File No. 40166

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

JOHN AQUINO, 2304288 ONTARIO INC., MARCO CARUSO, GIUSEPPE ANASTASIO a.k.a. Joe Ana AND LUCIA COCCIA a.k.a. Lucia Canderle

APPELLANTS
(Appellants)

- and –

ERNST & YOUNG INC., in its capacity as Court-Appointed Monitor of Bondfield Construction Company Limited, and KSV KOFMAN INC., in its capacity as Trustee-in-Bankruptcy of 1033803 Ontario Inc. and 1087507 Ontario Limited

RESPONDENTS
(Respondents)

-and-

ATTORNEY GENERAL OF ONTARIO and INSOLVENCY INSTITUTE OF CANADA

INTERVENERS

APPELLANTS' FACTUM IN REPLY TO INTERVENERS

FILED BY THE APPELLANTS, JOHN AQUINO, 2304288 ONTARIO INC., MARCO CARUSO, GIUSEPPE ANASTASIO A.K.A. JOE ANA AND LUCIA COCCIA A.K.A. LUCIA CANDERLE

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PART I – OVERVIEW

1. On June 19, 2023, Justice Rowe of this Court, sitting as a Motions Judge, granted leave to intervene in the herein appeal to both the Attorney General of Ontario ("AGO") and the Insolvency Institute of Canada ("IIC"). In so doing, Justice Rowe ruled, in relevant part, as follows: "The interveners are not entitled to raise new issues or to adduce further evidence or otherwise to supplement the record of the parties but to confine their submissions to the implications of the Court's determination of the issues raised by the parties." In addition, Justice Rowe granted permission to the appellants to "serve and file a single factum in reply to both interventions in 40166 [*i.e.*, the herein appeal] not to exceed ten (10) pages in length". Finally, in relevant part, Justice Rowe also ruled as follows: "The factums in reply are to be directed to points raised in the intervener factums only." Accordingly, pursuant to the permission granted and in conformance with the parameters thereof, the appellants respectfully submit the herein reply.

PART II - REPLY TO FACTUM OF THE IIC

2. At para. 2 of the IIC factum, the following was stated therein:

> *First*, the Court should make clear that *Dredge* did not purport to provide an all-encompassing test for corporate attribution. Rather, Justice Estey's path-marking opinion for the Court is best read as embracing (i) a general common law rule for imputing to a corporation the knowledge and intent of its directing mind (the "identification doctrine") and (ii) a policy-based exception to that rule in the context of a *mens rea*-based criminal offence.

3. The foregoing statement is demonstrably false. The Supreme Court of Canada, in its trilogy of cases dealing specifically with the corporate attribution doctrine, has <u>indeed</u> formulated "an all-encompassing test for corporate attribution", contrary to what the IIC has asserted, with minimal criteria "that must always be met". In *Deloitte &*

Touche v. Livent Inc (Receiver of), 2017 SCC 63 (per Gascon and Brown, JJ., for the majority), which was a civil case arising out of the monitorship of Livent Inc., this Court ruled, in relevant part, as follows: "The test for corporate attribution was set out by this Court in *Canadian Dredge & Dock Co. v. The Queen*, [1985] 1 S.C.R. 662" (emphasis added). As made manifest by this Court itself, it is a singular test and applies across the legal spectrum. The singularity of this test was further evidenced when this Court ruled in *Livent, supra*, as follows: "To attribute the fraudulent acts of an employee to its corporate employer, two conditions must be met". Accordingly, whenever a situation arises where the Crown, in the criminal context, or a plaintiff/applicant in the civil context, seeks to attribute "the fraudulent acts of an employee to its corporate employer", the two stipulated conditions must be met. In the appeal at bar, since the alleged fraudulent state of mind of John Aquino, as an employee of the corporate debtors, is being sought to be attributed to the corporate debtors themselves, the corporate attribution doctrine is necessarily implicated.

4. At para. 13 of the IIC factum, the following was stated therein: "Even as *Dredge* recognized the general rule of the identification doctrine, it also recognized an exception to that rule, or what Estey J. described as "defences"". However, the notion of a "general rule of identification", subject to "defences", is itself subject to an important caveat. *Canadian Dredge*, *Livent* and *Christine DeJong* all made clear that the legal onus lies with the Crown/plaintiff/applicant to satisfy the Court that the stipulated minimal criteria for corporate attribution have been met; failing which, the fraudulent acts/state of mind of the corporate employee will simply not be attributed to the corporate employer as a matter of law. In other words, the defendant does not have a positive obligation to raise these "defences" and to prove them either under the criminal or civil standard; rather, it is the Crown's or plaintiff's sole prerogative to ensure that the minimal criteria have been satisfied before corporate attribution can be applied.

5. At para. 18 of the IIC factum, at footnote 33, the following was stated therein, in relevant part:

> To the extent this Court's decision in *Christine DeJong Medicine Professional Corp. v. DBDC Spadina Ltd.*, 2019 SCC 30 [*DeJong*] reads the *Dredge* defence as being applicable in *all* contexts, that approach is inconsistent with *Dredge* itself. *DeJong* should thus be limited to knowing assistance claims "in the time-honoured tradition of interpreting the scope of a previous decision". [...] That is all the more so because *DeJong's* fleeting discussion of *Dredge* was not dispositive.

(Emphasis in the original.)

6. Needless to say, the IIC's attempt to diminish (in point of fact, to completely negate) what this Court stated in *Christine DeJong* in regards to the corporate attribution doctrine is misguided in the extreme. For ease of reference, in *Christine DeJong*, Justice Brown (on behalf of the unanimous Court) stated as follows:

> In view of the statement of the majority at the Court of Appeal that this Court's decision in *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63, [2017] 2 S.C.R. 855, invited a "flexible" application of the criteria stated in *Canadian Dredge & Dock Co. v. The Queen*, [1985] 1 S.C.R. 662 for attributing individual wrongdoing to a corporation, we respectfully add this. What the Court directed in *Livent*, at para. 104, was that even where those criteria are satisfied, "courts retain the discretion to refrain from applying [corporate attribution] where, in the circumstances of the case, it would not be in the public interest to do so" (emphasis added). In other words, while the presence of public interest concerns may heighten the burden on the party seeking to have the actions of a directing mind attributed to a corporation, *Canadian Dredge* states minimal criteria that must always be met. The appeal is allowed, with costs throughout.

7. *First*, the IIC's assertion that the *Christine DeJong* court "misread" *Canadian Dredge* is both false and irrelevant. The "minimal criteria" were first formulated in *Canadian Dredge*, where they were applied in the criminal context; these minimal criteria were then extended to the civil context in *Livent;* finally, *Christine DeJong* clarified that these "minimal criteria" were universal in nature and thus always required to be met. Accordingly, nothing has been "misread". Furthermore, even if the scope of *Canadian Dredge* was misread (*i.e.*, inappropriately extended beyond the criminal context), as

asserted by the IIC, it is now irrelevant as two separate decisions of the Supreme Court have confirmed the applicability of the corporate attribution doctrine across the legal spectrum, including of course the civil context.

8. *Second*, the IIC seems to imply that, since this Court's corporate attribution doctrine comments in *Christine DeJong* were not technically "dispositive" of that appeal, those comments should be viewed as *obiter* and thus lacking force of law. Needless to say, the IIC is incorrect. In *R. v. Henry*, 2005 SCC 76 (per Binnie, J., for the unanimous Court), at para. 57, this Court ruled as follows:

> The issue in each case, to return to the Halsbury question, is what did the case decide? Beyond the *ratio decidendi* which, as the Earl of Halsbury L.C. pointed out, is generally rooted in the facts, the legal point decided by this Court may be as narrow as the jury instruction at issue in *Sellars* or as broad as the *Oakes* test. All *obiter* do not have, and are not intended to have, the same weight. The weight decreases as one moves from the dispositive *ratio decidendi* to a wider circle of analysis which is obviously intended for guidance and which should be accepted as authoritative. Beyond that, there will be commentary, examples or exposition that are intended to be helpful and may be found to be persuasive, but are certainly not "binding" in the sense the *Sellars* principle in its most exaggerated form would have it. The objective of the exercise is to promote certainty in the law, not to stifle its growth and creativity. The notion that each phrase in a judgment of this Court should be treated as if enacted in a statute is not supported by the cases and is inconsistent with the basic fundamental principle that the common law develops by experience.

(Emphasis added.)

9. Accordingly, as this Court made clear in *Henry, supra*, even if statements made by this Court were not technically dispositive of the issues at hand, and provided that such statements were "intended for guidance", then such statements "should be accepted as authoritative". In *Christine DeJong, supra*, there can be no doubt that the corporate attribution doctrine comments made by this Court were clearly "intended for guidance", and thus should "be accepted as authoritative".

10. *Finally*, the claim that the *Christine DeJong* court has misread the scope of *Canadian Dredge*, and that its corporate attribution doctrine arguments were *obiter* and thus lacking force of law, is an issue which was never raised by any of the parties, either in this appeal, in the appeals in the court below, or before the applications judge at the court of first instance. Accordingly, as this issue runs afoul of Justice Rowe's admonition that "[t]he interveners are not entitled to raise new issues", it should be ignored or considered forfeited.

11. At paras. 25 and 26 of the IIC factum, the following was stated therein:

> Whether the directing mind is acting "totally in fraud" of the corporation or for their own benefit is irrelevant under section 96. That is so because, as one leading scholar has observed, "[t]he social purpose of the legislation is to protect creditors from actions of the debtor that diminish the assets that are available for recovery of the creditor's claims, and this social purpose is served *whether or not the directing mind is acting in fraud of the corporation*."
>
> It bears recalling that "the corporation is not prejudiced by a section 96 remedy" because "the remedy is directed against *the transferee* who receives the property and *not against the debtor corporation* who transfers it." The rationale underlying the *Dredge* exception to the identification doctrine is thus wholly absent. While Estey J. was concerned that "no social purpose is served by convicting a corporation whose directing mind has acted throughout in fraud of that corporation", the corporation's interests have no role to play in applying section 96.

(Emphasis in the original; internal footnotes omitted.)

12. In response thereto, the following points are in order: *First*, the assertion that the "corporation is not prejudiced by a section 96 remedy" is demonstrably false. Section 96(1)(b)(ii)(B) of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, as amended ("*BIA*"), reads in relevant part as follows: "the debtor intended to defraud, defeat or

delay a creditor." Accordingly, under this specific statutory provision[1], in order for the impugned transaction to be impeached, the debtor must first be found to have acted in a fraudulent matter *vis-à-vis* its creditors. *Ipso facto*, a finding that the debtor has acted in a fraudulent manner is a finding of liability upon that debtor corporation, which finding will clearly prejudice it. Apart from the obvious social stigma associated with a finding of fraud, the corporation may very well sustain future monetary losses (in the event that the corporation is rehabilitated from its *CCAA* monitorship) on account of future lenders or suppliers unwilling or unable to deal with an entity adjudged fraudulent.

13. *Second*, section 96 of the *BIA*, even when successfully applied to impeach an impugned transaction, does not eliminate the debt between the transferor and the transferee. Rather, it merely voids the transaction as against the trustee or the monitor. In other words, an impugned transaction that is set aside creates new liability for the debtor corporation in that it is still liable to account to the transferee for the quantum of funds that it was obligated to pay the trustee or monitor.

14. In *Bank of Montreal v. Iskenderov*, 2023 ONCA 528 (per Feldman, J.A., for a unanimous five-member panel of the Court of Appeal), the court therein ruled, at para. 36, as follows:

> While some courts have ordered a reconveyance of the property that was the subject of the impugned transaction back to the transferor, in fact, the section does not afford that remedy. Because the fraudulent conveyance is void only "as against creditors or others", the case law has made it clear that the transaction remains valid as between the transferor and the transferee: *Elford v. Elford*, (1922) 64 S.C.R. 125, at p. 129; *Re Lawrason's Chemicals Ltd.* (1999), 127 O.A.C. 51 (C.A.), at para. 8.

(Emphasis added.)

1It is important to recall that this specific statutory provision is the sole cause of action upon which both the Monitor and the Trustee brought forth their respective applications.

15. Though *Iskenderov* dealt with the provisions of the Ontario *Fraudulent Conveyances Act,* R.S.O. 1990, c. F.29, as amended, its ruling applies with equal force to the provisions of section 96 of the *BIA*. After all, section 96 of the *BIA* empowers the Court to declare the impugned transaction "void as against [...] the trustee" or, conversely, order the transferee or "any other person who is privy to the transfer" to pay "to the estate the difference between the value of the consideration received by the debtor and the value of the consideration given by the debtor" (emphasis added). In other words, since the transaction between the debtor-transferor and the transferee remains valid, the transferee would have a claim as against the debtor for any monies that it was required to pay to the trustee or monitor. This of course would increase the liability of the corporate debtor. Therefore, the assertion that a "corporation is not prejudiced by a section 96 remedy" has been proven false.

16. *Finally*, the IIC's claim that "[t]he rationale underlying the *Dredge* exception to the identification doctrine is thus wholly absent" is also false. Apart from the fact that the debtor corporation does indeed incur prejudice by a section 96 of the *BIA* remedy, as previously mentioned in the appellants' factum, the rationale underlying the so-called "*Dredge* exception" is logical coherence, and not some policy-based rationale.

PART III - REPLY TO FACTUM OF THE AGO

17. At para. 21 of the AGO factum, the following was stated therein:

> In light of the distinct context in which *Canadian Dredge* was decided, this Court's finding in *DeJong* that *Canadian Dredge* "states *minimal* criteria that must always be met" may be unduly restrictive for some novel statutory contexts. It means that, unless all the criteria from *Canadian Dredge* are met, a court must decline to attribute intent or knowledge to a corporation.

18. The problem with the foregoing statement is that it fails to explain why the application of the minimal criteria may be "unduly restrictive for some novel statutory contexts", and further fails to provide any concrete examples to illustrate any such undue

restrictiveness. After all, the minimal criteria requirement, as judge-made law, can always by ousted or modified through legislative action if either the Federal or Provincial Legislatures were to deem such minimal criteria as being "unduly restrictive".

19. At para. 23 of the AGO factum, the following was stated therein:

> Particularly, if a strict application of the *Canadian Dredge* criteria would lead to a result inconsistent with the text, context and purpose of a statutory provision, a strict application of the *Canadian Dredge* criteria should not be adopted. Instead, a court considering the issue of corporate attribution in a novel statutory context should ask, how corporate attribution would best achieve the legislature's intent in enacting the relevant statutory provision? To answer this question, the court should look to the specific statutory provision at issue and consider whose intent or knowledge ought to be attributed (or not) to the corporation to best achieve the provision's purpose. The application of corporate attribution doctrine will therefore be specific to the statutory context in which it arises.

(Footnote omitted.)

20. With all due respect, the foregoing statement by the AGO adds little (if anything) to the issues at hand in this appeal. Both the Monitor and the Trustee have explicitly relied on the intentionality of John Aquino, whose intentionality they have sought to attribute to the corporate debtors themselves, in order to prove that the corporate debtors "intended to defraud, defeat or delay a creditor", which is the specific requirement of s. 96(1)(b)(ii)(B) of the *BIA*. The problem, however, is that the *BIA* does not define the word "intended". Though recourse to a dictionary can often by useful, in the cases at bar, such recourse would be to no avail. Since we are dealing with the corporate context, and since the alleged fraudulent state of mind of a corporate agent is being sought to be attributed to the corporate principal, the corporate attribution doctrine is necessarily implicated. Therefore, unless this Court is prepared to follow the Court of Appeal's "reframed" test (or something similar to it), which effectively ousted the common law corporate attribution doctrine in the bankruptcy context, there is no escape from this proposition. And, applying this doctrine to the facts at bar, leads inexorably to the

conclusion that John Aquino's state of mind cannot, as a matter of law, be imputed onto the corporate debtors.

21. It is important to note here that, if we were dealing with individual debtors, as opposed to corporate ones, recourse to the common law to determine whether such individuals intended to "defraud, defeat or delay a creditor" would be entirely non-controversial. After all, a wide body of jurisprudence, with its "badges of fraud" rubric, has been developed and applied in making this very determination. Accordingly, if recourse to the common law to determine whether an individual intended to defraud his or her creditors is considered non-controversial, then why should recourse to the common law corporate attribution doctrine be considered any less non-controversial?

22. It appears that the interveners, though ostensibly neutral, seek to change established law in order to avoid a result that they simply do not like (*i.e.*, the appellants being completely absolved of any liability). Not to belabour this point any further, but this predicament arose as a direct result of the Monitor and the Trustee putting all of their proverbial eggs in one very small basket (*i.e.*, section 96(1)(b)(ii)(B) of the *BIA*). When one hedges their bets on such a small basket, their is no room for error and, if any such error were to occur, the results will be catastrophic (at least from their point of view). This, however, should not necessitate a paradigm shift in the law, which is exactly what has now occurred.

23. Finally, at para. 28 of the AGO factum, the following was stated therein:

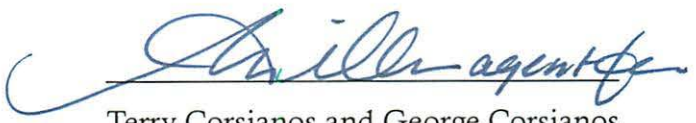
> The Privy Council's "special rule" of attribution plainly and appropriately prioritizes legislative intent. Indeed, in the UK Supreme Court's decision in *Jetivia SA and another v Bilta (UK) Limited (in liquidation) and others*, Lord Mance confirmed that the framework established by the Privy Council in *Meridian* was contextual and purposive:
>
> > [41] As Lord Hoffmann made clear in *Meridian Global*, the key to any question of attribution is ultimately always to be found in considerations of context and

> purpose. The question is: whose act or knowledge or state of mind is *for the purpose* of the relevant rule to count as the act, knowledge or state of mind of the company? Lord Walker said recently in *Moulin Global*, para 41 that: "One of the fundamental points to be taken from *Meridian* is the importance of context in any problem of attribution"...

(Emphasis in original; footnote omitted.)

24. Though the question of "whose act or knowledge or state of mind is *for the purpose* of the relevant rule to count as the act, knowledge or state of mind of the company?" is the correct one, the answer is left completely undecided. What is important to note here is that, whether one looks at Canadian law, New York law or English law, at least to the extent known, it has never been the case that attribution to the corporate principal from the corporate agent will have occurred when the corporate agent has acted completely in fraud of the principal. Accordingly, at least from an apophatic approach, we can state definitively whose "act or knowledge or state of mind" should not "count as the act, knowledge or state of mind of the company".

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 14th day of August 2023



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PART IV – TABLE OF AUTHORITIES