

CANADA / JUDGMENT

Lucero v. ID Biomedical Corporation

2008 BCSC 1843

COURT

Supreme Court of British Columbia

DECIDED

10 April 2008

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2008 BCSC 1843 Lucero v. ID Biomedical Corporation

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Lucero v. ID Biomedical Corporation

2008 BCSC 1843

Date: 20080410

Docket: S067514

Registry: Vancouver

Between:

Charles S. Lucero, David C. Morse, James H. Morse, and

Marilyn B. Morse, both on her own behalf and as Trustee for

Samantha C. Morse, Matthew J. Morse, Katherine G. Morse,

Emily J. Morse, John McShane Morse and Allison E. Morse

Plaintiffs

And:

ID Biomedical Corporation

Defendant

Before: The Honourable Mr. Justice Leask

Oral Reasons for Judgment

In Chambers

April 10, 2008

Counsel for Plaintiffs

J.A. Rost

A.K. Atwal

Counsel for Defendant

B. Kaplan, QC

S.K. Boyle

Place of Hearing:

Vancouver, B.C.

[1] THE COURT: The plaintiffs held warrants entitling them to purchase stock in the defendant company, ID Biomedical Corporation (IDB). In the fall of 2005, an international pharmaceutical company, GlaxoSmithKline (GSK), proposed to acquire IDB. GSK made an offer for all outstanding shares and warrants of IDB. There was never a dispute about the price offered for the stock, but there was a dispute about the value of the warrants. These plaintiffs sold some or all of their warrants before the proposed acquisition received final court approval. When final court approval was given, it was on the basis of a higher price for the warrants than the original price offered by GSK. This action was brought seeking to recover the difference between the price at which the plaintiffs sold their warrants and the higher price approved by the Court. The plaintiffs base their claim on allegations of negligent misrepresentation and a claim that the company owed them a fiduciary duty.

[2] The issues the Court must resolve are:

1. does the company have a complete answer to the plaintiff's claim based on the law as pronounced by the Supreme Court of Canada in *Kerr v. Danier Leather Inc.*, [2007] 2 S.C.R. 331;
2. do companies have a fiduciary duty to warrant holders; and
3. do the facts in this case support a claim for negligent misrepresentation as outlined by the Supreme Court of Canada in *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87.

Background Facts

[3] The defendant in this action is ID Biomedical Corporation, a publicly traded company specializing in influenza vaccine products. The plaintiffs are former security holders in IDB. Specifically, they are Charles Lucero, David Morse, James Morse and Marilyn Morse, on her own behalf and as the trustee for her infant grandchildren, in whose name securities were held during the material time period. Marilyn and David Morse are married and are the parents of James Morse. All of the plaintiffs held common share purchase warrants that

were issued in 2003 when IDB sought to raise US \$100 million. The plaintiffs also held common shares in IDB.

- [4] Both David Morse and Charles Lucero are sophisticated investors who paid very close attention to their investments in IDB. They attended annual general meetings and reviewed newspaper and online reports. David Morse spoke with the investment relations representative, Dean Linden, on a regular basis.
- [5] James and Marilyn Morse relied very heavily on the advice of David Morse in making decisions regarding their investments.
- [6] In early September 2005, two companies, which carry on business as GSK, entered into a combination agreement with IDB by which IDB would become a wholly owned subsidiary of GSK. This agreement provided that GSK would acquire all of the outstanding IDB shares and warrants through a plan of arrangement process in accordance with the British Columbia Business Corporations Act. The agreement provided that GSK would pay US \$35 for each common share of IDB and CDN \$5.33 for each 2003 warrant.
- [7] Following the announcement of the takeover, David Morse, James Morse and Marilyn Morse sold all of their IDB shares and purchased additional 2003 warrants. All of these warrants were purchased at a rate higher than the CDN \$5.33 per warrant that was stipulated in the combination agreement. David Morse believed and hoped that IDB would become the object of a bidding war and that the price of the warrants would rise.
- [8] Proceedings before this Court, under the provisions of the BCBCA, were commenced on October 4, 2005, for orders relating to the holding of a special meeting and the related process of approval of a plan of arrangement (the "Plan of Arrangement") by the securityholders of the defendant. On October 17, 2005, Master Donaldson, of this Court, issued an interim order, ordering that a special meeting of the shareholders and other securityholders take place on November 16, 2005 for the purpose of considering and voting on the Plan of Arrangement. With respect to IDB's disclosure obligations, the Interim Order stated, at para. 7, that:

The Circular is hereby deemed to represent sufficient and adequate disclosure, including for the purpose of s. 290(1)(a) of the BCBCA, and IDB shall not be required to send to the Securityholders any other or additional statement pursuant to s. 290(1)(a) of the BCBCA.

- [9] The Interim Order further stated, at para. 25, that:

The persons entitled to appear and be heard at any hearing to sanction and approve the Arrangement shall be only:

- (a) IDB, [GlaxoSmithKline Inc.], and [GlaxoSmithKline plc]; and
- (b) persons who have served and filed an Appearance

[10] The Interim Order also stated, at para. 26, that the sending of the Notice of Special Meeting of Securityholders, the Management Proxy Circular and the forms of proxy:

shall constitute good and sufficient service and no other form of service need be effected and no other material need be served on such persons in respect of these proceedings, except with respect to any persons who shall file an Appearance and deliver the filed Appearance to IDB's counsel

[11] Finally, at para. 28, the Interim Order stated, with regard to a potential adjournment of the hearing of the application for a final order approving the Plan of Arrangement, that:

in the event that the hearing of the [application for an order approving the Arrangement and declaring that the Arrangement is fair and reasonable] is adjourned, then only those persons who filed and delivered an Appearance need be served and provided with notice of the adjourned hearing date.

[12] IDB complied with the terms of the Interim Order and properly served all the plaintiffs in this action.

[13] There is no evidence that the Morses were the least bit dissatisfied with the warrant price that was set out in the Plan of Arrangement. David Morse had always voted with management, and it was his intention to do so again.

[14] Mr. Lucero, on the other hand, believed that the price was low, but on the advice of a lawyer in the United States did not file an Appearance, nor did he pursue any other avenue for disputing the valuation of the warrants or learning more about the process.

[15] A number of warrantholders, sometimes referred to as the "Informal Committee," were unhappy with the price that was to be paid per warrant under the Plan of Arrangement and filed an Appearance in order to dispute the valuation of the warrants. They also obtained an expert opinion valuing the 2003 warrants at CDN \$10.57 each. The plaintiffs did not know of the Informal Committee nor did they file Appearances.

[16] As specified in the Interim Order, there was a meeting on November 16, 2005, at which the securityholders voted in favour of the Plan of Arrangement by a margin of over 80 percent. The Morses voted in favour of the Plan of Arrangement, while Mr. Lucero voted against it.

[17] On November 18, 2005, IDB applied for and obtained an adjournment in respect of the court date for approval of the Plan of Arrangement in order to prepare and file material answering the Informal Committee's opposition to the valuation of the 2003 warrants. The hearing was rescheduled for December 2, 2005.

[18] On November 18, 2005, IDB issued a news release, which gave notice that the matter had been rescheduled, but did not provide any information as to the reason for the rescheduling. Specifically, the news release made no mention of the Informal Committee or their challenge to the valuation of the warrants.

[19] An internal e-mail between senior IDB management shows that the IDB president, Todd Patrick, stated:

We have to explain the reason for the delay so people are going to know there is opposition.

[20] Following the issue of the press release, the Morses sold all of their warrants and Mr. Lucero sold some, but not all, of his warrants.

[21] James Morse, on the advice of his father, sold all of his warrants on November 22, 2005. Before selling the warrants held by himself and his wife, David Morse called Dean Linden. There is disputed affidavit evidence concerning the contents of the telephone conversation, but there is no dispute that Mr. Linden made no mention of the existence of the Informal Committee or their challenge to the valuation of the 2003 warrants.

[22] On December 6, 2005, this Court approved the Plan of Arrangement with two modifications: firstly, that the holders of the 2003 warrants would receive CDN \$9.20 instead of CDN \$5.33 for each warrant held; and secondly, that warrantholders were given the right to dissent.

[23] The plaintiffs argue that the press release of November 18 and the conversation with Mr. Linden, taken separately or together, constitute negligent misrepresentation and a breach of a fiduciary duty owed to the plaintiffs. They further argue that had they known of the existence of the Informal Committee and the evidence it filed in Court, they would not have sold their warrants when they did and, consequently, would have benefited from the increased price set for the warrants on December 6.

The Defendant's Position Regarding the Statutory Duty to Disclose

[24] The defendant argues that their only disclosure duties with respect to information regarding the combination of GSK and IDB are laid out in the Securities Act. Furthermore, they argue that Danier Leather stands for the proposition that the statutory disclosure requirements, for reporting issuers, fully define their disclosure obligations and such obligations cannot be extended by the common law principles of negligent misrepresentation. They argue that this is dispositive of the case at bar, and that, on this basis alone, the plaintiffs' claim should fail.

[25] The plaintiffs, on the other hand, submit that Danier Leather is not authority for the proposition that the applicable securities legislation is a complete code barring all common law claims. Their submission is that Danier Leather is expressly restricted to statutory liability of an issuer for misrepresentation in a prospectus. They argue that Danier Leather is a statutory misrepresentation case and does not deal with the common law. They quote Mr. Justice Binnie, who poses the question as follows, at para. 4:

In essence, the legal question is whether a compliant issuer can be civilly liable for statutory misrepresentation for failing to update its prospectus with information that comes to light during the period of distribution (i.e. after the prospectus was filed on May 6, 1998, but prior to closing) to correct a statement that was correct when made but which became misleading. More succinctly, is compliance with the regulatory demands of ss. 56 to 58 a shield against an action for statutory misrepresentation under s. 130(1)?

[26] Mr. Justice Binnie further stated, at para. 43 of the reasons:

In summary, when (as here) a prospectus (or an amendment) contains no misrepresentation on the date the document is filed, information amounting to material facts (but not material changes) that arises subsequently cannot support an action under s. 130(1). (Of course, if a material change arises during the period of distribution, failure to disclose this change as required by s. 57(1) could support an action under s. 130(1).) In the case at bar, however, the trial judge found that the intra-quarterly results were not a material change, and as will be explained, I agree with the trial judge in this regard. Such is the prospectus disclosure policy presently mandated by the Act and the courts are obliged to give effect to it. In contexts other than 'prospectus misrepresentation', including regulatory or stock exchange oversight, a different policy may prevail, depending on the governing rules and enactments. This appeal is concerned only with s. 130(1).

[27] I agree with the plaintiffs' position, which is supported by *Ryan v. Victoria (City)*, [1997] 1 S.C.R. 201, another Supreme Court of Canada decision, in which Mr. Justice Major stated, at para. 29:

Legislative standards are relevant to the common law standard of care, but the two are not necessarily co-extensive. The fact that a statute prescribes or prohibits certain activities may constitute evidence of reasonable conduct in a given situation, but it does not extinguish the underlying obligation of reasonableness. Thus, a statutory breach does not automatically give rise to civil liability; it is merely some evidence of negligence. By the same token, mere compliance with a statute does not, in and of itself, preclude a finding of civil liability.

Fiduciary Duty

[28] As an alternative basis for finding IDB liable, counsel for the plaintiffs argued that the corporation owed a fiduciary duty to the plaintiffs. In argument, counsel conceded that there are no decided cases finding that a corporation owes a fiduciary duty to its shareholders. At the material time, these plaintiffs had sold their shares in IDB and only owned warrants. Even if corporations were in a fiduciary relationship with their shareholders, it would require a further extension of the fiduciary principle to find that such a duty was owed to a person whose only connection to the corporation was a contractual right to become a shareholder. Nothing in the facts of this case causes me to believe that such a novel extension of fiduciary responsibility is justified.

Negligent Misrepresentation

[29] The real issue at the centre of this litigation is whether the press release issued by IDB on November 18, 2005, constituted a negligent misrepresentation. In *Cognos*, the Supreme Court of Canada articulated a five-part test for finding liability in negligent misrepresentation. The five requirements under *Cognos* are:

1. there must be a duty of care based on a "special relationship" between the representor and representee;
2. the representation in question must be untrue, inaccurate, or misleading;
3. the representor must have acted negligently in making said representation;
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 they suffered resulting damage.

[30] The first inquiry under the *Cognos* test is whether or not there was a duty of care based on a special relationship. In Canada, the existence of a duty of care in negligence claims is determined by the application of the two-part test which has come to be referred to as the *Anns/Kamloops* test. The test was first established by Lord Wilberforce in *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.) at 751-752:

.the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter - in which case a *prima facie* duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise .

[31] Accordingly, the first part of the *Anns/Kamloops* test involves a determination of whether the defendant had a *prima facie* duty of care, whereas the second part involves policy considerations regarding the negating of the *prima facie* duty of care. The test was explicitly adopted by the Supreme Court of Canada in *Neilson v. The City of Kamloops*, [1984] 2 S.C.R. 2.

[32] The *Anns/Kamloops* test applies in the context of a tort of negligent misrepresentation, as Mr. Justice La Forest determined in *Hercules Management Limited. v. Ernst & Young*, [1997] 2 S.C.R. 165 at para. 21:

I see no reason in principle why the same approach should not be taken in the present case. Indeed, to create a "pocket" of negligent misrepresentation cases (to use Professor Stapleton's term) in which the existence of a duty of care is determined differently from other negligence cases would, in my view, be incorrect.

[33] In discussing a prima facie duty of care in the context of negligent misrepresentation, Mr. Justice La Forest said this at paras. 22 and 24:

The first branch of the Anns/Kamloops test demands an inquiry into whether there is a sufficiently close relationship between the plaintiff and the defendant that in the reasonable contemplation of the latter, carelessness on its part may cause damage to the former.

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In cases of negligent misrepresentation, the relationship between the plaintiff and the defendant arises through reliance by the plaintiff on the defendant's words. Thus, if 'proximity' is meant to distinguish the cases where the defendant has a responsibility to take reasonable care of the plaintiff from those where he or she has no such responsibility, then in negligent misrepresentation cases, it must pertain to some aspect of the relationship of reliance. To my mind, proximity can be seen to inhere between a defendant-representor and a plaintiff-representee when two criteria relating to reliance may be said to exist on the facts: (a) the defendant ought reasonably to foresee that the plaintiff will rely on his or her representation; and (b) reliance by the plaintiff would, in the particular circumstances of the case, be reasonable. To use the term employed by my colleague, Iacobucci J., in *Cognos*, supra, at p. 110, the plaintiff and the defendant can be said to be in a "special relationship" whenever these two factors inhere.

[34] Accordingly, while reasonable reliance is an independent element of proof of the claim, an analysis of that reliance is also necessary to determine whether, in a particular circumstance, there is sufficient "proximity", commonly based on reasonable foreseeability, such that a prima facie duty of care arises.

[35] With respect to the second part of the Anns/Kamloops test - policy considerations for negating the prima facie duty of care - Mr. Justice La Forest recognized in *Hercules*, at para. 31 (citing Cardozo C.J., in *Ultramares Corp. v. Touche Niven & Co.*, 174 N.E., 441 (U.S.C.A. 1931) at 444) that its purpose is to avoid the possibility of exposing defendants in negligent misrepresentation claims to "liability in an indeterminate amount for an indeterminate time to an indeterminate class."

[36] Since the reasonable foreseeability/reasonable reliance test for ascertaining a prima facie duty of care may well be satisfied in many negligent misrepresentation claims, the problem of indeterminate liability will often arise. To address this problem Mr. Justice La Forest proposed, at para. 37, that two factors should be considered at the second part of the Anns/Kamloops test:

(a) whether the defendant knew the identity of the plaintiff; and

- (b) whether the defendant's impugned statements were used for the specific purpose or transaction for which they were made.
- [37] IDB submits that the plaintiffs' case fails to satisfy either aspect of the Anns/Kamloops test. Specifically, they allege the plaintiffs' case fails on the first part of the test because it was not reasonably foreseeable that they would rely on IDB to keep them apprised of the court proceedings. It fails on the second part of the test because IDB's impugned statements were not used for the specific purpose for which they were made and because IDB was not required under the applicable legislation, common law, and the Court's Interim Order to disclose the information the plaintiffs say they were missing. I agree with IDB's submissions on this point.
- [38] Focusing on the two key elements outlined by Mr. Justice La Forest in *Hercules Management* -- that is that (a) the defendant ought reasonably to foresee that the plaintiff will rely on his or her representation, and (b) reliance by the plaintiff would, in the particular circumstance of the case be reasonable -- the case law often focuses on whether or not the plaintiff, to the knowledge of the representor, had other means of accessing or checking the information provided by the defendant: see, for example, *Keith Plumbing & Heating Company v. Newport City Club Ltd.* (2000), 184 D.L.R. (4th) 75 (B.C.C.A.), leave to appeal to the SCC ref'd [2000] S.C.C.A. No. 193.
- [39] The plaintiffs in this case claim they had "no alternative source of information with respect to what was happening in court other than the updates that IDB was providing them."
- [40] I cannot accept this statement as factual. First, the Interim Order specified that by filing an Appearance, securityholders would receive notification of adjournment hearing dates. Second, the court process was public. Anyone could attend or send a representative to learn what transpired. Third, either the Court registry or a Vancouver lawyer could provide an interested party with relevant information.
- [41] These facts go to both branches of the *Hercules Management* test. It was not reasonable for the defendant to foresee that the plaintiffs would rely on their representation nor, and I emphasize these words, "in the particular circumstances of this case" would reliance by the plaintiff be reasonable.
- [42] This finding, on the first element of the *Cognos* test, is sufficient to dispose of the plaintiffs' claim. Nevertheless, I will provide my views on the other elements of the *Cognos* test.
- [43] The second element of the *Cognos* test is whether there was an untrue, inaccurate or misleading statement. *Cognos* itself held that implied representations can be a basis for liability in negligent misrepresentation.
- [44] The November 18 press statement was neither untrue nor inaccurate. However, despite the forceful submissions of counsel for the defendant, I am satisfied that it was misleading.

[45] Counsel for the defendant submitted that for an implied misrepresentation to be misleading it must be the only reasonable inference a person could draw from the direct representation. This argument was derived from the passage in *Cognos* where Iacobucci J. said, at para. 78:

The implied misrepresentation found by the trial judge is not only reasonable in the surrounding circumstances, but it is also perhaps the only inference that could be drawn from the direct representations made to the appellant.

[46] I believe counsel is reading *Cognos* too narrowly and I reject his interpretation based on Mr. Justice Iacobucci's language in the previous paragraph of his reasons:

It is unnecessary for me to set out in detail the circumstances in which so-called implied representations can be enough to sustain an action in tort for negligent misrepresentation. I prefer leaving this task to trial judges dealing with specific factual situations. Suffice it to say that the case at bar falls well within this category.

[47] I agree with the views of IDB's president, Todd Patrick:

We have to explain the reason for the delay so people are going to know there is opposition.

[48] The third *Cognos* factor is that the representor must have acted negligently in making the representation. I find that the company was negligent in failing to follow the advice of its president to disclose the existence of the Informal Committee's opposition and the basis for it.

[49] The fourth *Cognos* factor is that the representee must have relied, in a reasonable manner, on the negligent misrepresentation. I find that all of the plaintiffs have failed this branch of the test. James and Marilyn Morse relied on David Morse rather than IDB's press release. David Morse relied on his own judgment. He was not holding IDB warrants because he believed GSK and IDB had undervalued them; he held them because he anticipated a bidding war in which ownership of the warrants would be a cost-effective means to profit from any higher value put on the company as a whole. Once the Plan of Arrangement was approved by an overwhelming majority of securityholders (including himself and his family) he had no reason to hold the warrants and sold them.

[50] Charles Lucero is different. He did think the warrants were undervalued and he voted against the Plan of Arrangement for that reason. However, he was aware of the possibility of entering an Appearance in Court. He sought legal advice from a Montana lawyer and relied upon that advice rather than IDB's press release. His failure, and his American lawyer's failure, to take reasonable steps to learn what was happening in the court-approval process was the proximate cause of his failure to hold all of his warrants.

[51] On the issue of reliance, the plaintiffs seek to rely on the expert opinion of Mr. Smith. I did not find it to be of assistance and preferred the views expressed in the expert opinion of Mr. Leon Getz.

[52] The fifth test is that the reliance must have been detrimental to the representee. Having found no reasonable reliance by any of the plaintiffs, the fifth test has no relevance.

Conclusion

[53] The result is that the plaintiffs' case is dismissed with costs to the defendant on scale B.

Mr. Justice Peter Leask

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