GETTING BLOOD FROM A STONE – ENFORCING UNPAID CORPORATE JUDGMENTS AGAINST DIRECTORS

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Collecting judgments against deadbeat corporations can sometimes be a difficult proposition. This can be particularly frustrating when the corporate principals abandon the original corporation, only to start a practically identical corporation in the same premises under a slightly different name. Two recent Ontario court decisions demonstrate why this is not always the end of the line when attempting to recover from deadbeat corporations. As discussed below, if the principals of the corporations involved in this shell game did so without giving proper consideration to creditors, they can be personally found liable for the debts of the abandoned corporation.

In *Chan v City Commercial Realty Group Ltd* [1], a real estate broker called City Commercial Realty Services (Canada) Ltd. ("City 1") had previously sued four defendants and lost. After a trial and an unsuccessful appeal, City 1 had been found liable to the defendants for $119,000 in costs. Instead of paying these costs, the principals of City 1 chose to abandon City 1 and start a new company, City Commercial Realty Group Ltd. ("City 2"). City 2 took over City 1's business, and operated from the same premises, with the same furniture, phone number, business name, signage and some of the same personnel. As a real estate broker, City 1 had no real assets, and the defendants were therefore unable to collect the outstanding costs award from City 1.

Similarly, in *Pitney Bowes v Belmonte* [2], a husband and wife were the principals of two numbered companies: 1140311 Ontario Inc. ("Mini Sticks #1"), which affixed NHL logo stickers to novelty items and sold them, and 1601089 Ontario Inc., which owned the NHL logo stickers before they were affixed to the novelty items. Mini Sticks #1 leased photocopying equipment from Pitney Bowes. When Mini Sticks #1 defaulted on its lease, Pitney Bowes obtained a $25,107.09 judgment against it. In the meantime, the principals of Mini Sticks #1 had incorporated a new numbered company, 1734385 Ontario Inc. ("Mini Sticks #2), which took over the business, business name and premises of Mini Sticks #1. This left Mini Sticks #1 with no assets and no ongoing business, and left Pitney Bowes with no way to enforce its judgment against Mini Sticks #1.

In both cases, the judgment creditor was left with what appeared to be a worthless judgment, with no way to collect against the defunct corporate debtors. The creditors, however, were able to successfully turn to the oppression provisions of the *Ontario Business Corporations Act*[3] in order to enforce the judgments against the principals of the corporation.

creditors' relief under the *Ontario Business Corporations Act*

The oppression remedy under the OBCA is most commonly seen as a provision that protects minority shareholders against unfair acts by the majority shareholders in a corporation. It is, however, much broader than this, and protects various classes of parties from conduct that is unfairly prejudicial or unfairly disregards their genuine interests in the corporation. This includes creditors of corporations, in the proper circumstances.

Although there is no strict definition of when a creditor is entitled to protection through the oppression remedy, the Ontario Court of Appeal has provided some guidelines to consider in determining whether to provide relief to a creditor, including:

- What were the underlying expectations of the creditor?
- Were the acts of the debtor unforeseeable?
- Could the creditor have protected its interests against the acts complained of[4]?

If these considerations convince a judge that the creditor has been unfairly prejudiced or unfairly disregarded, then there are a wide range of remedies that the judge can impose. In situations like those in *Chan* and *Pitney Bowes*, the most direct and powerful relief is to essentially "pierce the corporate veil" and hold the directors of the corporations personally liable.

In both *Chan* and *Pitney Bowes*, one of the most powerful factors was that the directors did not provide evidence of any genuine underlying business reason for their actions. In Chan, the court found that the actions of the directors were highly suspicious, and that no explanation was provided as to why a profitable business would suddenly close down. In *Pitney Bowes*, the evidence, including admissions from the director of the corporation, showed that the first corporation was abandoned primarily to avoid its creditors. While the defendants in both cases likely believed that they were protected because their acts were not technically illegal or fraudulent, the judge's use of the oppression remedy against them shows that technical defences will not necessarily work when the result is seen as unfair.

While the oppression remedy is not a substitute for other means of protecting a creditor's interests, such as obtaining personal guarantees or proper security against available assets, it remains available as a last resort against parties who try to cover themselves through a form of corporate shell game.

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.