

CANADA / JUDGMENT

CIT Financial Ltd. v. Pavac Technology Inc.

2008 BCSC 595

COURT

Supreme Court of British Columbia

DECIDED

13 May 2008

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

2008 BCSC 595 CIT Financial Ltd. v. Pavac Technology Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

CIT Financial Ltd. v. Pavac Technology Inc.,

2008 BCSC 595

Date: 20080513

Docket: S050835

Registry: Vancouver

Between:

CIT Financial Ltd.

Plaintiff

And:

Pavac Technology Inc., Pavac Industries Inc.,

Ralf Klaus Edinger and Monika Edinger

Defendants

Before: The Honourable Madam Justice Allan

Reasons for Judgment

Counsel for the Plaintiff

Gordon G. Plottel

Counsel for the Defendants,

Ralf Edinger and Monika Edinger

Martin A. Thomas

Date and Place of Summary Trial:

March 31 and April 2, 2008

Vancouver, B.C.

- [1] The plaintiff CIT Financial Ltd. ("CIT") seeks judgment against the defendant Pavac Technology Inc. ("Pavac Technology") in the amount of \$301,500.43 plus interest at the Royal Bank of Canada's prime rate plus 5% per annum from and after January 18, 2005 and special costs. That relief is not opposed and there will be judgment accordingly.
- [2] Judgment against the defendant Pavac Industries Inc. is not sought on this application.
- [3] On this application, CIT seeks judgment pursuant to Rule 18A of the Rules of Court against the defendants Ralf and Monika Edinger in the amount of \$147,878.55, plus court order interest and special costs. I will refer to Ralf and Monika Edinger as the "Defendants".

Pavac Technology's default and CIT's claims

- [4] CIT, a finance company, entered into a Master Lease Agreement with Pavac Technology for the financing of laser technology equipment (the "Equipment") on October 17, 2001 (the "Lease Agreement").
- [5] CIT paid \$420,279.08 to Hitachi to purchase the Equipment and lease it to Pavac Technology.
- [6] Pavac Technology made payments to CIT under the Lease Agreement totalling \$80,911.21 between January and November 2002. On January 16, 2003, it defaulted under the Lease Agreement and CIT repossessed the Equipment. CIT incurred moving and repair costs and sold the Equipment for \$221,500.43. Pavac Technology is no longer in business.
- [7] Ralf Edinger was the director, officer and sole shareholder of Pavac Technology. His wife, Monika Edinger, held herself out as the "Vice President" of Pavac Technology but she was not a director, officer or shareholder. She was trained as an accountant in Germany and specialized in preparing financial statements. She is not qualified to practice in that field in Canada. She supervised the preparation of Pavac Technology's financial statements and Ralf Edinger approved them on behalf of the company.
- [8] Prior to entering the Lease Agreement, the Defendants had provided CIT with financial information regarding Pavac Technology, including the financial statements which indicated a Shareholder Loan of \$503,000 owing to Ralf Edinger. Ralf Edinger executed a "Subordination Agreement" of that Shareholder Loan.

- [9] However, after Pavac Technology defaulted, the Defendants disclosed that approximately \$400,000 of the \$503,000 indebtedness was owed to Monika Edinger and her mother, Berta, who had not subordinated their loans.
- [10] Shortly before the Subordination Agreement was signed, Pavac Technology granted to Monika and Berta, a "Security Agreement" to secure their \$400,000 indebtedness.
- [11] CIT asserts that it would not have financed the acquisition of the Equipment unless all of its credit conditions were met, including the subordination of Pavac Technology's entire indebtedness of \$503,000.
- [12] CIT says that in late 2003, Monika Edinger seized Pavac Technology's assets under her Security Agreement and transferred them to Pavac Research, for which she was given credit as a loan for \$109,000. On February 11, 2005, Pavac Research granted her a promissory note, loan agreement, and general security agreement in that amount.
- [13] CIT asserts that the Defendants knowingly misrepresented to CIT the identity of the creditors of Pavac Technology in order to induce CIT to finance the Equipment.

Background

- [14] Paine Machine Tool Inc. ("Paine") was the local distributor for Hitachi, the manufacturer of the Equipment. In June 2001, Paine's principal, Jeremy Paine, contacted CIT's senior account manager, Mr. Mehta, to inquire about lease financing for the Equipment.
- [15] Mr. Mehta completed an "IF Request for Approval" form recommending the financing and noted on it that Mr. Edinger was "100% shareholder". He also noted that the company's losses in the previous two years had been supported by equity injection by the shareholder's loan. The "favorables" included the following: Pavac Technology had no long-term debt except for the \$503,000 shareholder loan; Hitachi, which was well established, would provide a Recourse Guarantee for \$162,440 (40% of the Equipment cost); and the "\$503M Postponement of Shareholder Loan to be obtained provides additional comfort."
- [16] CIT's credit department advised Mr. Mehta that it was a condition for approval of the financing transaction that Mr. Edinger postpone his shareholder loan in favour of CIT. In Mr. Mehta's opinion, that condition had the same effect as the subordination of a debt. He had the Subordination Agreement prepared for Mr. Edinger's signature. That document was comprised of two pages with signature lines for Mr. Edinger and Pavac Technology on the second page. The third page consisted of a Schedule which gave as "particulars of specific debts subordinated" the shareholder's loan of \$503,000. Ms. Rajah, a program manager at CIT mailed that document to Pavac Technology with a covering letter on August 1, 2001.

- [17] Mr. Mehta deposes that if either of the Defendants had told him that Mr. Edinger was not the person to whom the shareholder's loan was owed, CIT would have required that the actual creditor or creditors would have had to subordinate their claims to CIT. CIT would not have provided the financing without a subordination of the full shareholder loan amount.
- [18] The Defendants say that before Ralf Edinger signed the Subordination Agreement, both he and Mr. Paine told Mr. Mehta that the majority of the \$503,245 amount recorded as payable to the shareholder consisted of loans that Monika Edinger and her mother had made to Pavac Technology. They say that they told Mr. Mehta that Mr. Edinger was not willing to include those debts in the Subordination Agreement. Mr. Mehta deposes he has no recollection of receiving that information and if he had, he would have insisted on a subordination agreement from the other creditors. If CIT had not received that subordination agreement, it would not have provided the funding. Mr. Mehta also deposes that Mr. Edinger confirmed that the entry "payable to shareholder" on the financial statements referred to his shareholder loan to Pavac Technology.
- [19] Ms. Edinger also says that she told Mr. Paine that she and her mother were not prepared to subordinate their loans to satisfy CIT's financing condition. Mr. Paine deposes that he was aware of this "problem," which he and Mr. Mehta referred to as a "postponement" of the shareholder loan. However, there is no evidence that Mr. Paine disclosed to Mr. Mehta in writing the fact that Ms. Edinger and her mother were the primary creditors of the "shareholder's loan." Instead, in an e-mail to Mr. Mehta dated September 26, 2001, he stated:

Pavac have come up with the following conditions under which they will agree to your contract:

The following applies to the postponement of shareholder loan:

1. The amount must be limited to the amount of the debt on a declining balance.
2. CIT will have 2nd position after the bank.
3. The postponement will be valid for 12 months unless there have been problems with monthly payments.

- [20] Ms. Edinger stated on her examination for discovery that she knew CIT would not provide the financing without subordination of the indebtedness indicated by the shareholder's loan:

Q. Okay. So you must have known, then, that if you weren't willing to subordinate your part of that loan and your mother wasn't willing to subordinate her part of the loan, CIT wouldn't have gone ahead with the financing, right?

A. Yes, and I didn't care.

- [21] Ms. Edinger says that she overheard a telephone conversation in which Mr. Edinger told Mr. Mehta to discuss the Subordination Agreement, after which Ralf made handwritten changes to the Schedule. She says that, following his request, she faxed it and the Subordination Agreement to Mr. Mehta. She observed that her husband had changed the amount from \$503,000 to \$103,000 and initialled that amendment.
- [22] Ralf Edinger says he told Mr. Mehta that the amount of the shareholder loan in Schedule was far too high because most of it was owed to Monika and her mother. He says "I also reasoned with him that since CIT had a recourse from Hitachi, they should not require such a high amount to be subordinated by me." He said Mr. Paine was present on at least one of those occasions, at which time Mr. Mehta told Mr. Edinger to write in the amount he was willing to subordinate and Mr. Mehta would try to get it approved. Mr. Paine recalled that conversation in November 2001, and deposed that he told Mr. Mehta that Ralf still had "a problem" because he was not prepared to include in it the loans to Monika and Berta.
- [23] Mr. Edinger deposes that he was surprised when he received the Schedule that showed the full amount of \$503,000 was to be subordinated. He said that on November 26, 2001, he phoned Mr. Mehta who told him to change the amount to represent his loan. Accordingly, when he signed the Subordination Agreement, he changed the amount of the debt owing to the shareholder in the schedule from \$503,000 to \$103,000. He says the amended schedule (which was on a separate page) was then faxed to Mr. Mehta. The original documents were then mailed to CIT. There is evidence that a fax was sent to CIT on November 26 and that documents were couriered on November 27. However, no amended schedule has ever been produced. The Defendants say they did not make a copy of the amended document they sent and CIT denies receiving an amended schedule. Subsequently, CIT advised that the Subordination Agreement was not correctly signed and witnessed and returned page two to Mr. Edinger to be re-signed and witnessed. Curiously, CIT was also unable to produce the original signed Subordination Agreement.
- [24] Mr. Edinger's affidavit evidence conflicts to a significant degree with that given previously on his examination for discovery on June 17, 2005. Then, he testified that CIT had produced the Schedule showing the shareholder's loan to be \$103,000. At that time, he was asked to produce any document by which he had advised CIT of third party loans relating to Monika and Berta Edinger. In response, his counsel provided the following answer:

The subordination agreement was altered as a result of these discussions to \$103,000 and initialled by Mr. Edinger and Mr. Paine. Mr. Edinger believes that either Mr. Paine or CIT should have the finalized version of the subordination schedule 3. There was no copy machine when the schedule was amended, so Mr. Paine promised to forward on the amendment to CIT and provide a copy to Pavac. It is apparent that the latter did not occur, and possibly CIT did not receive the amendment either.

- [25] On March 30, 2008, Mr. Edinger swore a further affidavit attempting to explain those statements which conflicted so dramatically with the evidence in his first affidavit. He said when he made those statements, he had not discussed the issues with Mr. Paine or reviewed Monika's correspondence file with CIT. After he was added as a personal defendant, he had discussions with Mr. Paine and Monika, and was able to recall that he had asked her to fax the amended Schedule and that Mr. Paine had not been involved in that process.
- [26] The financial statements were prepared by two external accounting firms on a "notice to reader" basis. Monika Edinger deposes that she provided information regarding the loans made by herself, her mother, and her husband to the accountants. She said she asked them why they did not record the loans separately but they insisted on recording the loans as a shareholder loan. She deposes that one of them told her "it is all family money" and the other that she would have to provide some kind of "legal proof" to separate the accounts. There is no evidence from either accountant. It is significant that Ms. Edinger's area of expertise when she was an accountant in Germany was in financial statements. She would have fully understood that a lender - who was only prepared to provide financing on condition the shareholder's loan was subordinated - would be materially misled by such an obvious misrepresentation.
- [27] CIT obtained a recourse agreement (guarantee) from Hitachi for \$162,440 (40% of the cost of the Equipment). The Defendants submit that was a more significant factor to CIT in approving the lease financing than the Subordination Agreement. They say that the subordination of the shareholder loan merely provided "additional comfort".
- [28] CIT proved unable to recover its losses from Hitachi because the latter declared bankruptcy in 2002.
- [29] When Pavac Technology ceased operating, it had substantial debts and very few assets. The Defendants say that neither Monika nor her mother received any tangible benefits from their loans and the Security Agreement. They say that CIT has suffered no loss from the fact that the whole \$503,000 was not subordinated.

Can the Plaintiff's claim be resolved pursuant to Rule 18A?

- [30] Although the Defendants do not suggest that Rule 18A is inappropriate to resolve CIT's claims, the affidavits of the parties raise conflicts in the evidence. Mr. Edinger alleges, and CIT denies, that he advised Mr. Mehta that the \$503,000 indebtedness of Pavac Technology was not entirely owing to its single shareholder.
- [31] Clearly the Court must be cautious in resolving credibility issues on a summary trial. However, there is ample authority for determining matters pursuant to Rule 18A in the face of conflicting evidence where documentary evidence permits the Court to prefer the evidence of one witness or set of witnesses over another: *Orangeville Raceway Ltd. v. Wood Gundy Inc.* (1995), 6 B.C.L.R. (3d) 391, 40 C.P.C. (3d) 226 (C.A.); *Port Hardy Processors Ltd. v. Ostergaard* (1998), 59 B.C.L.R. (3d) 376, [1998] B.C.J. No. 2693 (Q.L.) (C.A.) and *Coast Wholesale*

Appliances Ltd. v. Armitstead (1993), 77 B.C.L.R. (2d) 267, 22 B.C.A.C. 84. In *McAllister Industries Ltd. v. McNestry Management Ltd.*, [1996] B.C.J. No. 1129 (S.C.) (QL), Hall J. stated at para. 14:

The amount of money in dispute here is a significant sum and that sometimes can be a factor that would lead a court to decline to proceed under Rule 18A. Counsel for the respondent, MML, suggested that there were serious credibility issues here that could not be properly resolved by this procedure. I think it is fair to say that there is an element of substance in what counsel says concerning credibility but I am bound to observe that as was noted in the case of *Faryna v. Chorny*, [1952] 2 D.L.R. 354, credibility is often much more complex than simply observing and assessing witnesses in the witness box. It usually involves a number of competing considerations. The court must consider a body of evidence to decide whether or not apparent differences can be resolved by reviewing and comparing other evidence in the case and deciding whether the evidence of a witness generally accords with written documents and the evidence of other witnesses. One must also consider the whole factual matrix of a case and the inherent probabilities of the situation disclosed in the case. Where, for instance, two people who observe an auto accident give dramatically differing accounts, one could say that there is demonstrated in a vivid way a credibility conflict that might require a *viva voce* assessment of the parties' reliability, their capacity to observe and recollect and their credibility generally. But where one is dealing with matters of a commercial nature or a case where there exists documentary evidence that may throw light on disputed questions, then issues of credibility become perhaps more capable of resolution short of an assessment of the parties' manner of giving evidence, and the necessity then for actual observation of the witnesses by the trier of fact is somewhat attenuated.

[32] In this case, the Defendants' (self-serving) evidence is contradicted by all of the documentation and by Mr. Mehta; it is not fully supported even by their own witness, Mr. Paine. It strains credulity to suggest that they faxed and mailed a revised version of the Schedule to the Subordination Agreement to CIT but did not keep a copy of that document or ask CIT to acknowledge its receipt or return a copy. There is no correspondence confirming the alleged revisions to the Schedule. Moreover, Mr. Edinger's contradictory evidence and his attempt to blame Mr. Paine for failing to forward the phantom amended schedule to CIT is fatal to his credibility.

[33] It is clear from the unchallenged documentation and Mr. Mehta's evidence, that had CIT received such a revised Schedule, it would have required Ms. Edinger and her mother to subordinate their loans. It was the fact of the subordination and not the identity of the creditors that was important to CIT.

The relevant law

[34] CIT asserts that its claim against the Defendants for misrepresentation meets the five requirements articulated in *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 at 110, 99 D.L.R. (4th) 626:

The decisions of this Court cited above suggest five general requirements: (1) there must be a duty of care based on a "special relationship" between the representor and the representee; (2) the representation in question must be untrue, inaccurate, or misleading; (3) the representor must have acted negligently in making said misrepresentation; (4) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and (5) the reliance must have been detrimental to the representee in the sense that damages resulted.

[35] CIT also submits that, having established a material misrepresentation, it is entitled to be placed in the position it would have been in if that misrepresentation had not been made. In *Canadian National Railway Company v. Rainbow Industrial Caterers Ltd.*, [1991] 3 S.C.R. 3, 59 B.C.L.R. (2d) 129 (S.C.C.), Sopinka J. for the majority of the Court stated at 14-16:

In a case in which a material negligent misrepresentation has induced the plaintiff to enter into a transaction, the plaintiff's position is usually that, absent the misrepresentation, the plaintiff would not have entered into the transaction. The plaintiff was restored to the position he would have occupied had he never entered the transaction in the following cases: *Friesen v. Berta* (1979), 100 D.L.R. (3d) 91 (B.C.S.C.); *Irving Oil Ltd. v. Adams* (1984), 46 Nfld. & P.E.I.R. 234, 135 A.P.R. 234 (Nfld. C.A.); *H.B. Nickerson & Sons Ltd. v. Wooldridge* (1980), 40 N.S.R. (2d) 388, 73 A.P.R. 388 (N.S.S.C.A.D.), and *Steer v. Aerovox Inc.* (1984), 65 N.S.R. (2d) 91, 147 A.P.R. 91 (N.S.S.C.T.D.).

Once the loss occasioned by the transaction is established, the plaintiff has discharged the burden of proof with respect to damages. A defendant who alleges that a plaintiff would have entered into a transaction on different terms sets up a new issue. It is an issue that requires the court to speculate as to what would have happened in a hypothetical situation. It is an area in which it is usually impossible to adduce concrete evidence. In the absence of evidence to support a finding on this issue, should the plaintiff or defendant bear the risk of non-persuasion? Must the plaintiff negative all speculative hypotheses about his position if the defendant had not committed a tort or must the tortfeasor who sets up this hypothetical situation establish it?

Although the legal burden generally rests with the plaintiff, it is not immutable. See *National Trust Co. v. Wong Aviation Ltd.*, [1969] S.C.R. 481, and *Snell v. Farrell*, [1990] 2 S.C.R. 311. Valid policy reasons will be sufficient to reverse the ordinary incidence of proof. In my opinion, there is good reason for such reversal in this kind of case. The plaintiff is the innocent victim of a misrepresentation which has induced a change of position. It is just that the plaintiff should be entitled to say "but for the tortious conduct of the defendant, I would not have changed my position". A tortfeasor who says "Yes, but you would have assumed a position other than the status quo ante", and thereby asks a court to find a transaction whose terms are hypothetical and speculative, should bear the burden of displacing the plaintiff's assertion of the status quo ante.

[36] The Defendants assert that CIT did not plead that it suffered damages on the basis that "but for" the misrepresentation, it would not have not provided the financing. In its statement of claim, CIT pleads that if the Defendants had not misrepresented the amount of the shareholder loan and the existence of the third party loans, "CIT would have had recourse to

the personal property of the lessee in priority to Monika and Berta Edinger". It does not plead that they would not have entered into the lease agreement. Its pleadings do not quantify the damages suffered as a result of the misrepresentation. Mr. Thomas, counsel for the Defendants, says that he examined Mr. Mehta on the basis of the pleadings.

- [37] In response, Mr. Plottel, counsel for CIT, submits that the statement of claim contains the material facts upon which CIT relies pursuant to Rule 19(1) and that reasonable reliance is pleaded. For example, it claims that:

Ralf Edinger, to the knowledge of Monika Edinger, supplied the Plaintiff with a copy of the Financial Statements, intending that the Plaintiff would rely upon the accuracy of the Financial Statements in entering into the Agreement. The Plaintiff did, in fact, rely upon the accuracy of the Financial Statements in entering into the Agreement.

- [38] In addition, the affidavits of Mr. Giroux, an Assistant Vice-President of CIT, and Mr. Mehta both specifically depose that CIT would not have agreed to purchase the Equipment and enter into the Lease Agreement with CIT if the Subordination Agreement did not apply to the full amount of the \$503,000 debt. Mr. Mehta's evidence on discovery was to the same effect. Indeed, Ms. Edinger conceded that she knew that fact during her examination for discovery.

- [39] Mr. Thomas submits that the provable loss is far less than what CIT claims and there is insufficient evidence before the court to assess damages at this point. However, I agree with Mr. Plottel's analysis that CIT's damages consist of its losses occasioned by entering into the Lease Agreement with the Defendants. They are calculated at \$147,878.55 after deducting payments received and net sale proceeds from the original asset cost of \$420,279.08.

Conclusion

- [40] I agree that the plaintiff has successfully made out the basic elements of the tort of misrepresentation. In seeking financing for the Equipment from CIT, Mr. Edinger put himself in a "special relationship" with CIT. He misrepresented the amount of the shareholder loan that CIT insisted be subordinated to it. Both he and his wife were fully aware of the misleading and inaccurate statement on Pavac Technology's financial statements and failed to bring it to CIT's attention. Clearly the Subordination Agreement was prepared in reliance upon the information in the financial statements.
- [41] CIT reasonably relied upon that misrepresentation. There is no convincing evidence that Mr. Paine corrected that misrepresentation; rather CIT denied his efforts to limit the term of the Subordination Agreement.

- [42] The fact that CIT held a 40% recourse against Hitachi does not exonerate the Defendants. CIT's reliance upon the credit conditions it imposed on the Defendants was reasonable. The recourse against the manufacturer was unsecured and, in fact, Hitachi became insolvent. The specialized Equipment had a limited resale market. The financial status of Pavac Technology was uncertain. CIT rejected the Defendants' request to limit the term of the Subordination Agreement.
- [43] It is clear that CIT would not have approved the financing without the subordination of the full amount of what was mistakenly classified as a "shareholder's loan" and it is equally clear that Ms. Edinger and her mother would not have agreed to any subordination of their loans. Hence, in the absence of the misrepresentation, CIT would not have suffered the loss that it did.
- [44] However, CIT cannot succeed against Monika Edinger. It was not in a special relationship with her and did not rely on any misrepresentations made by her. Mr. Mehta did not know that she regarded herself as a Vice President of Pavac Technology. Monika Edinger was not a director of Pavac Technology and she did not sign or approve its financial statements. She was not a party to the Lease Agreement. Apparently, she never discussed the shareholders loan or financial statements with Mr. Mehta or CIT. The evidence indicates that Mr. Mehta considered her to be the office manager who performed administrative and secretarial duties with the company.
- [45] CIT is entitled to judgment against Ralf Edinger in the amount of \$147,878.55 plus pre-judgment interest from January 16, 2003, the date that CIT claimed default under the Lease Agreement and demanded payment due under the Lease.
- [46] The claim against Monika Edinger is dismissed, without costs.
- [47] CIT will have judgment against Pavac Technology Inc. in the amount of \$301,500.43 plus interest at the Royal Bank of Canada's prime rate plus 5% per annum from and after January 18, 2005.

Costs

- [48] CIT is entitled to special costs against Ralf Edinger on the basis that he knew of the material misstatement in Pavac Technology's financial statements and failed to correct it or advise CIT of its inaccuracy. Although CIT's claim against Monika Edinger is dismissed, I do not award her costs. Both Defendants were represented by the same counsel and her addition as a party did not add significantly to the cost of the defence. Her evidence was a critical part of Mr. Edinger's defence.
- [49] CIT is also entitled to special costs against Pavac Technology Inc.

"M.J. Allan J."

The Honourable Madam Justice Allan

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/08/05/2008BCSC0595.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/cit-financial-ltd-v-pavac-technology-inc-2008>

Prepared on 28 October 2026 · Esheria