appeal the respondents submit that the trial judge erred in failing to hold Trentfab and 220 jointly and severally liable for costs. What they assert is that the trial judge was mistaken when he wrote in his costs endorsement that, "the directed trial was agreed to by, and involved only, Trentfab, Kinmond and 219. 220 was a party to the notice of action for the purpose of asserting additional claims against the defendants that were not subject of the trial."

[18] The trial judge in separate reasons on costs noted that the trial was a significant one, lasting seven-and-a-half days. He took into account that 219 and Kinmond's defences were largely the same. He fixed both Kinmond's and 219's costs 219 and awarded 219 its disbursements. However, the trial judge only held Trentfab – currently in receivership – liable for costs, and not 220 being its parent shareholder company.

[19] It is true that the plaintiffs in style of cause were Trentfab Inc. and 2202158 Ontario Inc. And, we accept that it appears that it was never the plaintiffs' position at trial that 220 was not a party. However, when the reasons and order of the trial judge are considered fully, it is clear that the shareholder of Trentfab, 220, was neither the subject of the trial nor the party asserting the claim.

[20] The respondents have not demonstrated that the trial judge either committed an error in law or that he was clearly wrong in his costs awards. If the trial judge simply made a mistake, the proper approach was to bring this to the attention of the trial judge. Accordingly, we grant the respondents leave to appeal costs, but dismiss the cross-appeal.

[21] Regarding costs of the appeal, the parties have agreed on costs whatever the result and will file a consent order for this court's approval.

"H.S. LaForme J.A."
"David Watt J.A."
"S. Lederman J. (*ad hoc*)"