
CANADA / JUDGMENT

439288 B.C. Ltd. v. Marmon Financial Management Co. Ltd.

2013 BCSC 1034

COURT

Supreme Court of British Columbia

DECIDED

30 April 2013

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2013 BCSC 1034 439288 B.C. Ltd. v. Marmon Financial Management Co. Ltd.

THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

439288 B.C. Ltd. v. Marmon Financial Management Co. Ltd.,

2013 BCSC 1034

Date: 20130430

Docket: S117839

Registry: Vancouver

Between:

439288 B.C. Ltd., a Bankrupt

Plaintiff

And

Marmon Financial Management Co. Ltd.

Defendant

Before: The Honourable Madam Justice Gropper

Oral Reasons for Judgment

In Chambers

Counsel for Plaintiff:

S. R. Andersen

Counsel for Third Party, Sharol Briere:

W. W. Chapman

Place and Date of Trial/Hearing:

Vancouver, B.C.

April 30, 2013

Place and Date of Judgment:

Vancouver, B.C.

April 30, 2013

[1] THE COURT: PricewaterhouseCoopers Inc. (PwC), the trustee in bankruptcy of 439288 B.C. Ltd. ("439"), applies for judgment against Sharol Briere arising from her role as the sole director, officer and shareholder of two companies, Graywood Energy Ltd. and Marmon Financial Management Co. Ltd ("Marmon"). The companies perpetuated a fraudulent conveyance and/or preference to the prejudice of the judgment creditor of 439.

History of Proceedings

[2] Marmon is indebted to 439 and that indebtedness has been reduced to judgment.

[3] The trustee filed notice of this application on August 15, 2012, and delivered it to the corporate offices of Marmon and Graywood on August 27, 2012. They were not able to serve Ms. Briere personally.

[4] Mr. Justice Grauer heard the application against Marmon and Graywood on the 31st of August, 2012, and he made the following orders:

- a) The diversion of funds by Marmon to Graywood was either a fraudulent conveyance or a fraudulent preference and void as against 439.
- b) All amounts so deposited stood charged in favour of 439.
- c) Graywood was ordered to deliver up those monies and 439 was entitled to judgment in the amount of those monies, which was to be assessed.
- d) The Canadian Imperial Bank of Commerce ("CIBC") and the Bulkley Valley Credit Union ("BVCU") were ordered to provide copies of relevant banking documents to 439 to determine the amount diverted.
- e) Further accounts, directions and inquiries were to be made to enable 439 to trace and recover the monies.
- f) The motion for judgment and costs against Briere be adjourned.

- [5] A subservice order was made on November 8, 2012, by which Ms. Briere was eventually served on February 8, 2013, and the hearing of the motion for judgment and costs against her was set for February 28, 2013. That hearing was adjourned to March 7, 2013, to accommodate Ms. Briere's counsel and enable her to get banking documents to account for the funds. At this hearing Ms. Briere produced banking records, but, as is apparent, they are incomplete, and no explanation for that has been given by Ms. Briere.

Facts

- [6] I will refer to the facts, which are not disputed, except where noted.
- [7] 439 is a company that was incorporated by Douglas Montaldi which made an assignment into bankruptcy on November 30th, 2009. PwC is the trustee in bankruptcy of 439.
- [8] Marmon and Graywood are companies incorporated under the laws of British Columbia. Marmon provides accounting services to customers from offices in Burns Lake and Houston. Graywood has no active business. It is Ms. Briere's holding company.
- [9] Ms. Briere is the sole shareholder, director and officer of Marmon and of Graywood, and as a matter of law, she is therefore the directing mind of both companies.
- [10] Ms. Briere denies this, and she says that Mr. Montaldi is the directing mind. Mr. Montaldi does not assert that he is the directing mind of Marmon or Graywood, nor does he assert that he has full management and decision-making ability.
- [11] When Mr. Montaldi was examined in aid of execution, he did not appear as a representative of Marmon. He was examined as someone with knowledge of Marmon, having been an employee. He said that he had no ability to bind Marmon. Mr. Montaldi confirmed that Ms. Briere was the final decision-making authority on behalf of both companies.
- [12] PwC on behalf of 439 made a demand for payment from Marmon on October 28, 2011. PwC garnished Marmon's bank accounts before judgment, on November 23, 2011.
- [13] In January 2012 or earlier, Marmon caused monies payable to it instead to be deposited into accounts in the name of Graywood at either the CIBC in Burns Lake or the BVCU in Houston. Beginning about the same time, Ms. Briere caused money payable to Graywood deposited at CIBC or BVCU to be disbursed to her.
- [14] On January 26, 2012, just before 439 obtained default judgment, Marmon granted a mortgage of the only lands which it owned in favour of a relative of Ms. Briere. Ms. Briere signed the mortgage on behalf of Marmon.
- [15] On February 6, 2012, judgment was granted in favour of 439 for \$357,202.79.
- [16] On April 4, 2012, this Court set aside the mortgage of January 26, 2012, as a fraudulent preference which was granted to defeat, hinder, delay or prejudice 439.

- [17] From January 1, 2012, to August 30, 2012, \$680,026.72 that was payable to Marmon was deposited into the Graywood accounts at CIBC and BVCU. Of that sum, \$120,363.53 was transferred by Graywood to Briere. This activity undermined the effectiveness of the garnishment effort, despite the significant cash generated from Marmon's business during that period. The garnishment efforts between December 2011 and June 2012 only attached \$34,846.34.
- [18] The bank records that were disclosed under the orders of Grauer J. and by Ms. Briere in anticipation of this hearing demonstrate that from January to August 2012, \$105,877.53 was disbursed from the CIBC account of Graywood to Ms. Briere. In July and August 2012, \$45,500 was transferred from Ms. Briere's personal account to Graywood's CIBC account. It is not known whether this was a return of Marmon's money or some other money. Between February and May 2012, \$14,486 was disbursed from the Graywood account of BVCU to Ms. Briere.
- [19] In summary, the total amount of funds diverted from Marmon to the Graywood accounts at CIBC and BVCU was \$680,026.72. The total funds disbursed to Ms. Briere were \$120,363.53. \$45,500 was deposited into the CIBC account during the months I have indicated. Approximately \$200,000 remains owing on the judgment.

Position of the Parties

- [20] PwC asserts that Ms. Briere as the sole shareholder, director and officer of Marmon and Graywood effected the deposit of Marmon's cheques to the Graywood account. They could not have occurred without her consent and agreement as the sole shareholder, director and officer of Graywood, and the funds could not have been disbursed from Graywood's accounts without Briere's consent and agreement. Ms. Briere authorized other signatories on the accounts and authorized employees to use a stamp of her signature to deposit some withdrawals from those accounts, which could be used with her permission.
- [21] PwC asserts that there is no other explanation for the opening of the Graywood accounts or the depositing and disbursement of Marmon's funds through them but to defeat the creditor. Ms. Briere and Mr. Montaldi both appear to have admitted that the disbursing of Marmon's funds to Graywood was done to defeat 439's garnishment efforts.
- [22] Similarly, PwC asserts that there is no other explanation for the disbursement of funds from Graywood's CIBC and BVCU accounts to Ms. Briere. Although the bank records demonstrate that \$45,500 was deposited into the CIBC account, PwC says that Ms. Briere has not explained whether the monies were refunded or from some other source. PwC asserts that Ms. Briere should not be given the benefit of the doubt.

- [23] PwC also says that there are alternative ways to fix Ms. Briere with liability, including piercing the corporate veil, finding her liable for her own tortious act, finding her liable as the directing mind of the two companies, or awarding damages against her as part of an oppression remedy under the BC Corporation Act, S.B.C. 2002, c. 57. The trustee points out that the usual approach in BC is the second option, that is, finding liability for Ms. Briere's own tortious act.
- [24] Ms. Briere says that the monies were diverted at the request of Mr. Montaldi. She agreed to divert the money to try and keep the business of Marmon alive. She says that she agreed to engage in the scheme because Marmon's employees were frantic as a result of the garnishments. Ms. Briere diverted the money so she could maintain their employment and, as she says, to help the Burns Lake community for which she cares deeply.
- [25] At the moment Ms. Briere is not a party to this action. She argues that this impairs her ability and opportunity to address this application. She is only able to file an affidavit. She asks to be given the opportunity to give evidence and be cross-examined. Ms. Briere also argues that the matter should be referred to the trial list in order that she have the opportunity for full disclosure of documents and examination for discovery. Ms. Briere says that the court should hear evidence of her intent. It was not fraudulent. Her intent was to keep the businesses operating.

Legislative Framework

- [26] The Fraudulent Conveyance Act, R.S.B.C. 1996, c. 163, provides:

1 If made to delay, hinder or defraud creditors and others of their just and lawful remedies

- (a) a disposition of property, by writing or otherwise,
- (b) a bond,
- (c) a proceeding, or
- (d) an order

is void and of no effect against a person or the person's assignee or personal representative whose rights and obligations are or might be disturbed, hindered, delayed or defrauded, despite a pretence or other matter to the contrary.

- [27] The Fraudulent Preference Act, R.S.B.C. 1996, c. 164, provides:

Definition

1 In sections 3, 4 and 5, "creditor" includes

- (a) a surety and the endorser of a promissory note or bill of exchange who would, on payment by that person of the debt, promissory note or bill of exchange for which the suretyship was entered into or endorsement was given, become a creditor of the person giving the preference within the meaning of the sections, and
- (b) the beneficiary of a trust or other person to whom liability is equitable only.

Instruments preferring creditors

2 If a person in insolvent circumstances, unable to pay the person's debts in full, or knowing that the person is on the eve of insolvency, voluntarily or by collusion with a creditor, agrees to a judgment against the person, with or without time to pay, or gives a power of attorney to do so, with intent to defeat or delay the person's creditors wholly or in part, or to give one or more of the person's creditors a preference over other creditors, or over some of them, the judgment or power is void against the creditors of the person.

Analysis

- [28] From January 1, 2012, to August 30, 2012, \$680,026.72 that was payable to Marmon was deposited into Graywood accounts at CIBC and BVCU. Of that sum, I find that \$120,363.53 was disbursed by Graywood to Ms. Briere. Ms. Briere opened the accounts and instructed or authorized the fraudulent scheme diverting money from Marmon to Graywood as the sole shareholder, director and officer. She is the directing mind of both Marmon and Graywood.
- [29] Although Ms. Briere admits that she diverted the money from Marmon to Graywood and makes no defence in respect of the disbursement to herself, she says she did so to keep the business operating and her employees working and her intent was entirely in good faith. She says that her intent must be fully explored, hence the request that she be added as a party and the matter be referred to the trial list.
- [30] With respect, a trial in this matter would be superfluous. The authorities address the matter of intent, and I am able to determine Ms. Briere's intent from her conduct and from the proper application of the authorities.
- [31] In respect of Ms. Briere's argument that she did not intend to engage in any fraudulent transaction or to frustrate the garnishment efforts of the trustee but did what she did in good faith, I refer to *Botham Holdings (Trustee of) v. Braydon Investments*, 2009 BCCA 521 at para. 73, where the court states:

The only intent now necessary to avoid a transaction under the modern version of the Act is the intent to "put one's assets out of the reach of one's creditors" (per *RBC v. Clarke*). No further dishonest or morally blameworthy intent is required.

- [32] As noted in *Mawdsley v. Meshen*, 2012 BCCA 91 at para. 71:

... intention may be inferred from the effect of the transaction, and indeed a presumption may arise in some circumstances from that effect. If there is no credible evidence to the contrary, the Fraudulent Conveyance Act may be satisfied; but there is no rule of law that in every case, an intention to defeat creditors must be inferred from the effect of the impugned transaction.

- [33] In accordance with the authorities, my role is not to measure whether Ms. Briere's actions were made in good faith. Her actions put the assets out of the reach of creditors and thus satisfies the test for intent referred to in *Botham Holdings*. Indeed, she has not provided any evidence to the contrary. While *Mawdsley* suggests there is no rule of law that there is a presumption of intent to put one's assets out of the reach of one's creditors, I have no evidence upon which to base another conclusion.
- [34] I find Ms. Briere personally liable, and in doing so I approach the matter in accordance with the practice in British Columbia. She is liable for her own tortious acts. The leading case is *B.G. Preece I (Pacific Coast) Ltd. v. Bon Street Holdings Ltd.* (1989), 37 B.C.L.R. (2d) 258, 60 D.L.R. (4th) 30 (B.C.C.A.). The facts of that case are set out in paras. 1 - 4:
- [1] The litigation arises out of a contract by which the plaintiff agreed to sell property to Bon Street Developments Ltd. for \$4,220,000. The sale was to close on September 25, 1985, but on September 5, 1985 the purchaser repudiated the agreement and offered \$3,000,000. Later it offered \$3,300,000. When a Mr. Ortt, the realtor involved, pointed out that the purchaser would be liable on the agreement, the defendant Kaplan responded that they could "walk away from the deal because their lawyer had some angle".
- [2] The "angle" only became apparent after these proceedings were launched. The Bon Street Developments Ltd. with whom the original discussions were held was a different company than the Bon Street Developments Ltd. that entered into the contract. The new Bon Street Developments Ltd. was a shell company. It had no assets. The company with whom they had originally dealt had changed its name to 262098 B.C. Ltd. and is now Bon Street Holdings Ltd. The defendants Kaplan and MacDonald are directors and the beneficial owners of the shares of each company.
- [3] The new Bon Street Developments Ltd. was found liable for breach of contract and judgment for \$1,746,336.40 was awarded against it. That company has no assets and does not appeal.
- [4] The focus of the lawsuit, the appeal and the cross-appeal is on the liability of the defendants Bon Street Holdings Ltd. (the original Bon Street Developments Ltd.), Kaplan and MacDonald and the finding of the trial Judge that "Their actions constituted a deceit, a fraudulent misrepresentation." Damages for fraud were assessed against those three defendants in the amount of \$400,000.
- [35] The court determined that the proper remedy was not to lift the corporate veil but to award damages for fraud against the individuals in the company that committed the fraud, at para. 50.

- [36] On that basis I find Ms. Briere jointly and severally liable for the amount of the outstanding judgment. I agree with PwC that the judgment should not be reduced to account for the \$45,500 deposited to Graywood's CIBC account. There is no evidence to support that Ms. Briere was returning funds that she removed earlier.
- [37] I find that Ms. Briere perpetuated a deliberate fraud with intent, and thus I cannot make any assumption in her favour. Further, her disclosure of her bank records is incomplete, from which I can derive an adverse inference.
- [38] PwC is also entitled to special costs of this application in accordance with the principal set out in *Taylor Ventures Ltd. (Trustee of) v. 554925 B.C. Ltd.*, 2004 BCSC 1612 at paras. 57 to 59.
- [39] It is so ordered.
- [40] THE COURT: Thank you. Mr. Chapman.
- [41] MR. CHAPMAN: My Lady, I'm informed by my client that Marmon Financial has some money in its account. Please bear in mind that I believe in August 2012 a receiver was put in.
- [42] THE COURT: Yes.
- [43] MR. CHAPMAN: So if my client is to be liable for the balance of the judgment, I presume there's going to have to be an accounting, and I'm told there's about 100,000 in the account now less operating expenses, whatever they might be, plus the amount of the judgment may have gone down because the receiver [indiscernible] all that time, My Lady. I wonder if I can't sort it out with my friend if we might have liberty to apply.
- [44] THE COURT: Certainly. I will make an order that further accounts, directions and inquiries can be made to trace and recover the monies and that if necessary you can return to address these matters.
- [45] MR. CHAPMAN: Thank you, My Lady.

"Madam Justice M. Gropper"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/SC/13/10/2013BCSC1034.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/439288-b-c-ltd-v-marmon-financial-management-co-ltd-2013>

Prepared on 28 October 2026 · Esheria