

Normart Management Limited v. West Hill Redevelopment  
Company Limited et al.

[Indexed as: Normart Management Ltd. v. West Hill  
Redevelopment Co.]

37 O.R. (3d) 97  
[1998] O.J. No. 391  
Docket No. C25986

Court of Appeal for Ontario  
Finlayson, Charron and Goudge JJ.A.  
February 3, 1998

Civil procedure -- Pleadings -- Plaintiff party to joint venture agreement to develop land -- Joint venture lands being sold under power of sale by mortgagee -- Plaintiff alleging that defendant joint venture partners breaching joint venture agreement and breaching fiduciary duty by acquiring joint venture lands from mortgagee -- Plaintiff alleging that principals of corporate defendants liable for conspiracy -- Action for conspiracy against principals struck from statement of claim.

Corporations -- Directors -- Liability -- Conspiracy -- Plaintiff party to joint venture agreement to develop land -- Joint venture lands being sold under power of sale by mortgagee -- Plaintiff alleging that defendant joint venture partners breaching joint venture agreement and breaching fiduciary duty by acquiring joint venture lands from mortgagee -- Plaintiff alleging that principals of corporate defendants liable for conspiracy -- No conduct on part of directors tortious in itself or exhibiting separate identity of interest from that of corporation -- Action for conspiracy against principals struck from statement of claim.

N Ltd., WH Ltd. and B Ltd. were parties to a joint venture agreement to develop a property known as the Bond Lake property. The purchase of the property was financed through a loan from the Royal Bank. The loan went into default, and the bank issued a notice of power of sale under its mortgage. N Ltd. alleged that during the currency of the power of sale proceeding, WH Ltd., B Ltd. and their directors secretly met with officials of the bank and arranged to purchase the Bond Lake property through a numbered company. N Ltd. sued WH Ltd. and B Ltd. for breach of fiduciary duty and breach of the good faith provision of the joint venture agreement; it claimed damages and a constructive trust on the property. It also claimed damages for conspiracy, and alleged that the directors of the corporate defendants were parties to the conspiracy. The principals moved to have the claim for conspiracy against them struck from the statement of claim. They were successful. N Ltd. appealed.

Held, the appeal should be dismissed.

The issue for the court was whether the plaintiff's statement of claim provided the basis for a separate cause of action in conspiracy against the directors of the corporate respondents in their personal capacity. In this case, however, the factual basis for the damages flowing from the breach of the joint venture agreement and the so-called conspiracy to injure were one and the same and not separate. The directing minds of a corporation cannot be held civilly liable for the actions of the corporations they control and direct unless there is some conduct on the part of those directing minds that is either tortious in itself or exhibits a separate identity of interest from that of the corporation such as to make the acts or conduct complained of those of the directing minds. In the statement of claim in appeal, there was no factual underpinning to support an allegation that the personal defendants were at any time acting outside their capacity as directors and officers of the corporations of which they were the directing minds. Liability does not attach to the directors merely by virtue of the fact that they stood to gain from the completion of the impugned transaction as a result of their positions with the corporations. The decision of the directing minds of the

corporations to cause the corporations to ignore their corporate obligations under the joint venture agreement cannot amount to a conspiracy by the directing minds to injure the third contracting party or its directing mind. To give effect to this argument simpliciter would eliminate any semblance of the corporate veil.

#### Cases referred to

Canada Cement LaFarge Ltd. v. B.C. Lightweight Aggregate Ltd., [1983] 1 S.C.R. 452, 145 D.L.R. (3d) 385, 47 N.R. 191, [1983] 6 W.W.R. 385, 21 B.L.R. 254, 24 C.C.L.T. 111, 72 C.P.R. (2d) 1; H.A. Imports of Canada Ltd. v. General Mills Inc. (1983), 42 O.R. (2d) 645, 150 D.L.R. (3d) 574, 74 C.P.R. (2d) 257, 36 C.P.C. 296 (H.C.J.); Hunt v. Carey Canada Inc., [1990] 2 S.C.R. 959, 49 B.C.L.R. (2d) 273, 74 D.L.R. (4th) 321, 117 N.R. 321, [1990] 6 W.W.R. 385, 4 C.C.L.T. (2d) 1, 43 C.P.C. (2d) 105 sub nom. Hunt v. T & N plc; Ontario Store Fixtures Inc. v. Mmmuffins Inc. (1989), 70 O.R. (2d) 42 (H.C.J.); ScotiaMcLeod Inc. v. Peoples Jewellers Ltd. (1995), 26 O.R. (3d) 481, 129 D.L.R. (4th) 711 (C.A.); Ward v. Lewis, [1955] 1 All E.R. 55, [1955] 1 W.L.R. 9, 99 Sol. Jo. 27 (C.A.)

#### Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 21.01, 25.06, 25.11

#### Authorities referred to

Bullen, Leake and Jacob, *Precendents of Pleadings*, 12th ed. (London: Sweet & Maxwell, 1975), pp. 646-47

APPEAL from an order of Pitt J. (1996), 30 O.R. (3d) 531, 140 D.L.R. (4th) 550, 4 C.P.C. (4th) 64 (Gen. Div.), striking a claim for conspiracy from a statement of claim.

J.L. McDougall, Q.C., and Norman J. Emblem, for appellant.  
Thomas McRae, for respondents, West Hill Redevelopment Co.,  
1133373 Ontario Inc., Joseph Lebovic and Wolf Lebovic.  
Darlene E. Richards-Loghrin, for respondents, Betovan  
Construction Ltd. and Thomas Kohn.

The judgment of the court was delivered by

FINLAYSON J.A.: -- Normart Management Limited ("Normart")  
appeals from the order of the Honourable Mr. Justice Pitt of the  
Ontario Court (General Division) in respect of the respondents'  
motions pursuant to rules 21.01, 25.06 and 25.11 of the Rules of  
Civil Procedure whereby Pitt J. struck out the appellant's  
conspiracy claim against the individual defendants. His judgment  
is reported at (1996), 30 O.R. (3d) 531, 140 D.L.R. (4th) 550  
(Gen. Div.).

The parties

The appellant Normart is a corporation incorporated pursuant  
to the laws of Ontario which carries on business in Ontario and  
since 1976 has been primarily engaged in the development of  
residential housing projects. Normart's president, at all  
material times, was Simon Yakubowicz ("Yakubowicz").

The respondents, West Hill Redevelopment Company Limited  
("West Hill"), Betovan Construction Limited ("Betovan") and  
1133373 Ontario Inc. ("1133373"), are corporations incorporated  
pursuant to the laws of Ontario and carry on business in  
Ontario.

The respondents, Joseph Lebovic ("J. Lebovic"), and Wolf  
Lebovic ("W. Lebovic"), reside in Ontario and at all material  
times were officers and directors of West Hill and 1133373. The  
respondent, Thomas Kohn ("Kohn"), was at all material times an  
officer and director of Betovan and 1133373.

Bond Lake Estates Development Corporation ("Bond Lake  
Estates") acted as bare trustee for the appellant and the  
respondents West Hill and Betovan in respect of the acquisition

of the Bond Lake property. Yakubowicz, J. Lebovic and Kohn were at all material times officers and directors of Bond Lake Estates.

#### The facts

On February 2, 1988, the corporate respondents, West Hill and Betovan, entered into a joint venture agreement with the appellant corporation for the purposes of completing the acquisition and development of approximately 588 acres of land in Richmond Hill, Ontario, which is referred to as the Bond Lake property. Article 4 of the agreement expressly provides that West Hill, Betovan and Normart agree that they owe each other a "duty of utmost good faith" in respect of their relationship with one another under the agreement.

The appellant alleges in its statement of claim that as a result of entering into the agreement, proceeding to acquire the Bond Lake property and beginning development of it, the parties, expressly and by necessary implication, assumed fiduciary obligations, one to the others in respect of the Bond Lake property which became the subject of the fiduciary relationship and, as a consequence, precluded any one of the parties to the relationship from dealing with the property to the exclusion or detriment of the others.

Financing for the acquisition of the Bond Lake property was provided to each of the appellant corporation and the respondents West Hill and Betovan by Royal Bank of Canada ("Royal Bank"). The principal amount of \$20 million was loaned by Royal Bank to the appellant and the respondents West Hill and Betovan in July 1988 ("Bond Lake loan") and secured by a mortgage on the subject property. Each of the appellant and the respondents West Hill and Betovan were severally but not jointly liable for their respective portions of the Bond Lake loan in the same percentage as their respective ownership interests appeared in the agreement, namely the respondent West Hill (50 per cent), the respondent Betovan (25 per cent), and the appellant (25 per cent). The appellant's initial 25 per cent ownership interest in the Bond Lake property was subsequently reduced to 22 per cent as a consequence of the

appellant conveying a 1.75 per cent ownership interest in the Bond Lake property to Demesne Developments Inc. and a 1.25 per cent ownership interest in the Bond Lake property to Lionstar Enterprises Inc. This latter transaction is of no significance to this appeal.

By letter dated August 13, 1993, Royal Bank issued a demand for payment upon the Bond Lake participants and commenced an action to realize upon its mortgage interest in the Bond Lake property.

On April 13, 1995, Royal Bank issued a notice of sale under charge/mortgage in respect of the Bond Lake property. The redemption period pursuant to the notice of sale was initially to expire May 23, 1995, but was extended to June 16, 1995.

On June 19, 1995, 1133373's principals, J. Lebovic, W. Lebovic and Kohn, executed an agreement of purchase and sale whereby the respondent 1133373 purported to acquire, as trustee on behalf of the corporate respondents, West Hill and Betovan, the Bond Lake property. Subsequently, Royal Bank transferred title in the Bond Lake property to 1133373. This transaction and its effect on the appellant is the subject of the present litigation.

The position overall of the appellant was that its two corporate partners in the joint venture agreement, West Hill and Betovan, in breach of their fiduciary duty to the appellant, entered into secret negotiations with Royal Bank whereby it was arranged that when Royal Bank exercised its power of sale under its mortgage of the Bond Lake property and extinguished the title of the three corporate joint venturers, the property would then be sold to 1133373, a corporation owned and controlled by the principals of the two corporate partners. In the alternative, it is alleged that the personal respondents, Kohn, on behalf of Betovan, and the two Lebovics, on behalf of West Hill, conspired with their corporations and each other to bring about this result, to the injury of the appellant.

The cause of action

The four claims in the statement of claim are as follows:

(a) an order imposing a constructive trust on the Bond Lake property, to the extent of a 22% ownership interest in favour of the appellant;

(b) in the alternative, damages for breach of contract in the amount of \$30,000,000;

(c) in the further alternative, damages for conspiracy in the amount of \$30,000,000;

(d) in addition or in the alternative, repayment of \$3,340,526 being the amount contributed to Bond Lake property by the plaintiff.

We are not concerned in this appeal with (a) and (d). The substantive pleading with respect to the claim for breach of contract (b) is contained in paras. 20 and 23 of the statement of claim:

20. On June 6, 1995, West Hill caused 1133373 to be incorporated, which company was later used as the corporate vehicle through which West Hill and Betovan would acquire the Bond Lake property from RBC to Normart's exclusion and detriment. Notwithstanding that Normart sought information from the principals of West Hill and Betovan, they refused to provide any meaningful information to Normart and/or misled Normart concerning the plan which they had entered into, the purpose of which was to extinguish Normart's interest in the Bond Lake property, which conduct was in breach of their fiduciary obligations and duty of the utmost good faith as well as in breach of the terms of the Joint Venture Agreement.

. . . . .

23. As a result of the aforesaid conduct of West Hill, Betovan, Lebovic, Kohn and 1133373, Normart's 22% ownership interest in the Bond Lake property was purportedly

extinguished through the power of sale contained in instrument no. LT 502276 and subsequent resale to 1133373. Normart has lost its ability to share in the profits to be derived from the development of the Bond Lake property and has lost its investment in the Bond Lake property as well. This has had and will continue to have a serious financial impact on Normart with respect to its remaining operations.

The substantive pleading with respect to the claim in conspiracy (c) is para. 18 of the statement of claim:

18. In breach of the Joint Venture Agreement and in furtherance of a conspiracy between the respondents, Lebovic and Kohn conspired with and among each other directly and through the corporate defendants they then and continue to control to injure Normart. The plan agreed to, and embarked upon was, prior to the expiry of the redemption period pursuant to the Notice of Sale as extended, the principals of West Hill and Betovan, Lebovic and Kohn a means [sic] to unlawfully obliterate Normart's interest in the Bond Lake property and to secure that interest for themselves. In furtherance of the aforesaid conspiracy, in breach of their obligations of the utmost good faith and fiduciary duties and in flagrant breach of contract, the defendants engaged in substantial secret discussions with representatives of RBC with respect to acquiring the Bond Lake property from RBC which had, or was shortly to, acquire the Bond Lake property pursuant to the power of sale contained in instrument no. LT 502276.

## Issues

1. Has a sustainable cause of action in conspiracy been pleaded?
2. If there is a sustainable conspiracy action, does it merge with the action for breach of contract?

## Analysis

Issue 1. Has a sustainable cause of action in conspiracy



been pleaded?

As a starting point, it should be noted that this is largely an appeal dealing with the sufficiency of the appellant's statement of claim with respect to the cause of action of conspiracy. This court is called upon to consider whether the statement of claim, as drafted, provides the basis for a separate cause of action in conspiracy against the directors of the corporate respondents. In so doing, this court must determine whether the allegations relating to the claim of conspiracy and the ensuing damages are substantially the same as those of the cause of action for breach of contract and fiduciary duty, such that the two causes of actions relate to the same underlying factual foundation and no significant differences between the two causes of actions emerge. As a precondition to sounding a cause of action in conspiracy against the directors of the respondent corporations, sufficient particulars must be pleaded in the statement of claim which disclose a basis for attaching liability against the directors in their personal capacities as a result of the completion of the impugned transaction.

Despite the best efforts of counsel for the appellant to persuade me to the contrary, there can be no doubt on a plain reading of the statement of claim that the appellant is attempting to convert its straightforward action against the respondent corporations for breach of contract and breach of fiduciary duty arising out of that contract into a personal action against the officers and directors of the respondent corporations. The factual basis for and the damages flowing from the breach of the joint venture agreement and the so-called conspiracy to injure are one and the same.

It is well established that the directing minds of corporations cannot be held civilly liable for the actions of the corporations they control and direct unless there is some conduct on the part of those directing minds that is either tortious in itself or exhibits a separate identity or interest from that of the corporations such as to make the acts or conduct complained of those of the directing minds: see *ScotiaMcLeod Inc. v. Peoples Jewellers Ltd.* (1995), 26 O.R.

(3d) 481 at p. 491, 129 D.L.R. (4th) 711 (C.A.). In the statement of claim in appeal, there is no factual underpinning to support an allegation that the personal defendants were at any time acting outside their capacity as directors and officers of the corporations of which they were the directing minds. There is nothing in the pleadings which suggests that in making the alleged arrangements, Kohn and the Lebovics were acting other than on behalf of and in the interests of the corporations that they controlled. Rather, the impugned transactions were completed in the name of the corporate respondents and for the benefit of the corporate respondents. In the absence of further facts, liability does not attach to the individual respondents merely by virtue of the fact that the individual respondents stood to gain from the completion of the impugned transaction as a result of their financial positions within the respondent corporations. The following words of *ScotiaMcLeod*, *supra*, at p. 491 are applicable:

A corporation may be liable for contracts that its directors or officers have caused it to sign, or for representations those officers or directors have made in its name, but this is because a corporation can only operate through human agency, that is, through its so-called "directing mind". Considering that a corporation is an inanimate piece of legal machinery incapable of thought or action, the court can only determine its legal liability by assessing the conduct of those who caused the company to act in the way that it did. This does not mean, however, that if the actions of the directing minds are found wanting, that personal liability will flow through the corporation to those who caused it to act as it did. To hold the directors of Peoples personally liable, there must be some activity on their part that takes them out of the role of directing minds of the corporation. In this case, there are no such allegations.

It therefore follows that, limiting the acts under review to the directing minds, *per se*, a directing mind of a corporation cannot, by causing the corporation to act in a certain way, be said to have made an agreement with that corporation. The directing mind could make an agreement with another corporation by making an agreement with the directing mind of that other

corporation, but if both directing minds are acting on behalf of their respective corporations, the agreement is between the two corporations. To conclude otherwise would be to challenge the recognized separate legal identity afforded to corporations under our law and to conclude that every corporate action which may give rise to a breach, by virtue of the decision-making authority of the corporate management, is an action of the directing minds personally. As I will develop, an agreement between two corporations to injure can amount to the tort of conspiracy, but it does not necessarily follow that those who as directing minds caused their respective corporations to enter into the agreement are themselves party to the conspiracy.

The appellant maintains that apart from its actions arising out of the joint venture agreement, it is alleging against the personal respondents a separate tort of conspiracy to injure. And yet the factual foundation for the conspiracy pleaded is identical to that which underpins the allegations of breach of contract; i.e., that the joint venture agreement created a fiduciary duty among the corporate joint venturers and that the actions of the corporate respondents in purchasing the Bond Lake property through 1133373 was in breach of that contractually created fiduciary duty to the appellant corporation. The damages alleged in both cases are identical.

In *H.A. Imports of Canada Ltd. v. General Mills Inc.* (1983), 42 O.R. (2d) 645, 150 D.L.R. (3d) 574 (H.C.J.), O'Brien J., dealing with the civil action of conspiracy as pleaded, quoted from Bullen, Leake and Jacob's *Precedents of Pleadings*, 12th ed. (London: Sweet & Maxwell, 1975), as follows at pp. 646-47:

The statement of claim should describe who the several parties are and their relationship with each other. It should allege the agreement between the defendants to conspire, and state precisely what the purpose or what were the objects of the alleged conspiracy, and it must then proceed to set forth, with clarity and precision, the overt acts which are alleged to have been done by each of the alleged conspirators in pursuance and in furtherance of the conspiracy; and lastly, it must allege the injury and damage occasioned to

the plaintiff thereby.

The above is still good law. It is to be noted that the pleadings here do not set out facts which point to specific tortious acts which are independent of the breach of contract already alleged. There is no allegation that the individual respondents were acting outside the scope of their authority or not acting in the best interests of their corporations. While there is a statement as to the general terms of the conspiracy, there is no detail with respect to overt acts in furtherance of the conspiracy and no indication of what damages were suffered as a result of the conspiracy as opposed to the breach of contract. In *Ontario Store Fixtures Inc. v. Mmmuffins Inc.* (1989), 70 O.R. (2d) 42 (H.C.J.), McFarlane J. dealt with a statement of claim containing an action for breach of contract against a corporation combined with an action against the principal officer and director of that corporation for the tort of inducing a breach of that same contract. Nevertheless, I think her language can be applied to this case. She said at p. 44:

I am of the view that to give rise to a separate claim for intentional inducement of breach of contract as well as a claim for breach of contract arising out of the same circumstances, there must be separate identities of interest . . . .

The appellant relies upon *Canada Cement LaFarge Ltd. v. B.C. Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452, 145 D.L.R. (3d) 385. This was a conspiracy to eliminate competition which ended up injuring the respondent. As found by the courts below, while the appellants did not deliberately conspire to drive the respondent out of business, the appellants did intend to eliminate all competitors which in the view of the courts below included the respondent. In delivering the judgment for the Supreme Court of Canada, Estey J. stated at pp. 471-72:

Although the law concerning the scope of the tort of conspiracy is far from clear, I am of the opinion that whereas the law of tort does not permit an action against an individual defendant who has caused injury to the plaintiff,

the law of torts does recognize a claim against them in combination as the tort of conspiracy if:

- (1) whether the means used by the defendants are lawful or unlawful, the predominant purpose of the defendants' conduct is to cause injury to the plaintiff; or,
- (2) where the conduct of the defendants is unlawful, the conduct is directed towards the plaintiff (alone or together with others), and the defendants should know in the circumstances that injury to the plaintiff is likely to and does result.

In situation (2) it is not necessary that the predominant purpose of the defendants' conduct be to cause injury to the plaintiff but, in the prevailing circumstances, it must be a constructive intent derived from the fact that the defendants should have known that injury to the plaintiff would ensue. In both situations, however, there must be actual damage suffered by the plaintiff.

In argument and in its factum, the appellant enlarges on the pleading by saying that the only cause of action asserted against the individual respondents is the tort of conspiracy. Its factum states:

As against the individual defendants, the appellant alleged that they conspired with and among each other, directly and through the corporate defendants they then controlled and continue to control, to injure the appellant.

This bare allegation of a conspiracy involving the directing minds of the respondent corporations is an impermissible legal proposition. Additionally, it is very difficult to fit it into either of the two categories referred to in *Canada Cement LaFarge*, supra. There is no allegation of a predominant purpose to injure under (1) or of unlawful acts under (2). The acts of the individual respondents are not unlawful per se. They are not parties to the contract in issue and have no personal obligation to the appellant or to its principal Yakubowicz, either contractual or fiduciary. Simply reciting a series of

events and stating that they were intended to injure the appellant is hardly sufficient to establish a conspiracy at law particularly where the same facts have already been pleaded in support of an action for breach of contract. The basis in law of a stand-alone conspiracy is simply not established.

To accept that this pleading constitutes a conspiracy to injure would expand the existing law to embrace as co-conspirators the directing minds of corporations who have breached their contracts. Assuming cold calculation, can the decision of the directing minds of the two corporate entities to cause their corporations to ignore their corporate obligations under the joint venture agreement and pursue an independent course amount to a conspiracy by the directing minds to injure the third contracting party or its directing mind? I think not. To give effect to this argument simpliciter would eliminate any semblance of the corporate veil. This fact situation on its face is a straight action for breach of contract. It cannot proceed as an action in tort unless something radical is added to the present fact situation. The facts as pleaded would not sustain a cause of action in conspiracy. Moreover, as I understand what was said in argument by counsel for the appellant, he has no further facts to plead at this stage. This statement was made in answer to my inquiry as to whether the appellant was suggesting that the Royal Bank was a party to the conspiracy.

The appellant relied upon the judgment of the Supreme Court of Canada in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, 74 D.L.R. (4th) 321, for the propositions that it must be "plain and obvious" that the appellant's statement of claim reveals no cause of action and that the presence of another nominate tort does not preclude the allegation in a pleading of a conspiracy to injure. I am well aware of the principle that the court should be reluctant to dismiss a cause of action at this stage but I agree with the motions judge that, on its pleadings, *Hunt v. Carey* is distinguishable from the case in appeal. The unlawful means to carry out the conspiracy alleged were different from the facts said to constitute negligence.

Issue 2. If there is a sustainable conspiracy action, does it

merge with the action for breach of contract?

The law relating to merger has been stated by Lord Justice Denning in *Ward v. Lewis*, [1955] 1 All E.R. 55 at p. 56, [1955] 1 W.L.R. 9 (C.A.):

It is important to remember that when a tort has been committed by two or more persons an allegation of a prior conspiracy to commit the tort means nothing. The prior agreement merges in the tort.

The motions judge recited the respondents' arguments before him that "the conspiracy claim is essentially a conspiracy to achieve an objective that has been achieved and the conspiracy is merged with the breach" (at p. 535), but he does not appear to have decided the motion on the basis of merger. He focuses, rather, on the fact that there is no separate claim for damages in the conspiracy claim. He says at p. 537:

A conspiracy that does not result in damages is not actionable and the conspiracy becomes irrelevant if the breach of contract or fiduciary duty is proved. There are no special damages for this alleged conspiracy and none is alleged. One cannot satisfy the rule in *Hunt v. Carey*, supra, or in *Sun Life*, supra [*Sun Life Assurance Co. of Canada v. 401700 Ontario Ltd.* (1991), 3 O.R. (3d) 684 (Gen. Div.)], by merely making an artificial separation of claims.

Since I have found that the tort of conspiracy has not been pleaded adequately, it follows that there can be no merger. However, should the appellant choose to serve an amended statement of claim pursuant to leave which I propose to give, it might well be that this will become a problem that must then be faced.

#### Disposition

I would dismiss the appeal with costs. The court was not given any basis upon which the conspiracy pleading could be reframed so as to comply with the principles that have been discussed above. Nevertheless, out of an abundance of caution

and in keeping with the spirit of *Hunt v. Carey*, *supra*, I would give the appellant leave to serve an amended statement of claim within 30 days of the release of this judgment.

Appeal dismissed.