



The Supreme Court concludes that the fraudulent intent of the president of two construction companies can be attributed to the companies in bankruptcy proceedings.

This appeal addressed when a court can attribute the intent of a senior officer or employee, known as a “directing mind”, to the corporation.

John Aquino was the president of two family-owned construction companies that worked on large-sale construction projects. When the companies began experiencing serious financial difficulties, investigations revealed that Mr. Aquino and several others had been fraudulently taking tens of millions of dollars from the companies through a false invoicing scheme. For years, they created fake invoices from fake suppliers for services that were never provided, and then directed the construction companies to pay the invoices. In bankruptcy proceedings against the companies, these payments were challenged under s. 96(1)(b)(ii)(B) of the *Bankruptcy and Insolvency Act* (“BIA”). This provision allows for the recovery of money if a transaction is a “transfer at undervalue” and the debtor intended to “defraud, defeat or delay a creditor”. A transfer at undervalue is a transaction where property or services are provided to another person for nothing in exchange or for much less than fair market value.

The application judge concluded that the false invoice payments were transfers at undervalue. She found that the payments involved several “badges of fraud”, which are suspicious circumstances that may help prove fraudulent intent. She rejected the argument that the construction companies could not have had fraudulent intent because they were paying their creditors in full and on time at the time of the payments. She considered the purpose of bankruptcy legislation, which is to provide a remedy to creditors, and concluded that Mr. Aquino’s intent should be attributed to the companies. She ordered Mr. Aquino and others to pay the money they received under the scheme. Mr. Aquino and the others involved in the scheme appealed the application judge’s ruling. Both before the Court of Appeal and the Supreme Court, they repeated the arguments made before the application judge. The Court of Appeal upheld the application judge’s ruling.

The Supreme Court has dismissed the appeal.

Writing for the Court, Justice Jamal concluded that the application judge did not misapply the badges of fraud approach to inferring fraudulent intent. A court may find that a debtor intended to defraud, defeat, or delay a creditor under s. 96(1)(b)(ii)(B) of the *BIA* even if the debtor was not insolvent at the time of the transfer at undervalue. There is therefore no basis to interfere with the application judge’s conclusion that Mr. Aquino intended to defraud, defeat or delay a creditor under the false invoicing scheme. Furthermore, Mr. Aquino’s fraudulent intent should be attributed to the debtor companies because he was their directing mind and acted in the sector of corporate responsibility assigned to him.

The corporate attribution doctrine must be applied purposively, contextually, and pragmatically to give effect to the policy goals of the law under which a party seeks to attribute to a corporation the actions, knowledge, state of mind, or intent of its directing mind. In the context of a claim under s. 96 of the *BIA*, the “fraud” and “no benefit” exceptions to corporate attribution should not apply because these exceptions would undermine the purpose of this provision. The test for corporate attribution under s. 96 is simply whether the person was the directing mind and whether their actions were performed within the sector or corporate responsibility assigned to them.

Breakdown of the decision: *Unanimous*: Justice [Jamal](#) dismissed the appeal (Chief Justice [Wagner](#) and Justices [Karakatsanis](#), [Côté](#), [Rowe](#), [Martin](#), and [O’Bonsawin](#) agreed).

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