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Martin v. Goldfarb - A Cautionary Tale on Damages

This series of actions originated 19 years ago with Mr. Martin alleging Mr. Goldfarb caused him to lose over $10 million. The courts have found Mr. Goldfarb, and his firm Farano, Green LLP, breached their fiduciary duty to Mr. Martin. However, Mr. Martin's actions have failed.

Central to Mr. Martin's repeated failures to achieve a judgment against the defendants, is Mr. Martin's failure to prove his damages to the standards required by the courts. Specifically, Mr. Martin failed to:

- be specific as to losses that are being claimed, for example, which transactions or assets were affected by the breach or wrong, and what are the specifics of each transaction or asset;
- demonstrate how the alleged breach or wrong caused the losses that are being claimed; and
- respond to the defendant's assertion that the losses were caused by factors other than the alleged breach or wrong.

Here are several of the comments from The Court of Appeal, Finlayson, J.A.:

> "… where the absence of evidence makes it impossible to assess damages, the litigant is entitled to nominal damages at best." (p. 187)

> "… the explanation that Martin is bankrupt because of the activities of Axton and cannot afford to retain forensic experts to put together a credible estimate of damages does not justify his counsel dumping on the trial judge the responsibility for pulling a figure out of the air." (p. 189)

Overview of the Actions

The actions in this dispute fall into two streams. Initially, Mr. Martin sued personally for: a) the damages he had suffered personally, and b) the damages suffered by his two holding companies. The Court of Appeal found that Mr. Martin was not able to claim the damages suffered by his holding companies; the companies themselves should have advanced their own claims. Lederman, J. found that Mr. Martin had not proved his personal damages. Having been unsuccessful in the first stream, Mr. Martin had the claims assigned to him by his two holding companies, and he pursued the claims on this basis. Perell, J. decided that cause of action estoppel applied, and as a result, this claim failed. In addition, Perell, J. decided that, as with Mr. Martin's personal claim, the damages claimed by the two holding companies were not proven.

A more detailed chronological review of the two streams follows.

The First Stream of Actions

In August 1988, Clifford Goldfarb, a lawyer with Farano, Green LLP, was retained to act for Mr. Robert Edward Martin. Mr. Martin alleges solicitor's negligence and breach of fiduciary duty. Specifically, that Mr. Goldfarb knew, but failed to disclose to Mr. Martin, that one of Mr. Martin's business associates (Mr. Axton) had been convicted of fraud in Ontario. This knowledge was not disclosed, despite Mr. Axton and Mr. Goldfarb both working on some of Mr. Martin's real estate and commercial transactions.

On January 11, 1990, Mr. Martin commenced an action alleging that Mr. Goldfarb's failure to disclose Mr. Axton's background allowed Mr. Axton and his cronies to misappropriate the assets of, or fraudulently obtain funds from, Mr. Martin and his holding companies.

Mr. Martin's theory of causation and quantification, labeled the "before and after" theory, asserted that Mr. Martin and his holding companies had assets (net of debt) of over $10 million before, and $ nil after, Mr. Goldfarb's breach of fiduciary duty. Therefore, Mr. Martin claimed $10 million.

By judgment dated May 7, 1997[i], Lederman, J. concluded that:

- Mr. Goldfarb and Farano, Green LLP breached their fiduciary duty;
- Mr. Martin could personally assert the claims of his holding companies; and
- the plaintiff bears the onus to prove that the loss was caused by the breach, and the quantum of the loss.

Lederman, J. awarded Mr. Martin damages of $6 million, and pre-judgment interest of $3 million.

However, this ruling was successfully appealed. The Court of Appeal[ii] concluded that:

- there had been a breach of fiduciary duty, and that the breach could cause damage;
- Mr. Martin was not entitled to blame his solicitors for his entire ruin;
- Lederman, J. erred in treating the losses of Mr. Martin's holding companies as losses recoverable by Mr. Martin; and
- the identification and quantification of Mr. Martin's personal losses were wholly unsatisfactory, and remitted the matter of damages back to Lederman, J.

There are several interesting aspects to this decision:

- As the Court noted, if Mr. Martin had been compensated personally for losses of the holding companies, then Mr. Martin would have jumped the queue to the prejudice of all of the creditors of the corporations; and

- It is not clear whether Mr. Martin ever asserted a claim for the reduction in value of his shares in the two holding companies, as opposed to the losses sustained by the two holding companies.

Leave to appeal to the Supreme Court was dismissed on February18, 1999. By judgment dated January 3, 2002[iii], Lederman, J. dismissed Mr. Martin's action due to his failure to prove damages in his personal claim. Mr. Martin's appeal of this decision to the Court of Appeal was dismissed on November 20, 2003[iv].

The Second Stream of Actions

Meanwhile, the second stream of decisions was unfolding. In May 1999, Mr. Martin entered into an agreement to have causes of action possessed by the two holding companies assigned to him. On September 8, 1999, Mr. Martin, as assignee of his two holding companies, commenced an action against Mr. Goldfarb on the same basis as the action commenced in January 1990.

By decision dated July 7, 2006[v], Perell, J. concluded that:

- the defences of limitation periods and laches do not apply; and
- the action is barred by cause of action estoppel. Specifically, the claims of the corporations could and should have been advanced in the 1990 action.

Perell, J. goes on to say that if his conclusions about the technical defences are incorrect, he would still dismiss Mr. Martin's action on the grounds that he failed to prove that the two holding companies actually suffered a loss from the breach of fiduciary duty. He identifies two main problems with Mr. Martin's quantification of the damages suffered by the two holding companies.

First, Mr. Martin again did not present any reliable evidence as to the value of the holding companies' assets at August 1988, the date Mr. Martin retained Mr. Goldfarb, specifically:

- Mr. Martin's experts presented evidence as at the wrong dates: December 1988, and January 1990;
- Mr. Martin's experts may have omitted three mortgage liabilities with a value of $2,430,000; and
- the figures on his statement of net worth are not supported.

Second, there are substantial losses that Mr. Martin cannot connect to Mr. Goldfarb's breach of fiduciary duty. Potential losses that are "pre-Goldfarb and/or non-Axton transactions" include the following:

- loss on a Florida project - $1.0 million;
- loss on a plastic engine investment - $3.0 million;
- loss on retrofitting a building - $5.0 million;
- loss from operations in ongoing businesses- $1.0 million; and
- the increase in interest rates, and the related down turn in the real estate market which occurred around the relevant time period.

Mr. Martin plans to appeal the July 2006 decision.

Recap on Both Streams

In conclusion, this series of decisions demonstrates the importance of quantifying and proving damages. Specifically, the plaintiff must:

- be specific as to losses that are being claimed, for example, which transactions were affected by the breach or wrong, and what are the specifics of each transaction;
- demonstrate how the alleged breach or wrong caused the plaintiff to suffer the losses that are being claimed; and
- be prepared to respond to the defendant's assertion that the losses were caused by factors other than the alleged breach or wrong.

Without complete, clearly defined and compelling financial arguments, the courts will have great difficulty finding in your favour. As the Court of Appeal judge Finlayson J.A. states, judges are not there to pull figures out of the air.

January 2007

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[i] (1997), 31 B.L.R. (2d) 265 (Ont. Gen. Div.)
[ii] 1998 CanLII 4150 (ON C.A.), (1998), 41 O.R. (3d) 161 (C.A.)
[iii] [2002] O.J. No. 6 (S.C.J.)
[iv] 2003 CanLII 28757 (ON C.A.), (2003), 68 O.R. (3d) 70 (C.A.)
[v] 2006 CanLII 23152 (on S.C.)